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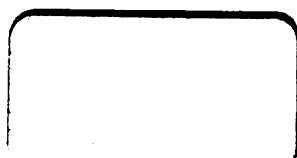
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AMERICAN AND ENGLISH

CONTAINING THE IMPORTANT CASES SELECTED FROM
THE CURRENT AMERICAN, CANADIAN,
AND ENGLISH REPORTS

THOROUGHLY ANNOTATED

EDITORS

WILLIAM M. MCKINNEY AND H. NOYES GREENE

ANN. CAS. 1918 B

EDWARD THOMPSON COMPANY
NORTHPORT, L. I., N. Y.
1918

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1918

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TABLE OF CASES

REPORTED IN THIS VOLUME.

	PAGE		PAGE
Adleman v. Ocean Accident, etc. Corp.— 130 Md. 572	730	C. B. Barker Construction Co., Niehaus v.—135 Tenn. 382	23
Aetna Life Ins. Co. v. Taylor—128 Ark. 155	1122	Chambers v. Preston—137 Tenn. 324 ..	428
Akers, Compton v.—96 Kan. 229	983	Chesaning, Baldwin v.—188 Mich. 17 ..	512
Altman, Fields v.—193 Ala. 160	189	Chesapeake, etc. R. Co. v. Harmon's Adm'r—173 Ky. 1	41
American Express Co. v. Fox—135 Tenn. 489	1148	Chicago Dry Kiln Co. v. Industrial Board—276 Ill. 556	645
American Southern Nat. Bank v. Smith —170 Ky. 512	959	Childs, Berryman v.—98 Neb. 450	1029
Anderson v. Shockley—266 Mo. 543 ..	500	Chilton v. Commonwealth—170 Ky. 491	851
Andrews v. South Haven—187 Mich. 294	100	Church, Northcut v.—135 Tenn. 541 ..	545
Arver v. United States—245 U. S. 366	856	Ciaco, Soper v.—85 N. J. Eq. 165	452
Axtion Fisher Tobacco Co. v. Evening Post Co.—169 Ky. 64	560	City Sash, etc. Co. v. Bunn—90 Wash. 669	31
Babb v. State—18 Ariz. 505	925	Cobb v. Western Union Telegraph Co.— 90 Vt. 342	1156
Bacon v. Reichelt—272 Ill. 90	1	Commonwealth, Brackett v.—223 Mass. 119	963
Baldwin v. Chesaning—188 Mich. 17 ..	512	Commonwealth, Butchers' Slaughtering, etc. Co. v.—223 Mass. 119	863
Bartholomew v. Springdale—91 Wash. 408	432	Commonwealth v. Chilton v.—170 Ky. 491	851
Becker v. Hopper—23 Wyo. 209	35	Commonwealth v. First Christian Church—169 Ky. 410	525
Benedict, Holstein v.—22 Hawaii 441 ..	941	Commonwealth v. Starks—169 Ky. 410	525
Berryman v. Childs—98 Neb. 450	1029	Compton v. Akers—96 Kan. 229	983
Blanton v. Wheeler, etc. Co.—91 Conn. 226	747	Conner, Sawyer v.—114 Miss. 363	388
Bolland v. United States—238 Fed. 529	520	Conrad v. Ellison-Harvey Co.—120 Va. 458	1171
Bowen, Littlefield v.—90 Wash. 286 ..	177	Cox v. Trollope—[1916] 2 K. B. 682 ..	637
Brackett v. Commonwealth—223 Mass. 119	863	Cunningham v. Cunningham—187 Mich. 68	478
Brady, Fergus v.—277 Ill. 272	220	Dale v. Saunders—218 N. Y. 59	703
Brady v. New York, etc. R. Co.—218 N. Y. 140	588	Dawson v. National Life Ins. Co.—176 Iowa 382	230
Braeuel v. Reuther—270 Mo. 603	533	Denver, Thompson v.—61 Colo. 470 ..	915
Brewer v. Browning—115 Miss. 358 ..	1013	Detroit, etc. Ferry Co., People v.—187 Mich. 177	170
Brinckwirth's Estate v. Troll—266 Mo. 473	1056	District Court, State ex rel. Duluth v.— 134 Minn. 28	635
Browning, Brewer v.—115 Miss. 358 ..	1013	Dixon, People v.—188 Mich. 307	385
Buckbee v. P. Hohenadel, Jr. Co.—224 Fed. 14	88	Dwyer v. Libert—30 Ida. 576	973
Bunn, City Sash, etc. Co. v.—90 Wash. 669	31	Earwicker v. London Graving Dock Co.—[1916] 1 K. B. 970	665
Burckhard, Peerless Pacific Co. v.—90 Wash. 221	247	Edmonton, Jamieson v.—54 Can. Sup. Ct. 443	379
Burlington Traction Co., Western Union Tel. Co. v.—90 Vt. 506	841	Elliott, People v.—272 Ill. 592	391
Butchers' Slaughtering, etc. Co. v. Com- monwealth—223 Mass. 119	863	Ellison-Harvey Co., Conrad v.—120 Va. 458	1171
Byrne, Phelps v.—36 S. Dak. 369	996	Erie R. Co. v. Winfield—244 U. S. 170	662
Cain v. Garner—169 Ky. 633	824	Estate of Manchester—174 Cal. 417 ..	227
Cain v. Parfitt—48 Utah 81	28	Eugene Dietzen Co. v. Industrial Board 279 Ill. 11	764
Caldwell, Greene v.—170 Ky. 571	604	Evening Post Co., Axtion Fisher Tobacco Co. v.—169 Ky. 64	560
Carroll v. Knickerbocker Ice Co.—218 N. Y. 435	540	Faivre, Wideman v.—100 Kan. 102	1168
Carroll v. What Cheer Stables Co.—38 R. I. 421	346	Falkovitch, People v.—280 Ill. 321	1077

TABLE OF CASES REPORTED.

	PAGE		PAGE
Farmers Loan, etc. Co. v. Planck—98 Neb. 225	598	Kansas ex rel. Brewster, Wear v.—245 U. S. 154	586
Fergus v. Brady—277 Ill. 272	220	Kansas City v. Jordan—99 Kan. 814 ..	273
Fields v. Altman—193 Ala. 160	189	Kinney, Pittsburgh, etc. R. Co. v.—95 Ohio St. 64	286
First Christian Church, Commonwealth v.—169 Ky. 410	525	Knickerbocker Ice Co., Carroll v.—218 N. Y. 435	540
First National Bank v. Stover—21 N. Mex. 453	145	Koonovsky v. Quefflette—226 Mass. 474 ..	1146
Fitzroy, Massaletti v.—228 Mass. 487 ..	1088	Kramer v. United States—245 U. S. 366 ..	856
Flynn v. New York, etc. R. Co.—218 N. Y. 140	588	Leavea v. Southern R. Co.—266 Mo. 151 ..	97
F. Mayer Boot, etc. Co., Stetz v.—163 Wis. 151	675	Libert, Dwyer v.—30 Ida. 576	973
Fox, American Express Co. v.—135 Tenn. 489	1148	Linn, State ex rel. Burns v.—49 Okla. 526	139
Froeming v. Stockton Electric R. Co.—171 Cal. 401	408	Littlefield v. Bowen—90 Wash. 286 ..	177
Fusselman v. Yellowstone Valley Land, etc. Co.—53 Mont. 254	420	Llandudno Coaching, etc. Co., Williams v.—[1915] 2 K. B. 101	682
Gaffey v. St. Paul Fire, etc. Ins. Co.—221 N. Y. 113	1041	London, etc. R. Co., Withers v.—[1916] 2 K. B. 772	341
Garner, Cain v.—169 Ky. 633	824	London Graving Dock Co., Earwicker v.—[1916] 1 K. B. 970	665
General Accident, etc. Assur. Corp., State ex rel. Anderson v.—134 Minn. 21	615	Lund, Thorp v.—227 Mass. 474	1204
Gibson, People v.—218 N. Y. 70	509	Manchester, Estate of,—174 Cal. 417 ..	227
Gordon, Marshall v.—243 U. S. 521 ..	371	Manchester Township Supervisors v. Wayne County Commissioners—257 Pa. St. 442	278
Gordon, State ex rel. Gass v.—266 Mo. 304	191	Marconi Wireless Tel. Co., Schmidt v.—86 N. J. L. 183	131
Gorsuch, Virginia R. etc. Co. v.—120 Va. 655	838	Marsh, Peuser v.—218 N. Y. 505	913
Grahl v. United States—245 U. S. 366 ..	856	Marshall v. Gordon—243 U. S. 521 ..	371
Graubard v. United States—245 U. S. 366	856	Massaletti v. Fitzroy—228 Mass. 487 ..	1088
Great Western R. Co. v. Helps—[1918] A. C. 141	1120	Masses Publishing Co. v. Patten—246 Fed. 24	999
Greene v. Caldwell—170 Ky. 571	604	Maydwell v. Maydwell—135 Tenn. 1 ..	1043
Grinnell v. Wilkinson—39 R. I. 447 ..	618	McCracken v. Missouri Valley Bridge, etc. Co.—96 Kan. 353	689
Hahn, In re—85 N. J. Eq. 510	830	Meehan v. Ingalls—91 Wash. 86	71
Harmon's Adm'r, Chesapeake, etc. R. Co. v.—173 Ky. 1	41	Metropolitan Life Ins. Co. v. Nelson—170 Ky. 674	1182
Hayes, In re—72 Fla. 558	936	Minneapolis, etc. R. Co. v. Winters—242 U. S. 353	54
Heiskell v. Morris—135 Tenn. 238 ..	1134	Mississippi Railroad Commission v. Mobile, etc. R. Co.—115 Miss. 101 ..	828
Helps, Great Western R. Co. v.—[1918] A. C. 141	1120	Missouri Valley Bridge, etc. Co., McCracken v.—96 Kan. 353	689
Hiecke v. Hiecke—163 Wis. 171	497	Mitchell, Hitchman Coal, etc. Co. v.—245 U. S. 229	461
Hill v. Purdy—46 App. Cas. (D. C.) 495	847	Mobile, etc. R. Co., Mississippi Railroad Commission v.—115 Miss. 101	828
Hitchman Coal, etc. Co. v. Mitchell—245 U. S. 229	461	Montgomery, Postal Telegraph-Cable Co. v.—193 Ala. 234	554
Holstein v. Benedict—22 Hawaii 441 ..	941	Montpelier, etc. R. Co., Sayers v.—90 Vt. 201	1050
Hopper, Becker v.—23 Wyo. 209	35	Morris, Heiskell v.—135 Tenn. 238	1134
Industrial Board, Chicago Dry Kiln Co. v.—276 Ill. 556	645	Morris, Young v.—47 Okla. 748	450
Industrial Board, Eugene Dietzen Co. v. 279 Ill. 11	764	Moseley, Taylor v.—170 Ky. 592	1125
Industrial Board, Victor Chemical Works v.—274 Ill. 11	627	Nash, St. Louis v.—266 Mo. 523	134
Industrial Ins. Commission, Stertz v.—91 Wash. 588	354	National Life Ins. Co., Dawson v.—176 Iowa 362	230
Ingalls, Meehan v.—91 Wash. 86	71	Nelson, Metropolitan Life Ins. Co. v.—170 Ky. 674	1182
James v. State—193 Ala. 55	119	Neven v. Neven—38 Nev. 541	1083
Jamieson v. Edmonton—54 Can. Sup. Ct. 443	379	New Dells Lumber Co., Vennen v.—161 Wis. 370	293
Jensen, Woll v.—36 N. Dak. 250	982	Newell v. Reid—189 Mich. 174	224
Jordan, Kansas City v.—99 Kan. 814 ..	273	New Orleans v. Toca—141 La. 551 ..	1032
		New York, etc. R. Co., Brady v.—218 N. Y. 140	588

TABLE OF CASES REPORTED.

vii

	PAGE		PAGE
New York, etc. R. Co., Flynn v.—218		Selective Draft Law Cases—245 U. S.	
N. Y. 140	588	366	856
Niehau v. C. B. Barker Construction		Senatobia Blank Book, etc. Co., State	
Co.—135 Tenn. 382	23	ex rel. Collins v.—115 Miss. 254 ..	953
Northcut v. Church—135 Tenn. 541 ..	545	Shaughnessy v. Northland Steamship	
Northland Steamship Co., Shaughnessy		Co.—94 Wash. 325	655
v.—94 Wash. 325	655	Shockley, Anderson v.—286 Mo. 543 ..	500
Ocean Accident, etc. Corp., Adleman v.		Silver King Coalition Mines Co. v. Sil-	
—130 Md. 572	730	ver King Consol. Min. Co.—204 Fed.	
O'Rear v. Sartain—193 Ala. 275	593	166	571
Pacific Power, etc. Co. v. White—96		Silver King Consol. Min. Co., Silver	
Wash. 18	125	King Coalition Mines Co. v.—204	
Parfitt, Cain v.—48 Utah 81	28	Fed. 166	571
Patten, Masses Publishing Co. v.—246		Simonini, Vaughan's Seed Store v.—275	
Fed. 24	999	Ill. 477	713
Paul Jones & Co. v. Wilkins—135 Tenn.		Smith, American Southern Nat. Bank v.	
146	977	—170 Ky. 512	959
Peerless Pacific Co. v. Burckhard—90		Soper v. Cisco—85 N. J. Eq. 165	452
Wash. 221	247	Southern R. Co., Leavea v.—266 Mo.	
People v. Detroit, etc. Ferry Co.—187		151	97
Mich. 177	170	Southern R. Co. v. Puckett—244 U. S.	
People v. Dixon—188 Mich. 307	385	571	69
People v. Elliott—272 Ill. 592	391	South Haven, Andrews v.—187 Mich.	
People v. Falkovitch—280 Ill. 321	1077	294	100
People v. Gibson—218 N. Y. 70	509	Springdale, Bartholomew v.—91 Wash.	
People v. Steeplechase Park Co.—218 N.		408	432
Y. 459	1099	Starks, Commonwealth v.—169 Ky. 410	
Peuser v. Marsh—218 N. Y. 505	913	State, Babb v.—18 Ariz. 505	925
Phelps v. Byrne—36 S. Dak. 369	996	State, James v.—193 Ala. 55	119
P. Hohenadel, Jr. Co., Buckbee v.—224		State v. Tetrault—78 N. H. 14	425
Fed. 14	88	State ex rel. Anderson v. General Acci-	
Pittsburgh, etc. R. Co. v. Kinney—95		dent, etc. Assur. Corp.—134 Minn. 21	
Ohio St. 64	286	State ex rel. Burns v. Linn—49 Okla.	
Planck, Farmers Loan, etc. Co. v.—98		526	139
Neb. 225	598	State ex rel. Collins v. Senatobia Blank	
Poole v. Poole—96 Kan. 84	929	Book, etc. Co.—115 Miss. 254	953
Postal Telegraph-Cable Co. v. Montgom-		State ex rel. Duluth v. District Court—	
ery—193 Ala. 234	554	134 Minn. 28	635
Preston, Chambers v.—137 Tenn. 324 ..	428	State ex rel. Gass v. Gordon—266 Mo.	
Puckett, Southern R. Co. v.—244 U. S.		394	191
571	69	State ex rel. Thompson v. Reichman—	
Purdy, Hill v.—46 App. Cas. (D. C.)		135 Tenn. 653, 685	889
495	847	State Board v. Terrill—48 Utah 647 ..	1117
Quellette, Koonovsky v.—226 Mass. 474	1146	Steeplechase Park Co., People v.—218	
Ravenscroft v. Stull—280 Ill. 406	1130	N. Y. 459	1099
Reichelt, Bacon v.—272 Ill. 90	1	Stertz v. Industrial Ins. Commission—	
Reichman, State ex rel. Thompson v.—		91 Wash. 588	354
135 Tenn. 653, 685	889	Stetz v. F. Mayer Boot, etc. Co.—163	
Reid, Newell v.—189 Mich. 174	224	Wis. 151	675
Reuther, Braeuel v.—270 Mo. 603	533	Stockton Electric R. Co., Froeming v.	
Rezac v. Zima—96 Kan. 752	1035	171 Cal. 401	406
St. Louis v. Nash—266 Mo. 523	134	Stover, First National Bank v.—21 N.	
St. Louis v. St. Louis, etc. R. Co.—266		Mex. 453	145
Mo. 694	881	Stratton v. Wilson—170 Ky. 61	917
St. Louis, etc. R. Co., St. Louis v.—266		Stull, Ravenscroft v.—280 Ill. 406	1130
Mo. 694	881	Taylor, Aetna Life Ins. Co. v.—128 Ark.	
St. Paul Fire, etc. Ins. Co., Gaffey v.—		155	1122
221 N. Y. 113	1041	Taylor v. Moseley—170 Ky. 592	1125
Sartain, O'Rear v.—193 Ala. 275	593	Terrill, State Board v.—48 Utah 647 ..	1117
Saunders, Dale v.—218 N. Y. 59	703	Tetrault, State v.—78 N. H. 14	425
Sawyer v. Conner—114 Miss. 363	388	Thompson v. Denver—61 Colo. 470	915
Sayers v. Montpelier, etc. R. Co.—90 Vt.		Thorp v. Lund—227 Mass. 474	1204
201	1050	Timberlake, Wessell v.—95 Ohio St. 21	
Schmidt v. Marconi Wireless Tel. Co.—		81	402
86 N. J. L. 183	131	Toca, New Orleans v. 141 La. 551	1032
Seaman, Matter of—218 N. Y. 77	1138	Troll, Brinkwirth's Estate v.—266 Mo.	
		473	1056
		Trollope, Cox v.—[1916] 2 K. B. 682 ..	637
		United States, Arver v.—245 U. S. 366	856
		United States, Bolland v.—238 Fed. 529	520

TABLE OF CASES REPORTED.

	PAGE		PAGE
United States, Grahl v.—245 U. S. 366	856	Western Union Telegraph Co., Cobb v. 90 Vt. 342	1156
United States, Graubard v.—245 U. S. 366	856	What Cheer Stables Co., Carroll v.—38 R. I. 421	346
United States, Kramer v.—245 U. S. 366	856	Wheeler, etc. Co., Blanton v.—91 Conn. 226	747
United States, Wangerin v.—245 U. S. 366	856	White, Pacific Power, etc. Co. v.—96 Wash. 18	125
Vaughan's Seed Store v. Simonini—275 Ill. 477	713	Wideman v. Faivre—100 Kan. 102	1168
Vennen v. New Dells Lumber Co.—161 Wis. 370	293	Wilkins, Paul Jones & Co. v.—135 Tenn. 146	977
Victor Chemical Works v. Industrial Board—274 Ill. 11	627	Wilkinson, Grinnell v.—39 R. I. 447	618
Virginia R. etc. Co. v. Gorsuch—120 Va. 655	838	Williams v. Llandudno Coaching, etc. Co.—[1915] 2 K. B. 101	682
Wangerin v. United States—245 U. S. 366	856	Wilson, Stratton v.—170 Ky. 61	917
Wayne County Commissioners, Manchester Township Supervisors v.—257 Pa. St. 442	278	Winfield, Erie R. Co. v.—244 U. S. 170	662
Wear v. Kansas ex rel. Brewster—245 U. S. 154	586	Winters, Minneapolis, etc. R. Co. v.—242 U. S. 353	54
Wessell v. Timberlake—95 Ohio St. 21	402	Withers v. London, etc. R. Co.—[1916] 2 K. B. 772	341
Western Union Tel. Co. v. Burlington Traction Co.—90 Vt. 506	841	Woll v. Jensen—36 N. Dak. 250	982
		Yellowstone Valley Land, etc. Co., Fuseselman v.—53 Mont. 254	420
		Young v. Morris—47 Okla. 743	450
		Zima, Rezac v.—96 Kan. 752	1035

ANN. CAS.

1918 B.

BACON

v.

REICHELT ET AL.

Illinois Supreme Court—February 16, 1916.

272 Ill. 90; 111 N. E. 565.

Mechanics' Liens — Foreclosure — Parties.

The decree in a mechanic's lien foreclosure suit, to which B. was a party defendant, under Mechanic's Lien Act (Hurd's Rev. St. 1913, c. 82, § 25), § 11, as a person having a claim to the premises, that R. was the owner of the premises in fee simple, and that W. was entitled to a lien thereon, and ordering sale of the premises free of all claims of the parties, is conclusive between the parties as to the matters actually determined, and to every other thing within the knowledge of the parties which might have been set up as ground for relief or defense, and is a bar to subsequent suit by B., based on the fact, known by him at the time of the lien suit, that R. had bought the premises with money embezzled by him from B., to have it decreed that the land was held in trust for B., and for that reason to have issuance of deed on sale under the decree in the lien suit enjoined.

[See note at end of this case.]

Appeal from Circuit Court, Cook county:
BALDWIN, Judge.

Action by Edward R. Bacon, plaintiff, against Otto E. Reichelt et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

Moses, Rosenthal & Kennedy, Walter Bachrach and Sigmund W. David for appellant.

Simon LeGrou, S. C. Irving and Emory D. Frazer for appellees.

Ann. Cas. 1918B.—1.

[91] **DUNN, J.**—The circuit court of Cook county dismissed for want of equity, upon a hearing, the appellant's bill of complaint, the relief sought by which was a decree declaring certain real estate to have been purchased by the appellee Otto E. Reichelt with the money of the appellant and to be held in trust for the benefit of the appellant, and to enjoin the execution of a deed by a master in chancery upon a sale of such real estate made under a decree in proceedings for the enforcement of a mechanic's lien.

The facts claimed by the appellant and found by the master are, that Otto E. Reichelt, in the years 1910, 1911 and 1912, was in the employ of the appellant and through a series of forgeries and embezzlements appropriated \$24,329.60 of the appellant's money, with a part of which he purchased and obtained the title to the real estate in controversy. The appellant discovered Reichelt's fraudulent appropriation of his money in April, 1912, and on May 14, 1912, began an action of assumpsit in the circuit court of Cook county against Reichelt for the money so misappropriated and caused an attachment in aid to be levied on the real estate in controversy. The cause was tried, and on July 11, 1914, a judgment was rendered in favor of the [92] plaintiff on the issue in assumpsit but against him on the attachment issue, and the writ of attachment was dismissed. An appeal was taken by the plaintiff and is still pending in the Appellate Court. On May 14, 1912, Reichelt conveyed the premises by warranty deed to the defendant John W. Barker for the purpose of indemnifying Barker as bail for Reichelt on an indictment which had been returned against the latter, and in March, 1914, Reichelt executed a trust deed of the premises to the defendant Andrew J. Redmond for the purpose of securing his promissory note for \$6,000, payable to and indorsed by himself, for the purpose of securing the attorneys' fees and expenses of the defendants Andrew J. Redmond, B. A. Dunlap

and Simon La Grou while acting as attorneys for Reichelt. The defendant Emil Wetzel was engaged in the wire and iron works business, and prior to May 12, 1912, erected upon and around the real estate in question an iron fence for Reichelt, for which the latter was indebted to Wetzel in the sum of \$1595.20, for which Wetzel filed a bill in the circuit court of Cook county to establish and foreclose his mechanic's lien. The appellant, as well as Reichelt, was made a defendant and answered, admitting Reichelt's ownership of the premises prior to April 24, 1912, but filed no cross-bill, though he had then knowledge of all the facts upon which the present bill is founded. The mechanic's lien proceeding was referred to a master, and in the taking of testimony it was stipulated on the part of appellant that on April 24, 1912, and prior thereto, Reichelt was the owner in fee simple of the premises in controversy and that the interest of appellant in such premises arose under an attachment suit filed by him against Reichelt, in which a levy had been made upon the interest of Reichelt in the premises. The master made a report, in accordance with which a decree was entered, finding, among other things, that Reichelt was the owner of the premises in fee simple; that the appellant's interest arose by virtue of the attachment suit; that Wetzel [93] was entitled to a lien on the premises for \$1595.20 and costs, and ordering a sale of the premises free of all claim, title and interest of the parties to the cause. Under this decree the master sold the premises on January 31, 1914, to Wetzel for the sum of \$1800. At the time Wetzel erected the fence on the premises he had no knowledge of the manner in which Reichelt had acquired title to the premises or of the appellant's rights in them, if any, but before his purchase under the decree he was informed of Reichelt's defalcation and of the manner in which he had obtained the title. No redemption has been made from the master's sale. After the expiration of twelve months and before the expiration of fifteen months from the date of the sale Wetzel sold the certificate of sale to the defendant Redmont, who purchased for the benefit of himself, La Grou and Dunlap with money obtained by means of a loan from the defendant Reinhold Anders, to whom the certificate of sale was delivered, with the understanding that he was to have a first mortgage on the premises for his loan as soon as a master's deed was obtained therefor.

The appellant was a defendant to the proceeding to enforce the mechanic's lien, and under the statute had a right to redeem the premises at any time within twelve months from the sale. He had no right, under the statute, to redeem at any later time. He was properly made a defendant to the pro-

ceeding under the Mechanic's Lien act, section 7 of which requires all parties interested to be made defendants, and declares that parties in interest, within the meaning of the act, shall include "all persons who may have any legal or equitable claim to the whole or any part of the premises upon which a lien may be attempted to be enforced under the provisions thereof, or who are interested in the subject matter of the suit." It was the duty of the appellant to set up in that proceeding his interest in the premises, and the decree in that case is conclusive upon him, not only as to the issues which were actually made and [94] determined in the case, but also as to every matter which was properly involved and which might have been raised and determined. A prior adjudication between the same parties is conclusive upon them, not only as to the matters actually determined, but as to every other thing within the knowledge of the parties which might have been set up as a ground for relief or defense. *Ruegger v. Indianapolis, etc. R. Co.* 103 Ill. 449; *Rogers v. Higgins*, 57 Ill. 244; *Hamilton v. Quimby*, 46 Ill. 90; *Roby v. Calumet, etc. Canal, etc. Co.* 165 Ill. 277, 46 N. E. 214.

The object of the mechanic's lien proceeding was to adjudicate the amount due the complainant and have the interest of the defendant Reichelt in the premises sold for the payment of that amount. The statute provides that whatever right or estate the owner had in the land at the time of making the contract may be sold in the same manner as other sales of real estate are made under decrees in chancery. At the time of making the contract Reichelt appeared to be the owner in fee simple of the premises. That was the title to which the lien of Wetzel attached and it was that title which he had a right to have sold for the payment of his claim. Subsequent conveyances were made and subsequent liens accrued, but they did not affect the prior right of Wetzel to have the premises sold. They were all subject to the priority of his claim. Each one of the parties to the suit was required to set up everything within his knowledge which might constitute a ground for relief or defense. Wetzel had a right to a decree for the sale of the premises, unincumbered. Nothing effecting that right was set up in the answers filed and he obtained such a decree. His right, or the right of any other person to purchase, was not affected by knowledge of equities acquired subsequent to the accruing of his right. The master's sale was of the title in fee simple, free of any right or interest of any of the parties to the suit, and the purchaser acquired the title free of any right of redemption or of any right [95] to the property by reason of its having been purchased by Rei-

chelt with the appellant's funds which Reichelt had embezzled or otherwise unlawfully obtained.

The decree of the circuit court was right and it will be affirmed.

Decree affirmed.

NOTE.

Necessary or Proper Parties to Action to Foreclose Mechanic's Lien.

I. Introductory, 3.

II. Plaintiffs:

1. In General, 3.

2. Action by Assignee of Lien, 5.

III. Defendants:

1. Principal Contractor, 6.

2. Owner:

a. In General, 11.

b. Effect of Conveyance of Premises, 14.

3. Wife or Widow of Owner, 14.

4. Husband of Owner, 15.

5. Lessee, 15.

6. Lessor, 15.

7. Heir, 16.

8. Personal Representative, 16.

9. Trustee, 17.

10. Cestui Que Trust, 18.

11. Mortgagee, 19.

12. Other Lien Claimant, 21.

13. Surety, 23.

14. Receiver, 23.

I. Introductory.

The lien of a mechanic or materialman on buildings and land, while recognized by the civil law (1 Domat, § 174) and by the Code Napoleon (Art. 2103, § 2) was unknown either at common law or in equity (18 R. C. L. p. 872). The proceeding for its enforcement is therefore in the nature of a statutory special proceeding. (18 R. C. L. p. 982.) The necessity or propriety of joining particular parties, when not fixed by the terms of the statute, is to be determined on the basis of the fundamental principle that no property right can be divested without notice and hearing, and hence the general rule is that in a proceeding to enforce a mechanic's lien all persons interested in the property to which the lien attaches must be made parties. See the cases cited throughout this note. In jurisdictions wherein the distinction between law and equity is preserved proceedings to foreclose a mechanic's lien are said to be equitable in their nature (18 R. C. L. p. 978) and the same rule as to parties has been declared as the result of the application of equitable principles. Thus, in Lombard v. Johnson, 76 Ill. 599, the court said:

"A proceeding to enforce a mechanic's lien is, in effect, a suit in chancery, and the rules that govern causes in equity usually control cases instituted under the statute to enforce a mechanic's lien. The general rule in courts of equity, as to parties, is, that all persons materially interested in the subject-matter ought to be made parties to the suit, either as plaintiffs or defendants."

II. Plaintiffs.

1. IN GENERAL.

It has been held that only such persons as have a common interest may unite as parties plaintiff in an action to foreclose a mechanic's lien. *Bush v. Connelly*, 33 Ill. 447; *Harch v. Morgan*, 1 Kan. 293; *Rockwood v. Walcott*, 3 Allen (Mass.) 458; *Perry v. Swanner*, 150 N. C. 141, 63 S. E. 611; *Oldfield v. Barbour*, 12 Ont. Pr. 554. Compare *Barber v. Reynolds*, 33 Cal. 497, id. 44 Cal. 519.

Thus in *Oldfield v. Barbour*, supra, it appeared that the plaintiffs, four carpenters, had worked for the contractor in erecting a building. They each filed their liens and thereafter brought a joint action to enforce the same. It was held that while each could bring an action in his own name they had no right to unite in one action. The court said: "These four men have each a claim against Barbour—not any joint claim of the four—and each can and should sue him for it in the division court. If they cannot maintain their mechanic's lien that has been filed, they cannot maintain any joint action."

So in *Bush v. Connelly*, 33 Ill. 447, the court said: "The complainants by their own showing have no community of interest in the subject-matter of the suit. Their interests have been severed by the settlement of the building accounts, and the indebtedness distributed among the contractors, and separate notes executed to the separate parties for the respective amounts due. By the complainants' own showing, Eller has no interest in the note executed to Bush & Benhart, nor have they any interest in the note executed to Eller. They are separate and independent claims, and should have been sued for separately. No joint interest is shown, and consequently, the demurrer should have been sustained. *Sutherland v. Ryerson*, 24 Ill. 517. The parties here do not show they are jointly entitled to a lien on the premises, but the contrary."

Compare *Rockwood v. Walcott*, 3 Allen (Mass.) 458, wherein it appeared that Rockwood and one Dickinson who were not general partners, undertook jointly to perform labor for the defendants. Thereafter they

joined in an action to foreclose their lien. During the pendency of the action Dickinson died. It was held that Rockwood could maintain the action in his own name and as the surviving partner of Dickinson.

In *Fischer v. Hanna*, 8 Colo. App. 471, 47 Pac. 303, it was held that one who superintended the erection of a building had a right to intervene as a party plaintiff in an action to foreclose a mechanic's lien on the building. The court said: "It is contended by appellant that the allegations in the petition do not bring the intervenor within the provisions of the statute as entitled to a lien. The statute provides a lien for 'whoever shall do any work. . . . For the purposes of this act the term "work" shall be deemed to include labor of every kind, whether skilled or unskilled.' I see no good reason why the superintendence of the construction of a building is not within the statute without a special designation. It is certainly work and labor. . . . The language of the statute is clear and comprehensive, and includes all persons who perform labor, whether skilled or unskilled. The person superintending the construction performs labor as truly as the mason who lays the wall."

As a general proposition the known members of a partnership which furnishes labor or materials for the erection of a building, are proper parties to an action to foreclose a mechanic's lien. *Roberts v. Gates*, 64 Ill. 374; *Lombard v. Johnson*, 76 Ill. 599; *Goble v. Gale*, 7 Blackf. (Ind.) 218, 41 Am. Dec. 219 (dormant partner not necessary party); *Sharon Town Co. v. Morris*, 39 Kan. 377, 18 Pac. 230 (one partner may sue for partnership); *Kleinert v. Knoop*, 147 Mich. 387, 110 N. W. 941; *Holmes v. Shands*, 27 Miss. 40; *Jones v. Hurst*, 67 Mo. 568; *Hammersmith v. Hilton*, 8 Mo. App. 564; *Davis v. Church*, 1 Watts & S. (Pa.) 240 (surviving partner may bring action in his own name).

In *Jones v. Hurst*, 67 Mo. 568, it appeared that the plaintiff in conjunction with his partner had performed work and furnished materials on the property of the defendant. Thereafter the plaintiff's partner assigned to the former his share of the interest in the lien against the defendant's property. It was held that the plaintiff's assignor was not a necessary party to the action to foreclose the lien. The court said: "In addition to being the assignee of his copartner's interest, Embree was a joint owner of the debt, and an original party to the contract, and as such partner and contractor he had an undoubted right to use the firm name to perfect the lien. The statement constituting the lien recites a contract with, and an indebtedness to, the firm, and, though sworn to by Embree alone, is in all respects sufficient as a lien filed by the firm. The statute provides that the

account filed may be verified by the contractor himself, or by some credible person for him. 2 Wag. Stat. p. 909, § 5. The recital therein that the debt had been assigned to Embree, and that he alone was entitled to the benefit of the lien, is mere surplusage, and does not alter its effect or impair its value. Nor will the fact that the lien was filed in the name of the firm after the assignment to Embree of his copartner's interest affect the validity of the lien."

In *Lombard v. Johnson*, 76 Ill. 599, it appeared that the defendant had purchased from the plaintiffs certain building materials, and had obtained from them labor and services. The plaintiffs were partners at the time of the purchase. An action to foreclose the lien for the goods sold was thereafter brought in the name of the two partners composing the firm. It was held that both partners were proper parties plaintiff. The court said: "In this case, while the contract was made in the name of one of the appellees, yet it was made for the benefit of both. One was as much interested therein as the other, and, under the chancery practice, it was proper to file the bill in the name of both, and the contract was properly admitted in evidence. From this it follows that the proof admitted by the court that the work was done by Johnson & Epling was proper, and the second position relied upon is not well taken."

But in *Roberts v. Gates*, 64 Ill. 374, it appeared that one of the plaintiffs had furnished to the defendant materials to be used in the erection of a building. Thereafter, and while the building was nearing completion, the plaintiffs entered into a partnership for a future business. Before the building was completed the partnership furnished a small proportion of the material used. It was held that the partner who as an individual furnished the material from the beginning, was the only proper party plaintiff. The court said: "Upon no principle can this decree be sustained. The goods were furnished under an express contract with one person, and the formation of the partnership gave to the incoming partner no lien by virtue of the contract. Upon the allegations of the petition no joint lien was created, and the court had no power to declare a lien in favor of the partners. It may be that, after the partnership, both petitioners were equally interested in the goods then delivered, but this equal interest alone could not make a lien, and only the persons who have a lien are entitled to the benefit of the statute. The principle, that all persons interested in the subject-matter should be made parties, has no application to this case. To entitle a person to be a petitioner, he must not only have an interest, but a lien within the purview of the statute."

2. ACTION BY ASSIGNEE OF LIEN.

In some jurisdictions it is expressly provided by statute that a mechanic's lien may be assigned and that the assignee may bring an action in his own name to foreclose the lien; and by the weight of authority the assignor is not a necessary party to the foreclosure proceedings. *Davis v. Billsland*, 18 Wall. 659, 21 U. S. (L. ed.) 969; *Pensacola R. Co. v. Schaffer*, 76 Ala. 233; *Barnett v. Wright*, 116 Ark. 44, 172 S. W. 254; *Phoenix Mut. L. Ins. Co. v. Batchen*, 6 Ill. App. 621; *Friedman v. Roderick*, 20 Ill. App. 622; *Moore v. Dugan*, 179 Mass. 153, 60 N. E. 488; *Tuttle v. Howe*, 14 Minn. 145, 100 Am. Dec. 205; *Peters v. St. Louis*, etc. R. Co. 24 Mo. 586; *Goff v. Papin*, 34 Mo. 177; *Jones v. Hurst*, 67 Mo. 588; *McCormick v. Lawton*, 3 Neb. 449; *Rogers v. Omaha Hotel Co.* 4 Neb. 54; *Hoagland v. Van Etten*, 31 Neb. 292, 47 N. W. 920; *Skyrme v. Occidental Mill*, etc. Co. 8 Nev. 219; *Hallahan v. Herbert*, 57 N. Y. 409, 11 Abb. Pr. (N. S.) 336 (assignor may sue for benefit of assignee); *Williams v. Deutscher Verein*, 14 N. Y. S. 368; *Williams v. Edison Electric Illuminating Co.* 16 N. Y. S. 857; *Shannon v. McDuffee*, 2 Pa. Dist. 230; *Oliver v. Fowler*, 22 S. C. 534; *Austin*, etc. R. Co. v. *Daniels*, 62 Tex. 73; *House v. Schulze*, 21 Tex. Civ. App. 243, 52 S. W. 654 (one claimant may, by assignment, sue for himself and on claim of others); *Iaegre v. Bossieux*, 15 Grat. (Va.) 83, 76 Am. Dec. 189; *Pairo v. Bethell*, 75 Va. 825 (assignors, while not necessary, are proper parties); *Harrington v. Miller*, 4 Wash. 808, 31 Pac. 325. See also *Dye v. Forbes*, 34 Minn. 13, 24 N. W. 309; *Kerr v. Moore*, 54 Miss. 286. See also *Brown v. Harper*, 4 Ore. 89. Compare *Fitzgerald v. Port Huron First Presb. Church*, 1 Mich. (N. P.) 243.

In *Pensacola R. Co. v. Schaffer*, 76 Ala. 233, it appeared that the Pensacola Railroad Company, entered into a contract with one Beuz by which the latter undertook to erect a building for the former. Beuz later abandoned the work, and with the consent of the defendant assigned his rights under the contract to Schaffer, the plaintiff. Schaffer completed the work and thereafter brought an action in his own name to foreclose his lien. It was held that Beuz was not a necessary party to the action.

In *Tuttle v. Howe*, 14 Minn. 145, 100 Am. Dec. 205, the court said: "We can conceive of no reason in the nature of things why an assignment of the debt or account, and the lien, such as was made in this case, should not be valid, so that the assignee can enforce the lien in his own name. The claim of the materialman and the lien are certainly the property of the materialman, and why should he not have the right to dispose of both? There is nothing in the lien right of the

nature of a personal trust. The lienholder is not intrusted with the possession of the property bound by the lien. His lien is a security. What difference can it make to the lienor who holds the lien? His duty is to pay the debt. If he pays it his property is discharged. If he fails to pay it, and so loses the property, of what moment is it to him whether the lien is enforced by the materialman or by his assignee?"

In *Harrington v. Miller*, 4 Wash. 808, 31 Pac. 325, it was said: "Actions to enforce liens of mechanics and materialmen are equitable in their nature, and the procedure is the same as governs in the foreclosure of mortgages on real estate. See Gen. Stat. § 1677; *Washington Iron-Works v. Jensen*, 3 Wash. 584, 28 Pac. 1019; *Fox v. Nachtsheim*, 3 Wash. 684, 29 Pac. 141. The principle is well established that a mortgagor of real estate who has sold and conveyed his equity of redemption is not a necessary party to an action to foreclose the mortgage, where no personal judgment is sought against him. *Stevens v. Campbell*, 21 Ind. 471; *Story's Equity Pleading* (6th ed.) § 197; 2 *Jones on Mortgages*, 1404. And the same rule applies in the foreclosure of liens. The object of the action is to affect the property, not the debt, and after assignment the assignor has no longer any interest in the property to be affected, and is not a necessary party under the rule that all persons interested in the subject-matter in controversy should be made parties, either as plaintiff or defendant."

But in *Fitzgerald v. Port Huron First Presb. Church*, 1 Mich. (N. P.) 243, the court said: "The statute under which this proceeding is commenced is a special and peculiar one, and must be strictly construed and as strictly pursued. It in distinct terms gives the lien to the contractor or subcontractor, and makes it personal to them, and to none other. The contractor or subcontractor are alone authorized to file a petition, and this right cannot be extended to an assignee. There are no words in the statute in any way implying that such lien may be held or enforced by an assignee, and in this case it seems to have been so understood when Marshall made his certificate of lien five months ago after the assignment to Fitzgerald, and only a few days before the petition was filed. In that certificate he states that there is then due to him the \$1,199 previously assigned to Fitzgerald, and says: 'I claim a lien upon said lots and appurtenances for the sums aforesaid.' This claim was not, on its face, for the benefit of Fitzgerald, but was personal to Marshall. Fitzgerald files no certificate of claim of lien, but depends on Marshall's claim. The claim made by Marshall cannot inure to Fitzgerald's benefit."

To the same effect see *Phoenix Mut. L. Ins. Co. v. Batchen*, 6 Ill. App. 621, wherein the court said: "But we think the lien given by the statute to a mechanic or materialman is so far a personal right that the proceeding to establish it, even if the right itself should be held to be assignable in equity, should be carried on in the name of the assignor rather than that of the assignee. Whether a mechanic's lien is assignable at all, is a question upon which the authorities are far from being harmonious. In *Cairo, etc. R. Co. v. Fackney*, 78 Ill. 116, the supreme court of this state expresses a grave doubt as to whether the liens given by the statute upon the property of railway companies are susceptible of assignment. In other states, courts of the highest respectability have held that mechanics' liens are not assignable so as to enable the assignee to prosecute, in his own name, suits to establish and enforce them."

III. Defendants.

1. PRINCIPAL CONTRACTOR.

The great weight of authority is that the principal or original contractor is a necessary party defendant to an action to foreclose a mechanic's lien and that the lien cannot be enforced without making him a party unless the owner waives his right to have him joined.

Arkansas.—*Simpson v. J. W. Black Lumber Co.* 114 Ark. 464, 172 S. W. 883; *Cruce v. Mitchell*, 122 Ark. 141, 182 S. W. 530.

California.—*Giant Powder Co. v. San Diego Flume Co.* 78 Cal. 193, 20 Pac. 419; *Wood v. Oakland, etc. Rapid Transit Co.* 107 Cal. 500, 40 Pac. 806 (contractor proper but not necessary party defendant); *Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 97 Pac. 414, 420; *Holder v. Mensinger (Cal.)* 165 Pac. 950. Compare *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331.

Colorado.—*Union Pac. R. Co. v. Davidson*, 21 Colo. 93, 39 Pac. 1095; *Charles v. E. F. Hallack Lumber, etc. Co.* 22 Colo. 283, 43 Pac. 548; *State Bank v. Plummer*, 54 Colo. 144, 129 Pac. 819; *Davis v. John Mouat Lumber Co.* 2 Colo. App. 381, 31 Pac. 187; *Estey v. Hallack, etc. Lumber Co.* 4 Colo. App. 165, 34 Pac. 1113; *Sayre-Newton Lumber Co. v. Park*, 4 Colo. App. 482, 36 Pac. 445.

Georgia.—*Lombard v. Young Men's Library Assoc. Fund*, 73 Ga. 322; *Castleberry v. Johnston*, 92 Ga. 409, 17 S. E. 772; *Royal v. McPhail*, 97 Ga. 457, 25 S. E. 512; *Clayton v. Farrar Lumber Co.* 119 Ga. 37, 45 S. E. 723; *Mauck v. Rosser*, 126 Ga. 268, 55 S. E. 32; *Griffin v. Gainesville Iron Works*, 144 Ga. 840, 88 S. E. 201; *Smith v. Turner*, 146 Ga. 242, 91 S. E. 71; *Carey Mfg. Co. v. Viaduct*

Place, 1 Ga. App. 707, 58 S. E. 274; *Thurman v. Willingham*, 18 Ga. App. 395, 89 S. E. 442. See also *Wilder's Sons Co. v. Walker*, 98 Ga. 508, 25 S. E. 571. Compare *Massachusetts Bonding, etc. Co. v. Realty Trust Co.* 142 Ga. 499, 83 S. E. 210.

Illinois.—*Olson v. O'Malia*, 75 Ill. App. 387; *I. Lurya Lumber Co. v. Bernstein*, 168 Ill. App. 85; *Howell v. Anderson*, 170 Ill. App. 14. Compare *Cohen v. Bernstein*, 170 Ill. App. 113.

Indiana.—Compare *Leeper v. Myers*, 10 Ind. App. 314, 37 N. E. 1070; *Crawfordsville v. Barr*, 65 Ind. 367; *Hubbard v. Moore*, 132 Ind. 178, 31 N. E. 534.

Iowa.—*Vreeland v. Ellsworth*, 71 Ia. 347, 32 N. W. 374; *Wheelock v. Hull*, 124 Ia. 752, 100 N. W. 863. Compare *Simonson Bros. Mfg. Co. v. Citizens' State Bank*, 105 Ia. 264, 74 N. W. 905; *W. D. Jenkins Lumber Co. v. Cramer*, 160 N. W. 42.

Louisiana.—Compare *Carolina Portland Cement Co. v. Southern Wood Distillates, etc. Co.* 137 La. 469, 68 So. 831.

Michigan.—*Kerns v. Flynn*, 51 Mich. 573, 17 N. W. 62; *Godfrey Lumber Co. v. Kline*, 160 Mich. 565, 125 N. W. 682.

Minnesota.—*Emmet v. Rotary Mill Co.* 2 Minn. 286; *Northwestern Cement, etc. Pavement Co. v. Norwegian-Danish Evangelical Lutheran Seminary*, 43 Minn. 449, 45 N. W. 868.

Mississippi.—*Flake v. Central Hardware Co.* 96 Miss. 838, 51 So. 461.

Missouri.—*Wibbing v. Powers*, 25 Mo. 599; *Ashburn v. Ayres*, 28 Mo. 75; *Horstkotte v. Menier*, 50 Mo. 158; *Russell v. Grant*, 122 Mo. 161, 26 S. W. 958, 43 Am. St. Rep. 563; *Bombeck v. Devorss*, 19 Mo. App. 38; *Foster v. Wulffing*, 20 Mo. App. 85; *Fruin v. Mitchell Furniture Co.* 20 Mo. App. 313 (one of several joint contractors sufficient as necessary defendant); *Steinkamper v. McManus*, 26 Mo. App. 51; *Steinmann v. Strimple*, 29 Mo. App. 478; *Murdock v. Hillyer*, 45 Mo. App. 287 (owner acting as contractor); *Johnson-Frazier Lumber Co. v. Schuler*, 49 Mo. App. 90; *Rumsey, etc. Co. v. Pieffer*, 108 Mo. App. 486, 83 S. W. 1027; *O'Neil Lumber Co. v. Greffet*, 154 Mo. App. 33, 133 S. W. 113; *Hughes Bros. Paint, etc. Co. v. Prewitt*, 170 Mo. App. 594, 157 S. W. 120; *American Radiator Co. v. Connor Plumbing, etc. Co.* 184 S. W. 907; *Benning v. Farmers' Bank*, 190 S. W. 983. See also *Whitmeyer v. Dart*, 29 Mo. App. 565 (principal contractor, when acting as agent for owner, not necessary party); *Reinhardt v. Varney*, 72 Mo. App. 646.

Montana.—*Gilliam v. Black*, 16 Mont. 217, 40 Pac. 303; *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65, 60 Pac. 991, 60 Pac. 594. See also *Duignan v. Montana Club*, 16 Mont. 189, 40 Pac. 294.

New Jersey.—Sinnickson v. Lynch, 25 N. J. L. 317; Ayres v. Revere, 25 N. J. L. 474.

New York.—Hilton Bridge Constr. Co. v. New York Cent. etc. R. Co. 145 N. Y. 390, 40 N. E. 86; Whisten v. Kellogg, 50 Misc. 409, 100 N. Y. S. 526; Freese v. Avery, 57 App. Div. 633, 69 N. Y. S. 150 (may be made party plaintiff); Maneely v. New York, 119 App. Div. 376, 105 N. Y. S. 976; Maltby, etc. Co. v. Charles P. Boland Co. 152 App. Div. 596, 137 N. Y. S. 470.

North Carolina.—Lookout Lumber Co. v. Mansion Hotel, etc. R. Co. 109 N. C. 658, 14 S. E. 35.

Ohio.—Compare Kloeppinger v. Grasser, 25 Ohio Cir. Ct. Rep. 90.

Oklahoma.—Union Bond, etc. Co. v. Bernstein, 40 Okla. 527, 139 Pac. 974; Eberle v. Drennan, 40 Okla. 59, 136 Pac. 162, 51 L.R.A. (N.S.) 68; New Home Lumber Co. v. Ryal, 156 Pac. 637.

Oregon.—Compare Osborn v. Logus, 28 Ore. 302, 37 Pac. 456; Cooper Mfg. Co. v. Delahunt, 36 Ore. 402, 51 Pac. 649, 60 Pac. 1; Hand Mfg. Co. v. Marks, 36 Ore. 523, 52 Pac. 512, 53 Pac. 1072, 59 Pac. 540.

Pennsylvania.—Barnes v. Wright, 2 Whart. 184.

South Dakota.—Burgi v. Rudgers, 20 S. D. 646, 108 N. W. 253 (principal contractor proper but not necessary party).

Tennessee.—Warner v. Yates, 118 Tenn. 548, 102 S. W. 92.

Texas.—Austin, etc. R. Co. v. Rucker, 59 Tex. 587; Thomas v. Ownby, 1 White & W. Civ. Cas. Ct. App. § 1212; Slade v. Amarillo Lumber Co. 93 S. W. 475.

Washington.—Brace, etc. Mill Co. v. Burbank, 87 Wash. 350, Ann. Cas. 1917E 739, 151 Pac. 803. Compare Maxon v. School Dist. No. 34, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110.

West Virginia.—Augir v. Warder, 68 W. Va. 752, 70 S. E. 719, 33 L.R.A. (N.S.) 69; William James Sons Co. v. Farley, 71 W. Va. 173, 76 S. E. 169; Augir v. Warder, 74 W. Va. 103, 81 S. E. 708; Gist v. Virginian R. Co. 90 S. E. 554.

Wisconsin.—Carney v. La Crosse, etc. R. Co. 15 Wis. 504; Harbeck v. Southwell, 18 Wis. 418; Yawkey-Crowley Lumber Co. v. DeLonge, 157 Wis. 390, 147 N. W. 334.

Wyoming.—Becker v. Hopper, 22 Wyo. 237, Ann. Cas. 1916D 1041, 138 Pac. 179; Becker v. Hopper, reported in full, post, this volume, at page 35.

In *American Radiator Co. v. Connor Plumbing, etc. Co.* (Mo.) 184 S. W. 907, the court said: "By force of section 8233 of the statute (as well as by the necessity of the situation between the owner, contractor, subcontractor, materialman, and laborer), it is made the duty of the contractor in lien actions, other than his own, to defend them at his own expense; and the owner may deduct the

amount of the judgment lien against his property from what he may owe such contractor; or, if he has paid him, that he may have recourse against him. . . . From these considerations it is clear that, in fairness to all concerned, the contractor should be bound by the judgment rendered, and, since he will not be bound if not a party, it becomes necessary, unless waived, to make him a party defendant."

In *Griffin v. Gaineaville Iron Works*, 144 Ga. 840, Ann. Cas. 1917D 994, 88 S. E. 201, L.R.A. 1916F 216, it was held that in an action to foreclose a mechanic's lien the principal contractor is a necessary party defendant and that, therefore, the plaintiff cannot recover against the owner of the premises the value of the material furnished, unless the principal contractor is personally served with a summons. The court said: "The facts in the case of *Clayton v. Farrar Lumber Co.* 119 Ga. 37, 45 S. E. 723, were substantially similar to those of the present case, and it was there ruled: 'In a suit to foreclose a lien on real estate, for materials furnished to a contractor and used by him in improving said real estate, the contractor is a necessary party; and where no process is prayed against such contractor, though he may be referred to in the petition as one of the defendants, and though the clerk annexes a process against "the defendants" generally, he is not thereby made a party, and a demurrer setting up these objections should be sustained.'"

In *Estey v. Hallack, etc. Lumber Co.* 4 Colo. App. 165, 34 Pac. 1113, it was held that since the principal contractor is an indispensable party to an action to foreclose a mechanic's lien a failure to make him a party cannot be waived. The court said: "It is claimed that by proceeding to trial without urging and relying upon the want of the contractor as a necessary party the irregularity was waived. In such cases there can be no waiver. A judgment against the contractor is an indispensable prerequisite to a lien upon the property. The owner and subcontractors cannot adjudicate and settle the accounts and equities between the contractor and the subcontractors, nor can they adjudicate and adjust claims and matters between the owner and the contractor. In one case the owner and contractor are the contracting parties, in the other the contractor and subcontractors. The right to the lien is purely statutory, is subsidiary and contingent, dependent upon the enforcing the judgment against the contractor. The owner is not primarily liable—hence the indispensable necessity of the contractor being before the court as a party to a triangular adjudication, and the necessity, primarily, of a judgment against the contractor as a basis of proceedings against the property of the owner."

In *Davis v. John Mouat Lumber Co.* 2 Colo. App. 381, 31 Pac. 187, the court said: "The initial question naturally presented in the order of events concerns the parties to the suit and the method by which they have been brought into court. Our statute lacks the definite direction which some enactments contain that all persons in interest, including owners, contractors and lienors, shall be made parties. But the essential character of the suit, the indebtedness upon which the right to a lien rests, and the general provision concerning the entry of judgment, as clearly as the definite direction of the other acts, require the presence of the contractor in a suit by the materialman to recover for that which he has furnished. However true it may be that the principal purpose of that suit is to enforce the lien against the property and thereby recover the debt due from the contractor, it is as equally certain that that debt is the foundation of the action, and unless it exists, and is then enforceable, the incidental right to enforce the lien cannot prevail. Many of the cases which have passed upon the question, put their decisions upon the ground that the inquiry necessarily involves the contract relations and state of accounts existing between the contractor and the one seeking to enforce the lien; that without the establishment of that debt there can be right of recovery by the subcontractor, and his right to a lien is dependent upon the establishment of his claim or debt against the contractor. With this, say the authorities, the owner has nothing to do, and the burden of establishing that claim is put by the law upon him who brings the suit and seeks the relief. On this broad general basis, regardless of the statute, it has been often held that the contractor was an indispensable party to the action. With this view we agree, and adjudge that the contractor is not only a proper, but a necessary and indispensable party, against whom a debt must be established as the foundation of the decree for the foreclosure of the lien. . . . While the statute does not directly require that the contractor shall be a party to the suit, it undoubtedly provides for a judgment in his favor against the party personally liable for the claim, to be followed by a decree in his favor against the property to the betterment of which his material has gone. It was within the evident contemplation of the legislature that the original promisor should be a party to the suit, and that a judgment against him should precede a decree against the owner, who would probably be entitled to compel the collection of the personal judgment if he could show assets belonging to the contractor before the one holding the derivative right, and proceeding in invitum could take his land in payment of the debt. At all events the reasons for the presence of the

original debtor are so conclusive that in the absence of any statute it should be adjudged necessary to bring that debtor before the court prior to the entry of any decree against the owner of the land."

In *Casey Mfg. Co. v. Viaduct Place*, 1 Ga. App. 707, 58 S. E. 274, it was held that a materialman could not enforce his lien against the owner of the premises, because the principal contractor had been discharged in bankruptcy. The latter, who was a necessary party to the action, could not, because of the discharge, be joined in the action nor could the owner be sued alone.

In *Giant Powder Co. v. San Diego Flume Co.* 78 Cal. 193, 20 Pac. 419, the court said: "It has been the constant and uniform practice ever since we had a lien law in this state for the benefit of materialmen and others, in actions for the foreclosure of such liens, to make the owner and contractor parties defendant, and to unite a personal action against the contractor for the money, with the action to establish the lien and for its foreclosure against the owner. The practice is much to be commended, in that it prevents a multiplicity of suits, and thus saves labor and expense. If each materialman or person performing labor on a building had to bring separate actions against the contractor for the recovery of his money, it is manifest the expense of the litigation would be greatly increased. This constant and uniform procedure continued for so long a time is strongly persuasive that the practice is correct. . . . The person personally liable for the debt in the case of materialmen would usually be the contractor, though sometimes the owner might be, as the purchaser himself of the materials. When the contractor is personally liable for the debt, the section 1194 of the Code of Civil Procedure, just referred to, authorizes his being made a defendant along with the owner, and a determination in such action of the amount for which he is liable to each lienholder, and in case of deficiency above pointed out, a docketing of the judgment against him for such deficiency as he may be personally liable for. As this could not be done without his being made a defendant, the law must authorize his being made a defendant. We have no doubt from the provisions of sections 1193, 1194, and 1195 that it was the intent of the lawmakers that in an action to enforce a lien under this statute, all the persons claiming liens under the statute, including the contractor and owner, should be made parties, so that there might be a complete determination of all matters in controversy between the materialmen and other lienholders, the owner and the contractor, and in this point of view, the contractor is a necessary party; and if he was not made a party, the court should order him to be made a defendant, that there might be a full and

complete determination of the matters in controversy." But see *Green v. Clifford*, 94 Cal. 49, wherein the court said: "We do not know of any law which makes the contractor a necessary party, so far, at least, as the rights of the owner of the building are concerned. . . . Graham (the contractor) was certainly not a necessary party to the actions brought to enforce liens for labor and materials furnished after the abandonment of his contract."

In *Brace, etc. Mill Co. v. Burbank*, 87 Wash. 356, Ann. Cas. 1917E 739, it appeared that the owner of the premises did not require the plaintiff to make the principal contractor a party defendant until the close of the trial. It was held that the owner had waived his right to request that the principal contractor should be made a party. The court said: "We are not prepared to say that the owner, under some circumstances, might not rightfully insist upon the contractor being made a defendant, but it is not reversible error for the trial court to proceed to final judgment of foreclosure, in the absence of such request until the close of the trial. This view finds abundant support in the authorities, and we think must necessarily be correct in the light of our statute. *Crawfordsville v. Barr*, 65 Ind. 367; *Russ Lumber, etc. Co. v. Garrettson*, 87 Cal. 589, 25 Pac. 747; *Osborn v. Logus*, 28 Ore. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997; 27 Cyc. 356. Our decision in *James v. Brainard*, 64 Wash. 175, 116 Pac. 633, is in harmony with this view, though that case involved the foreclosure of a mortgage. We conclude that the Modern Bungalow Company, as contractor, was not a necessary party to the foreclosure of these liens, and that, in any event, appellants waived whatever right they had to insist upon the Bungalow Company being made a defendant, by their silence on that question until the close of the trial."

In *Leeper v. Myers*, 10 Ind. App. 314, 37 N. E. 1070, it appeared that a materialman furnished materials to the principal contractor, who had been engaged by the owner of the premises to repair the same. Thereafter the parties agreed among themselves that the owner would pay to the materialman the debt of the contractor. It was held that the contractor was not a necessary party to an action to foreclose the materialman's lien. The court said: "In this case there was a settlement between all of the parties. It was mutually agreed between appellant, appellees and Pollock that appellant should become the debtor to appellees, and that in consideration thereof their debt against Pollock should be released. The old debt against Pollock was extinguished, and appellant was substituted as a new debtor for Pollock. If, as is alleged, the amount due and owing from appellant to Pollock was settled and determined, and if

Pollock was owing the same amount to appellees, and, under such circumstances, it was mutually agreed between all of the parties that appellant should pay the amount she owed Pollock to appellees, and appellees, in consideration of such agreement, released Pollock from liability, there was no necessity for making Pollock a party to this action."

In *Emmet v. Rotary Mill Co.* 2 Minn. 286, the court said: "Where there is an intermediate contractor to whom the credit is given, it is all important that he should be the party to an action for materials furnished him, as he alone can be presumed to know about the correctness of the claim made, or the proper defense to make, should any exist. The owner of the property may know nothing of either, and would not therefore be in a condition to defend his property against even an illegal demand. He may even have paid the contractor in full, according to the terms of the contract, before notice of any claim by a subcontractor. Justice to the owner, therefore, requires that the subcontractor should first exhaust his remedy against his immediate debtor, the contractor, before resorting to the owner and compelling him to pay, perhaps, a second time. Besides, a judgment against the owner in an action by the subcontractor would not be conclusive on the intermediate contractor, and the owner would be driven to another action against him to recover the amount he has been obliged to pay, and might, in such action, recover less than the amount of the judgment against himself."

In *Rumsey, etc. Co. v. Pieffer*, 108 Mo. App. 486, 83 S. W. 1027, it appeared that a subcontractor furnished materials for the erection of a building at the request of another subcontractor. Thereafter he brought an action to foreclose his lien. He joined as parties defendant the owners of the property and the other subcontractor but left out the principal contractor. A statute of Missouri provided that in an action to foreclose a mechanic's lien all the necessary parties must be served with process within ninety days from the accrual of the right of action. After the time expired the plaintiff sought to make the principal contractor a party. It was held that he could not do so.

In *Hilton Bridge Constr. Co. v. New York Cent. etc. R. Co.* 145 N. Y. 390, 40 N. E. 86, the court said: "This case arises under the Mechanic's Lien Law, and it is an action peculiar to itself and one in which we think it proper that the contractor should be brought in where the plaintiff's cause of action depends upon the payments made by the owner to the contractor before they were due under the terms of the contract."

In *Kloeppinger v. Grasser*, 25 Ohio Cir. Ct. 90, it appeared that the principal contractor had assigned his rights to a subcontractor.

It was held that in an action by another subcontractor to enforce a mechanic's lien the principal contractor was not a necessary party.

In *Cooper Mfg. Co. v. Delahunt*, 36 Ore. 402, 51 Pac. 649, 60 Pac. 1, it was held that while the principal contractor is a necessary party to an action to foreclose a mechanic's lien he is not a necessary party to an appeal from a judgment in such an action where no personal judgment is asked against him. To the same effect see *Hand Mfg. Co. v. Marks*, 36 Ore. 623, 52 Pac. 612, 53 Pac. 1072, 59 Pac. 549.

In *Warner v. Yates*, 118 Tenn. 548, 102 S. W. 92, the court said: "Where the suit is brought by a subcontractor the principal contractor and the owner of the property upon which the lien is claimed must both be made parties defendant. The principal contractor is a necessary party, because he is the debtor sued, and the owner of the property, because it is sought to reach his or her property. They are both interested, and must have their day in court; otherwise, there would be a failure of due process of law. The principal contractor has the right to controvert the indebtedness claimed, and the owner of the property the existence of the lien sought to be enforced, and the action cannot be maintained." See also *Slade v. Amarillo Lumber Co. (Tex.)* 93 S. W. 475, wherein the court said: "It is the established practice in this class of cases to make not only the owners, but also the contractors parties, and no reason is perceived why the usual course should not be pursued in this case. They are undoubtedly proper parties, and at least some members of the court are inclined to the option that they are necessary parties."

In *Massachusetts Bonding, etc. Co. v. Realty Trust Co.* 142 Ga. 499, 83 S. E. 210, the owner of the premises brought an equitable action against the principal contractor and his surety, and also sought to restrain the materialmen from enforcing their liens against the contractor. It was held that in view of the fact that the principal contractor had absconded he was not a necessary party to the action to foreclose the materialmen's liens. The court said: "The present litigation was initiated by the landowner at a time when the materialmen could have come into court and foreclosed their liens. The owner of the premises undertook to bring the contractor before the court, and procured an order enjoining the materialmen from instituting any suit against the owner or its property, looking to the foreclosure of their liens, and that the whole matter should be settled in this litigation. The owner so tied the hands of the materialmen as to prevent an action outside of this litigation. It brought them into this litigation, and it does

not lie in its mouth to say that they cannot obtain a judgment of foreclosure of their liens because they have not independently obtained a judgment against the contractor. They were enjoined from taking any steps looking to the foreclosure of their liens against the Realty Trust Company or its property. One of the necessary steps in a proceeding to foreclose that lien was to sue the contractor in an independent suit and obtain judgment, or to sue him concurrently with the owner of the premises. We therefore think that by the voluntary action of the realty company (the owner of the premises), requiring these materialmen to establish their liens in this litigation, it cannot contend that the contractor has not been personally served. The bond was given to furnish a security against the default of the contractor. It cannot be that if the contractor not only defaults but is without the jurisdiction, so as not to be personally served, the security is destroyed. Such construction would render a bond of this character a security in name only in a case like this. None of the decisions referred to by counsel are contrary to what is above stated."

In *Kansas* the courts have held that in an action by a subcontractor to foreclose a mechanic's lien he must give notice thereof to the principal contractor. Moreover he is liable in damages to the owner for his failure to do so. *Tracy v. Kerr*, 47 Kan. 656, 28 Pac. 707; *Sash, etc. Co. v. Heiman*, 65 Kan. 5, 68 Pac. 1080. Thus in *Tracy v. Kerr*, supra, the court said: "¶ 4738, General Statutes of 1889, provides: 'Where such action is brought by a subcontractor, or other person not the original contractor, such original contractor shall be made a party defendant, and shall at his own expense defend against the claim of every subcontractor, or other person claiming a lien under this act; and, if he fails to make such defense, the owner may make the same at the expense of such contractor; and until all such claims, costs and expenses are finally adjudicated and defeated, or satisfied, the owner shall be entitled to retain from the contractor the amount thereof, and such costs and expenses as he may be required to pay.' In view of the provisions of this section, it practically makes no difference whether we consider Kerr technically as a subcontractor, or one of the other persons claiming a lien under this act,' for the language is so plain, the command that the contractor be made a party so imperative, that requirement is so mandatory, and the result of a failure or refusal to make him a party is so specifically stated, that there seems to be no fair ground, either by construction or otherwise, on which to place approval of the ruling of the trial court. The provision in

question is a just and equitable one for the owner of the building. He ought not to be required to litigate at his own expense all the differences that naturally and inevitably arise between the contractor and the men who furnish material to him, and those who are hired by the contractor to perform labor on the building. This provision was designed to relieve him from the trouble and expense of a litigation in which he has practically no interest. This provision, and the one that the owner shall not become liable to any claimant for any greater amount than he agreed to pay the original contractor, are designed for the protection of the owner of the land and building, and are deserving of such liberal interpretation as will best accomplish the intent of the legislature. It may be suggested that if the subcontractor, or other person not the original contractor, neglect or refuse to make the contractor a party, the owner may do so on his own motion, and while it is probably true that the trial court would permit or order this to be done, yet the plain command of the statute is, that the contractor shall be made a party, and we think it is primarily the duty of the party instituting such an action to do so. In this case Kerr was requested so to do and refused, and Tracy was compelled to assume the burden and to pay the expenses of a litigation that the legislature casts upon the contractor. He now seeks to recover the costs and expenses of such litigation from the assignee of the contractor. We think he cannot do this, for the evident reason that there is no showing in the record that Connacher ever had notice or knowledge of the pendency of the original action; but he has a cause of action against Kerr personally for the recovery of the costs and expenses necessarily incurred by him because of Kerr's wrongful institution of that action."

In *Simonson Bros. Mfg. Co. v. Citizens' State Bank*, 105 Ia. 264, 74 N. W. 905, it was held that while the principal contractor was a necessary party to an action to foreclose a mechanic's lien it was not necessary that he should be served personally with process. The court said: "The contention of appellee is that plaintiff's claim against Lofgren [the principal contractor] was purely personal, and that there can be no adjudication against him until the court has jurisdiction of his person, and that this cannot be acquired on service by publication. It would, indeed, be a singular defect in our law if a subcontractor, who has a right to a mechanic's lien, can be prevented from enforcing it by the absconding of the principal contractor. We have always regarded an action to enforce a mechanic's lien as in the nature of a foreclosure of a mortgage. Where no personal judgment is asked, it is strictly a proceeding in rem."

In *New Home Lumber Co. v. Ryal* (Okla.) 156 Pac. 637, it was held that while the principal contractor is a necessary party defendant to an action to foreclose a mechanic's lien, a materialman may enforce his rights against the property without obtaining a personal judgment against the principal contractor where it appears that process cannot be served on the latter.

It has been held that where the principal contractor is a firm consisting of several members all the members of the firm are necessary parties defendant to an action to foreclose a mechanic's lien. *McDonald v. Backus*, 45 Cal. 262; *Snodgrass v. Holland*, 6 Colo. 596. Compare *Barnes v. Colorado Springs*, etc. Dist. R. Co. 42 Colo. 461, 94 Pac. 570.

In *Cohen v. Bernstein*, 170 Ill. App. 113, it appeared that at the time the owner of the premises contracted for material and labor the principal contractor was a partnership composed of three members. Soon thereafter one of the partners severed his connection with the firm. The contract was then executed by the remaining two partners. They were treated by all persons concerned as the principal contractor. It was held that, in an action to foreclose a mechanic's lien, the retiring partner was not a necessary party. To the same effect see *I. Lurya Lumber Co. v. Bernstein*, 168 Ill. App. 85.

In *New York* it was held in two early cases that while the principal contractor is a necessary party to an action to foreclose a mechanic's lien the fact that he is not made a party is not a ground for the dismissal of the action. *Foster v. Skidmore*, 1 E. D. Smith (N. Y.) 719; *Lowber v. Childs*, 2 E. D. Smith (N. Y.) 577, 1 Abb. Pr. 415. Apparently the rule is otherwise under later statutes. Lien Law, § 44, *McKinney's Consol. Laws*, Book 32, p. 118; *Maneely v. New York*, 119 App. Div. 376, 105 N. Y. S. 976; *Maltby, etc. Co. v. Charles P. Boland Co.* 152 App. Div. 596, 137 N. Y. S. 470.

2. OWNER.

a. In General.

By the weight of authority the owner of the premises against which a mechanic's lien is sought to be foreclosed is of course a necessary party, and no foreclosure may be had without joining him.

Alabama.—*Roman v. Thorn*, 83 Ala. 443, 3 So. 759.

California.—*Hooper v. Flood*, 54 Cal. 218; *Los Angeles County v. Winans*, 13 Cal. App. 234, 109 Pac. 640. See also *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. 856.

Colorado.—*San Juan, etc. Min. etc. Co. v. Finch*, 6 Colo. 214; *Johnston v. Bennett*, 6 Colo. App. 362, 40 Pac. 847.

Georgia.—*Williams v. Chatham Real Estate, etc. Co.* 13 Ga. App. 42, 78 S. E. 869; *Thurman v. Willingham*, 18 Ga. App. 395, 89 S. E. 442; *Atkinson v. Wingate Plumbing Co.* 93 S. E. 122 (where owner and contractor live in same county both must be joined in action by materialman).

Illinois.—*Glos v. John O'Brien Lumber Co.* 183 Ill. 211, 55 N. E. 712 (one holding tax title to premises against which lien is sought to be enforced is proper party defendant); *O'Brien v. Gooding*, 194 Ill. 466, 62 N. E. 898 (owner and principal contractor must be joined); *Harty Bros. etc. Co. v. Polakow*, 237 Ill. 559, 86 N. E. 1085 (owner and principal contractor must be joined); *Race v. Sullivan*, 1 Ill. App. 94; *Howell v. Anderson*, 170 Ill. App. 14. And see the reported case.

Indiana.—*Holland v. Jones*, 9 Ind. 495; *Marvin v. Taylor*, 27 Ind. 73; *Vorhees v. Beckwell*, 10 Ind. App. 224, 37 N. E. 811 (owners of equity of redemption); *Davis, etc. Bldg. etc. Co. v. Vice*, 15 Ind. App. 117, 43 N. E. 889 (owner corporation created after obligation to mechanic incurred); *Krotz v. A. R. Beck Lumber Co.* 34 Ind. App. 577, 73 N. E. 273.

Iowa.—*Keller v. Tracy*, 11 Ia. 531.

Kansas.—*Stough v. Badger Lumber Co.* 70 Kan. 713, 79 Pac. 737; *Lang v. Adams*, 71 Kan. 309, 80 Pac. 593.

Louisiana.—*Johnson v. Weinstock*, 31 La. Ann. 698 (mortgagee on whose interest only materials were furnished necessary party but mortgagor not).

Maine.—See *William H. Glover Co. v. Rolins*, 87 Me. 434, 32 Atl. 999.

Massachusetts.—*Peabody v. Eastern Methodist Soc.* 5 Allen 540; *Thaxter v. Williams*, 14 Pick. 49; *Osborne v. Barnes*, 179 Mass. 597, 61 N. E. 276.

Missouri.—*Compare Schaeffer v. Lohman*, 34 Mo. 68; *Hilliker v. Francisco*, 65 Mo. 598.

Montana.—*Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65, 60 Pac. 594, 991; *Cook v. Gallatin R. Co.* 28 Mont. 340, 72 Pac. 678.

Nebraska.—*Green v. Sanford*, 34 Neb. 363, 51 N. W. 967; *Pickens v. Polk*, 42 Neb. 267, 60 N. W. 566.

New Jersey.—*Sinnickson v. Lynch*, 25 N. J. L. 317; *Ayres v. Revere*, 25 N. J. L. 474; *Edwards v. Derrickson*, 28 N. J. L. 39; *Derrickson v. Edwards*, 29 N. J. L. 468, 80 Am. Dec. 220; *Robbins v. Burn*, 34 N. J. L. 322.

New York.—*McMahon v. Tenth Ward School-Officers*, 12 Abb. Pr. 129; *Tisdale v. Moore*, 8 Hun 19; *Martens v. O'Neill*, 131 App. Div. 123, 115 N. Y. S. 260 (failure to serve owner with summons within time allowed by statute discharges his liability); *Maltby, etc. Co. v. Charles P. Boland Co.* 152 App. Div. 596, 137 N. Y. S. 470. See also

Baldinger v. Levine, 83 App. Div. 130, 82 N. Y. S. 483. *Compare Bierschenk v. King*, 38 App. Div. 360, 56 N. Y. S. 696.

Tennessee.—*Foust v. Wilson*, 3 Humph. 31 (absconding owner may be made party by publication); *Ragon v. Howard*, 97 Tenn. 334, 37 S. W. 136; *Warner v. Yates*, 118 Tenn. 548, 102 S. W. 92.

Texas.—*Carter Lumber Co. v. Simpson*, 83 Tex. 370, 18 S. W. 812 (joint owners of property may be united as defendants); *Slade v. Amarillo Lumber Co.* 93 S. W. 475.

Washington.—*City Sash, etc. Co. v. Bunn*, reported in full post, this volume, at page 31.

West Virginia.—*Gist v. Virginian R. Co.* 90 S. E. 554.

Wisconsin.—*Carney v. La Crosse, etc. R. Co.* 15 Wis. 504; *McCoy v. Quick*, 30 Wis. 521; *J. A. Treat Lumber Co. v. Warner*, 60 Wis. 183, 18 N. W. 747; *Yawkey-Crowley Lumber Co. v. DeLonge*, 157 Wis. 390, 147 N. W. 334.

Canada.—*Hovenden v. Ellison*, 24 Grant Ch. (U. C.) 448.

In *Hilliker v. Francisco*, 65 Mo. 598, the plaintiff brought an action to foreclose a mechanic's lien against the principal contractor and the owner of the property. It was held that while the owner was not a necessary party, having been made a party he could prosecute an appeal from a judgment in the foreclosure proceedings.

In *Hooper v. Flood*, 54 Cal. 218, it was held that while the owner of the property was a necessary party defendant to an action to foreclose a mechanic's lien, his agent, who acted on his behalf in contracting for the work and materials furnished, was neither a necessary nor a proper party to the proceedings.

In *San Juan, etc. Min. etc. Co. v. Finch*, 6 Colo. 214, a proceeding to foreclose a mechanic's lien, the corporation which owned the property on which the lien attached was not served with process. It was held that the judgment against the corporation was void.

In *Peabody v. Eastern Methodist Soc.* 5 Allen (Mass.) 540, it was held that a mechanic could not maintain an action to foreclose a lien without making the owner a party defendant.

In *Green v. Sanford*, 34 Neb. 363, it appeared that at the time the mechanic performed labor and furnished materials the premises were occupied by one Nancy Dishong under a contract of purchase from Sanford, the owner of fee simple. The contract for materials was made by Jacob Dishong, husband of Nancy Dishong, acting as her agent. The mechanic did not know of the contract of purchase between Nancy Dishong and Sanford until long after he commenced an action to foreclose the lien against Jacob Dishong.

Thereafter she was made a party. Sanford was not made a party until after the expiration of the time allowed by statute within which to bring an action to foreclose a mechanic's lien. It was held that inasmuch as Sanford, as owner of the property, was a necessary party to the proceeding he should have been joined in the action within the statutory period, and that plaintiff's failure to do so released him. The court said: "It also appears that Sanford was not made a party defendant until more than three years after the lien was filed. The legal title to the land being in Sanford, he was not only a proper but a necessary party to the proceeding to enforce the lien. The rule as to parties defendant in a mechanic's lien foreclosure is the same as in a suit for the foreclosure of a mortgage. Is the suit barred as to Sanford? The plaintiffs in error contend that the statute was complied with by the commencement of the proceeding to foreclose the lien against Jacob Dishong within the statutory two years, and that it was proper to bring in new parties after the expiration of that time. . . . It is manifest that the only way a mechanic's lien can be continued in force beyond the two years is by instituting a suit within that time to enforce the lien, and the plain meaning of the statute is that it is only preserved as to the persons who are made parties to the suit prior to the limitation of the time for the bringing of such an action. A person who is not party to a suit ordinarily is not bound by the adjudication, nor is a suit deemed commenced against one until he is made a party to it, and when, in an action to enforce a mechanic's lien, the plaintiff by amendment of his petition, as in the case at bar, brings in a new party after the limitation of two years has run, as to such new party the suit is barred. . . . So far as we are able to discover, all the authorities, with the single exception of *Manly v. Downing* [15 Neb. 687] supra, affirm the doctrine that where, after a suit has been commenced, a new defendant has been brought in after the expiration of the period limited by statute for bringing the action as to such defendant the suit is barred."

In *Martens v. O'Neill*, 131 App. Div. 123, 115 N. Y. S. 260, the plaintiff, a mechanic, instituted an action to foreclose a lien against the principal contractor. He also made the owner of the premises a party defendant but not until after the statute of limitations had barred his claim. It was held that the owner was discharged. The court said: "The owner of the premises and a contractor for work thereon are not joint contractors as to the subcontractor. (Phillips Mechanics' Liens [3d ed.] § 397.) And they are not 'otherwise united in interest.' The interest of the contractor is to defeat the claim, or to reduce it to the saving of his own claim against

the owner. The interest of the owner is confined to see that the claim of the subcontractor rests upon a sum justly due from the owner to the contractor under their contract, inasmuch as the lien of the subcontractor attaches perforce of the owner's indebtedness to the contractor. . . . I am of opinion, then, that the service of the summons and complaint on the contractor was not a beginning of the action against the owner. As the plaintiff did not begin his action of foreclosure, or secure an order to continue it within one year from the time of filing his lien, the lien was discharged."

In *McCoy v. Quick*, 30 Wis. 521, the court referring to a failure to join the owner said: "The general rule of law is, that all persons having an interest in the subject-matter of an action, when the same is commenced, should be made parties thereto, and that none but parties and privies are concluded by the adjudication. This rule is so eminently reasonable and just, that no exceptions should be made to it unless clearly created by law."

In *Snodgrass v. Holland*, 6 Colo. 596, it appeared that the plaintiff had performed labor for the defendant and one Warwick, the latter's tenant in common. The plaintiff brought an action to foreclose his lien against the property owned by the defendant and Warwick was not made a party to the suit. It was held he was a necessary party. The court said: "The only question in issue upon the trial seems to have been as to the terms of the contract and the performance by Holland in doing the work and the proper amount due thereunder. Upon what ground the proceedings were dismissed as to Warwick in the county court, and for what reason he was not afterwards held to be a party defendant in the district court upon being ruled to show cause therefor, the record is silent. He was certainly, so far as this record discloses, a proper and necessary party defendant. He was a tenant in common of the premises, owning an undivided interest in fee thereto; that the contract was made on his behalf, as that of his cotenant Snodgrass, by his authority or sanction, does not appear to have been disputed, and the work done, from the very nature of it, inured to the benefit of both owners, and appears to have been so intended. And notwithstanding there was a judgment against Snodgrass personally for the amount found due, or what amounts to the same thing in that he was decreed to pay the same, the decree for the lien was not limited to the interest of Snodgrass therein, but was against the entire premises, directing a sale of the whole property in the event of nonpayment by Snodgrass. It is scarcely necessary to say that a judgment or decree cannot affect the estate of one who was not a party thereto, and in this proceeding a judgment could not be rendered against the

property generally, and against but one of the owners thereof, in a right of action clearly against both jointly. . . . Upon the state of the case as presented by the record, we must hold that the district court erred in not making Warwick a party defendant to the proceedings therein. If, however, for any good reason not disclosed by this record, Warwick was not a necessary or proper party, then the decree for the lien on the premises should have been against the interest therein of Snodgrass alone."

b. Effect of Conveyance of Premises.

A grantee who is the owner of the premises at the time the action to foreclose a mechanic's lien is brought is a necessary party to the foreclosure action, and if he is not joined no judgment of foreclosure may be rendered. *Harrison, etc. Iron Co. v. Council Bluffs City Water-Works Co.* 25 Fed. 170; *Burbank v. Wright*, 44 Minn. 544, 47 N. W. 162; *Clark v. Brown*, 25 Mo. 559; *Kling v. Railway Constr. Co.* 4 Mo. App. (appendix) 574; *Koenig v. Boehme*, 14 Mo. App. 593; *Robbins v. Burn*, 34 N. J. L. 322; *Gross v. Daly*, 5 Daly (N. Y.) 540 (grantee in fraudulent conveyance may be made party); *Garland v. Van Rensselaer*, 71 Hun 2, 24 N. Y. S. 781; *Bierschenk v. King*, 38 App. Div. 360, 56 N. Y. S. 696 (intermediate grantee need not be joined); *Cullers v. Greenville First Nat. Bank (Tex.)* 29 S. W. 72 (purchaser who agreed to pay lien necessary party); *Walter v. Dearing (Tex.)* 65 S. W. 380 (owner at time lien attached necessary party); *Rice v. Hall*, 41 Wis. 453. *Compare Boyle v. Robbins*, 71 N. C. 130.

In *Clark v. Brown*, 25 Mo. 559, the court said: "It [mechanic's lien action] is essentially a proceeding in rem, that seeks to condemn the property to satisfy a legal claim against it. And, as there can be no general judgment against the original debtor, if he is absent or insolvent, or is indifferent about protecting his vendee, he may have neither motive nor interest to defend the suit, or may even be in collusion with the plaintiff; and, therefore, the plainest dictates of justice require that the real owner, whose property it is proposed to condemn to pay another's debt, should at least have the opportunity of being present to show that no lien lawfully exists against his property. . . . This proceeding was commenced by scire facias, and the proof shows that Blood was the purchaser from the defendant, with a recorded deed, not only before the suit was begun, but before the last of the materials were furnished, and in our opinion, no judgment could be rendered in the case without the presence of Blood on the record. If it be said that Brown owed the debt, and had no right to object to the judgment being ren-

dered, it may be replied that he ought to have paid it, and the argument would be unanswerable, if the proceeding affected nobody but himself; but if the court had no authority, as the case stood, to render a judgment against Blood's property to pay Brown's debt, any party to the record had a right to object." *Compare Schaeffer v. Lohman*, 34 Mo. 68; *Hilliker v. Francisco*, 65 Mo. 598.

One who becomes the owner of premises after an action is instituted to foreclose a mechanic's lien thereon is not a necessary party. *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748; *Hillyard v. Robbins*, 53 Ind. App. 107, 101 N. E. 341; *Colley v. Doughty*, 62 Me. 501; *Laud v. Muirhead*, 31 Miss. 89; *Goff v. Papin*, 34 Mo. 177; *Crandall v. Cooper*, 62 Mo. 478; *Coe v. Ritter*, 86 Mo. 277; *Koenig v. Boehme*, 14 Mo. App. 593; *Goodwin v. Cunningham*, 54 Neb. 11, 74 N. W. 315.

Nor is one a necessary party who is not the owner of premises at the time the action is brought to foreclose a mechanic's lien although he was the owner at the time the lien accrued. *Kilbourn v. Sunderland*, 130 U. S. 505, 9 S. Ct. 594, 32 U. S. (L. ed.) 1005; *Case Mfg. Co. v. Smith*, 40 Fed. 339, 5 L.R.A. 231; *Rose v. Persee, etc. Paper Works*, 29 Conn. 256; *Kellenberger v. Boyer*, 37 Ind. 188; *Howard v. Robinson*, 5 Cush. (Mass.) 119; *McLundie v. Mount*, 145 Mo. App. 660, 123 S. W. 966; *Southard v. Moss*, 2 Misc. 121, 20 N. Y. S. 848; *Pierce v. Kinney*, 75 Misc. 328, 135 N. Y. S. 537 (grantor of property before lien is sought to be enforced is proper, but not necessary party). See also *Work v. Hall*, 79 Ill. 196; *Cullers v. Greenville First Nat. Bank (Tex.)* 29 S. W. 72. *Compare Carswell v. Patzowski*, 4 Penn. (Del.) 403, 55 Atl. 342, 1013; *Bierschenk v. King*, 38 App. Div. 360, 56 N. Y. S. 696.

In *Rose v. Persee, etc. Paper Works*, 29 Conn. 256, it was held that the grantors of the property sought to be foreclosed were not necessary parties to an action to foreclose a mechanic's lien. The court said: "After assignment, he [the assignor] has no longer any interest to be protected, and the circumstance that his deed contains covenants which may render him liable if the property was incumbered, can make no difference. If he is ever called upon for any claim arising out of any such covenants, he will be left with the same means of defending against it as if no decree, affecting other parties, had passed in reference to the property. This objection therefore must be overruled."

3. WIFE OR WIDOW OF OWNER.

Ordinarily the wife of the owner of property is not a necessary party to an action to foreclose a mechanic's lien thereon. *Franklin Sav. Bank v. Taylor*, 131 Ill. 376, 23 N.

E. 397; Vorhees v. Beckwell, 10 Ind. App. 224, 37 N. E. 811; Flake v. Central Hardware Co. 96 Miss. 838, 51 So. 461; Washburn v. Burns, 34 N. J. L. 18. See also Schnell v. Clements, 73 Ill. 613; Charleston Lumber, etc. Co. v. Brockmyer, 18 W. Va. 586.

But where the premises to be foreclosed under a mechanic's lien constitute a homestead, the owner's wife is a necessary party. Weston v. Weston, 46 Wis. 130, 49 N. W. 834. However, where the lien attaches to property which subsequently becomes a homestead the owner's wife is not a necessary party to the action to foreclose the lien. Watkins v. Spoull, 8 Tex. Civ. App. 427, 28 S. W. 356.

The widow of the owner is not a necessary party to an action to foreclose a lien which attached during the life of the husband. Schaeffer v. Weed, 3 Gilman (Ill.) 511; Pifer v. Ward, 8 Blackf. (Ind.) 232.

Where the property on which a mechanic's lien attaches is owned jointly as community property by a husband and his wife they are both necessary parties to an action to foreclose the lien and without the joinder of the wife no decree can be entered affecting the title. Littell, etc. Mfg. Co. v. Miller, 3 Wash. 480, 28 Pac. 1035; Sagmeister v. Foss, 4 Wash. 320, 30 Pac. 80, 744; Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397; Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; Northwest Bridge Co. v. Tacoma Shipbuilding Co. 36 Wash. 333, 78 Pac. 996. See also Rasmussen v. Liming, 50 Wash. 184, 96 Pac. 1044. In Littell, etc. Mfg. Co. v. Miller, supra, the court said: "Notwithstanding the fact, however, that the husband individually can incur the debt in all suits to foreclose liens upon community real estate the wife is a necessary party defendant. She has at least as much right to contest the facts making the same a charge against the community as the husband has. There can be no sale of the husband's or wife's interest in the community property separately during the existence of the community."

In Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389, it was said: "The court below was not, therefore, justified in assuming jurisdiction over the community property where the husband had not been brought into the action by the service of summons upon him. The affidavit as to the service of the amended complaint of Powell on James Nolan is entirely silent as to the service of any summons with it. James Nolan was not, therefore, so far as appears from the record, ever served with a summons in this action, and was therefore never brought into the action, and, as he never appeared in the action, the court had no jurisdiction over the community property belonging to himself and wife, so as to enter a decree affecting the same."

4. HUSBAND OF OWNER.

It has been held that in an action to foreclose a mechanic's lien where the owner of the property is a married woman the husband is a necessary party defendant. Greenleaf v. Beebe, 80 Ill. 520; Hutchinson v. Preston, 2 Pittsb. (Pa.) 303.

It has been held that an action to foreclose a mechanic's lien against the property of a married woman should not proceed to judgment without the joinder of her husband, but the decisions to that effect appear to be based largely on the common-law disabilities of married women or on the existence of an existing interest by the husband in the title. Herbert Boiler Co. v. Lewis, 185 Ill. App. 384; Clark v. Boarman, 89 Md. 428, 43 Atl. 926; Latshaw v. McNees, 50 Mo. 381; Fink v. Hanegan, 51 Mo. 280. Compare Greenleaf v. Beebe, 80 Ill. 520.

In other jurisdictions it has been said that the husband is a proper but not a necessary party. Vorhees v. Beckwell, 10 Ind. App. 224, 37 N. E. 811; Seary v. Wegenaar, 120 App. Div. 419, 104 N. Y. S. 1055.

5. LESSEE.

The owner of a leasehold interest in part of the premises to be foreclosed in a mechanic's lien action is a necessary party. Wright v. Cowie, 5 Wash. 341, 31 Pac. 878. So in Meyers v. Le Poidevin, 9 Neb. 535, 4 N. W. 319, it was held that a person who had erected a building on leased property was a necessary party to an action to enforce a lien for the labor and materials entering into the building.

But a tenant who buys tiling, which is used by the contractor with the knowledge of the owner, is not a necessary party. Texas Builders' Supply Co. v. Beaumont Constr. Co. (Tex.) 150 S. W. 770.

6. LESSOR.

Where a lien is asserted against a leasehold interest only, the lessor is not a necessary party to an action for its foreclosure. Horn v. Clark Hardware Co. 54 Colo. 522, 131 Pac. 405, 45 L.R.A. (N.S.) 100, wherein the court said: "The final question urged is, that the liens must fail because the owner of the property—that is, the Pewabic Consolidated Gold Mines Company—was not made a party. This contention is based upon section 4035, R. S. 1908, which provides that 'the owner or owners of the property to which such lien shall have attached, and all other parties claiming of record any right, title, interest or equity therein, whose title or interests are to be charged with or affected by such lien, shall be made parties to the action.' The owner meant by this section

is the person upon whose interest in the property the lien is claimed, and sought to be established. No claim was made by claimants as against the interest of the Pewabic company. The liens asserted and sought to be established by claimants were limited to the interest of the lessee, and it was, therefore, the owner of the property, as contemplated by the section of the statute above quoted."

As to cases wherein a lien is sought to be enforced against the fee, see *supra*, this subdivision, 2. *Owner*.

7. HEIR.

The heirs of a deceased owner of premises being by the devolution of title the owners thereof are necessary parties to an action to foreclose a mechanic's lien thereon. *Hughes v. Torgerson*, 96 Ala. 346, 11 So. 209, 38 Am. St. Rep. 105, 16 L.R.A. 600; *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748; *Sorg v. Crandall*, 233 Ill. 79, 84 N. E. 181; *Pifer v. Ward*, 8 Blackf. (Ind.) 252; *Simonds v. Buford*, 18 Ind. 176; *Gurrant v. Dawson*, 34 Miss. 149; *Belcher v. Schaumburg*, 18 Mo. 189; *Russell v. Howell*, 74 N. H. 551, 60 Atl. 886. Compare *Ferry v. Moore*, 18 Ill. App. 135 (heirs without interest); *Wilson v. Sherwin-Williams Paint Co.* (Tex.) 160 S. W. 418.

In *Belcher v. Schaumburg*, *supra*, it appeared that the owner of the property against which the plaintiff acquired a mechanic's lien died while the action to foreclose the same was pending. It was held that in reviving the action the heirs of the decedent were necessary parties. To the same effect see *Hughes v. Torgerson*, 96 Ala. 346, 11 So. 209, 38 Am. St. Rep. 105, 16 L.R.A. 600, wherein the court said: "Dr. Hughes, who was the owner of the building in question, and under a contract with whom, as claimed by the plaintiff, the services were rendered, died intestate, before the suit was instituted. The only defendant was the administrator of his estate. On the death of the intestate, his heirs became the owners of the property. A lien cannot be declared and enforced in a proceeding to which the owner of the property on which the lien is claimed is not a party. *Roman v. Thorn*, 83 Ala. 443. If the suit had been brought against the intestate in his lifetime, it could have been revived and prosecuted against his personal representative alone, without making his heirs parties. The statute expressly provides for that contingency. Code, § 3031. This provision does not apply to suits brought after the death of the owner or proprietor of the property. In such case, the general rule applies, that he who is, at the time the suit is commenced, the owner of the building or structure upon which the lien is sought to be en-

forced, is a necessary party defendant, without whose presence the lien cannot be declared or enforced. 15 Am. & Eng. Enc. of Law 165; Phillips on Mechanics' Liens, § 393. The personal representative of the deceased owner may also be made a party defendant. The prohibition against bringing suits against personal representatives within six months after the grant of letters, does not apply to suits for the enforcement of such liens. Code § 3043. Because of the absence of necessary parties defendant, the judgment must be reversed."

In *Wilson v. Sherwin-Williams Paint Co.* (Tex.) 160 S. W. 418, it was held that neither the heirs nor the personal representatives of a deceased insolvent subcontractor were necessary parties to an action to foreclose a mechanic's lien. The court said: "The first, second, third, and fourth assignments of error are to the same effect; that is, they complain of the court's overruling of defendant's exceptions to plaintiff's petition, the ground being the want of necessary parties, in that the representatives of Hieatt, deceased, were not parties to this action. We think no error was committed by the court in this particular. Hieatt was dead, and surviving him were a widow and seven children. He died insolvent, and the only property he had was homestead and some exempt personal property. The Alex Watson Construction Company owed him \$101.33, and there was nothing which made it worth while to have an administrator of the estate appointed. The widow and children had received from him no property which would make them liable to account to creditors, and to have made them parties to this proceeding would have increased the costs of the proceeding and otherwise proven absolutely useless. The law does not require the doing of a useless thing. The making of the widow and children parties would have proven of no practical benefit to either party, and therefore, if the strict rules of the law required such, the defendants have in no way been injured by the overruling of the exception."

In *Iowa* it is not necessary to join the heirs of a deceased owner as parties to a suit to foreclose a mechanic's lien, the personal representative being deemed to represent their interest. *Shields v. Keys*, 24 Ia. 298; *Welch v. McGrath*, 59 Ia. 519, 10 N. W. 810, 13 N. W. 638. Compare *Gammel v. Young*, 3 Ia. 297.

8. PERSONAL REPRESENTATIVE.

The personal representative of a deceased owner of premises must be made a party to an action to foreclose a mechanic's lien thereon. *Watson v. Bardwell*, 154 Ill. App. 326 (necessary party only when deficiency judgment is sought against estate; otherwise

proper party); *Holmes v. Humphreys*, 181 Mass. 181, 63 N. E. 396; *Guerrant v. Dawson*, 34 Miss. 149; *Security Mortg. etc. Co. v. Caruthers (Tex.)* 32 S. W. 837. See also the Iowa cases cited in the preceding subdivision. Compare *Holmes v. Humphreys*, 187 Mass. 513, 73 N. E. 668; *Crystal v. Flannelly*, 2 E. D. Smith (N. Y.) 583.

In *Holmes v. Humphreys*, 181 Mass. 181, 63 N. E. 396, the court said: "In suits to enforce a claim for a mechanic's lien, two interests properly are represented in defense; first the interest of the person primarily liable for the debt sought to be collected, and secondly the interest of the owners of the property upon which the lien is claimed. The statute which is invoked by the petitioners is R. L., c. 197, § 22, which provides that on the death of the respondent in a case like this, the petition 'may be prosecuted against his executor, administrator, heirs or assigns as if the estate or interest had been mortgaged to secure the debt.' The petitioners contend that the petition may be prosecuted against any of these parties, and that therefore the case may go on against their heirs alone, although they have no possible interest in it. The true meaning of the provision is, as we understand it, that the petition may be prosecuted against such of the parties mentioned as properly represent the interest to be affected. In a case like the present there is no doubt that the executor or administrator is a proper person to be summoned in as respondent. He represents the primary liability for the debt and he should have an opportunity to defend the suit. Inasmuch as the bond stands in the place of the land, he also, as principal, represents the security to be affected if the lien is established. In both relations he is interested, and he should be summoned to appear. The principal and sureties on the bond stand in the place that would be held by the heirs or assigns if the lien had not been discharged. In that relation, not as representing the primary liability for the debt, but as representing the security which is to be used to pay the debt if the lien is established, we are of opinion that they should have an opportunity to be heard as to the validity of the lien, and that at least in the absence of the administrator as a party, the sureties should be summoned before the suit can proceed further. Whether facts exist which make it possible to procure the appointment of an administrator de bonis non who can be summoned into court, we do not know; if not, and if on this account the petitioners were to lose their claim, it would be the result of their own negligence in allowing so many years to elapse without action. It may be, but upon this we express no opinion, for the matter is not now before us for adjudication, that as there were no assets

in the estate of the respondent, and as his estate has been settled and his administrator has deceased, and no interest of his estate can now be affected by an adjudication either upon his primary liability upon the debt or upon his secondary liability as principal in the bond, that the case may properly go on against the sureties alone, if they are brought into court as parties. The ruling that the suit was ripe for further proceedings without other parties was erroneous. The proceedings must be stayed until all necessary parties have been summoned to appear and defend."

9. TRUSTEE.

It has been held that a trustee of the property to be foreclosed being the owner of the legal title, is an indispensable party to an action to foreclose a mechanic's lien. *Johnson v. Bennett*, 6 Colo. App. 362, 40 Pac. 847; *Williams v. Chatham Real Estate, etc. Co.* 13 Ga. App. 42, 78 S. E. 869; *Lomax v. Dore*, 45 Ill. 379; *McGraw v. Bayard*, 96 Ill. 146; *Bennitt v. Wilmington Star Min. Co.* 119 Ill. 9, 7 N. E. 498; *Phoenix Mut. L. Ins. Co. v. Batchen*, 6 Ill. App. 621; *Columbia Bldg. etc. Assoc. v. Taylor*, 25 Ill. App. 429; *La Crosse Lumber Co. v. Grace M. E. Church*, 180 Ill. App. 584; *Keller v. Tracy*, 11 Ia. 531; *Schillinger Fire-Proof Cement, etc. Co. v. Arnott*, 14 N. Y. S. 326; *Farmers' Bank v. Watson*, 39 W. Va. 342, 19 S. E. 413; *Lunsford v. Wren*, 64 W. Va. 458, 63 L. E. 308. See also *Badger Lumber Co. v. Staley*, 141 Mo. App. 295, 125 S. W. 779. Compare *Lookout Lumber Co. v. Mansion Hotel, etc. R. Co.* 109 N. C. 658, 14 S. E. 35.

In *La Crosse Lumber Co. v. Grace M. E. Church*, 180 Ill. App. 584, it appeared that the trustees of the defendant church corporation were not made parties defendant to an action to foreclose a mechanic's lien. It further appeared that the trustees were also owners, together with the church, of the property. It was held that they were necessary parties. The court said: "It appears from the allegations of the bill that the trustees of Grace Methodist Episcopal Church are by the first paragraph of the bill alleged to be owners of the said real estate, together with the corporation, Grace Methodist Episcopal Church. If the trustees of Grace Methodist Episcopal Church are joint owners with the corporation they are necessary parties, and they are not in court. They must be sued as individual trustees and served with summons as such. They have not been so sued and have not been served except by service on the president and secretary of the board of trustees which is not sufficient. They have entered no appearance, have filed no pleading and they are not named except as a body,

and are not alleged to be a corporation anywhere in the bill. Grace Methodist Episcopal Church, a religious corporation, is in court and the demurrer is filed by it alone and this appeal is against the church corporation only. If the trustees hold title to the real estate then appellant's bill here is subject to a demurrer for want of necessary parties (*Granquist v. Western Tube Co.* 240 Ill. 132)."

Other decisions, proceeding apparently on the theory that the cestui que trust is the real owner, hold that while the trustee is a proper party a failure to join him is not fatal. *Roman v. Thorn*, 83 Ala. 443, 3 So. 759; *Niehaus v. C. B. Barker Construction Co.* reported in full, post, this volume, at page 23.

10. CESTUI QUE TRUST.

Where property is held in trust the cestui que trust should be made a party to an action to foreclose a mechanic's lien thereon. *Roman v. Thorn*, 83 Ala. 443, 3 So. 759; *McClair v. Huddart*, 6 Colo. App. 493, 41 Pac. 832; *Lomax v. Dore*, 45 Ill. 379; *Jennings v. Hinkle*, 81 Ill. 183 (church corporation no longer in existence not necessary party); *Gaytes v. Franklin Sav. Bank*, 85 Ill. 256; *Clark v. Manning*, 95 Ill. 580; *McGraw v. Bayard*, 96 Ill. 147; *Bennitt v. Wilmington Star Min. Co.* 119 Ill. 9, 7 N. E. 498; *Paddock v. Stout*, 121 Ill. 571, 13 N. E. 182; *Bannon v. Thayer*, 124 Ill. 451, 17 N. E. 54; *Phoenix Mut. L. Ins. Co. v. Batchen*, 6 Ill. App. 821; *Lamb v. Campbell*, 19 Ill. App. 272; *Columbia Bldg. etc. Assoc. v. Taylor*, 25 Ill. App. 429; *General F. Extinguisher Co. v. Lundell*, 66 Ill. App. 140; *Keller v. Tracy*, 11 Ia. 530; *Sheppard v. Messenger*, 107 Ia. 717, 77 N. W. 515; *Miller v. Faulk*, 47 Mo. 262; *Mississippi Planing Mill v. Presbyterian Church*, 54 Mo. 520; *T. A. Miller Lumber Co. v. Oliver*, 65 Mo. App. 435; *Farmers' Bank v. Watson*, 39 W. Va. 342, 19 S. E. 413. *Compare Lunsford v. Wren*, 64 W. Va. 458, 63 S. E. 308, (cestui without capacity to be sued).

In *T. A. Miller Lumber Co. v. Oliver*, 65 Mo. App. 435, it appeared that the plaintiff brought an action to foreclose a mechanic's lien. One Oliver was named as one of the defendants, he being the principal contractor. The other defendants were members of a committee representing a church organization, the owner of the property sought to be foreclosed. The defendants contended that all the members of the organization should have been made parties defendant. However, the court held that they were not necessary parties, saying: "As before stated, the foundation of this objection to the petition is that all of the members of the organization should have

been sued. This is an erroneous view. The statute is that the parties to the contract only are necessary parties. Others who may be interested in the matter in controversy or in the property charged with the lien may be made parties, but such as are not made parties will not be bound by the proceeding. R. S. 1889, sec. 6713. Here it is averred that Oliver made the contract with the building committee; that they and the other members of the congregation were the equitable owners of the land; that they were in possession of it, and that they had authority from their co-owners to make the contract. Under these averments the demurrer was properly overruled. The plaintiff had the right, if it so elected, to enforce the lien against the interests only of the parties to the suit, and of this they had no right to complain. The interests of their co-owners would in no wise be bound by the proceedings." To the same effect see *Mississippi Planing Mill v. Presbyterian Church*, 54 Mo. 520, wherein the court said: "It is further insisted by the defendants in this case, that the evidence of the witnesses shows that the Presbyterian Church is a corporation and should have been made a party to the suit, as it had an equitable interest in the property to be effected. It is sufficient to say in answer to this objection, that by answering to the merits of the action the defendants waived any objection they might have urged to the petition on the ground of a defect of parties to the action. The defendants sued were the persons who made the contract for the building, and who held the legal estate in the premises to be charged; they being proper parties, if other parties in interest were not also made parties, that fact would not defeat the action; the only effect that could result would be, that the judgment in the case might not, and in some cases would not, effect the interests of those who were not made parties."

Where the property sought to be foreclosed is held under an active trust the cestui que trust is not a necessary party to the foreclosure of a mechanic's lien. *McGraw v. Bayard*, 96 Ill. 146, wherein the court said: "This court has repeatedly held that suits to enforce mechanics' liens are substantially chancery proceedings, and are governed by the rules of chancery practice. . . . The general equity rule is, that all persons interested in the subject matter of a suit must be made parties in order that the decree may affect their rights, and this rule requires that in litigation had in respect to trust property, both the trustee and the cestui que trust be made parties. There is an exception to this where the trust is an active one, imposing on the trustee the duty of receiving, controlling and managing the trust fund for the benefit of the cestui que trust."

Some jurisdictions hold that a lien cannot be foreclosed on property held in trust unless the cestui que trust is made a party. *Roman v. Thorn*, 83 Ala. 443, 3 So. 759; *McClair v. Huddart*, 6 Colo. App. 493, 41 Pac. 832; *Farmers' Bank v. Watson*, 39 W. Va. 342, 19 S. E. 413.

In *Illinois* a failure to join a cestui que trust in a proceeding to enforce a mechanic's lien against the trust property is not fatal to the decree, but his interests are in no manner affected thereby. *Portoues v. Badenoch*, 132 Ill. 377, 23 N. E. 349, *affirming* 33 Ill. App. 312. In that case it appeared that the cestui que trust under a trust deed to the property on which a mechanic's lien was foreclosed was not made a party to the proceeding. It was held that the failure to make him a party was not a judicial error as his rights were not affected by the judgment in the foreclosure proceedings. The court said: "The petitions aver, and the answers admit, that there was a trust deed upon the land to one Chandler. Chandler, the trustee, was made a party defendant, and answered, but the cestui que trust, or holder of the note, was not made a party. The failure to make the cestui que trust a party is complained of by appellant. In this regard no error was committed in the court below. The holder of the note is not prejudiced by the decree, because the property is ordered to be sold subject to his incumbrance. The sale is to be made, not for the purpose of making the amount due upon the trust deed, but the amounts due the petitioners. The purchaser, under the decree rendered in this case, will buy the land subject to the lien of the trust deed. It is not perceived how the rights of appellant are prejudiced in any way by the fact that the holder of the note is not a party to the proceeding. Appellant can only urge such errors as affect his interests."

II. MORTGAGEE.

The general rule is that unless one who holds a mortgage on the premises to be foreclosed under a mechanic's lien is made a party to the foreclosure action his rights under the mortgage will not be affected by the decree of foreclosure.

California.—*Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748; *Martin v. Becker*, 169 Cal. 301, Ann. Cas. 1916D 171, 146 Pac. 665.

Colorado.—*State Bank v. Plummer*, 54 Colo. 144, 129 Pac. 819; *Bitter v. Mouat Lumber, etc. Co.* 10 Colo. App. 307, 51 Pac. 519.

Illinois.—*Williams v. Chapman*, 17 Ill. 423, 65 Am. Dec. 669; *Bannon v. Thayer*, 124 Ill. 451, 17 N. E. 54. *Compare* *Kelley v. Chapman*, 13 Ill. 530 (mortgagee subsequent to lien not necessary but proper party).

Indiana.—*Deming-Colburn Lumber Co. v. Union Nat. Sav. etc. Assoc.* 151 Ind. 463, 51 N. E. 936; *Stoermer v. People's Sav. Bank*, 152 Ind. 104, 52 N. E. 606; *Union Nat. Sav. etc. Assoc. v. Helberg*, 152 Ind. 139, 51 N. E. 916; *Husted v. National Home Bldg. etc. Assoc.* 152 Ind. 698, 51 N. E. 1067; *Martin v. Berry*, 159 Ind. 566, 64 N. E. 912.

Minnesota.—*Finlayson v. Crooks*, 47 Minn. 74, 49 N. W. 398, 645; *Bassett v. Menage*, 52 Minn. 121, 53 N. W. 1064; *Hokanson v. Gunderson*, 54 Minn. 499, 56 N. W. 172, 40 Am. St. Rep. 354.

Missouri.—*Riverside Lumber Co. v. Schaffer*, 251 Mo. 539, 158 S. W. 340. See also *Badger Lumber Co. v. Ballentine*, 54 Mo. App. 172; *Redlow v. Badger Lumber Co.* 194 Mo. App. 650, 189 S. W. 589.

New Jersey.—*Jacobus v. Mutual Ben. L. Ins. Co.* 27 N. J. Eq. 604; *Conlan v. Leonard*, 82 N. J. L. 108, 81 Atl. 492; *Cox v. Flanagan*, 2 Atl. 33; *Wix v. Frankel*, 100 Atl. 555. See also *Central Trust Co. v. Bartlett*, 57 N. J. L. 206, 30 Atl. 583. *Compare* *Tompkins v. Horton*, 25 N. J. Eq. 284.

New York.—*Compare* *Brown v. Danforth*, 37 App. Div. 321, 55 N. Y. S. 825 (mortgagee not proper party).

Washington.—*Davis v. Bartz*, 65 Wash. 395, 118 Pac. 334.

Wisconsin.—*Lampson v. Bowen*, 41 Wis. 484.

In *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748, the court said: "The principles which govern as to parties in those suits apply equally to suits for the enforcement of a mechanic's lien. The mortgage under which the plaintiff claims was placed upon the premises before suit was brought; the mortgagees, as subsequent incumbrancers, were necessary parties to the suit; not being made such parties, they were not bound by the decree or sale under it."

In *Cox v. Flanagan* (N. J.) 2 Atl. 33, it was said: "October 24, 1884,, a summons was issued on each of said claims. The complainants, then still holding their mortgage, were not made parties, as is required by the first section of the Act of 1884 (Pub. Laws 260) which provides that in every such case every person holding a mortgage of record against the property affected by said lien claim, whose mortgage would be cut off by a sale under said lien claim, shall be made a party defendant to said suit. This requirement is imperative, and was not complied with. I regard it as an omission which cannot be overcome, and which enables the complainant to proceed in the face of the claim made. This provision is another one of the conditions imposed by the legislature upon lien claimants which they must observe. December 27, 1884, one of the complainants and their counsel examined the records of the

clerk's office, and discovered that the said lien claims purported to be repairs, and also discovered that there was no indorsement upon them indicating that any summons had been issued thereon. The proof satisfies my mind that both counsel and clients supposed and believed that any claim upon the liens had been abandoned. Afterwards there was an indorsement made upon each of the lien claims in these words: 'Summons issued on the within claim this twenty-fourth day of October, A. D. 187,' which was signed by the clerk. I cannot but regard the omission to make the indorsement upon the claim of the issuing of the summons as fatal. Whatever may be fair and equitable (if such equitable principles are to be applied at all in the construction of statutes beyond the liberty expressed in the statute itself) there is nothing in this case permitting of their application. It is insisted, however, that the lien claimants have their judgments upon their liens, and that the proceedings thereunder cannot be questioned collaterally, however irregular. I cannot concur in this view. It does not seem to me that the principle which sanctifies a judgment has ever been applied against a person in interest who was not a party to the action in which the judgment was obtained. I do not see how I can be mistaken in this, for, plainly, the most high-handed wrongs could be perpetrated against the innocent and ignorant in the name of justice. I do not think that this view, in any sense, conflicts with the opinion expressed by the chief justice in the case of *Jacobus v. Mutual Ben. L. Ins. Co.* 27 N. J. Eq. 605, so carefully considered by all of the court; for what is there said I believe to be the law, resting upon the soundest principles of public policy. And that such indorsement should be made at the time of issuing the summons has been settled, I think, upon the soundest principles of construction, in the court of errors and appeals, in the case of *Wheeler v. Almond*, 46 N. J. L. 161. It may be said that that was a case at law; but the construction of a statute must be the same in every court. The legislative mandate cannot be supposed to have a double meaning. I conclude that the complainants are entitled to the fund, and will so advise."

In *Hokanson v. Gunderson*, 54 Minn. 499, 56 N. W. 172, 40 Am. St. Rep. 354, the court said: "It is not material at all whether the defendant Marvin had actual notice of the suit, unless she could be legally bound by the adjudication therein. Notice avails nothing unless or until the party receiving it, or the party under whom he claims, has an opportunity to have his rights litigated and determined. . . . The interest of the purchaser at a mortgage sale in this state during the redemption period is somewhat anomalous. But he is certainly a necessary party to a suit

affecting the interest of the mortgagee unless the latter is made a party, and it is not sufficient that the mortgagor alone is joined. The purchaser succeeds to the equitable interest of the mortgagee, and when no redemption is made this interest draws to it the subordinate legal title of the mortgagor, and his title then stands under the mortgagee precisely as if the mortgage had been an absolute conveyance at its date; or, in other words, the mortgage ripens into a perfect title through the process of foreclosure. The purchaser is, then, only concerned with the state of the title at the date of the mortgage, and the existence of liens affecting the rights of the mortgagee. His rights are not affected by liens adjudged against the mortgagor in a suit in which neither he nor the mortgagee is a party. The result is that the defendant Marvin was not seasonably made a party to this action, and did not take under anyone who was such at the time she purchased."

In *Tompkins v. Horton*, 25 N. J. Eq. 284, it was held that a mortgagee was not a necessary party. The court said: "The enforcement of a mechanic's lien is a proceeding at law, where no equity of redemption exists, and we are not aware that it has ever been held to be necessary in such a proceeding, that incumbrancers by mortgage or other liens (except of the same kind) should be made parties thereto, while it will be found upon examination, that it has been held just to the reverse. . . . A mechanic's lien, like that of an attachment, when confirmed or made effective by judgment, is binding upon the parties thereto. And the law, in order to give full effect to the principle by which the parties are held bound by it, equally concludes, by the same proceedings, all persons who are represented by the parties, and claim under them, or are privy to them, and they are estopped from litigating that which is conclusive upon those with whom they stand thus related. *Volenti non fit injuria*. The mortgagee whose lien is taken with notice of the liability of the land to the lien created by statute, and with notice also of the provision that in the enforcement of that lien no notice will be given to him, cannot complain of a result which he had reason to anticipate and which he is presumed to have contemplated. Every man must be presumed to know the public laws in existence, and to have contracted with reference to their provisions."

In *Iowa* it has been held that a mortgagee is not a necessary party to an action to foreclose a mechanic's lien. *State v. Eads*, 15 Ia. 114, 83 Am. Dec. 399; *Evans v. Tripp*, 35 Ia. 371 (junior mortgagee).

It has been held that a failure to join a mortgagee in an action to foreclose a mechanic's lien does not prevent a foreclosure

and sale, but the mortgagee is in no manner affected by the decree. *Case Mfg. Co. v. Smith*, 40 Fed. 339, 5 L.R.A. 231. Thus in *Deming-Colburn Lumber Co. v. Union Nat. Sav. etc. Assoc.* 151 Ind. 463, 51 N. E. 936, it appeared that after the mechanic acquired a lien right the owner of the premises gave a mortgage thereon. In an action to foreclose the lien the mortgagee was not made a party. The mechanic obtained a conveyance of the premises in satisfaction of his judgment. Thereafter the mortgagee sought to set aside this conveyance on the ground that the judgment in the foreclosure suit was null and void, because of the failure to make him a party. The contention was held untenable, except that the rights of the mortgagee were not affected by the foreclosure suit. The court said: "The mortgage here considered was, however, given after the attaching of the mechanic's lien, and is therefore a junior incumbrance. But it is not absolutely necessary to the validity of a foreclosure proceeding that either senior or junior incumbrancers should be made parties. At most, it is to be said that the rights of those not made parties are not affected. If such rights are not thereby diminished, neither are they increased, and we are to look to the law in each case to see what such rights are. If we should treat appellant's mechanic's lien and appellee's junior mortgage lien as having to each other simply the relation of two mortgages, as appellees would seem to argue they ought to be treated, then, as we have seen, the rights of appellees, as holder of the junior lien, were, at most, not affected by appellant's foreclosure. Its lien remains as before, junior to that of the senior lienholder. . . . Following the analogy of these cases, appellee's right as a junior lienholder—it not having been made a party to appellant's foreclosure suit, and not, therefore, being bound by it—would be precisely the same as it was before such foreclosure suit was begun. The statute as to the foreclosure of mechanics' liens certainly does not give any greater rights to a junior incumbrancer. It is only prior incumbrancers that are there protected when not made parties. . . . But, while the lien was duly foreclosed as against the owner of the property, yet, as we have seen, the appellee, as mortgagee, not having been made a party to the action, its rights were in no manner affected thereby; that is, appellee's mortgage stands just the same as it would have stood if the mechanic's lien had not been foreclosed within the time prescribed by the statute. In other words, the year given by statute having expired without a foreclosure of the lien, as against the mortgage, the lien itself and the judgment based thereon must be, as to such mortgage, absolutely void. Equity cannot, as in the case

of mortgages, maintain the senior lien on foot, after the expiration of the year, when the statute itself declares that such lien shall then be void. By its foreclosure the lienholder not having made the mortgagee a party, simply stepped into the shoes of the owner of the property; and, as such owner could not question the right of the mortgagee to foreclose against the property, neither can the lienholder now do so—the year given him by statute to foreclose his lien having expired. It would, of course, be different if the time for the foreclosure of a mechanic's lien were not limited by the statute."

So in *Riverside Lumber Co. v. Schafer*, 251 Mo. 539, 158 S. W. 340, it appeared that the owner of certain property, on which the plaintiff had performed labor and had furnished material, gave a mortgage thereon. The plaintiff thereafter brought an action to foreclose the lien. In the action he failed to make the mortgagee a party defendant. It was held that the mortgagee was a necessary party and that its rights could not be affected by a judgment for the plaintiff against the owner and the other defendants. The court said: "It is the general policy of the law to settle all litigation between the same parties, regarding the same subject-matter, in one suit; and it is upon this principle that all parties interested in the subject-matter of a suit are, by the practice act, or rules of equity, authorized or required to be made parties. The statutes and rules of equity recognize a distinction between proper and necessary parties, the details of which are not here necessary to be noted; but in this class of cases it seems from a careful reading of the act regarding mechanics' liens and the construction placed thereon by the courts of the state, that it was the design of the legislature to compel a party entitled to a lien for labor done, or materials furnished upon a building, to make all persons interested in the subject-matter of the suit, whom he wished to be affected thereby, parties defendant, and if he failed to do so, then their right should not be affected thereby. . . . So, viewing this case upon principle, I am fully satisfied that whatever preference the mechanic's lien had over the school mortgage, was waived and extinguished by the owner thereof not making the county court, the trustee of the school funds, a party to the mechanic's lien suit."

12. OTHER LIEN CLAIMANT.

In most jurisdictions the statutes providing for the foreclosure of a mechanic's lien are held to contemplate a single proceeding in which all liens arising out of a particular improvement shall be adjudicated. Accordingly if all the lien claimants are not made

parties the proceeding will be stayed until they are brought in.

Colorado.—San Juan, etc. Min. etc. Co. v. Finch, 6 Colo. 214.

Illinois.—Granquist v. Western Tube Co. 240 Ill. 132, 88 N. E. 468; Porter v. Western Tube Co. 240 Ill. 151, 88 N. E. 472; John E. Burns Lumber Co. v. W. J. Reynolds Co. 148 Ill. App. 356. See also Ropiequet v. Knebelkamp, 194 Ill. App. 268.

Kansas.—Sharon Town Co. v. Morris, 39 Kan. 377, 18 Pac. 230.

Maryland.—Kelly v. Gilbert, 78 Md. 431, 28 Atl. 274.

Massachusetts.—See Dewing v. Congregational Soc. 13 Gray 414.

Nebraska.—Harrington v. Latta, 23 Neb. 84, 36 N. W. 364.

New York.—Kaylor v. O'Connor, 1 E. D. Smith 672; Kenney v. Apgar, 93 N. Y. 539; Gass v. Souther, 46 App. Div. 256, 61 N. Y. S. 305 (affirmed 167 N. Y. 604, 60 N. E. 1111); Maneely v. New York, 119 App. Div. 376, 105 N. Y. S. 976; Brandt v. Radley, 23 N. Y. S. 277. See also Vitelli v. May, 120 App. Div. 448, 104 N. Y. S. 1082.

Oklahoma.—Union Bond, etc. Co. v. Bernstein, 40 Okla. 527, 139 Pac. 974.

Texas.—Austin, etc. R. Co. v. Rucker, 59 Tex. 587.

Utah.—See Elwell v. Morrow, 28 Utah 278, 78 Pac. 605.

Wisconsin.—See Fredrickson v. Riebsam, 72 Wis. 587, 40 N. W. 501; Milwaukee Structural Steel Co. v. Borun, 164 Wis. 502, 159 N. W. 811, rehearing denied 164 Wis. 509, 162 N. W. 424.

Canada.—Horenden v. Ellison, 24 Grant (U. C.) 448.

In John E. Burns Lumber Co. v. W. J. Reynolds Co. 148 Ill. App. 356, it appeared that several materialmen furnished goods to a subcontractor. The materials were used in the construction of the building on the property sought to be foreclosed under a mechanic's lien judgment. The subcontractor was not made a party to the foreclosure proceeding. It was held that he was a necessary party defendant. The court said: "The complainant, John E. Burns Lumber Company, the intervening petitioners, Schaller-Hoerr Company and William T. Waterstraat, who were allowed liens, and the intervening petitioner, South Side Lumber Company, who was not allowed a lien, are all furnishers of material for the subcontract and, being of that class, they, as they are obliged to do, claim liens under section 22 of the mechanic's lien act. They contracted with and trusted the subcontractor and, through that relation, they claim their lien upon the property. Should they eventually establish a right to liens and thereby the amount the owner would be obliged to pay for the carpenter

work be made to exceed the contract price, a right to be reimbursed by the subcontractor, if not by the original contractor, would arise. It is, therefore, of the highest importance that the actual subcontractor, a party in interest and under the lien law a necessary party as such, be a party to this proceeding. The owner's right to reimbursement would arise because of his being compelled, in order to protect his property, to pay out money which it was primarily the duty of another to pay. Chudnovski v. Eckels, 232 Ill. 312, 317, and Chicago v. Pittsburg, etc. R. Co. 146 Ill. App. 403. It appears that on March 19, 1906, Nicholson contracted with the owner to furnish 'the material, labor, tools, machinery, etc.,' and to build and complete 'all the general work' of the building in question, to be completed on or before September 1, 1906. In that contract Bradshaw, the owner, as the consideration, agreed to pay Nicholson \$45,300 and, in addition to that sum \$1,104.39 became due the contractor for extras. The building was completed about November 1, 1906. At the time of the institution of this proceeding, payments had been made by the owner so that only \$2,208.80 was due the contractor and, through the owner or his agents, the architects, payments had been made by the contractor to the subcontractor so that there was then only \$1,055.53 due to the carpenter subcontractor from the contractor. At the same time there was due the furnishers of material, John E. Burns Lumber Company, the Schaller-Hoerr Company, William T. Waterstraat and the South Side Lumber Company, under their contracts with the subcontractor, an aggregate of \$4,892.52, exclusive of interest. This aggregate includes \$1,281.84 disallowed to the South Side Lumber Company and \$1,405.15 disallowed to the John E. Burns Lumber Company. Thus it appears that there was due to the material furnishers from the subcontractor more than there was due him from the contractor and even more than there was due from the owner to the contractor. Hence it was, in this particular case, of the greatest importance, both to the owner and to the contractor, that the subcontractor should have been made a party and shown, by a preponderance of the evidence, to be the subcontractor."

In Wakefield v. Van Dorn, 53 Neb. 23, 73 N. W. 226, it was held that a mechanic who furnishes labor or materials for the erection of a building is bound to know who the other lien claimants are, and must make them all parties to his action of foreclosure.

Persons whose labor or material claims have been paid need not be joined. Meeks v. Sims, 84 Ill. 422.

In Continental, etc. Trust, etc. Bank v. Corey Bros. Const. Co. 208 Fed. 976, 126

C. C. A. 64, it was said that a claimant over whom the plaintiff does not claim priority need not be made a party.

The holder of a lien acquired after the commencement of the foreclosure action need not be joined. *Monk v. Exposition Deepwater Pier Co.* 111 Va. 121, 68 S. E. 280; *Lavanway v. Cannon*, 37 Wash. 593, 79 Pac. 1117.

The failure to join a lien claimant may be waived by the owner. *Luttrell v. Knoxville, etc. R. Co.* 119 Tenn. 492, 105 S. W. 585, 123 Am. St. Rep. 737.

The omission of a claimant does not render the foreclosure a nullity. *Wakefield v. Van Doran*, 53 Neb. 23, 73 N. W. 414; *Cain v. Parfitt*, reported in full, post, this volume, at page 28. But the rights of the omitted claimant are not affected by the decree. *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748.

13. SURETY.

The sureties on the bond of a contractor or subcontractor given for the faithful performance of his duties, or the sureties on the bond of a purchaser of the premises, should be joined in an action to foreclose a mechanic's lien if a recovery on the bond is sought, and their joinder may be compelled to avoid circuity of action. *Jones v. McKenzie*, 20 Misc. 222, 45 N. Y. S. 412; *Brewster v. McLaughlin*, 28 Misc. 50, 58 N. Y. S. 989; *Whisten v. Kellogg*, 50 Misc. 409, 100 N. Y. S. 526; *Maneely v. New York*, 119 App. Div. 376, 105 N. Y. S. 976 (sureties performing contract on default of contractor); *Haberzette v. Dearing* (Tex.) 80 S. W. 539 (proper but not necessary); *Warren v. Beaumont Hotel Co.* 151 Wis. 1, 138 N. W. 102. See also *Schultz v. Teichman Engineering, etc. Co.* 79 Misc. 357, 140 N. Y. S. 429.

In *Warren v. Beaumont Hotel Co.* 151 Wis. 1, 138 N. W. 102, it appeared that various persons became sureties on the bond of the principal contractor and the bond of the owner of the property. In an action to foreclose the liens of the subcontractors it was held that the sureties were necessary parties. The court said: "The relations of the sureties to the principal contractors, the subcontractors, and the hotel company, under the terms of the construction contracts and the bonds, have heretofore been considered, and they were held liable on their bonds to the hotel company and the lienors for any claims for material and labor needed to complete the construction of the hotel pursuant to the construction contracts on account of the principal contractors' default, hence they are vitally and adversely interested in the claims presented by the pleadings in favor of the hotel company and the lienors. Under their bonds they are primarily liable for payment of the debts and the liens for material and

work. Under the equitable rule declared by sec. 2603, Stats. (1898) 'Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein.' Since the bondsmen have an interest in the controversy adverse to the plaintiffs, they are interested in not being subjected to any liability for claims of the lienors in excess of what may be found justly due them, and they are necessary parties to the litigation to determine this liability on doubtful claims should any such be presented for allowance. The sureties being thus adversely interested in the questions litigated it is appropriate for a court of equity, in order to make a complete determination of all the questions involved between the parties, to require their presence so as to enable it to award judgment against them for the payment and discharge of all claims and liens according to the rights established in the action, thus saving the hotel company harmless in the matter."

In *Haney v. Moorehead*, 61 Pa. Super. Ct. 187, it was held that a title insurance company which insured the property against which an action to foreclose a mechanic's lien was brought, was neither a proper nor a necessary party to the foreclosure.

14. RECEIVER.

It has been held that a receiver of a railroad is a necessary party defendant to an action against the railroad to foreclose a mechanic's lien and no foreclosure can be had without joining him. *Central Trust Co. v. Chicago, etc. R. Co.* 54 Fed. 598; *Burk v. Muskegon Mach. etc. Co.* 98 Mich. 614, 57 N. W. 804. See also *Prather Engineering Co. v. Detroit, etc. R. Co.* 152 Mich. 582, 116 N. W. 376.

NIEHAUS

v.

C. B. BARKER CONSTRUCTION COMPANY ET AL.

Tennessee Supreme Court—May 27, 1916.

135 Tenn. 382; 136 S. W. 461.

Mechanics' Liens — Foreclosure — Limitation of Action — Effect of Amendment.

In a suit to establish a mechanic's lien, complainant did not make the trustees under

a prior mortgage parties before the expiration of the ninety days from the service of notice of lien. An amended bill in which the trustees were named as defendants was filed. In that bill the complainant prayed that the court determine the interest, if any, held by the trustees, and that, if the mortgage be found a valid prior lien, complainant be permitted to subject the equity of defendants to the satisfaction of his claim. Shannon's Code, § 4495, declares that at any time before trial new parties may be added. It is held that, as no relief was sought against the trustees, the notice required by section 3536, which is a condition precedent to a mechanic securing priority over the mortgage, not having been served, the amendment will be treated as relating back to the original bill, and the trustees cannot defeat the bill on the plea of limitation.

Parties — Failure to Join — Bringing in by Amendment.

In such case the contractor and mortgagor cannot defeat the lien because the trustees of the mortgage, who held the legal title, were not brought in within the ninety-day period; for, while such parties were indispensable, yet, as no relief was sought against them, limitations do not apply any more than where the contractor is not originally made a party.

[See note at end of this case.]

Same.

Where one seeking a mechanic's lien failed to make the trustees of a prior mortgage parties, but later brought them in by amendment, such amendment does not, under Shannon's Code, § 5237, declaring that the attachment laws shall be liberally construed, and plaintiff shall be permitted to amend any defect of form, destroy an attachment levied against the contractor and owner under the original bill.

[See note at end of this case.]

Attachment — Enforcement — Election of Remedies.

A plaintiff, who has attached a person's effects, both at law and in equity, may dismiss his attachment at law and proceed in equity.

Mechanics' Liens — Foreclosure — Parties.

Where a prior mortgage on the premises upon which complainant sought a mechanic's lien had been discharged save as to a few mortgage bonds, the holders of which could not be discovered, and the amount of such had been deposited for payment, a mechanic's lien against the premises cannot be defeated because the trustees under the mortgage who yet held the legal title were not made parties within ninety days after serving notice as required by law; for in such case the trustees were practically nominal parties.

[See note at end of this case.]

Appeal from Chancery Court, Shelby county: FENTRESS, Chancellor.

Action by Herman Niehaus, plaintiff, against C. B. Barker Construction Company et al., defendants. From judgment rendered,

plaintiff appeals. The facts are stated in the opinion. **REVERSED.**

J. W. Canada and M. E. Lesser for appellant.

H. H. Barker and Wilson & Armstrong for appellees.

[384] GREEN, J.—The Chickasaw Hotel Company let a contract to the C. B. Barker Construction Company to erect the Chisca Hotel in Memphis. The complainant was a subcontractor employed to do the plastering and metal lathing on the hotel building. The account of complainant not being paid, he gave notice as required by section 3540 of Shannon's Case, providing for the lien of mechanics or materialmen, and thereafter, within ninety days, as required by the statute, he brought an attachment suit to enforce the said lien against the Chisca Hotel property. Complainant named as defendants to his bill the C. B. Barker Construction Company, the Chickasaw Hotel Company, and the Bank of Commerce & Trust Company. The [385] last-named defendant was a trustee under a subsequent mortgage, and complainant's lien was superior to the lien of this mortgage.

After some delay the C. B. Barker Construction Company filed an answer denying the claim, and the Chickasaw Hotel Company filed a plea in abatement. The plea in abatement set out that the property was covered by a previous mortgage executed when said property belonged to the Citizens' Street Railway Company. It was averred in the plea that said original mortgage had not been satisfied, and that the attachment levied under complainant's bill was void, inasmuch as the trustees under this prior mortgage, who held the legal title, had not been made parties to the proceedings. The plea in abatement was not filed until after the expiration of ninety days from the notice of lien served by the complainant upon the Chickasaw Hotel Company.

Complainant then filed an amended bill to which all the original defendants were made parties, and the trustees under the mortgage of the Citizens' Street Railway Company were likewise made defendants. It was averred in the amended bill that this old mortgage had been satisfied; that the hotel company was estopped to rely on the existence of said mortgage as a defense; but the amended bill conceded that, if the old mortgage was valid and unsatisfied, complainant's lien would be subsequent to the lien of said mortgage, and the amended bill asked that the rights of the trustees [386] under the first mortgage be determined, and that, if it was found said mortgage was a valid prior

lien, complainant be permitted to subject the equity of the hotel company to the satisfaction of his claim.

To this amended bill all the parties filed separate answers; all insisting that, inasmuch as the amended bill was not filed until more than ninety days after the statutory notice of lien was given by the complainant to the hotel company, the suit to enforce the lien was barred. The case was referred to a master, and proof taken upon the complainant's claim. The master made his report, which was slightly modified by the chancellor. The complainant was given a decree against the C. B. Barker Construction Company for the amount found by the chancellor to be due to him. The chancellor, however, was of opinion that the amended bill came too late, and that the plea in abatement was good and denied complainant's asserted lien upon the Chisca Hotel property.

The chancellor based his decree on that line of cases, which hold that the owner of the legal title as well as the owner of the equitable title must be made a party to suits in which it is sought to reach the equitable estate. *Lane v. Marshall*, 1 Heisk. (Tenn.) 30; *Fulghum v. Cotton*, 6 Lea (Tenn.) 596; *Blackburn v. Clarke*, 85 Tenn. 506, 3 S. W. 505; *King v. Patterson*, 129 Tenn. 1, 164 S. W. 1191, and cases therein reviewed.

These cases will be referred to later.

Without for the present attempting to otherwise distinguish this controversy from the cases above [387] cited, we think they can have no application here by reason of the amendment made to the bill of complainant, by which amendment the trustees under the old mortgage of the Citizens' Street Railway Company were made parties.

The Tennessee statute with reference to the addition of new parties to a pending suit is in these words:

"At any time before trial, new plaintiffs or defendants may be added to the suit by the plaintiff, upon supplemental process taken out and served, and subject to such terms in regard to costs as the court may impose. If at the appearance term, it may be done without costs; if at any subsequent term, on such conditions as the court may prescribe, so as especially to prevent delay." *Shannon's Code*, section 4495.

It is true as a general rule, where new parties defendant are brought in by amendment, the statute of limitations continues to run in their favor until they are made parties; that is to say, the doctrine of relation, under which amendments are considered to have been made as of the date of the original suit, will not be applied so as to deprive any defendant of a substantial right. In other words, a defendant will not be made responsible for a proceeding of which he has had

no notice. 25 Cyc. 1302; *Miller v. McIntyre*, 6 Pet. 61, 8 U. S. (L. ed.) 320. See also *Flatley v. Memphis*, etc. R. Co. 9 Heisk. (Tenn.) 230.

If relief is sought against a party defendant, or if his interests are, in fact, involved, he cannot be prejudiced by the application of a fiction of the law. Such [388] a defendant may successfully interpose a plea of the statute of limitations when it is sought to bring his rights into jeopardy by an amendment to an existing action.

There is, however, another class of cases where the addition of new parties merely corrects a defect in the original proceeding. In these cases the statute of limitations may not be relied on, but the amendments are held to relate back to the institution of the suit.

We have several of these cases in Tennessee. In *Burgie v. Parks*, 11 Lea (Tenn.) 84, an amendment was allowed by which a co-executor was made party to a suit theretofore brought against the other executor. The amendment came more than two years and six months after the qualification of the executors, but the statute of limitations was held not to be available to the executor brought in by said amendment. Likewise, in *Love v. Southern R. Co.* 108 Tenn. 104, 65 S. W. 475, 55 L.R.A. 471, which was a suit by the administrator of one killed in a railroad accident, without averment of statutory beneficiaries, an amendment to the declaration was allowed more than twelve months after the accident, by which the statutory beneficiaries were brought in. This amendment was likewise held to relate back and the plea of the statute overruled. To like effect see *Brooks v. Brooks*, 12 Heisk. (Tenn.) 12.

There is less justification for a plea of the statute of limitations here than in any of the last cases mentioned.

[389] This is not a case in which it is claimed the mechanic's lien had priority over the existing mortgage. There was no notice to the mortgagee or trustee, which the statute requires, in order to give precedence to the liens of the mechanics. *Shannon's Code*, section 3536.

The estate of the trustees could not have been affected in any way by the original proceedings, nor could it have been affected by these proceedings after the amendment. The amended bill asked that the rights of the trustees under the Citizens' Street Railway mortgage be determined, and, if it was found that said mortgage was a prior existing lien, that complainant be permitted to reach the equitable estate of the Hotel Company.

Under these circumstances we are of opinion that the trustees were not entitled to avail themselves of the limitation of ninety

days prescribed by the statute for the institution of suits to fix mechanics' liens. This limitation is for the benefit of the owner of the property upon which it is sought to enforce the lien. Such limitation is not available to one against whom no relief is asked. The limitation is for the protection of property sought to be charged, not for the protection of an interest in no way involved.

We conclude therefore that the amendment by which the trustees under the old mortgage were made parties should be held to relate back to the beginning of the suits; that the trustees have no standing to invoke the ninety-day limitation, inasmuch as no relief [390] can be had against them, nor can their interests be affected by the proceedings.

In so far as the Chickasaw Hotel Company and the Barker Construction Company are concerned, these parties certainly have no right to insist on any statute of limitations.

It is well settled that bringing in new parties defendant by amendment does not extend the running of the statute of limitations in favor of the original defendants. The amendment relates back in so far as the original defendants are concerned and as to them the commencement of the suit arrests the running of the statute of limitations. No advantage accrues to original defendants by the bringing in of a new defendant.

It was held in *Harrison v. McCormick*, 122 Cal. 651, 55 Pac. 592, that an amendment to a complaint against a partnership which brings in an additional member of the firm not originally joined, while subject to the defense of the statute of limitations by the new defendant, does not change the action or introduce a new cause of action as to the original defendants nor let in the statute in their behalf.

In *Metropolitan L. Ins. Co. v. People*, 209 Ill. 42, 70 N. E. 643, it was held that there was no new cause of action brought in by an amendment which substitutes one party for another so far as the original party was concerned.

"Bringing in new parties defendant by amendment does not extend the running of the statute of limitations [391] in favor of the original defendants to the time of the amendment. As to them the commencement of the suit is the period at which the running of the statute is arrested." 25 Cyc. 1303.

See also cases collected in note 3 L.R.A. (N.S.) 306, and note 55, 25 Cyc. 1303.

It has been held in a number of cases that the general contractor, who is a necessary party, may be brought in by amendment after the expiration of the statutory period in which suit to enforce the lien of a materialman or subcontractor must be brought. This is so because the general contractor is not the party against whom the lien is to be

enforced, and is not interested in that phase of the litigation. *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331; *Western Sash, etc. Co. v. Heiman*, 65 Kan. 5, 68 Pac. 1080; *Cassery v. Wayne Circuit Judge*, 124 Mich. 157, 82 N. W. 841, 83 Am. St. Rep. 320. And see other cases collected in note 81, 27 Cyc. 344.

These cases are analogous to the cases under consideration, and their reasoning is applicable. The trustees under the mortgage of the Citizens' Street Railway Company are no more interested in the enforcement of this lien than a general contractor would be.

Inasmuch, therefore, as none of the parties defendant are entitled to set up the plea of the statutory period of limitations prescribed for mechanic's lien suits, as against the amended bill, it follows that the amendment must be held to relate back to the commencement [392] of the original suit. As amended by the addition of the new parties, these proceedings conform to all the requirements insisted on by the defendants.

We cannot agree that the attachment herein levied under the original bill can be treated as void in view of the amendment made to that bill.

Our statute provides that:

"The attachment law shall be liberally construed, and the plaintiff, before or during trial, shall be permitted to amend any defect of form in the affidavit, bond, attachment, or other proceedings; and no attachment shall be dismissed for any defect in, or want of, bond, if the plaintiff, his agent or attorney, will substitute a sufficient bond." Shannon's Code, section 5237.

There is no question in this case of any intervening attachments—attachments levied by others between the original bill and the amended bill. As seen before, no claim can be asserted against the interests of the new defendants. *Lillard v. Porter*, 2 Head (Tenn.) 177; *Watt v. Carnes*, 4 Heisk. (Tenn.) 532, and such cases are not in point.

The general rule as stated in *Ruling Case Law* with reference to amendments in attachment proceedings is as follows:

"Under the liberal statutes in force in many states the plaintiff will be allowed to correct defects and irregularities by amendment of the declaration or complaint. Defects in parties or a variance between [393] the names of the parties as stated in the attachment and the declaration or complaint may be cured in this manner. And defects in the form of declaring obviously may be cured by amendment, and neither subsequently attaching creditors nor bail can take advantage thereof. So an amendment changing the form of the action, merely, or adding a new count for the same, will not dissolve the attachment. Nor will the attachment be dissolved by an amendment which merely sets

the cause forth with greater detail." 2 R. C. L. p. 851.

The original bill in this case sought to subject to complainant's debt the interest of the hotel company in the land attached upon the supposition that the hotel company owned the entire estate therein at the time complainant's lien accrued. The object of the amended bill was the same, but, inasmuch as part of the estate was asserted to be in the trustees of the old mortgage, the complainant asked that the rights of such trustees, the new defendants, be determined, and that the real interest of the hotel company, whatever it was, should be subjected to his claim.

Such an amendment is permissible, and does not affect the validity of the attachment nor the lien of the complainant. *Morrow v. Fossick*, 3 Lea (Tenn.) 129, is quite in point. In that case an attachment was levied on the property of a nonresident, and a plea in abatement was filed setting out that the property attached belonged to a firm of which the original defendant was a member, and not to the original [394] defendant himself. The bill was then amended so as to reach the interest of the original defendant in the firm and the other members of the firm were made parties. This amendment was permitted by the court. The court held the property taken under the original attachment and proceeded to determine the rights of the parties.

To like effect see *Lookout Bank v. Susong*, 90 Tenn. 590, 18 S. W. 389; *Wilson v. Beadle*, 2 Head (Tenn.) 512.

The Chisca Hotel property was brought before the court by the attachment levy, and the complainant's amendment amounts to a mere release of his asserted lien thereupon, in so far as the title of the trustees is concerned. A plaintiff who has attached a defendant's effects, both at law and in equity, may be allowed to dismiss his attachment at law and proceed in equity. *Magill v. Manson*, 20 Gratt. (Va.) 527.

The defense made to the lien asserted for the complainant is extremely technical. It has often been said in Tennessee that the mechanic's lien statutes are to be liberally construed, and that technical niceties of construction will not be allowed to defeat their purpose. *Williams v. Birmingham*, etc. R. Co. 129 Tenn. 680, 688, 168 S. W. 160, and cases therein cited.

The rules announced in *Lane v. Marshall*, 1 Heisk. (Tenn.) 30, that the equitable interest in land cannot be reached unless the holder of the legal title is made a party to the proceedings, and that proceedings against the equitable title, in the absence of the [395] holder of the legal title, are ineffective, have been adopted in many of our cases. These cases are reviewed in *King v. Patter-*

son, 129 Tenn. 1, 164 S. W. 1191, and these rules again applied. These principles are too firmly embedded in our jurisprudence at this time to be shaken. However, none of the cases have involved the claims of mechanics asserting their statutory liens.

In this case it appears that the old trust deed executed by the Citizens' Street Railway Company has matured. All bonds have been paid off which were secured by this mortgage, except a few that cannot be located. Funds have been deposited in a New York bank to pay these scattering bonds outstanding, and advertisement has been made for the holders thereof. Several years ago the Memphis Street Railway took over the properties of the Citizens' Street Railway Company and assumed the indebtedness of the latter concern. The Memphis Street Railway made arrangements with the Central Trust Company of New York to take care of the bonds of the Citizens' Street Railway and collateral was deposited with the trust company to protect the bonds of the Citizens' Street Railway. So for a long while the bondholders of the Citizens' Street Railway Company secured by this old mortgage have been protected. For years such bondholders have had no real interest in this particular piece of realty involved in this suit. True, the trustees under the old mortgage held the legal title to secure the payment of the old bonds until all of said [396] bonds were satisfied, but, as a matter of fact, said bonds have been protected and arrangements perfected for their satisfaction long since.

Under such circumstances it would be highly inequitable to repel this lien claimant because of his original failure to name as defendants to his suit representatives of those having so little interest in the property sought to be charged. As a matter of fact, such defendants were little more than nominal defendants.

For the reasons stated, we are of opinion that the chancellor's decree, in so far as he denied complainant's lien, was erroneous. In that respect the decree will be reversed. There is no exception taken here to the amount found to be due the complainant. The cause will be remanded to the end that proper steps may be had for the enforcement of the complainant's lien.

There is no doubt but that an equitable estate may be subjected to a mechanic's lien, nor that the owner of such estate is the owner upon whom the statutory notice should be served by the subcontractor, when it is sought to charge the equity. *Gillespie v. Bradford*, 7 Yerg. (Tenn.) 168, 27 Am. Dec. 494; *Reid v. Tennessee Bank*, 1 Sneed (Tenn.) 262; *Alley v. Lanier*, 1 Cold. (Tenn.) 540; *Daniel v. Weaver*, 5 Lea (Tenn.) 392; *Ragon v. Howard*, 97 Tenn. 334, 37 S. W. 136.

The levy is upon the same land, whether the equity or legal title be attached. The levy made, taken in [397] connection with the contents of the amended bill, and applying the doctrine of relation, is a valid levy upon the equitable interest of the Chickasaw Hotel Company in the property described.

The costs of appeal will be paid by defendants. Costs below will be taxed by the chancellor.

NOTE.

The ruling of the reported case is that although a trustee of the premises on which a lien is sought to be enforced is a necessary party to the foreclosure of the lien, the failure to make him a party is not a ground for the dismissal of the action. As to who are necessary or proper parties to an action to foreclose a mechanic's lien, see the note to *Bacon v. Reichelt*, reported ante, this volume, at page 1.

CAIN

v.

PARFITT ET AL.

Utah Supreme Court—February 8, 1916.

48 Utah 81; 153 Pac. 448.

Mechanics' Liens — Foreclosure — Parties.

Under Comp. Laws 1907, § 2914, providing that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, one who, under a contract for sale of land, by instalments, claims a lien prior and superior to mechanics' liens on the property, although not an indispensable party, is properly made a defendant in the proceeding to enforce the mechanics' liens, for the purpose of determining the amount and character of his claim.

[See note at end of this case.]

Foreclosure Decree as Adjudication.

In an action to foreclose a contract for purchase of land because of a breach by failure of the purchaser to pay instalments, where plaintiff was made a defendant in a prior action by holders of mechanics' liens on the property, and answered, setting forth his contract, its breach, and claiming a lien prior and superior to the mechanics' liens, and obtained a judgment to the full extent of his claims, there is a binding adjudication of his claims, and he cannot bring another action to foreclose the lien.

Appeal from District Court, Salt Lake county: LOOFBOUROW, Judge.

Action by Addison Cain, plaintiff, against George H. Parfitt et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. REVERSED.

C. E. Norton and H. J. Fitzgerald for appellants.

F. E. McCracken for respondent.

[83] FRICK, J.—On November 29, 1913, the plaintiff commenced this action against George H. and A. Parfitt, as copartners, Thomas A. Davis, West Temple Terrace Company, a corporation, and Graham Lawrence, to foreclose a certain contract of purchase, whereby West Temple Terrace Company, hereinafter called the company, purchased from the plaintiff a certain parcel of real estate, which is specifically described both in the complaint and in said contract of purchase.

It is, in substance, alleged in the complaint that on the 21st day of November, 1910, said company entered into a contract with the plaintiff, whereby it purchased the real estate described therein for the sum of \$1,200, of which sum \$200 was paid in cash and the remainder said company agreed to pay in monthly installments of twenty dollars each, commencing with the month of January, 1911; that said contract was duly recorded in March, 1911; that it was therein provided that in case default should be made by said company in making any of said monthly payments, the plaintiff "was authorized to declare the whole amount due and payable at once," and that thereafter the interest on said indebtedness should be increased from eight to twelve per cent per annum; that prior to the 15th day of March, 1911, said company made default on its monthly payments, and that the plaintiff then elected to, and did, declare the whole amount due as in said contract provided. It is further alleged that on July 5, 1913, the defendants George H. and A. Parfitt, Davis and a number of others, obtained judgments in an action against said company for the foreclosure of certain mechanics' liens against the property in question; that said defendants George H. and A. Parfitt and Davis, by reason of said judgments, claimed some interest in the real estate described in said contract, but that such interests are inferior to plaintiff's lien under said contract for the reason that said contract was given for the purchase price of the real estate in question. The amount due on the contract was alleged to be \$980, with interest at twelve per cent from March 15, 1911, and plaintiff demanded the sum of \$250 in addition as an attorney's fee.

[84] The defendants George H. and A. Parfitt demurred to the complaint. The de-

murrer was overruled, and they filed an answer, in which they, in effect, denied the allegations thereof, and, in substance, averred that they, as co-partners, furnished material and performed labor for said company for the erection of a building on the premises described in the complaint and in said contract, and that on the 21st day of April, 1911, in compliance with the statute of this state, they perfected a mechanic's lien against the said company, which became a lien on the premises aforesaid; that said Davis and a number of others had, about the same time, also obtained mechanics' liens for materials furnished and labor performed for said company for the building being erected on said premises as aforesaid; that said George H. and A. Parfitt, pursuant to the statute of this state, in February, 1912, published notice of their intention to foreclose said mechanic's lien; that immediately upon the publication of said notice the said George H. and A. Parfitt commenced an action in the District Court of Salt Lake County against said company and against all other lien claimants, including the plaintiff herein, making all of them defendants; that all of said defendants, including the plaintiff herein, filed their verified answers in said action. The answer of the plaintiff filed in said action is made a part of the record, and by reference thereto it appears that the plaintiff, in said answer, made practically the same averments which are contained in his complaint in this action, and he there declared that he had elected to declare the whole amount specified in said contract as due and payable forthwith. The plaintiff also averred in said answer what payments had been made on said contract, which were the same as alleged in this action; that he is entitled to twelve per cent interest and an attorney's fee. The court, in said action, found that there was due and owing to the plaintiff on said contract the sum of \$980, with interest on said sum at the rate of twelve per cent from March 15, 1911, precisely what is found due in this action. As a conclusion of law the court also declared said sum of \$980 to be a first lien on the premises in question, and also allowed plaintiff an attorney's fee in the same amount that was allowed to the other mechanic's lien claimants as [85] provided by our statute. The court also allowed plaintiff the amount advanced by him for taxes and costs, the same as in this action. The court ordered foreclosed said mechanics' liens in favor of the lien claimants, found the amount due on each claim, and ordered the premises in question sold, subject, however, to plaintiffs' lien for said \$980 and the taxes paid by him as aforesaid. The plaintiff, therefore, was given precisely the same relief in said action that he is given in this, except that in the present

action he is awarded an additional sum of \$250 as an attorney's fee. The record also discloses that the real estate in question was sold subject to plaintiff's claim to satisfy the mechanics' liens; that the defendants George H. and A. Parfitt purchased the property in question on said sale, and obtained a sheriff's deed therefor. It is further made to appear that the property has again been sold by a receiver to satisfy the amount found due on plaintiff's said contract, together with the taxes and attorney's fee as aforesaid. The defendants George H. and A. Parfitt, it seems, have during all of the time the present proceedings were pending, objected, in season and out of season, to plaintiff's right to maintain the present action and to again foreclose said contract. Having failed in their object in the court below, they now, on appeal, invoke the aid of this court, and in substance contend that the trial court erred in overruling their demurrer, in permitting the plaintiff to maintain the present action, in allowing an additional attorney's fee, in appointing the receiver and in ordering the premises sold by the receiver to satisfy plaintiff's claim, and in confirming the receiver's sale.

It will be observed that the order of sale in the prior action was expressly made subject to the amount found due to plaintiff on his purchase-price money contract, which was declared to be a first or paramount lien on the property in question, and to which all other liens were declared to be subject and inferior. The plaintiff was made a defendant in the preceding action, however, for the express purpose of determining the amount, as well as the character, of his claim. If it were assumed, therefore, that inasmuch as plaintiff claimed to be and was the holder of a prior and [86] superior lien on the premises in question, therefore he was not an indispensable party to the action, yet, under our statute, Comp. Laws 1907, Section 2914, he was properly made a defendant. That section, so far as material here, provides that:

"Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff."

It is generally held by the courts that under such a statute all who claim an interest in the premises upon which liens are claimed by the parties claiming such liens are proper defendants, notwithstanding that their liens may be prior and paramount. It is, however, also generally held that they are not indispensable parties to such actions.

The fact remains in this case, however, that the plaintiff was made a defendant in the prior action which was commenced to foreclose the mechanics' liens. He appeared in that action and set forth his contract, and asked that the whole amount be declared due

and payable forthwith; that his lien be declared to be superior to all the mechanics' liens; that his claim from thenceforth bear twelve per cent interest, and that he be awarded an attorney's fee as against the other lien claimants. All those claims were considered and determined in his favor. The premises were ordered sold, therefore, subject to his lien. Suppose that in that action the court had adjudged plaintiff's claim to be inferior to the mechanics' liens, and he had not assailed that judgment on appeal, would he not have been bound thereby? He was made a defendant the same as all other lien claimants were, and, like all others, he set up his claim and had it adjudicated. Why is he not bound, as all others are bound, by that adjudication? By what process of reasoning can he again come into court and ask that his contract be again foreclosed, and that he be awarded attorney's fees and costs out of the property a second time? As a matter of course, he did not lose his lien simply because the premises were sold subject thereto, but that order did not give him the right to bring a second action for the purpose of obtaining a second judgment or decree of foreclosure of his contract. All that he was entitled to was to have the premises sold and out of [87] the proceeds of sale to be paid the amount found due him in the action, together with the taxes, and interest on both items, and the attorney's fee allowed him in the first action. Plaintiff already had an enforceable judgment and the right to have it enforced continued until the judgment was satisfied or the right to enforce it was barred. In other words, that action, so far as plaintiffs' rights were concerned, continued to be pending until the judgment was satisfied. *Sweetser v. Fox*, 43 Utah 45, Ann. Cas. 1916C 620, 134 Pac. 509, 47 L.R.A. (N.S.) 145. But instead of merely being allowed to enforce his claim he is not only awarded judgment for the same again, but is allowed an additional \$250 as an attorney's fee when he already had been awarded an attorney's fee in the other action. This may not be done. The former action was purely equitable, and so is this one. It was the duty, therefore, of the court in both actions to protect the interests of all concerned. The property in question was, so to speak, the fund out of which all lien claimants were to be reimbursed. The surplus, if any, belonged to the owner of the property. In this case the property having been sold upon the order of the court in the prior action to the defendants George H. and A. Parfitt, they are entitled to all that remains after the amount found due the plaintiff in the first action is paid, unless there are other legitimate claims to which the proceeds equitably shall be applied. Suppose the Parfitts had come into court at any time before the plaintiff ob-

tained judgment in the present action and had paid the amount found due him in the first action with taxes and interest, would it not have discharged the premises purchased by them under the first order of sale from all of plaintiff's claims against it? No one can doubt that. The situation was therefore the same as though they had discharged any other judgment which was a lien upon the premises.

True, one may bring an action upon a judgment and recover, but he may not bring a second action upon the original cause of action, as was done here. Then again, it is not at all likely that a court of equity would permit a claimant to exhaust the property or the fund by making unnecessary costs in bringing successive actions. Nor would any court be authorized [88] to allow an attorney's fee a second time upon the same cause of action. We are of the opinion, therefore, that the court erred in allowing out of the proceeds of sale the \$250 as an attorney's fee. It is quite enough that plaintiff was permitted to carry along his claim at twelve per cent interest. The court should have ordered the premises sold under the first judgment for all claims, including the plaintiff's, and should then have stopped the accruing of this excessive interest. The Parfitts, however, cannot complain of the court's action in ordering plaintiff's claim under the contract to be paid out of the proceeds of sale. They have a right, however, to insist that the plaintiff shall not be given more than his claim, and that right we have sought to protect.

We have not discussed the assignment relating to the overruling of the demurrer, for the reason that, in our judgment, the defect urged by counsel against the complaint did not sufficiently appear upon the face of it to be reached by demurrer. Besides, we deem it quite as well to dispose of the case upon the whole record.

In view of the present state of the record the other assignments are really not before us for review, and for that reason we express no opinion upon them.

The judgment of the district court by which the plaintiff was awarded the sum of \$250 as an attorney's fee is therefore reversed, and the cause is remanded to the district court of Salt Lake county, with directions to set aside its findings of fact and conclusions of law by which it allowed the plaintiff said sum of \$250 as an attorney's fee, and that it enter an order or judgment, dismissing the complaint filed in this action as against the appellants George H. and A. Parfitt, and that it enter judgment requiring the plaintiff to repay the said appellants said sum of \$250, with interest and costs. Appellants to recover costs on this appeal.

Straup, C. J., and McCarty, J., concur.

ON APPLICATION FOR REHEARING.

CITY SASH AND DOOR COMPANY
ET AL.

v.

BUNN ET AL.

(June 20, 1916).

FRICK, J.—Counsel for respondent has filed a petition for a modification of the judgment. In view of the very unsatisfactory [89] condition of the record on appeal, we were in much doubt with regard to what the judgment should be. It is now made to appear that the judgment as it appears in the original opinion should, in some respects, be modified. It is further made to appear that the respondent did not actually receive the amount of the attorney's fee, although it was awarded to him and although the premises in question were sold. The judgment requiring the repayment of said attorney's fees should therefore be modified. It is further made to appear that there are other matters that should be left for the determination of the district court. The judgment is therefore modified to read as follows:

The judgment of the district court by which the plaintiff was awarded the sum of \$250 as an attorney's fee is reversed, and the cause is remanded to the district court, with directions to set aside its findings of fact and conclusions of law upon that question, and that it enter judgment disallowing the plaintiff any attorney's fee in this action; that in all other matters the cause is remanded to said court, and it is directed to make disposition of all matters in accordance with the evidence before it. Appellant to recover costs.

Straup, C. J., and McCarty, J., concur.

NOTE.

It is held in the reported case that while another lien claimant is merely a proper party and not a necessary party to an action to foreclose a mechanic's lien, an adjudication of such other claimants' rights in the foreclosure suit is final and conclusive. See the note to *Bacon v. Reichelt*, reported ante, this volume, at page 1, for an extensive discussion of the question who are necessary or proper parties to an action to foreclose a mechanic's lien.

Washington Supreme Court—April 19, 1916.

90 Wash. 669; 156 Pac. 854.

Appeal and Error — Dismissal — Notice of Motion.

Under Rem. & Bal. Code, § 1733, providing that motion to dismiss an appeal shall be made at such time as shall be fixed by the rules of court and under supreme court rules 18, 19 (132 Pac. xiii, xiv), a motion to strike the transcript and dismiss the appeal, on the ground that no statement of facts had been brought up and no exceptions taken below, cannot be considered, where not made on ten days' notice.

Mechanics' Liens — Foreclosure — Parties.

The proceeding to establish and foreclose a mechanic's lien being one in rem, the owner of the property sought to be subjected to the lien is a necessary party, as jurisdiction of the property can be procured in no other manner, so such owner must be made a party within the time limited to institute action.

[See note at end of this case.]

Institution of Foreclosure — Time.

Rem. & Bal. Code, § 1138, declares that no lien shall bind the property for a period longer than eight calendar months after claim has been filed, unless action be commenced within that time to enforce such lien. Laws 1893, p. 407, § 1, passed at the same session of the legislature, declares that civil actions in the several superior courts shall be commenced by service of process. This section, as amended by Laws 1895, appears as Rem. & Bal. Code, § 220, providing that civil actions in the several superior courts shall be commenced by the service of a summons or by filing a complaint with the county clerk as clerk of the court, but unless service has been had on defendant prior to the filing of the complaint, plaintiff shall cause one or more of the defendants to be served personally. It is held that as the provision with respect to the duration of the lien is not a statute of limitation, but marks the extent of the lien, service of process on the owner of the property on which the lien is sought must be had within the eight-month period, notwithstanding the subsequent amendment of Laws 1893 (Rem. & Bal. Code, § 220) relating to commencement of actions.

Consolidation of Proceedings — Effect — Party Not Served in One Proceeding.

Where several actions to foreclose a mechanic's lien were consolidated, the fact that the court had inherent power to consolidate the several actions does not relieve the sev-

eral lien claimants of the duty to serve process on the owner of the premises, and by imputation make the service in favor of some of the lien claimants effective as to the others.

Appeal from Superior Court, King county: HUMPHRIES, Judge.

Action by City Sash and Door Company et al., plaintiffs, against Margaret Bunn et al., defendants. Judgment for plaintiffs. Certain defendants appeal. The facts are stated in the opinion. REVERSED.

George L. Palmer and Beechler & Batchelor for appellants.

Jas. A. Dougan for respondent City Sash and Door Company.

Reeves Aylmore for respondent Taylor Mill Company.

[670] ELLIS, J.—Action to foreclose a large number of mechanics' liens on lot 7, in block 42, of T. Hanford's addition to Seattle. The case is here upon the transcript, findings, conclusions and decree, which are so voluminous as to prohibit a statement of more than a bare outline. At the time the work was done, materials furnished and liens filed, covering the period from August 29, 1913, to February 10, 1914, Joseph A. McGinty and wife were the owners of the property. The work was done and the materials furnished at their instance for the construction of two houses, one on the north half, the other on the south half of the lot. On September 30, 1914, McGinty and wife conveyed the south half of the lot to Margaret Bunn and husband; and in October, 1914, [671] the north half to Louis Bernheim. Originally, four actions were instituted, numbered and entitled on the records of the superior court for King county as follows: Cause No. 97635, *Recchio v. McGinty et al.*, to foreclose a lien on all of lot 7. In this case, cross-complaints in intervention were filed by Charles Denny and S. W. R. Dally. Cause No. 99669, *Hanson v. McGinty et al.*, to foreclose a lien which, also, covered all of lot 7. Cause No. 99054, *City Sash & Door Company v. McGinty et al.*, to foreclose a lien upon the north half of lot 7. In this case, a complaint in intervention was filed by Bass-Heuter Paint Company to foreclose a claim of lien on the entire lot. Cause No. 99056, *City Sash & Door Company v. McGinty et al.*, to foreclose a claim of lien on the south half of lot 7. Four cross-complaints in intervention to foreclose claims of lien were filed in this case, one by D. J. McHugh covering the south half of lot 7; the second, by Taylor Mill Company, originally covering the north half of lot 7 but amended at the trial to cover the south half of the lot; the third, by

Arrow Electric Company covering the entire lot; the fourth, by Bass-Heuter Paint Company covering the entire lot.

The court made specific findings as to the time and character of service and persons served with summons, complaint and cross-complaints in each case, and a general finding that no process of any kind or nature was served upon McGinty and wife other than as in the special findings stated.

On December 22, 1914, after all the services that were ever made had been either made personally or commenced by publication, the four cases were consolidated pursuant to stipulation signed by the attorneys for the various plaintiffs and interveners.

On February 18, 1915, Margaret Bunn and husband and Louis Bernheim appeared specially and moved to dismiss the several causes of action on the ground that they were then the owners of lot 7, had never been served with summons in any of the actions except on the cross-complaint of Arrow [672] Electric Company, and that none of the actions, either by complaint or cross-complaint, had been commenced within eight months after the filing of the respective claims of lien. The motion was denied, and Bernheim and the Bunn were made additional parties defendant to all of the complaints and complaints in intervention, over their objections. This was long after the expiration of eight months from the filing of any of the lien claims. Thereupon the Bunn and Bernheim filed separate answers, setting up substantially the same facts as advanced on their motions. After trial, the court made findings of fact and conclusions of law, and thereon entered personal judgments against McGinty and wife for the amounts found due to each of the respective lien claimants, and a decree establishing as valid all of the liens claimed, and ordered sale of the two half lots and the buildings thereon to satisfy the liens so established against each half respectively, surplus, if any, of the proceeds of the north half to be paid to Bernheim and of the south half to the Bunn. The defendants Margaret Bunn and husband and Louis Bernheim appeal.

No brief has been filed by any respondent in defense of the decree on the merits. Respondents City Sash & Door Company and Taylor Mill Company, on the hearing in this court, filed identical motions to strike the transcript and dismiss the appeal on the ground that no statement of facts has been brought up and no exceptions were taken to the court's findings. There is no merit in the motions. Moreover, they were presented on only three days notice. Our rules require ten days notice. Rem. & Bal. Code, § 1733 (P. C. 81, § 1219), Supreme Court Rules 18 and 19.

No exceptions were taken to the findings. Appellants concede that they are sufficient to sustain the judgments and decree in favor of Recchio, Denny, Dally and Arrow Electric Company, but insist that they are wholly insufficient to sustain any decree establishing liens in favor of the respondents Hanson, City Sash and Door Company, Bass-Heuter Paint [673] Company, McHugh and Taylor Mill Company, in that they affirmatively show that no service of process conferring jurisdiction as to any of these was made upon the owner of the premises within the life of any of their liens.

The special statute limiting the life of mechanics' liens, Rem. & Bal. Code, § 1138 (P. C. 309, § 71; Laws 1893, p. 35, § 9) declares:

"No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim has been filed unless an action be commenced in the proper court within that time to enforce such lien; . . ."

This is not a statute of limitations. It "limits the duration of the lien." Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397; Davis v. Bartz, 65 Wash. 395, 118 Pac. 334. The general statute governing the commencement of actions passed at the same session of the legislature (Laws 1893, p. 407, § 1) declared:

"Civil actions in the several superior courts of this state shall be commenced by the service of a summons, as hereinafter provided."

The last quoted section was amended in 1895 (Laws 1895, p. 170, § 1; Rem. & Bal. Code, § 220 [P. C. 81, § 131]), to read as follows:

"Civil actions in the several superior courts of this state shall be commenced by the service of a summons, as hereinafter provided, or by filing a complaint with the county clerk as clerk of the court: Provided, that unless service has been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint."

Unless the special statute (Id. § 1138) was, by implication, also amended by the amendment of the general statute governing commencement of actions, thus extending the life of the lien merely by filing a complaint, it is plain that the [674] lien is lost as to any necessary defendant who is not served with summons within the eight months.

The owner of property subject to a mechanics' lien at the time of suit is a necessary party to an action to foreclose the lien. The proceeding to establish and foreclose the lien is, in a sense, *in rem*. Jurisdiction of the subject matter can only be acquired by service, actual or constructive, upon the owner

of the interest sought to be subjected and within the statutory life of the lien. Littell, etc. Mfg. Co. v. Miller, 3 Wash. 480, 28 Pac. 1035; Sagmeister v. Foss, 4 Wash. 320, 30 Pac. 80, 744; Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397; Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; Northwest Bridge Co. v. Tacoma Shipbuilding Co. 36 Wash. 333, 78 Pac. 996; Rees v. Wilson, 50 Wash. 339, 97 Pac. 245; Pickens v. Polk, 42 Neb. 267, 60 N. W. 566; Ortwine v. Caskey, 43 Md. 134; Hughes v. Torgerson, 96 Ala. 346, 11 So. 209, 38 Am. St. Rep. 105, 16 L.R.A. 600.

Our own decisions above cited were nearly all in cases where it was sought to foreclose liens on community property by serving only the husband within the life of the lien. It was held in all of these that the wife was a necessary party because the community of which she was a member was the owner of the property. In those cases, it was also held that service of summons on one spouse is not the commencement of an action as to the other; and in the Peterson and Northwest Bridge Co. cases, it was held that the bringing in of the wife subsequent to the expiration of the lien is of no avail and confers no jurisdiction to enforce the lien. We have also repeatedly held—and the holding was inevitable—that, under the provisions of § 220 above quoted, the filing of the complaint is not the commencement of an action but only a tentative commencement, wholly abortive unless followed by personal service on one or more defendants, or by the commencement of service by publication within ninety days. "Both must exist before the action is commenced." Deming Invest. Co. v. Ely, 21 Wash. 102, 57 Pac. 353; Fuhrman v. [675] Power, 43 Wash. 533, 86 Pac. 940; McPhee v. Nida, 60 Wash. 619, 111 Pac. 1049.

When it is remembered that § 1138 is not a mere statute of limitations limiting the time of commencing actions, but fixes a limit to the very existence of the lien, it is palpable that no action to foreclose a mechanics' lien can be deemed commenced until the *necessary parties to its maintenance* have been served either personally or by publication of summons. It would seem, also, that this must be done within the eight months of the statutory life of the lien, because jurisdiction of such parties, under the foregoing decisions, is an essential to any action "to enforce such lien" which is the kind of action which must be commenced *within that time* under the terms of the statute. The life of the lien, as fixed by the special statute on that subject, cannot be held to be extended for ninety days merely by the filing of a complaint within the eight months, though followed by service after the eight months but within ninety days as required by the general statute as

to commencement of actions subsequently passed. No such implication is necessary, since the filing of the complaint and the service or publication of summons thereafter at any time within ninety days may both be accomplished within the eight months of the life of the lien, thus giving scope for the operation of all the provisions of the general statute, § 220, without extending the statutory life of the lien as fixed by the special statute, § 1138. Since the implication is not necessary, we cannot indulge it. It follows that personal service must be made upon, or service by publication must be commenced against, such necessary parties within eight months after the lien is filed, else the court acquires no jurisdiction to enforce the lien. We have in effect so held in *Rees v. Wilson*, *supra*, and *Davis v. Bartz*, *supra*.

An examination of the transcript as to the publication of summons, and of the court's findings as to the filing of liens, complaints, and cross-complaints, and as to service thereon, [676] makes it plain that the court acquired no jurisdiction within the life of their respective liens to enforce the liens claimed in favor of the respondents H. A. Hanson, City Sash & Door Company, Bass-Heuter Paint Company, D. J. McHugh, and Taylor Mill Company, or any of them. As to the complaint of H. A. Hanson, the findings disclose that there was no service of process, either actual or constructive, within eight months or at all, upon any of the parties. As to the City Sash & Door Company, no party was served with summons on either of its complaints within eight months after its lien claims were filed; and the owners of the property, the McGintys, were never served with any process. As to the complaints in intervention of Bass-Heuter Paint Company and D. J. McHugh, no process of any nature was served, either personally or by publication, upon the necessary parties, the McGintys, at any time. As to the claim of Taylor Mill Company, the findings disclose that, though the complaint in intervention was filed within eight months after the filing of the lien claim, the publication of the summons against the necessary parties, the McGintys, was not commenced until long after the expiration of the eight months. In any event, it was fatally defective. The affidavit of publication in the transcript shows that the summons as published described other property than that actually covered by the amended complaint.

It seems to have been contended in the lower court, on the authority of *Peterson v. Dillon*, *supra*, that, because of the inherent

power of the court to consolidate the several actions, such consolidation gave the court jurisdiction of all parties who theretofore had appeared or had been served in either of the actions, and that, by some sort of imputed service, the appearance of the necessary parties, McGinty and wife, in the *Recchio* case inured as an appearance to all the other complaints and cross-complaints. The language used in the *Peterson* case, however, must be confined to the facts in that case. It can only apply where the subject-matter and issues [677] are identical and where the relation of the parties thereto are the same in each case, which was true of the cases there consolidated. Neither this court nor any other court, so far as we are advised, has ever held that a judgment on a complaint, cross-complaint, or complaint in intervention setting up an independent cause of action may be rendered without service on any necessary party merely because the case in which it is filed was consolidated with an action by another party on a different cause of action in which such service had been made. Such a holding would impinge the constitutional guaranty of due process of law. This court has expressly held that no jurisdiction is acquired to render judgment on a cross-complaint setting up a mechanics' lien in the absence of service of summons or copy of such cross-complaint upon the defendant, giving him a chance to plead. *Powell v. Nolan*, *supra*.

The decree, in so far as it establishes and forecloses the liens in favor of the respondents Hanson, City Sash & Door Company, Bass-Heuter Paint Company, McHugh, and Taylor Mill Company, is reversed, and the cause is remanded with directions to modify the decree in accordance with this opinion and dismiss their several complaints and cross-complaints in intervention. Appellants may recover their costs.

Morris, C. J., Fullerton, Chadwick, and Mount, JJ., concur.

NOTE.

The reported case holds that in a suit to foreclose a mechanic's lien the owner of the property against which the lien is sought to be enforced is a necessary party defendant. For a discussion as to who are necessary or proper parties to an action to foreclose a mechanic's lien, see the note to *Bacon v. Reichelt*, reported *ante*, this volume, at page 1.

BECKER ET AL.

v.

HOPPER ET AL.

Wyoming Supreme Court—April 26, 1915.

23 Wyo. 209; 147 Pac. 1085.

Mechanics' Liens — Foreclosure — Parties.

Comp. St. 1910, § 3806, providing that in suits to enforce mechanics' liens the parties to the "controversy" shall be made parties, and those not made parties shall not be bound, adds practically nothing to what the law would be without it, for it leaves the matter of parties to be determined by the court, and does not make the contractor a necessary or indispensable party to a suit by one furnishing labor and materials to the contractor; the word "controversy" being defined as a dispute arising between two or more persons in a civil action at law or in equity or a proceeding at law.

[See note at end of this case.]

Right to Lien — Contractor Paid in Full.

Where a lien is claimed for labor performed or materials furnished to a contractor, the right to the lien or its enforcement does not depend on the condition of the accounts between the owner and the contractor, and the fact that there is nothing due from the owner to the contractor does not defeat the lien.

Necessary Parties to Foreclosure Action.

Under Comp. St. 1910, §§ 3806, 3809, 3816, providing that in suits to enforce mechanics' liens the parties to the controversy shall be made parties, and constructive service may be had on any nonresident, and providing that, when the debtor has been served by publication, the judgment, if for plaintiff, shall be for the amount of the indebtedness to be levied out of the property charged with the lien, and requiring the contractor to defend an action to enforce a lien, and declaring that, pending the action, the owner may withhold from the contractor the amount of money for which a lien is filed, the contractor is a necessary party in a suit by a subcontractor to enforce a mechanic's lien in the sense that the owner may require that he be made a party, or by proper and timely objection defeat the action for failure to make him a party, though he is not an "indispensable party," who is one who must be brought into court before the controversy may be determined.

[See note at end of this case.]

Same.

The failure of a subcontractor suing to enforce a mechanic's lien to make the contractor a party may be waived by the owner.

[See note at end of this case.]

Same.

Where, in a suit to foreclose a subcontractor's lien, the petition named the contractor

a party, but there was a failure to make him a party because of the insufficiency of constructive service on him while a nonresident, the owner, on discovering the facts, must raise the objection of failure to make the contractor a party by amended answer, setting forth defective constructive service on the contractor.

[See note at end of this case.]

On rehearing. For former opinion see 22 Wyo. 237, 138 Pac. 179, Ann. Cas. 1916D 1041.

Error to District Court, Laramie county: MENTZER, Judge.

Action by John W. Hopper et al., plaintiffs, against Charles Becker et al., defendants. Judgment for plaintiffs. Defendants bring error. The facts are stated in the opinion. MODIFIED.

Burke & Riner for plaintiff in error, Charles Becker.

Marion A. Kline for defendants in error.

[214] POTTER, C. J.—This was an action brought by the defendants in error, John W. Hopper and Edward T. Bartley, co-partners doing business under the name of Hopper & Bartley, to enforce an alleged mechanics' lien upon certain real estate of the plaintiff in error, Charles Becker, upon which the plaintiff in error, Henry Becker, held a mortgage; the lien being claimed for certain work performed and materials furnished in and about the construction of a building, at the request of and for the firm of Brice & Mitchell, the contractors engaged in constructing said building. The case came to this court on error for review of the judgment entered upon the trial of the action establishing the lien for the sum of \$950.27 and costs of suit, including \$25 for attorney's fees. Upon the original hearing in this court the cause was ordered remanded to the District Court with directions to modify the judgment by deducting the sum of \$392 from the amount of the lien and striking out the amount allowed as attorney's fees, and as so modified the judgment was affirmed. (22 Wyo. 237, Ann. Cas. 1916D 1041, 138 Pac. 179.) The plaintiff in error, Charles Becker, filed a petition for rehearing, complaining only of the conclusion stated in the opinion that the plaintiffs in error as defendants below, by failing to raise the objection by answer, had waived the objection that the surviving member of the firm of Brice & Mitchell, the original contractors, had not been brought into the case as a party defendant by proper constructive service. The defendants in error also filed a petition for rehearing, alleging error in the conclusions of the court in three particulars: 1. In holding the statute allowing an attorney's fee in the case to be unconstitutional. 2. In hold-

ing the provisions of Chapter 68 of the Laws of 1911, with reference to the sufficiency of a lien [215] statement, inapplicable to this case. 3. In holding that the item of \$1,292 was insufficiently described in the lien statement to entitle the parties filing the same to a lien. A rehearing was granted, and the cause has again been heard. A reconsideration of the points on which a rehearing was asked has failed to convince the court of any error in the previous decision, and the writer hereof, who did not participate in that decision, joins the other members of the court in the view that the conclusions stated in the former opinion should be adhered to. The questions again raised by the petition of the defendants in error are sufficiently discussed in the former opinion, and what was there said as to those questions will be adopted for the purpose of disposing of them upon this rehearing.

In the petition of plaintiff in error for a rehearing it was stated that the objection that there was a defect of parties through the failure to properly bring the contractor into the case as a defendant was disposed of by the court on a ground not referred to in brief or oral argument or suggested at the original hearing, viz.: that the objection had been waived by the failure to raise it by answer. The argument against the view that the objection was so waived is confined to a review of the Missouri cases on the subject, on the theory that they should be followed here since our mechanics' lien statute was taken from that state. And it is contended that the effect of the Missouri decisions is to plainly declare it necessary and essential to a valid judgment enforcing a mechanics' lien that the one with whom the contract for the labor or materials was made by the lien claimant be properly brought into the case as a party defendant, and that where he is not made a party the defect is not waived by a failure to take the objection by demurrer or answer. We are not satisfied that such is clearly the result of the Missouri cases, where the action is brought in a court of record governed in the matter of procedure by the provision of the statute in that state, similar to our own, to the effect that the objection on the ground of a defect of parties is waived unless taken by demurrer or answer. [216] (*Horstkotte v. Menier*, 50 Mo. 158; *Johnson-Frazier Lumber Co. v. Schuler*, 49 Mo. App. 90.) In *Horstkotte v. Menier*, a case decided in 1872, the court said: "What we now hold is that the original contractor ought to be brought before the court as a co-defendant, for the purpose of protecting his own rights and those of the owner. But if he is not so brought before the court at the proper time, the judgment will not for this omission be error or void. The objection should have been

taken by the owner by demurrer or answer. If he fails to demur when the defect appears on the petition, or fails to set up the non-joinder by answer when it does not appear on the face of the petition, he will be presumed to have waived the objection. (Wagn. Stat. 1014-1015, Secs. 6, 10.) The defect of parties cannot be reached by way of instruction." In *Johnson-Frazier Lumber Co. v. Schuler*, an action to enforce a mechanics' lien originally brought before a justice of the peace, the court said: "It is contended by the plaintiff that, although the appealing defendants had the right to have the contractors, Schuler & Muench, made co-defendants and served with process, yet, as that was not done, and as they took no steps before judgment to have it done, that they thereby waived their right. It has been oftentimes decided under our practice act that unless the objection of defect of parties to the record is made, either by demurrer or answer, it will be deemed waived. (*Gimbel v. Pignero*, 62 Mo. 240; *Butler v. Lawson*, 72 Mo. 227.) And this rule has been held to apply in actions brought upon mechanics' liens in courts of record. (*Horstkotte v. Menier*, 50 Mo. 158; *Fruin v. Mitchell Furniture Co.* 20 Mo. App. 313.) But the statute, Section 2047, upon which the foregoing rule of practice is based, is limited to actions in courts of record, section 2038, and hence is not applicable to actions brought before justices of the peace."

Our attention has not been called to any decision of the supreme court of Missouri overruling the case of *Horstkotte v. Menier*. But we are cited to a case in one of the intermediate appellate courts of that state, viz.: *Steinmann [217] v. Strimple*, 29 Mo. App. 478, wherein the court distinguished *Horstkotte v. Menier* from the case then under consideration by stating that the former was a case where the lien claimant was one whose contract had been made with a sub-contractor, so that the original or principal contractor was not one of the "parties to the contract" within the "mandatory provision" of the mechanics' lien statute that "the parties to the contract shall" be made parties.

The section of the Missouri statute prescribing the rule as to parties in an action to enforce a mechanics' lien provides that, "the parties to the contract shall, and all other persons interested in the matter in controversy or in the property charged with the lien may be made parties, but such as are not made parties shall not be bound by any such proceedings." The provision that the parties to the contract shall be made parties seems to be construed by the courts in that state to refer to the contract under which the lien claimant furnished the labor or materials, whether owner, a contractor, or sub-contractor. But whatever may be the effect

of the Missouri decisions as to the question of waiver, though they would be persuasive as authority, they are not controlling, for the reason that while our mechanics' lien statute, as heretofore declared by this court, appears to have been taken from Missouri, the section of our statute with reference to parties in an action to enforce the lien is not the same as the corresponding section of the Missouri statute, but instead of the provision that "the parties to the contract" shall be made parties, it is declared by our statute that "the parties to the controversy shall . . . be made parties." (Comp. Stat. 1910, Sec. 3806.) The entire section reads as follows:

"In all suits under this chapter the parties to the controversy shall, and all other persons interested in the matter in controversy, and in the property charged in the lien, may be made parties, but such as are not made parties shall not be bound by any such proceeding, and constructive service may be had upon any defendant in suits brought under this chapter who may be non-residents of the state and cannot [218] be personally served with the summons within the state in the same manner as constructive service is had in other cases at law."

The provision for constructive service was added by a re-enactment of the section in 1886. (Laws 1886, Ch. 25, Sec. 4.) Otherwise the section remains as originally enacted in 1877. (Laws 1877, p. 79.) It is argued that while our statute requires that "parties to the controversy" shall be made parties, instead of parties to the contract, the provision is even broader than that of the Missouri statute, and must be held to include the parties to the contract. If that be conceded, we would still not be bound by the Missouri decisions construing the provision of their statute that "the parties to the contract" shall be made parties, for our legislature did not adopt that provision.

It is unnecessary, therefore, to consider the comparative meaning and effect of the two statutes. But we are to ascertain whether the provision of our statute that "the parties to the controversy" shall be made parties to a suit brought to enforce a mechanics' lien requires that the contractor shall be made a party to authorize a judgment foreclosing the lien. "Controversy" is defined as "a dispute arising between two or more persons." (1 Bouvier's Law Dict.; 7 Ency. L. (2d ed.) 458.) "A dispute; a disputed question; a dispute arising between two or more persons; a law suit; a suit at law; a civil action or proceeding at law." (9 Cyc. 813-814.) "A dispute between two or more persons; a civil action, or suit, either at law or in equity." (1 Rapalje & Lawrence's Law Dict.) It is apparent that in the provision under con-

sideration the word is not used in the sense of a suit, for that would make the provision read that in all suits the parties to the suit shall be made parties, which would be without practical meaning. It is rather to be understood as referring to the dispute, or the disputed question; so that its only force and effect would seem to be that the parties between whom the dispute has arisen shall be made parties. And that, taken literally, might exclude the contractor where there is no dispute between [219] him and the lien claimant. But if a personal judgment should be sought against the contractor it is clear that for that purpose it would be necessary to make him a party, although he might not dispute the account. And the owner might not dispute the amount claimed or the right of the claimant to a lien, in the sense of denying the alleged indebtedness or the right to a lien, though requiring before making payment, if only for his own protection, that a suit be brought and judgment obtained establishing the amount due and the lien. Manifestly, to apply this provision of the statute as to parties there must be some criterion for determining what constitutes the "controversy" or dispute. We think that criterion, at the outset at least, is the petition, and that in its averments and prayer, showing the cause of action and the relief sought, the "controversy" is to be found disclosed. If we are right in this interpretation of the provision, and we see no reason to doubt it, the provision adds practically nothing to what the law would be without it, for it does not prescribe or define who shall constitute or be deemed to be the parties to the controversy, but leaves that matter to be determined by the court, in the same manner as though the provision had been omitted from the statute. It certainly has no greater effect than if it had declared that the *necessary* parties to the controversy, or the parties necessary to the granting of the relief, shall be made parties to the suit. Had either phrase been used the provision would still be lacking in a definition of the term or words employed to designate the persons required to be made parties that could aid the court in determining in any case who are or who are not necessary parties to such a suit. Clearly, therefore, in our opinion, this statutory provision affords no ground for holding that the contractor is such a necessary and indispensable party to the suit that no judgment can be rendered establishing and foreclosing the lien unless he is made a party, or that the failure to make him a party cannot be waived by the owner.

Where the lien is claimed for labor performed for or materials furnished to a contractor the right to the lien or [220] its enforcement does not depend in this state upon

the condition of the accounts between the owner and contractor. The fact that there is nothing due from the owner to the contractor will not defeat the lien of such a claimant. Hence there is not the same reason for making the contractor a party as under statutes limiting the lien of a sub-contractor, laborer or materialman to the amount due from the owner to the original contractor, or requiring that before the lien can be established the state of the accounts between the owner and contractor shall be adjudicated. But it is provided by our statute (Comp. Stat. 1910, Sec. 3816) as follows:

"In cases where a lien shall be filed under the provisions of this chapter, by any person other than a contractor, it shall be the duty of the contractor to defend any action brought thereon at his own expense, and during the pendency of such action the owner or agent may withhold from the contractor the amount of money for which said lien shall be filed, and in case of judgment being rendered against the owner or his property upon the lien, he shall be entitled to deduct from any amount due by him to the contractor the amount of such judgment and costs, and if he shall have settled in full with the contractor he shall be entitled to recover back from the contractor any amount so paid by the owner for which the contractor was originally liable."

The provisions of this section were evidently incorporated in the statute for the owner's protection, and to accomplish the full purpose thereof the owner has a clear right to insist that the contractor be made a party, if possible, so that he may be bound by the judgment. While no personal judgment can be rendered against the contractor in such a suit unless there has been service of summons upon him within the state, he may nevertheless, if a non-resident of the state, be brought in as a party, for the statute has provided for constructive service in such a case. (Sec. 3806.) And by section 3809 it is provided that if the debtor has not been personally served with process according to law, but has [221] been lawfully notified by publication, the judgment, if for the plaintiff, shall be that he recover the amount of the indebtedness found to be due and the costs of suit, to be levied out of the property charged with the lien. We have no doubt, therefore, that the contractor ought to be made a party, and is a necessary party to the suit in the sense that the owner may require that he be made a party, or by proper and timely objection may defeat the action for a failure to make him a party. But such failure to make the contractor a party may be waived by the owner, for he is not, in our opinion, an indispensable party to the rendition of a valid judgment establishing and foreclosing the lien.

The terms "necessary" and "indispensable" as applied to parties to a suit are often used without distinction or as meaning the same thing, but such custom ought not, we think, to be taken as implying that all so-called necessary parties are equally indispensable to a valid determination of the suit upon the issues between the parties before the court. "Indispensable" parties are of course "necessary" parties, but some parties are necessary only in a limited sense, as where their presence may be required for the protection of some other party to the suit, or to save further litigation, though the distinction is perhaps not of much importance except when applying the rule as to waiver. Referring to the rules in equity upon the subject, the Supreme Court of the United States has classified parties as follows: "1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a [222] final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." (Shields v. Barrow, 17 How. 130, 15 U. S. (L. ed.) 158.)

That these three classes of parties clearly exist is conceded by the author of the article on the subject in the Encyclopedia of Pleading and Practice, though it is said therein that the terminology seems to be inapt and misleading, since the definition between "indispensable" and "necessary" is not readily apparent, and the two terms are used synonymously in a majority of the decisions. Therefore, in that article the two classes designated by the Supreme Court as "formal" and as "necessary" parties are treated as subdivisions of the class designated as "proper but not indispensable" parties, and named respectively as "formal or nominal parties" and "parties with separable interests." And, referring to the latter class it is said: "Parties who are proper but not indispensable include all persons who have an interest in the controversy, but whose interests are separable from those of the parties before the court and will not be directly and necessarily affected by a decree which does full justice between them and is com-

formable to equity and good conscience. The class corresponds to the class designated 'necessary parties' in the classification adopted by the United States Supreme Court." (15 Enc. Pl. & Pr. 610-611, 651, 653.) However, it is said (page 614) that the term "necessary" parties "includes persons who, while not necessary or indispensable on account of their own interest, yet are so connected with the subject-matter of the controversy that it is necessary to have them before the court for the proper protection of those whom the decree will necessarily and directly affect;" and (page 690) that "where the parties omitted are necessary only for the purpose of protecting the defendant from further litigation, the court may, in its discretion, disregard the objection if first raised at the hearing," following a statement of the general rule that the non-joinder of proper but not indispensable parties [223] must be raised by plea, answer, or demurrer, and if not so raised the defect is waived and not available at the hearing. This is to be understood, because of the classification employed in the article, as referring to all who are not indispensable parties. Whatever may be the appropriate classification of parties in stating the general rules on the subject, it is clear that there may be persons who are not indispensable but who ought to be made parties, so that where that has not been done the defendant may object, or may waive the defect by failing to object on that ground. Of course no person, whether a necessary or only a proper party, will be bound by a judgment in an action in which he was not a party. If the owner of the property is not made a party in an action to enforce a mechanics' lien no judgment can be rendered which will bind him or the property; and likewise if the contractor for whom the labor was performed or the materials furnished is not made a party, he will not be bound by the judgment. In the case of *Reformed Presbyterian Church v. Nelson*, 35 Ohio St. 638, it is said: "The proposition that, where no objection is made by demurrer or answer on account of the defect of parties, the objection is to be deemed as waived, applies only in cases where it is competent for the party pleading to waive the objection." The contractor would not be competent to waive the objection that the owner was not made a party, so as to authorize a judgment enforcing a lien upon the property, but he might waive the objection so as to permit a valid personal judgment to be rendered against himself for the amount of the indebtedness. So the owner, in our opinion, is clearly competent to waive the objection that the contractor or other subordinate who procured the labor or materials is not made a party, so far as to permit a valid judgment to be entered

foreclosing the lien. But the fact of such waiver will not justify a personal judgment against the contractor.

As shown above, the statute does not require that a personal judgment be recovered against the contractor as a prerequisite to the enforcement of the lien. And the fact that he is the debtor does not make him an indispensable party [224] to the suit to enforce the lien. His position in that respect is, it seems to us, analogous to a mortgagor who has disposed of all his interest in the mortgaged property. Notwithstanding that such mortgagor remains the debtor, and the only one personally liable, he is not regarded as an indispensable or necessary party to a suit to foreclose the mortgage, where no personal judgment is sought against him. "A necessary party" in a foreclosure suit "is one whose presence before the court is indispensable to the rendering of a judgment which shall have any effect upon the property; without whom the court might properly refuse to proceed, because its decree would be practically nugatory. The person who in this sense is a necessary party defendant is the owner of the equity of redemption." (2 Jones on Mort. sec. 1394.) It is further said in the section cited: "To obtain a judgment for any deficiency there may be after the sale, the debtor and any other person who may have assumed the debt are necessary parties; but as the primary object of the suit is to divest the title of the holder of the equity of redemption, and of others interested in it, and to transfer this by sale to a purchaser, the fact that one is personally liable for the debt makes him a proper party, but not in the general use of the term a necessary one." And in section 1402, it is said that "The mortgagor, if he remains the owner of the equity of redemption, is a necessary party to a foreclosure suit, because without his presence the primary object of the suit, a decree of foreclosure or sale, cannot be obtained. Even if he has wholly parted with his interest in the premises he should be made a party to the bill if a judgment is sought against him for any deficiency of the debt that may remain after applying to it the proceeds of the sale. Therefore, where the laws provide for a judgment for such deficiency he is always a proper party, though not a necessary one, after he has conveyed his interest, so far as effecting a complete foreclosure of the equity of redemption is concerned. If no personal judgment is sought against the mortgagor, or none can be had, he should not be made a party to the bill after he has ceased to have any interest in [225] the subject of the mortgage." (See also 27 Cyc. 1572; *Boutwell v. Steiner*, 84 Ala. 307, 4 So. 184; 5 Am. St. Rep. 375; *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Coney v*

Winchell, 116 U. S. 227, 6 S. Ct. 366, 29 U. S. (L. ed.) 610; Ayres v. Wiswall, 112 U. S. 137, 5 S. Ct. 90, 28 U. S. (L. ed.) 693.)

The following cases support the view above expressed that the rule as to waiver of a defect of parties applies in a suit brought to enforce a mechanics' lien, where the contractor has not been made a party. 27 Cyc. 346, 358; Osborn v. Logus, 28 Ore. 302, 306, 37 Pac. 468, 38 Pac. 190, 42 Pac. 997; Northwestern Cement, etc. Pavement Co. v. Norwegian-Danish Evangelical Lutheran Augsburg Seminary, 43 Minn. 449, 45 N. W. 868; Frederickson v. Riebsam, 72 Wis. 587, 40 N. W. 501; Eberle v. Drennan, 40 Okla. 59, 136 Pac. 162, 51 L.R.A.(N.S.) 68; Luttrell v. Knoxville, etc. R. Co. 119 Tenn. 492, 105 S. W. 565, 123 Am. St. Rep. 737; Duignan v. Montana Club, 16 Mont. 189, 40 Pac. 294.

It is, however, argued that the statute requiring the objection to be taken by demurrer or answer should not be held applicable, where the contractor is named in the petition as a party defendant, and the failure to bring him in as a party results from a defective service by publication. It is contended that in such a case the objection is sufficiently raised by a motion to dismiss, though made during the trial, as in the case at bar. We cannot agree with this contention. The argument that the defendant may not, under such circumstances, be sufficiently advised to raise the objection by answer, since the defect may not be apparent when the answer is due, is unsound, for the reason that it ignores the statutory provisions permitting amendments to pleadings. In *Gilland v. Union Pac. R. Co.* 6 Wyo. 185, 43 Pac. 508, where it was sought to raise the question of defect of parties by an instruction to the jury, and a motion was made after verdict to amend the answer by adding the defense of a defect of parties, so as to conform the pleadings to the proof, it was said by this court that, "when the testimony of the plaintiff disclosed the facts upon which the defendant was [226] willing to rely and maintain its proposition, the objection should have been made at that time, and application then made to amend its answer upon trial, setting forth the facts constituting the alleged defect of parties." And in *Mau v. Stoner*, 15 Wyo. 109, 87 Pac. 434, 89 Pac. 466, the allowance of an amendment to the answer at the close of plaintiff's evidence alleging a misjoinder of parties defendant was held proper, upon a showing that the amendatory facts were unknown to the defendants prior to the time when the plaintiff rested his case.

If it did not appear until the time of the trial, or during the trial, that the attempted service by publication was defective, the defendants might then have applied for leave

to amend their answer so as to set up the defense. As to all but one of the objections urged against the sufficiency of the constructive service the facts were shown by the files of the case before the answer of either defendant was filed. It appears that the petition was filed March 11, 1911, and that summons was issued on that date, which was afterwards returned showing personal service upon Charles Becker and Henry Becker, and that Brice was not found within the county. On March 15, 1911, an affidavit for publication was filed, and thereupon publication was made for service upon Brice in a daily paper for the requisite number of weeks. Proof of the publication was filed November 2, 1911, but the proof was defective for the reason that the affidavit was insufficient in that it was not properly sworn to. After some preliminary motions had been made and the plaintiffs had been permitted to amend the petition by striking out the prayer for personal judgment against Brice, and an averment supporting that prayer, a general demurrer was filed on November 4, 1911. That being disposed of and the petition being again amended, it appears that the answer was filed on December 23, 1911. The trial appears to have occurred on March 13 and 14, 1913. A motion was made at the close of the evidence for the plaintiffs to dismiss the case so far as the attempted enforcement of a lien is concerned upon the ground that Brice, the surviving member of [227] the firm of contractors, had not been brought into the case as a party and had not voluntarily appeared therein; it being alleged in the motion that said Brice had not been served personally with summons, that proper constructive or other service had not been made upon him, and that the pretended proof of publication filed in the case was void. Thereupon, it appears, that by leave of court over the objection of the defendants another or amended proof of publication was filed.

As shown above, the defective proof of publication had been on the files since November 2, 1911. An objection based on that defect or any infirmity in the publication itself might, therefore, have been presented by the answer filed several weeks later. One objection urged against the sufficiency of the service is based upon the provision of Section 4367, Comp. Stat. 1910, requiring that where the residence of a defendant to be served by publication is unknown, so that a copy of the publication cannot be mailed to him directed to his residence named therein, immediately after the first publication, the party who makes the service, his agent or attorney, shall before the hearing make and file an affidavit that the residence of the defendant is unknown, and cannot with reasonable diligence be ascertained. The affidavit for publication

173 Ky. 1.

which must precede the service by publication, and was filed in this case at the proper time, is required to show that service of summons cannot be made within this state upon the defendant to be served, and that the case is one in which service by publication is authorized. (Id. Sec. 4368.) Such affidavit in this case stated among other things that the "present residence" of the defendant, George R. Brice, was unknown, and the notice was directed to the said defendant as one "whose present address is unknown." But it does not appear that any affidavit was filed before the hearing or at any time, that the residence of the defendant cannot with reasonable diligence be ascertained, as required by Section 4367. The fact that no such affidavit had been filed might have been known to the defendants at the time of the commencement of the hearing, and clearly [228] was known to them when the plaintiffs had closed their evidence and the motion to dismiss was made. And an application could have been made when the fact first came to the knowledge of defendants to amend the answer so as to set up the defense.

We do not wish to be understood as conceding that the service upon Brice was insufficient. The trial court found that there had been due and sufficient service upon him by publication, and his default was entered, on motion of counsel for plaintiffs, when the parties announced themselves ready for trial. We find it unnecessary to consider the question, having concluded that the objection on the ground of defect of parties was waived.

The judgment will be modified as directed in the former opinion, and as so modified affirmed, and the cause will be remanded accordingly.

Beard and Scott, JJ., concur.

NOTE.

In the reported case it is held that in an action to foreclose a mechanic's lien the original or principal contractor is a necessary but not an indispensable party defendant. For a comprehensive discussion as to who are necessary or proper parties to an action to foreclose a mechanic's lien see the note to *Bacon v. Reichelt*, reported ante, this volume, at page 1.

CHESAPEAKE AND OHIO RAILWAY COMPANY

v.

HARMON'S ADMINISTRATOR.

Kentucky Court of Appeals—December 15, 1916.

173 Ky. 1; 189 S. W. 1135.

Master and Servant — Federal Employers' Liability Act — Existence of Relation.

The federal employers' liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [Fed. St. Ann. 1909 Supp. p. 584]) has no application to an employee who incurs an injury while not engaged in interstate commerce, or an injury incurred by a person who is not an employee of the railroad at the time.

[See note at end of this case.]

Same.

The relation of master and servant must be based upon a contract, either express or implied, and the terms and conditions of the contract must, in a large measure, be looked to, to determine the duties which each owes to the other, so that it may be ascertained what acts of the employer may or may not constitute negligence, as applied to the employee.

[See note at end of this case.]

Same.

A "student" fireman, who receives no wages or other return, except information, for his services, performed by virtue of a permit authorizing him to ride on the engine only of defendant's trains at his pleasure, although an employee and entitled to a reasonably safe place to work in places where he must necessarily be while performing the duties contemplated by the arrangement, is not an "employee" within the federal employers' liability act, when killed in a rear-end collision while in the caboose after having abandoned his duties temporarily.

[See note at end of this case.]

Action under Federal Act — Review — Scope of Decision — Rights at Common Law.

Where the only question before the court on an appeal from an action under the Federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Fed. St. Ann. 1909 Supp. p. 584), was whether an employee was engaged in interstate commerce when killed, which was decided adversely, it is not necessary to decide whether a common-law right of action existed.

Res Judicata — Action under Federal Employers' Liability Act — Effect on Other Remedy.

The decision on appeal that decedent's administrator had no right of action for decedent's death under the federal employers' liability act does not preclude his seeking remedy under state law if he has any.

Appeal from Circuit Court, Floyd county.

Action by Mack Harmon's administrator, plaintiff, against Chesapeake and Ohio Railway Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

Harkins & Harkins, Worthington, Cochran & Browning and F. T. D. Wallace for appellant.

May & May for appellee.

[2] HURT, J.—This action was instituted, under the federal employers' liability act (Fed. St. Ann. 1909 Supp. p. 584), by the administrator of the estate of Mack Harmon, deceased, against the Chesapeake & Ohio Railway Company to recover the damages suffered by the estate of Harmon on account of his death, which it was alleged was caused by the negligence of the employees of the appellant, railroad company. At the time of his death, the decedent was riding in the caboose of a freight train of the appellant, which was called train No. 81, and consisted of forty-eight cars and was proceeding from Shelby, Kentucky, to Russell, over appellant's track. Just as this train was passing over Burrough's Hill, another freight train of the appellant, known as train No. 83, which was proceeding in the same direction, overtook and collided with the rear of train No. 81; crushed into pieces the caboose, and instantly killed the decedent. The action for damages was based upon the allegations that the appellant was engaged in interstate commerce, and that decedent was an employee of the appellant, and, also engaged in appellant's business of interstate commerce at the time of his death, and that the proximate cause of his death was the negligence of appellant's servants, in negligently permitting and causing the collision of the trains. The appellant, by its answer, denied that it was engaged in interstate commerce, at the time and place of the injury, to decedent, and, further denied, that decedent was an employee of it, or was engaged in assisting it in interstate commerce, and that his death arose from a risk, which he assumed, and further, that he was contributorily [3] negligent. The affirmative averments of the answer were denied by a reply. The trial in the Floyd circuit court resulted in a verdict of the jury and a judgment of the court in favor of the appellee. The appellant filed grounds for a new trial and entered a motion to set aside the verdict of the jury and judgment of the court, but its motion was overruled and hence this appeal.

It seems to be conceded, that each of the trains and the crews, in charge of them, were, at the time of the collision, engaged in

interstate commerce, and that the collision was caused by the negligence of one or both of the crews of the trains, but it is seriously insisted for the appellant, that the decedent, at the time of his death, was not an employee of it and was not engaged in interstate commerce, and that, if he was an employee, he was not, at the time of his death, engaged in any duty, which was within the scope of his employment; that it owed him no duty at the time and place of his death, and hence, the court should have sustained its motion made at the conclusion of all of the evidence to direct a verdict in its favor.

The act of Congress, under which the action was instituted, deals only with the liability of a railroad engaged in interstate commerce for injuries sustained by its employees while, also, engaged in such commerce. It has no application to an employee, who incurs an injury, while not engaged in interstate commerce, or an injury incurred by a person, who is not an employee of a railroad company at the time. The admitted facts and such as are proven by the uncontradicted evidence, upon which it must be determined, as a matter of law, whether the decedent was an employee of appellant within the meaning of the federal employers' liability act, are substantially as follows:

The decedent resided at Prestonsburg, and in December, 1913, was employed by appellant as an engine watchman. After continuing in that service, for a short time, at Prestonsburg, he had employment of the same kind for some time and up to about the 28th day of May, 1914, upon the Elkhorn & Beaver Valley Railroad. There is a disagreement between the parties as to whether his employment upon the latter road was really a continuance of the employment by appellant, or whether the Elkhorn & Beaver Valley Railroad was an independent road, and the employment by it, was, as it [4] was pretended to be; but whether it was the one or the other is not material, since, on account of his services not being further needed, his employment, as engine watchman, came to an end on the 28th day of May, 1914, and he ceased to be employed in any way by either of the railroads. In the latter part of May he approached the train master and road foreman of engines of appellant, with a request for permission to go upon the trains of appellant and learn the duties of a fireman of locomotives, and to qualify himself for services of that kind, so that in the future, if his services were needed, he could be able to secure a place of that kind. He informed this official, that he had been engaged for some time, theretofore, as an engine watchman, under the directions of one Mr. Allen, who had some kind of connection with the Elkhorn & Beaver Valley Railroad, but that he had lost that

position on account of his services being no longer needed. He was then informed, that it would be necessary for him to secure a letter of recommendation from Allen, which he said he felt he would be able to do. The train master and road foreman of engines, according to his statement, conveyed a direction to the general foreman of the motor power department of appellant, at Russell, to give decedent a "permit" to learn the duties of a fireman upon the Big Sandy division of appellant's road. The decedent secured the requested letter from Allen on the 28th day of May, but, it does not appear, that he secured the "permit" from Butler, the general foreman of the motor power department of appellant, at Russell, until the 4th day of June, which authorized him to ride upon the locomotive engines of appellant with the engineers and firemen and learn the duties of a fireman. There seems to be something, which is unexplained about the "permit," which the decedent had, as the train master seems to be under the impression that Butler gave the decedent a "permit" about the time decedent first approached the train master on the subject, as he says, that thereafter the decedent approached him again on the 31st day of May, according to his recollection, and informed him that he had secured the endorsement of two engineers upon his "permit," but had lost it or mislaid it, and the train master then informed decedent that it would be necessary for him to preserve his "permit" and to secure the endorsement of three engineers upon it and return it to him before he [5] would be authorized to consider an application for a position from him, and that Butler was directed to give decedent a "permit" in lieu of the former one, but Butler is emphatic in the declaration, that he gave decedent but one "permit," which was the one exhibited on the trial and bears the date of June 4th. The widow of decedent gave testimony to the effect, that on the night of the 28th of May he was awakened after he had retired for the night by some one, whom, she said was a brakeman, who requested him to come at once and assist them, as they had a "double header" and wanted to reach some point, which she did not remember, before the arrival of some other train, and that decedent immediately arose and went toward a train, which was then at Prestonsburg, and did not return to his home until the following Tuesday morning, about four o'clock, and that he was covered with coal dirt and appeared to have been working; that he remained at home on Tuesday and left again upon the engine of a train and did not return until Thursday evening, when he remained but a short time and went away. As to what decedent was doing between the Thursday night, when he was called from his

home, and the following Thursday evening, when he returned on a train, is not material, as he, on Thursday, June 4th, on the evening of which he returned to his home at Prestonsburg upon the train, had secured the "permit," which is exhibited, in the evidence, and there is no pretense that he was on the trains under any other kind of arrangement than the one indicated, to learn the duties of a fireman. On Thursday afternoon, when train No. 81, which was proceeding from Shelby to Russell, arrived at Woods, which is a station between Prestonsburg and Shelby, an engine, with a caboose attached, arrived from in the direction of Prestonsburg. Decedent was riding in the engine cab with the engineer. When train No. 81 had arrived within a few miles of Prestonsburg, the decedent came over the train, from towards its rear, to the engine and got upon the engine, where he exhibited the "permit," which Butler had given him that day, to the engineer, and thereupon the engineer directed the fireman to stand aside and to permit the decedent to act as fireman, which he did until the arrival of the train at Prestonsburg. The train remained at that point for about one hour, during which the boiler was filled with water, the engine inspected, and the ash pan cleaned [6] out by the regular fireman. Decedent said to the engineer, that he would go to his home, which was nearby, and secure some clothing, and that if the train pulled out before his return, that he would catch on to the caboose and then come on to the engine along the train and perform the duties of fireman. The conductor testified, that just before the train proceeded on its way, decedent returned and entered the caboose; that the engineer had requested him to tell the decedent to come and ride upon the engine and assist the fireman, and that he delivered the message, but that decedent said that he had "fired" an engine from Russell that evening and was tired and would rest a while; that he urged decedent to leave the caboose, and said to him that he had no right to permit him to ride in it, but the decedent declined it and exhibited his "permit," but the conductor told him, that he did not authorize him or permit him to ride in the caboose, but that he must go and ride upon the engine. The decedent, however, remained in the caboose and when the train arrived at Paintsville, the engineer again requested the conductor to tell the decedent to come and assist in "firing" the engine; that he delivered the message to decedent and again requested him to leave the caboose, but the decedent declined to do so, but said that he would go to the engine when the train arrived at Richardson. The train thereafter stopped at Richardson and at Chapman and, also, at Torchlight, at each of which places

the conductor testifies that he requested the decedent to leave the caboose and go to the engine, and upon one of the occasions said to him, that he could never learn the duties of a fireman by riding in the caboose, and that at one of these places the engineer again sent a message to decedent to come on over to the engine. The decedent remained until the next stop, which the train made at Catalpa. The fireman was very tired and somewhat exhausted by this time and the engineer again requested decedent to come and assist. The message to him from the engineer was again conveyed to the conductor. The engineer corroborates the conductor in these statements. The decedent did not make any motion to go to the engine, until after the train was proceeding from Catalpa, when the conductor advised him, that because of the darkness, it was not safe for him to undertake to go over the train to the engine with the train moving as it was. After leaving that point and as the train had [7] arrived at the top of Burnaugh Hill, the conductor and rear brakeman, who were in the caboose, discovered that the engine of train No. 83 was dangerously near and approaching very rapidly, and the certainty of a collision seemed to be imminent. The decedent was lying asleep in the caboose, when the brakeman cried out to him, that the approaching train was going to run into the caboose, and lighted a fuse as a warning to the approaching train; the conductor then ran to decedent and awakened him, but the danger was then imminent and the conductor and brakeman jumped off from the caboose and saved themselves, while the engineer, fireman and front brakeman on train No. 83, sprang down from the engine of their train, just before it struck the caboose, with the result above mentioned. It should be, also, stated, that it was proven by another witness, that just as train No. 81 was leaving Prestonsburg, the decedent was seen standing upon a coal car in the train, with his face in the direction of the engine. This witness, also, stated, that shortly before the train had arrived at Prestonsburg, he saw the decedent upon the engine and engaged in throwing coal into it, while another witness, who says he was in company with the last mentioned witness, testified that as the train was leaving Prestonsburg, he saw the decedent engaged in putting coal into the engine, but the engineer, fireman and front brakeman upon the train all testify that they did not see the decedent, and that he was not upon the engine, at any time, after the train had arrived at Prestonsburg, and in this statement, they are corroborated by the conductor. The train left Prestonsburg about 7 o'clock P. M., and the collision occurred, at about 3 o'clock, on the next morning, and there is no

disagreement, in the evidence, as to the fact, that decedent was ever upon the engine, at any time, after the train left Prestonsburg. The engineer, fireman and front brakeman on train No. 81 escaped unhurt from the effects of the collision, and in fact the collision affected the engine, upon which they were riding, so slightly, that they did not know until they had received information of it, what had happened, or that a collision had occurred at the rear of the train. It is apparent, that if the decedent had been upon the engine, where he was authorized to ride, that he would have escaped from the effects of the collision unharmed. All the testimony was to the effect that decedent was occupying the position, which [8] is called in the railroad's parlance, a "student" fireman; that he received no wages or return for his services, except the information, which would enable him to perform the duties of a fireman; that the "permit" authorized him to ride upon the engine of the train and at no other place; that while upon the train he was under the direction of the engineer; that no promise of employment was made him; that the railroad company kept the names of such persons as had received the endorsement of three engineers, as fit persons to be employed as fireman, for future reference, in the selection and employment of fireman; that when a "student" fireman had secured the approval of three engineers, who would endorse him as apparently having the qualities necessary to make a fireman, after an examination by some superior official of the company and found to be acquainted with the duties of the position, his application for employment of that kind would be considered when a man was needed for such a place.

The "permit," which the decedent held and by virtue of which he was upon appellant's trains, was as follows, viz.:

"Russell, Ky., June 4, 1914.

"To M. C. Harmon:

"This will be your authority to learn the road on the Big Sandy division as fireman.

"Yours truly,

"F. R. BUTLER,
"General Foreman."

To be an employee of a railroad corporation, in the capacity of an operative, upon a train, it is apparent, that the relation of master and servant must exist between the company and the individual, who claims to be an employee. The relation of master and servant must be based upon a contract, either express or implied, and the terms and conditions, of the contract, must, in a large measure be looked to, to determine the duties, which each one owes to the other, so that it may be ascertained, what acts of the em-

ployer may or may not constitute negligence, as applied to the employee. It has been said that "various tests have been proposed for determining when the relation of master and servant exists, so as to render the master liable to indemnify the servant for personal injuries; but it is impossible to [9] lay down any definite and satisfactory rule applicable to all cases; and the question must be determined as it arises, upon the facts and circumstances of the particular case." 26 Cyc. 1083. When the terms of the arrangement between appellant and decedent is looked to, it is apparent that it does not contain any obligation upon the decedent to ever go upon one of appellant's trains or engines, or to in any manner undertake to learn the duties of a fireman, and that no time is provided, within which, he may take advantage of the permission given to him, to ride upon the engines and receive information as to the duties of a fireman. He may take one trip, and never go upon another, or he may ride from one station to another, and there desist in his endeavors until another time, and if he resumes, he then may go upon some other train and in another direction. He is absolutely free to use his own pleasure, as to when and upon what train, and at what time or times, he will undertake to exercise the permission granted to him, or he may decline to ever exercise it, or he may commence to do so and desist at such time and place, as he may desire. It is, furthermore, apparent that the railroad company may, at any time, withdraw its permission to ride upon its engines or to receive information from its employees or experience in the duties of a fireman upon its trains. If he takes advantage of the permission granted him and learns the duties of a fireman and secures the endorsement of the three engineers, and takes successfully the examination upon the duties of a fireman, he is still free to refuse employment as a fireman, and the railroad company is free, never, to engage his services. While, however, he is exercising his privileges under the permission granted him and is performing the duties contemplated by the arrangement, the railroad company is accepting his services, and in consideration of same is giving him the knowledge and experience, which will fit him for the avocation of a fireman. What the "student" fireman is receiving and what the railroad company is receiving in return is valuable. While the "student" fireman is upon the engine and performing the duties contemplated by the arrangement, and within the scope of his duties under the arrangement the railroad company certainly owes to him the same duties it owes to the regularly employed fireman of an engine in his employment. *Rief v. Great Northern R. Co.* 126

Minn. 430, 148 N. W. 309. The law makes him an employee [10] while engaged in the duties expected of him under the arrangement, and being accepted by appellant. It is the duty of the railroad company to furnish its servant with a reasonably safe place to perform the work required of him. He is, also, entitled to this duty from the master, while he has to be in places, which are incident to his work—that is such places at which he must necessarily be, in connection with his work. It has been held that the relation of master and servant, in so far as the duty to protect the employee is concerned, begins when the servant is necessarily on the premises of the master, in accordance with his contract of employment. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, Ann. Cas. 1914C 159, 34 S. Ct. 305, 58 U. S. (L. ed.) 591; *Gray v. Chicago*, etc. R. Co. 153 Wis. 637, 142 S. W. 505; *Fletcher v. Baltimore*, etc. R. Co. 168 U. S. 135, 18 S. Ct. 35, 42 U. S. (L. ed.) 411; *St. Louis*, etc. R. Co. v. *Seale*, 229 U. S. 156, Ann. Cas. 1914C 156, 33 S. Ct. 651, 57 U. S. (L. ed.) 1129. Under the arrangement between decedent and appellant, it was the duty of decedent, when undertaking to take advantage of the terms of his arrangement, to be upon the engine, and under the direction of the engineer. It is apparent that he could not perform any of the duties of his position while riding or sleeping in the caboose, at the farthest point upon a long train from the engine. He had a right, as before stated, to desist from his duties, at any time he chose, but he could not do so and insist upon riding upon a train, at a place where, under the scope of his employment, he had no right to be. The caboose was not a place where his duties necessarily required him to be in connection with the duties of his employment. If the uncontradicted evidence is to be believed, he, when he received his injuries, had for the time being, at least, abandoned and desisted from exercising the duties of his employment, as he had a right to do, and for his own wishes and convenience was at a place where his employment did not make it necessary for him to be, and was refusing to engage in the work contemplated by his arrangement, and, under the facts, was not at the time, an employee within the meaning of the act under which the appellee seeks a recovery and under the arrangement with the appellant. It could not be successfully contended, that even a regularly employed servant of a railway carrier, who received a regular wage for his services, but who received an injury from the negligence of the carrier, when he was not upon duty, and not engaged in any service for the carrier, and was not at a place where he had a right to be, or [11] where it was necessary for him to be in the performance

of his duties when on duty, is an employee of the carrier, within the meaning of the federal employers' liability act. One of the reasons is obvious. The injured servant was not, at the time of his injury, engaged in interstate commerce. The duty of a railway carrier to provide a reasonably safe place for its servant to do the work required of him applies to every place where the employee must necessarily be in connection with the duties of his employment, but as was said in *Hobbs v. Great Northern R. Co.* 80 Wash. 678, 142 Pac. 20, 56 L.R.A. (N.S.) 503:

"But that duty is not incident to a place, where a servant is not required to be in the performance of his work. Nor does it cover the servant when he is not within the scope of his employment or doing some act which is not incident to his employment. This rule is sustained by all the authorities and the Federal act in no wise attempts to change it."

The same rule is upheld by the decisions of this court. *Louisville, etc. R. Co. v. Hocker*, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119; *Louisville, etc. R. Co. v. Pendleton*, 126 Ky. 605, 104 S. W. 382. Under the terms of the employment of decedent, he was a servant of appellant at the times he was engaged in its service, and in the performance of the duties, which he was, by the terms of the arrangement, expected to perform, and not when he was not engaged in such duties, and at a place entirely without the scope of his employment to be, and where no duty connected with his employment required him to be. There is no sufficient reason shown why he was refusing to perform the duties expected of him, except his own pleasure, and at the time of his injury and since the evening before, he had not been engaged in the service of appellant. For the reasons given, the court should have sustained the motion for a direct verdict made by appellant.

The instruction upon the measure of damages was erroneous, as held by the United States Supreme Court in *C. & O. R. Co. v. Kelly*, 167 Ky. 745, 181 S. W. 375, decided June 5th, 1916, but with the conclusion we have arrived at upon the main question in the case, as above expressed, it is not necessary to pass upon the other questions raised upon the motion for a new trial.

The judgment is therefore reversed and cause remanded for proceedings consistent with this opinion.

ON PETITION FOR REHEARING.

(March 23, 1917.)

174 Ky. 850, 192 S. W. 817.

[850] HURT, J.—The question before this court in this case was, whether the appellee's intestate, at the time of his death, was an employee of appellant and engaged in interstate

commerce, so as to make appellant liable for damages on account of his death, in an action under the federal employers' liability act. The conclusion arrived at was, that he was not. The recovery was sought solely under the provisions of that statute. Hence the conclusion that the motion for a directed verdict should have been sustained. Whether, under the facts stated, there was a cause of action for any reason under the common law of the state, was not before us then nor now and was not considered. It was not necessary for this court, in order for appellee to take advantage of his common-law remedies, if any he has, upon the return of the case to the trial court, for this court, in advance, to determine such rights and their nature and to give any direction in regard to same, as such questions were in no way before us upon the record. The result of the decision does not preclude [851] the appellee from seeking his remedy under the state law, if any he has, in accordance with the principles announced by this court in *Illinois Cent. R. Co. v. Kelly*, 167 Ky. 745, 181 S. W. 375; *Cincinnati, etc. R. Co. v. Tucker*, 168 Ky. 149, 181 S. W. 940; and *Cincinnati, etc. R. Co. v. Hansford*, 173 Ky. 126, 190 S. W. 690, upon the return of the case to the trial court.

Hence, the petition for rehearing, modification and extension of the opinion is overruled.

NOTE.

Existence of Relation of Employer and Employee under Federal Employers' Liability Act.

Introductory, 46.

In General, 47.

Employee Going to or Returning from Work, 47.

Employee Learning Business, 49.

Employee Violating Order, 49.

Employee Serving Two Railroads, 50.

Employee of Lessee Railroad, 52.

Independent Contractor, 52.

Express Agent, 52.

Pullman Car Employee, 53.

Introductory.

The federal employers' liability act (Fed. St. Ann. 1909 Supp. p. 584) imposes on common carriers by railroad while engaging in interstate commerce a liability in damages "to any person suffering injury while he is employed by such carrier in such commerce." By the terms of the statute as quoted two conditions to the existence of the liability must co-exist; the injured person must be employed by the carrier and he must be employed in interstate commerce. The present

note deals specifically with the first mentioned of these conditions—the necessity that the relation of master and servant shall exist between the carrier and the injured person in order to give rise to a liability under the act. The question when an employee is engaged in interstate commerce so as to come within the terms of the act is discussed in the notes to *Illinois Cent. R. Co. v. Bihrens*, Ann. Cas. 1914C 163; *Shanks v. Delaware, etc. R. Co.* Ann. Cas. 1916E 467, and *Minneapolis, etc. R. Co. v. Winters*, reported post, this volume, at page 54. In the construction of the statutory phrase heretofore quoted a third prerequisite to liability under the act has been imposed; viz., that at the time of receiving the injury the employee must have been acting within the scope of his employment. The cases discussing that question are reviewed in the note to *Byram v. Illinois Cent. R. Co.* Ann. Cas. 1918A 1067.

In General.

That in order to give a right of action under the federal employers' liability act, the relation of employer and employee must exist between the railroad and the person injured at the time of the injury is clear from the terms of the statute and is unhesitatingly recognized by all the cases in which the question has arisen. Thus where it appeared that an employee of a business corporation while at work on a vestibule of a building belonging to it and by means of which freight was being unloaded from a car brought from without the state was injured by the negligence of the railroad company it was held that he could not sue the railroad company under the act despite the fact that his employer was engaged in interstate commerce. *Ft. Worth Belt R. Co. v. Perryman* (Tex.) 158 S. W. 1181, writ of error *denied* 161 S. W. XV no op. And an employee of one railroad cannot maintain an action under the federal employers' liability act against a second railroad for injuries caused by it while shifting cars in the yards of the first road, there being no evidence of the existence of the relation of employer and employee between the second road and the injured person. *Kentucky, etc. R. Co. v. Minton*, 167 Ky. 516, 180 S. W. 831.

In *Atlantic Coast Line R. Co. v. Tredway* (Va.) 93 S. E. 560, in speaking of the character of the relation contemplated by the act, the court said: "The federal act in question does not itself define the meaning of the word 'employee,' or the word 'employed,' also used in the act. That portion of such act (section 1 [U. S. Comp. St. 1916, § 8657]) which is pertinent to the question under consideration, is as follows: 'Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . or, in case of the death of such em-

ployee, to his . . . personal representative.' The learning and exhaustive search of able counsel on both sides of this case have not resulted in citing us to any decision or discussion by any textwriter of the meaning of these terms as employed in such act. The precise question before us seems, therefore, to be a novel one both in our federal and state courts. The word 'employer,' and more especially the word 'employee,' considered apart from their context in the federal act, are ambiguous in their meaning. They may be limited in meaning by the idea that an express contract of hiring by the carrier of and the payment of wages by the latter to the employee are essential to bring him within the provisions of the act. Or they may have a broader meaning and include as employees all who are engaged in the discharge of duties of servants of the carrier, whose service is knowingly accepted by the latter. On a collateral question it has been held that the failure of the Congress to define the meaning of the words referred to above manifests a purpose in the legislation in question that these words should be interpreted and understood in their ordinary sense and according to their usage in the law of master and servant. *Louisville, etc. R. Co. v. Walker* (1915) 162 Ky. 209, 172 S. W. 517. That is to say, the relationship of employer and employee is the same as that of master and servant."

Employee Going to or Returning from Work.

Generally an employee is deemed to be in the master's service whenever present to perform his duty under the contract creating the relation of master and servant and subject to orders, although at the given moment he may not be engaged in the actual performance of any labor, but only on his way to take up his duties. *Lamphere v. Oregon R. etc. Co.* 196 Fed. 336, 116 C. C. A. 156, 47 L.R.A.(N.S.) 1. Thus in *Missouri, etc. R. Co. v. Rentz* (Tex.) 162 S. W. 959, wherein it appeared that an engineer was injured while on his way to the roundhouse to take out his engine, the rule was stated as follows: "It is contended, however, that when appellee halted in his journey to the roundhouse, stepped upon the track upon which he was injured, and engaged in conversation with his fellow servants, he thereby voluntarily suspended the relation of master and servant, and, his injuries having been received during such suspension, appellant was not liable. Having determined that appellee was in the employ of appellant at the time of the injury, he then comes within that class of cases, . . . which hold that though the employee may not be actually engaged in labor that fact does not destroy the relation of master and servant, and accordingly appellant

owed appellee the duty of the master to the servant."

So a fireman going on the premises of a railroad in answer to a call for service has been held to stand in the relation of employee within the meaning of the act. *Philadelphia, etc. R. Co. v. Tucker*, 35 App. Cas. (D. C.) 123, wherein it was said: "When Tucker was killed he was upon the premises of the defendant, in response to its call, to assume the duties he had been engaged by the defendant to assume, and for their mutual interest and advantage. Can it be that under such circumstances the relation which the decedent sustained to the defendant was that of a mere stranger? Is it possible that the act under consideration warrants a distinction so fine as to permit a master to escape liability for negligence resulting in the injury of one hired to perform service, because the injury occurs before the service is actually undertaken, notwithstanding that, at the time of the injury, the servant is properly and necessarily upon the premises of the master for the sole purpose of his employment? We think not. Such a rule, in our view, would be as technical and artificial as it would be unjust. We think the better rule, the one founded in reason and supported by authority, is that the relation of master and servant, in so far as the obligation of the master to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master. The servant in such a situation is not a mere trespasser nor a mere licensee. He is there because of his employment, and we see no reason why the master does not then owe him as much protection as it does the moment he enters upon the actual performance of his task."

It has been held that a brakeman who, having completed his trip, was being sent back on a pass on a passenger train when he was injured, was still an employee of the railroad and not a passenger and so entitled to the benefits of the act. *St. Louis Southwestern R. Co. v. Brothers* (Tex.) 165 S. W. 488, wherein it was said: "Arriving at Ft. Worth, the end of his run, he was directed to return to Commerce and there report for further duty, which his contract also bound him to do, and for doing which he was compensated. . . . He commenced his journey, and was injured while en route, and under the rule stated and the contract of employment it cannot be said that the relation of carrier and passenger existed, even though Brothers was on a passenger train and performing no actual service, since he was there as a servant receiving compensation and entitled to be on the train solely because of his employment."

The rule as heretofore stated in regard to an employee going to work is equally applicable to an employee injured while leaving the premises of the railroad after completing his work. *Louisville, etc. R. Co. v. Walker*, 162 Ky. 209, 172 S. W. 517. Thus it has been held that a section hand injured after working hours while returning on a hand car to his bunk house was still an employee of the railroad. *Salabrin v. Ann Arbor R. Co.* (Mich.) 160 N. W. 552, wherein it was said: "It is contended that, even assuming the plaintiff to have told the truth with regard to the inception of the journey, it is contradicted upon this record that the quitting time was five o'clock. It is therefore urged that when five o'clock came plaintiff and his companions were at liberty to go in any direction their several fancies might dictate, and that if plaintiff and his companions chose rather to wait for the departure of the hand car from Dundee in order to secure a ride from that point of Lulu, where their sleeping and living car was located, it should be held that in so doing they were acting for their own pleasure and convenience, and not as employees of the defendant company. We are unable to agree with this contention. It seems to us that it would make no difference whether the journey was undertaken before or after the hour when plaintiff usually quit his daily labor, provided it was so undertaken at the command of the master through the foreman and for the benefit of the master. If, as plaintiff testifies, the foreman instructed him to accompany the party for the purpose of obtaining the 'jack,' and he remained with the hand car after obtaining the 'jack' at the command of his foreman until the return of the party from Dundee, and then entered upon the return trip with the rest of the party, we think it should be held that at the moment of collision he sustained the relation of servant to the defendant company as master."

In *Grow v. Oregon Short Line R. Co.* 44 Utah 160, Ann. Cas. 1915B 481, 138 Pac. 398, it appeared that an employee engaged in installing a block system was injured while being carried from his work on a tricycle operated over the tracks of the railroad. In answer to the contention that the relation of master and servant had ceased as between him and the railroad, the court said: "We think the relation of master and servant between the deceased and the defendant with respect to the latter's liability for the charged negligence as clearly existed at the time of the injury as though the deceased then had been actually engaged in his work along the track."

In *Easter v. Virginian R. Co.* 76 W. Va. 383, 86 S. E. 37, it was said in a syllabus by the court: "The relation of master and

servant between a railroad company and one of its trainmen does not necessarily terminate the instant the train reaches its destination on the company's yards, or the servant ceases to labor, but continues for a reasonable time thereafter to enable such employee to wash himself and change his soiled clothing, in the caboose provided with the conveniences therefor, before going to his lodging place; such being the custom of trainmen. . . . What is a reasonable time is generally a question of fact for the jury to determine from all the facts and circumstances of the particular case; but, when there is no evidence tending to prove the time reasonably required for a trainman to make his toilet, preparatory to leaving the train for his lodging place, and his evidence proves that he consumed no more time than was required for that purpose, the fact that about one hour had elapsed between the arrival of the train and the accident does not warrant the inference that the time was unreasonable; and the giving of an instruction which assumes the existence of the relation of master and servant at the time of the accident is not reversible error. In view of the established facts, it cannot be said, as matter of law, that an hour was unreasonable time."

But in *Perez v. Atchison, etc. R. Co.* (Tex.) 192 S. W. 274, it was held that a section hand who after his day's work was done was standing behind a box car for shelter from the weather and to watch his children to see them safely across the tracks was not an employee of the railroad company at the time and so could not maintain an action under the federal employers' liability act.

Employee Learning Business.

The holding of the reported case that a student fireman is an employee of the railroad though receiving no compensation for his services finds support in *Rief v. Great Northern R. Co.* 126 Minn. 430, 148 N. W. 309, wherein it appeared that the injured employee was a student brakeman learning the business under a contract with the railroad which contained among others the following provision: "It being fully understood and agreed by me that while learning the duties and requirements of such position I shall receive no compensation and in no sense be deemed a servant or employee of said company, but merely a licensee upon its property, trains and cars for my own personal benefit and education, the license to be revoked at any time at the option of the company." Holding the brakeman to be an employee of the railroad company despite the quoted provision in the contract the court said: "The court held that plaintiff was an employee of the defendant as a matter of law, and since it was admitted that the train from

Ann. Cas. 1918B.—4.

which plaintiff fell was engaged in interstate traffic, the court excluded the contract as void and of no effect under the federal employers' liability act (Act April 22, 1908, c. 149, 35 St. 65 [U. S. Comp. Stat. Supp. 1911, p. 1322]). We think there was no prejudicial error in the ruling. For, although there is nothing in the contract itself indicating that plaintiff as student brakeman was to render any service whatever for defendant, the testimony conclusively shows that he was expected to perform, and did perform, such tasks as were assigned him by the members of the crew in charge of the trains. He helped load and unload freight at way-stations, threw switches and did whatever he was ordered to do in the operation of the train . . . he was an employee and not a licensee." To the same effect see *Findley v. Coal, etc. R. Co.* 76 W. Va. 747, 87 S. E. 198.

Employee Violating Order.

The mere violation by an employee while engaged in his duties of an order or regulation of the railroad does not have the effect of suspending the relation of master and servant and so depriving him of the benefit of the federal employers' liability act. Thus, holding that the violation of the rules of the company by an engineer did not place him without the scope of his employment, the court in *Louisville, etc. R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125, said: "It was a duty of plaintiff's intestate under his employment to break in, try out, or test engines, and that is beyond dispute what he was doing when he was killed. That he may have acted imprudently, or negligently, or contrary even to some rule provided for his governance, did not necessarily bar a recovery under the federal statute, nor put him without the line and scope of his employment. It is possible, of course, that plaintiff's intestate, in the use of the engine, may have departed entirely from his employment, and in such case defendant would not have been liable to him as an employee, but there was no evidence to sustain such theory in this case. The mere fact that he was operating his engine at a high rate of speed was no evidence that he had wholly quit the purposes of his employer."

In answer to the contention that the violation of an order for the movement of his train by a motorman on an interstate electric railroad terminated the relation of employer and employee for the time being, the court in *Spokane, etc. R. Co. v. Campbell*, 241 U. S. 497, 36 S. Ct. 683, 60 U. S. (L. ed.) 1125, said: "This invokes the doctrine that where an employee voluntarily and without necessity growing out of his work abandons the employment and steps entirely aside from

the line of his duty, he suspends the relation of employer and employee, and puts himself in the attitude of a stranger or a licensee. The cases cited are those where an employee intentionally has gone outside of the scope of his employment, or departed from the place of duty. The present case is not of that character; for Campbell, as the jury might and presumably did find, had no thought of stepping aside from the line of his duty. From the fact that he disregarded and in effect violated the order as actually communicated to him, it, of course, does not necessarily follow that he did this wilfully. The jury was not bound to presume—it would hardly be reasonable to presume—that he deliberately and intentionally ran his train out upon a single track on which he knew an incoming train with superior rights was then due. However plain his mistake, the jury reasonably might find it to be no more than a mistake attributable to mental aberration, or inattention, or failure for some other reason to apprehend or comprehend the order communicated to him. In its legal effect this was nothing more than negligence on his part, and not a departure from the course of his employment.”

Employee Serving Two Railroads.

In *Atlantic Coast Line R. Co. v. Tredway* (Va.) 93 S. E. 560, the question at issue was whether a signalman at a crossing of two railways was an employee of the defendant railroad within the meaning of the federal employers' liability act. It appeared that the Southern Railway Company by agreement with the Atlantic Coast Line Railroad Company and in pursuance of the Virginia statute relating to the subject had undertaken to construct a crossing over the latter's tracks on consideration that it, the Southern Railway, should bear all expense including the hiring and payment of proper signalmen. Holding that the injured signalman was an employee of the Atlantic Coast Line Railroad Company, the court said: "In the law of master and servant the principles of the common law determining when this relationship exists are well settled. At common law, upon the question of whether the relationship of master and servant exists, there are four elements which are considered: (1) Selection and engagement of the servant; (2) payment of wages; (3) power of dismissal; and (4) the power of control of the servant's action. . . . The first, second, and third of these elements are not essential to the relationship. . . . The 'power of control' is the most significant element bearing on the question. . . . Is this the ultimate fact to be sought in our inquiry? Manifestly not, where the duties of the serv-

ant are nonassignable. If the master could escape liability for the torts of his servants, or for negligent injuries to them, by surrendering his power of control over them, in a qualified way (as was done by the agreement in evidence in the instant case), or by entirely surrendering such control, he might do so. Yet, plainly, in the case of nonassignable duties, the inquiry would still remain, in every case of tort or injury aforesaid: Did the relationship of master and servant in fact exist? If so, the duties imposed by law upon the master as the result of that relationship would remain, independent of the fact in whom the immediate or ultimate power of control of the servant might reside. The defendant had the power of control in question originally. It need not have parted with it. If by the agreement in evidence it did part with it, partly or wholly, it could not thereby divest itself of the legal responsibility it was under to exercise such control. It is indeed illogical and unsound in principle to make the possession of the power of control of a servant the test in the ascertainment of who is the master of such servant, in cases where the duties of the latter are nonassignable. In truth, it follows rather from the relationship of master and servant—from the mutual duties and obligations which the law imposes as the result of such relationship—that the master has the right of control of the servant, than does the relationship follow from the existence of the power of control. The latter may indeed, and does in fact almost invariably, accompany the former; but it accompanies it as an effect and not as a cause. Again, it may not invariably accompany the relationship, as we have seen. This consideration alone condemns it as a test of the existence of the relationship in question. Therefore, while we have not found it elsewhere so expressed in terms, the authorities on the subject have developed and led us to the necessary conclusion, where the duties of the master are nonassignable, that control is not the ultimate fact for which we are in search. The ultimate facts are: Was the person in question engaged in the discharge of the duties of a servant of another, and was that service accepted by that other—was such service rendered and accepted? If so, the law implies the contract of master and servant between the latter and the former—of employer and employee—and the existence of that relationship between them. We are aware that many authorities give no weight to the rendition of the service and predicate the conclusion that one is or is not the master upon the four elements above referred to being present or absent in the conduct of the latter. The effect which a knowing acceptance of the service must have,

in principle, is often overlooked. Further: Were the service not accepted as that of a servant, and, by express agreement or otherwise, the master were to attempt to escape responsibility by relinquishing control of the servant—where the duty is nonassignable—the master cannot escape the duty resting upon him by relinquishment of control of the servant, or by otherwise making it impossible for himself to perform the duty. . . .

So, in the instant case, the duties of the plaintiff's intestate (among others) were to operate signals connected with the passage of the trains of defendant and to keep a certain light, which served exclusively the operation of certain of defendant's trains. They were in their very nature duties necessarily to be performed by some one for the defendant, to enable the latter to discharge its public service duties as a common carrier,—its public employment under its franchise.

. . . . They were therefore duties of the defendant, and not of the Southern Railway Company, or of any other person or corporation. Their discharge was the discharge of duties of a servant to the defendant. That service by the plaintiff's intestate was knowingly accepted by the defendant. Hence, upon the established principles of the common law, the plaintiff's intestate was a servant—an employee—of the defendant. If it were thought that ultimate power of control—and, indeed, the selection and engagement of the plaintiff's intestate, the power of dismissal and the payment of his wages, were essential to his relationship to the defendant being that of an employee—all of these elements will be found, on consideration, present and possessed by the defendant in the instant case. With respect to the ultimate power of control, that was possessed by the defendant through the Southern Railway Company. If the latter had supplied an inefficient servant for the discharge of the duties of the plaintiff's intestate and had refused to discharge him, it would have been a breach of contract for which the law would have afforded ample remedy to enable the defendant to accomplish the discharge of such a servant and the engagement of a competent servant in his stead. Indeed, counsel for defendant, in the trial of the case in the court below, very properly and correctly stated, in effect, that, in case there should be a breach of its duty by the Southern Railway Company to the defendant in the matter of supplying the former with efficient servants in and about the signal tower, the defendant 'would find a way' to control the matter. No absolute right of control of the employees contemplated thereby was vested in the Southern Railway Company by the agreement in evidence, or by the Virginia statute on the subject. Quoad the service to

be rendered by the employees for the defendant, the agreement imposed the undertaking of the immediate control upon the Southern Railway Company for the benefit of the defendant. The former was merely the agent of the latter in performing such undertaking, both under said agreement and under the Virginia statute. There was nothing in the Virginia statute which forbade or prevented the defendant from exercising such control directly—as indeed the defendant is now doing, the agreement in evidence having been abrogated since the case at bar arose. There is nothing in section 1294b, cl. 3, Pollard's Code Va. 1904, referred to in reply brief for the defendant, inconsistent with the foregoing conclusions. From this it is manifest that while said agreement was in force the Southern Railway Company was merely the agent of the defendant under such agreement to exercise the immediate control of the plaintiff's intestate, with the ultimate power of control remaining vested in the defendant. *Qui facit per alium, facit per se*. With respect to the selection and engagement of the plaintiff's intestate and the power of dismissal, what is said in the next three preceding paragraphs above holds true. . . . With respect to the payment of wages, they were in effect paid by defendant through its predecessor in title, when the latter furnished the consideration of permitting the crossing, for which the agreement in evidence, and the Virginia statute in such case made and provided, bound the Southern Railway to pay such wages. Hence we have present as the instant case all four of the elements above referred to which are considered upon the question of whether the relationship of master and servant exists."

In *Wichita Falls, etc. R. Co. v. Puckett* (Okla.) 157 Pac. 112, it appeared that two railroad companies were incorporated under the laws of different states, but their tracks connected at the state line, and together formed a continuous line of railroad extending into both states. Both the companies used the same headquarters, roundhouse, and switch yards, had the same managing and operating officers, employed and used the same engineers and train crews, used indiscriminately each other's engines, cars, and trains, jointly operated through trains and train crews over both lines of road, sold continuous tickets and carried passengers over both roads, and deposited the earnings of both companies in one common fund received, kept and disbursed by a common auditor of both companies, from which common fund the employees and expenses of both companies were paid. The joint earnings and expenses were respectively credited and charged to each company in proportion to the mileage owned by it of the aggregate continuous lines of

railroad in the two states. The same common managing officers of both companies had authority to employ, direct, control, and discharge at will the engineers and other employees of both companies, all of whom might be required to work on either company's line of railroad. It was held that an engineer so employed and controlled, who was injured by the negligence of one or both of such railroad companies, while doing the work of both, was an employee of both within the meaning of the federal employers' liability act, and might sue one or both of the companies.

Employee of Lessee Railroad.

An employee of one railroad which operates in part over the tracks of another through an agreement of lease does not thereby become an employee of the lessor road and so cannot maintain an action against it under the federal employers' liability act. *Chicago, etc. R. Co. v. Wagner*, 239 U. S. 452, 36 S. Ct. 135, 60 U. S. (L. ed.) 379, *affirming* 265 Ill. 245, Ann. Cas. 1916A 778, 106 N. E. 809.

Independent Contractor.

A person put in charge of the coal chutes of a railroad under a written contract whereby he was to be responsible for his own labor and was to have absolute charge of the handling of the coal, the railroad being interested only as to the results of the work and having no control over the manner or mode in which it was done, was held in *Chicago, etc. R. Co. v. Bond*, 240 U. S. 449, 36 S. Ct. 403, 60 U. S. (L. ed.) 735, *reversing* 47 Okla. 161, 148 Pac. 103, to be an independent contractor and not a servant of the railroad and not to come within the federal employers' liability act. The court in that case said: "There was, it is true, and necessarily, a certain direction to be given by the company, or rather, we should say, information given to Turner. But the manner of the work was under his control, to be done by him and those employed by him. He was responsible for its faithful performance and incurred the penalty of the instant termination of the contract for nonperformance. This was only a prudent precaution, indeed, necessary in view of the purpose of his contract, which was to make provision for a daily supply of coal for the operation of the railroad. The power given was one of control in a sense, but it was not a detailed control of the actions of Turner or those of his employees. It was a judgment only over results and a necessary sanction of the obligations which he had incurred. It was not tantamount to the control of an employee and a remedy against his incompetency or neglect. The whole instrument shows system and particu-

lar care. It is not the engagement of a servant submitting to subordination and subject momentarily to superintendence, but of one capable of independent action, to be judged of by its results. And the covenants were suitable for the purpose, only consistent with it, not consistent with a temporary employment. This is manifest from the provision for payment, from the careful assignment of liabilities and the explicit provision that Turner 'shall be deemed and held as the original contractor and the railroad company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished.' The railroad company, therefore, did not retain the right to direct the manner in which the business should be done, as well as the results to be accomplished, or, in other words did not retain control not only of what should be done but how it should be done. . . . We do not think that the contract can be regarded as an evasion of § 5 of the employers' liability act, which provides 'that any contract, rule, regulation or device whatsoever, the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: . . .' Turner was something more than a mere shoveler of coal under a superior's command. He was an independent employer of labor, conscious of his own power to direct and willing to assume the responsibility of direction and to be judged by its results. This is manifest from the contract under review and from the cooperation contract; it is also manifest from his contracts with the other companies to whose industries the railroad company's tracks extended. We certainly cannot say that he was incompetent to assume such relation and incur its consequences. Thus being of opinion that Turner was not an employee of the company but an independent contractor, it is not material to consider whether the services in which he was engaged were in interstate commerce."

Express Agent.

An express messenger employed and paid solely by an express company and entitled under an arrangement between the express company and the railroad to ride on the trains of the latter in the discharge of his duties is an employee, not of the railroad company, but solely of the express company and as such does not come within the terms of the federal employers' liability act. *Missouri, etc. R. Co. v. Blalack*, 105 Tex. 296, 147 S. W. 559; *Missouri, etc. R. Co. v. West*, 38 Okla. 581, 134 Pac. 655.

A station agent, employed also by an express company, who is injured while attend-

ing solely to the business of the express company is at the time an employee of the express company and not of the railroad within the meaning of the federal employers' liability act. *Whalen v. New York Cent. etc. R. Co.* 173 App. Div. 268, 159 N. Y. S. 244.

In *Bogart v. New York Cent. etc. R. Co.* 171 App. Div. 652, 157 N. Y. S. 420, wherein the facts were similar to those in *Whalen v. New York Cent. etc. R. Co.* supra, the court stated the rule as follows: "The primary question, and the only one I consider, is whether the decedent was at the time employed by the defendant in interstate commerce. There was no relation between the express company and the defendant, except that the latter carried the former's freight, and allowed it to occupy its premises for its receipt and dispatch. The decedent when he was injured was handling the freight as the agent and custodian of the express company, and was responsible to it for fidelity in the discharge of the immediate duty, and it alone was obligated to pay him for the service, and alone was liable to respond for his dutiful performance of it. The inquiry comes at once to this point: Was the injured servant doing an act in furtherance of interstate commerce in the course of employment by the defendant? The decedent was employed by the defendant to do all that falls to the duty of a station agent. He was employed by the express company to do all that falls within the usual employment of an express agent, but to such duties the defendant's responsibility did not extend. Hence *Bogart*, as the agent of the express company, was doing what it was the duty of that company to do and what it was not the duty of the defendant to do. Therefore, he was not employed by defendant in interstate commerce."

However, where an express messenger was also employed by the railroad to take charge of and operate its electric plant for lighting the cars, which was situated in the express car, he was held to be an employee of the railroad and entitled to sue under the federal employers' liability act. *Weaseler v. Great Northern R. Co.* 90 Wash. 234, 155 Pac. 1063, *rehearing denied* 90 Wash. 237, 157 Pac. 461.

Pullman Car Employee.

A porter on a Pullman car employed, paid by and under the control of the Pullman company does not sustain the relation of servant to the railroad company and cannot maintain an action under the federal employers' liability act. *Robinson v. Baltimore, etc. R. Co.* 237 U. S. 84, 35 S. Ct. 491, 59 U. S. (L. ed.) 849, *affirming* 40 App. Cas.

(D. C.) 169, L.R.A.1915D 510. See also *Lindsay v. Chicago, etc. R. Co.* 226 Fed. 23, 141 C. C. A. 131.

In the case first cited it was said: "We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the act." And it was further held in this case that the fact that the porter collected tickets from passengers coming aboard in the late hours of the night did not alter his relation to the railroad, the court saying on this point: "This, however, was an obvious accommodation to the passenger in the Pullman car, and in any event it was merely an incidental matter which cannot be deemed to qualify the character of plaintiff's employment as it is to be viewed from the standpoint of the statute."

However, where the Pullman cars are owned and operated jointly by the railroad and the Pullman company, a porter employed thereon is an employee of the railroad within the meaning of the act. *Oliver v. Northern Pac. R. Co.* 196 Fed. 432, wherein it was said: "In my opinion this question must be answered in the affirmative: The contract between these two companies was entered into long prior to the passage of the act in question, and was therefore not entered into for the purpose of circumventing or avoiding liabilities imposed by law. Nevertheless, if such a contract is recognized and given the effect claimed for it by the defendant, there is nothing to prevent railway companies from avoiding obligations imposed upon them by this or other laws of Congress. It was attempted in argument to draw a distinction between those positive obligations imposed upon public service corporations by law and obligations voluntarily assumed by them for the comfort and convenience of passengers, and for their own profit. Such a distinction may, and in some cases does, exist, but it cannot be gainsaid that persons employed by railway companies in performing obligations voluntarily assumed are as much employees of the company as those servants who are discharging positive duties imposed by law. Persons employed as the deceased was come within the spirit of the statute, and those dependent on them for support should not be denied the protection it affords."

**MINNEAPOLIS AND ST. LOUIS
RAILROAD COMPANY**

v.

WINTERS.

United States Supreme Court—January 8,
1917.

242 U. S. 353; 37 S. Ct. 170.

Master and Servant — Federal Employers' Liability Act — Applicability — Saving Question for Review.

Error, if any, in basing a recovery in a personal injury action upon the Federal Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, c. 149 [Fed. St. Ann. 1909 Supp. p. 584]), does not entitle the defendant to have the judgment reversed, where such defendant in no way saved its rights to deny that the parties were engaged in interstate commerce at the time of the accident, or to object to the application of the federal statute, but, on the contrary, invoked and relied, without qualification, upon that statute and the rights that, because of that statute, it supposed itself to possess.

Employees within Act — Machinist in Roundhouse.

A machinist's helper, engaged, while making repairs in the roundhouse, upon an engine which had been used in hauling over the railway company's lines freight trains carrying both intrastate and interstate freight, and which was used in the same way after the accident, is not then employed in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, c. 149 [Fed. St. Ann. 1909 Supp. p. 584]), governing the liability of an interstate carrier for injuries to its employees when employed in interstate commerce.

[See note at end of this case.]

Error to Minnesota Supreme Court.

Action by George H. Winters, plaintiff, against Minneapolis and St. Louis Railroad Company, defendant. Judgment for plaintiff in District Court, Ramsey county. Judgment affirmed by Supreme Court of Minnesota. Defendant brings error. The facts are stated in the opinion. **AFFIRMED.**

Frederick M. Miner and William H. Bremner for plaintiff in error.

Humphrey Barton and John H. Kay for defendant in error.

[354] HOLMES, J.—This is an action for personal injuries suffered by the plaintiff, the defendant in error, at Marshalltown, Iowa, on October 21, 1912. The decisions below will be found in 126 Minnesota 260 and 131 Minnesota 181; *Id.* 496. The declaration alleged that at the time the plaintiff was em-

ployed by the defendant in interstate commerce, although it went on to set forth laws of the State of Iowa concerning the liability of railroads and contributory negligence. It alleged that the injury was caused by the negligence of the defendant in failing to furnish a reasonably safe instrument for the work that the plaintiff was set to do. The answer denied among other things that the plaintiff was employed in interstate commerce and set up the plaintiff's negligence and assumption of the risk. In the course of the trial, the facts touching the employment having been agreed, the counsel for the defendant intimated that he might want to take the question whether the commerce was interstate to this court, but said no more about it and later moved to dismiss the suit upon [355] the ground, among others, that the plaintiff assumed the risk, adverting to a decision that the defence was open under the federal act. Later still the presiding judge in his charge, without objection, told the jury that the action was tried under the law of the United States; and in the assignment of errors to the supreme court of the state one error assigned was that the jury was instructed that they might find a less than unanimous verdict in a suit founded upon the Federal Employers' Liability Act (Fed. St. Ann. 1909 Supp. p. 584)—a proposition disposed of since the trial by a decision of this court. *Minneapolis, etc. R. Co. v. Bombolis*, 241 U. S. 211, Ann. Cas. 1916F 505, 36 S. Ct. 595, 60 U. S. (L. ed.) 961, L.R.A. 1917A 86.

It is true that error is assigned because the court affirmed its opinion rendered after a former trial. But in the assignment of errors to the state court no such error is alleged, and beyond judicial recitals that the evidence with some exceptions was the same at both trials and quotations from the decision as to negligence, the record shows nothing but a casual statement of counsel as to what was done or ruled before. In short, at the trial the defendant in no way saved its rights to deny that the parties were engaged in interstate commerce at the time of the accident or to object to the application of the federal statute. On the contrary without qualification it invoked and relied upon that statute and the rights that because of that statute it supposed itself to possess. There is an ambiguous assignment of error that the supreme court of the state erred in holding as matter of law that the plaintiff was engaged in interstate commerce and in holding that the question of the plaintiff's assumption of the risk was for the jury "thereby depriving the appellant of a right guaranteed to it under the provisions of" the Federal Employers' Liability Act. But if the first clause is more than an introduction to and reason for the second, then, as we have indicated, no foundation for such an assignment was laid

in the proceedings before the state courts. [356] Therefore even if the courts and parties were wrong about the proper basis for the suit that fact does not entitle the defendant to have the judgment reversed. It cannot complain of a course to which it assented below.

The defendant, however, as has been seen, did save the questions concerning its right to a unanimous verdict and the assumption of risk under the act of Congress and also concerning the evidence of its negligence, all of which, of course, in a case arising under the act could be brought to this court. In the present case the facts upon which the act of Congress was supposed to apply are stated and were agreed, so that although, for the reasons that we have stated, an error on that point would not entitle the defendant to a new trial, it necessarily must be determined whether they show a foundation for the attempt to come here upon the questions that were reserved. The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. This engine "had been used in the hauling of freight trains over defendant's line . . . which freight trains hauled both intrastate and interstate commerce, and . . . it was so used after the plaintiff's inquiry." The last time before the injury on which the engine was used was on October 18 when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a freight train out from the same place. That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might [357] be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time not upon remote probabilities or upon accidental later events.

Judgment affirmed.

NOTE.

Employees Entitled to Protection under Federal Employers' Liability Act.

Introductory, 55.

General Rule, 55.

Application of Rule:

Employee Operating Train, 58.
Employee Coupling, Uncoupling or Switching Car, 58.
Employee Engaged in Construction or Repair, 59.
Employee Supplying Fuel or Water, 63.
Employee Guarding or Inspecting Property, 64.
Employee Going to or Returning from Work or Temporarily Diverted Therefrom, 66.
Employee Working on Watercraft, 68.
Other Employees, 68.

Introductory.

The present note reviews the recent cases which consider the question what employees are entitled to protection under the federal employers' liability act (Fed. St. Ann. 1909 Supp. p. 584). The earlier cases discussing the subject are collected in the notes to *Illinois Cent. R. Co. v. Behrens*, Ann. Cas. 1914C 163, and *Shanks v. Delaware, etc. R. Co.* Ann. Cas. 1916E 467. For cases dealing with the necessity under that act that the relation of employer and employee shall exist and when the relation exists, see the note to *Chesapeake, etc. R. Co. v. Harmon's Admr.* reported ante, this volume at page 41.

General Rule.

In construing the federal employers' liability act the courts agree that to warrant an action under the act both the employer and the employee must be engaged in interstate commerce at the time of the injury. *Pryor v. Bishop*, 234 Fed. 9, 148 C. C. A. 25; *Chicago, etc. R. Co. v. Feightner* (Ind.) 114 N. E. 659; *Chicago, etc. R. Co. v. Cosio* (Tex.) 182 S. W. 83. And see the cases cited throughout this note. "It is essential to a case under the statutes of the United States, not only that the defendant was at the time engaged in interstate commerce, but also (as the fact might be the defendant was likewise engaged in transportation within the state) that the plaintiff was, at the time the cause of action arose, employed in interstate commerce work. This is settled beyond the necessity of the citation of authorities laying down the ruling." *Lucchetti v. Philadelphia, etc. R. Co.* 133 Fed. 137.

In *Cincinnati, etc. R. Co. v. Hansford*, 173 Ky. 126, 190 S. W. 690, the test as to the character of the traffic was stated as follows: "The true test as to whether one is engaged in interstate commerce is this: Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

The rule for determining whether a railroad is engaged in interstate commerce so as to bring it within the operation of the federal employers' liability act was stated in *Chicago, etc. R. Co. v. Kindlesparker*, 234 Fed. 1, 148 C. C. A. 17, as follows: "In determining whether plaintiff was engaged in interstate commerce at the time of his injuries, consideration must be given to the character of the instrumentality upon which he was working and the nature of the work he was performing. The character of the locomotive, the instrumentality, may be ascertained both from the nature of the railroad on which defendant was accustomed to operate the engine and of the traffic handled by it. In view of all the facts above pointed out, it would seem plain enough that defendant's road constituted a link in interstate lines for all purposes of interstate and intrastate traffic. At the time in question, as we have seen, defendant was transporting freight both ways upon its line, and also handling freight in its yards, which originated upon its connections at points without and was destined to points within the state and also freight which originated within and was destined to places without the state; and, it is true, defendant was also transporting freight originating and destined locally within the state. The former fact, however, concerning freight interstate cannot be ignored because of the latter fact touching freight intrastate. Every road, which physically extends into or through two or more states and is so operated, necessarily carries both classes of freight, interstate and intrastate, and yet we do not see how it can in reason be said of such a carrier that it is any more certainly 'engaging in commerce between any of the several states,' within the meaning of the employers' liability act, than the present defendant was at the time plaintiff received his injuries; the latter situation as well as the former answers to the language of the act, 'that every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages . . . by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed,' etc. 35 Stat. 65 (Comp. St. 1913, § 8657). True, defendant's railroad, in a physical sense, was entirely within the limits of the state of Michigan, but this did not prevent defendant from connecting the road with admittedly interstate lines and so engaging in interstate commerce; in every practical sense, according to the present record, defendant had at the time in question appropriated its road as well as its yards to the transportation and handling of interstate traffic as definitely as it had of traffic of an intrastate character, and these conditions ex-

isted at the time of the accident and afterwards. When a company thus in effect dedicates such a road and the yards to a dual use—interstate and intrastate—it invests the road with the characteristics of an interstate line and subjects it to the obligations of that sort of a line. It makes it a part of the through line and becomes entitled to a part of the receipts derived from the through service. Its duties must correspond with the benefits it seeks: it must respond to federal law and regulation; this, however, is not in any true sense violative of its rights and duties as an intrastate carrier."

In *Louisville, etc. R. Co. v. Parker*, 242 U. S. 13, 37 S. Ct. 4, *affirming* 165 Ky. 658, 177 S. W. 465, the court, holding that the purpose of the act performed governed the determination of the question whether it was interstate commerce, said: "The business upon which the deceased was engaged at the moment was transferring an empty car from one switch track to another. This car was not moving in interstate commerce, and that fact was treated as conclusive by the court of appeals. In this the court was in error, for if, as there was strong evidence to show, and as the court seemed to assume, this movement was simply for the purpose of reaching and moving an interstate car, the purpose would control and the business would be interstate. The difference is marked between a mere expectation that the act done would be followed by other work of a different character, as in *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473, 478 [Ann. Cas. 1914C 163, 34 S. Ct. 646, 58 U. S. (L. ed.) 1051], and doing the act for the purpose of furthering the later work."

A railroad owned and operated by a lumber company for the transportation of logs from the forests to a tidewater point within the same state is not engaged in interstate commerce and an employee injured while working for such a road cannot maintain an action under the federal employers' liability act, and this is true though the logs after being sold at the tidewater point are transported by the purchasers beyond the limits of the state. *McCluskey v. Marysville, etc. R. Co.* 243 U. S. 36, 37 S. Ct. 374; *Ray v. Merrill, etc. Logging Co.* 243 U. S. 40, 37 S. Ct. 276.

That the employee must be engaged in interstate commerce at the precise time of the injury is emphasized by the courts. Thus in *Erie R. Co. v. Welsh*, 242 U. S. 303, 37 S. Ct. 110, the court set out the facts and its holding as follows: "Plaintiff was . . . a yard conductor engaged in night duty at its Brier Hill yard, a mile or more west of Youngstown; that he performed miscellaneous services in the way of shifting cars and breaking up and making up trains, under

orders of the yardmaster, and had to apply frequently to the latter for such orders; that when any orders thus given had been performed, or had 'run out,' he usually reported at the yardmaster's office for further orders; that on the night in question plaintiff, with a yard crew, took a freight car loaded with merchandise destined to a point without the state, and a caboose which so far as appears was not to go beyond the limits of the state, from the Brier Hill yard eastwardly to the 'F. D. yard' in Youngstown, where the freight car was placed upon a siding, so that it might be made up into a train by another crew; that they then took the caboose a short distance farther and placed it upon another siding; that they next took the engine to a water plug and took on water, and then returned with it to the Brier Hill yard; that on this return journey the engine was slowed down near the yardmaster's office, which is at the easterly end of that yard, so as to enable Welsh to report for further orders, all previous orders having been executed; and that the injury was received while he was attempting to alight for that purpose. . . . The orders plaintiff would have received, had he not been injured on his way to the yardmaster's office, would have required him immediately to make up an interstate train. Upon the strength of this it is argued that his act at the moment of his injury partook of the nature of the work that, but for the accidental interruption, he would have been called upon to perform. In our opinion this view is untenable. By the terms of the employers' liability act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act."

As a rule the courts have been content to lay down the rule in general terms that both the employer and the employee must be engaged in interstate commerce at the time of the injury in order to bring the case within the federal statute and some confusion has arisen in cases where an employee engaged in interstate commerce was injured by an instrumentality of the railroad not so engaged. This, however, was finally settled by the Supreme Court in *Pedersen v. Delaware, etc. R. Co.* 229 U. S. 146, Ann. Cas. 1914C 153, 33 S. Ct. 648, 57 U. S. (L. ed.) 1125, wherein it appeared that an employee engaged in interstate traffic was struck by an intrastate train. The court said: "Considering the terms of the statute, there can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce; but it is not essen-

tial, where the causal negligence is that of a coemployee, that he also be employed in such commerce, for, if the other conditions be present, the statute gives a right of recovery for injury or death resulting from the negligence 'of any of the . . . employees of such carrier,' and this includes an employee engaged in intrastate commerce." To the same effect see *In re Second Employers' Liability Cases*, 223 U. S. 1, 32 S. Ct. 169, 56 U. S. (L. ed.) 327, 38 L.R.A.(N.S.) 44; *Southern Pac. Co. v. Industrial Acc. Commission (Cal.)* 161 Pac. 1139; *Pittsburgh, etc. R. Co. v. Farmers' Trust, etc. Co.* 183 Ind. 287, 108 N. E. 108; *Louisville, etc. R. Co. v. Walker*, 162 Ky. 209, 172 S. W. 517. *Compare Illinois Cent. R. Co. v. Rogers*, 221 Fed. 52, 136 C. C. A. 530. In *Grybowski v. Erie R. Co.* 88 N. J. L. 1, 95 Atl. 764, *affirmed* in 98 Atl. 1085, the court commenting on the decision in *Pedersen v. Delaware, etc. R. Co.* supra, said: "Although in the *Pedersen* case it was conceded that the railroad company was engaged in interstate commerce at the time of the occurrence of the accident, the principle of the decision would necessarily have compelled such a finding, even in the absence of the concession, for the plaintiff could not, at the time of the accident, have been employed by the carrier in such commerce unless the latter at the same time was engaged therein."

In *Mayers v. Union R. Co.* 256 Pa. St. 474, 100 Atl. 967, it does not appear from the opinion whether the injured employee was engaged in interstate commerce at the time of the injury. The court, apparently basing its decision entirely on the nature of the traffic in which the train that struck him was engaged, said: "The engine which struck the plaintiff and the cars which had come from Ohio had finished some interstate business, and had not yet begun upon any other. Their next work, so far as appears, might have been interstate or confined to Pennsylvania, as it should happen. At the moment the plaintiff was injured they were not engaged in either. Their character as instruments of commerce depended on their employment at the time, not upon remote probabilities or upon accidental later events." And in *Mathews v. Alabama Great Southern R. Co. (Ala.)* 76 So. 17, a foreman of a bridge gang injured while on a flat car carrying a pile driver, by a faulty apron of an abandoned coal chute striking him as the flat car was being hauled past the chute, was held not to be so engaged in interstate commerce as to come within the federal employers' liability act. In the two cases last cited, if the facts were such as to bring the injured employee within the class of interstate employees regardless of the nature of the instrumentality causing the injury they

would seem to be contrary to the holding in *Pedersen v. Delaware, etc. R. Co. supra*, and therefore erroneous.

However, if an employee is not engaged in interstate commerce the mere fact that he is injured by an interstate train will not bring his case within the federal employers' liability act. *Hardy v. Atlanta, etc. R. Co. (Ga.)* 93 S. E. 18.

Application of Rule.

EMPLOYEE OPERATING TRAIN.

It is not open to question that an employee engaged in operating a train carrying interstate traffic comes within the federal employers' liability act, it being uniformly so held by the courts. *Washington R. etc. Co. v. Scala*, 244 U. S. 630, 37 S. Ct. 654 (conductor); *Waters v. Guile*, 234 Fed. 532, 148 C. C. A. 298 (brakeman); *Hunt v. Illinois Southern R. Co.* 196 Ill. App. 539 (conductor); *Daley v. Boston, etc. R. Co.* 166 N. Y. S. 840 (brakeman); *Chicago, etc. R. Co. v. Hughes (Okla.)* 166 Pac. 411 (fireman). Nor does the fact that a train carrying interstate shipments was a local train running only between points within the state alter the rule. *Chicago, etc. R. Co. v. Feightner (Ind.)* 114 N. E. 659 (brakeman).

An engineer on a gravel train hauling from North Dakota to Montana has been held to have been engaged in interstate commerce. *Hein v. Great Northern R. Co.* 34 N. D. 440, 159 N. W. 14, wherein it was said that neither the fact that a new train crew would take charge of the train before its going into Montana nor that the gravel was for use on the railroad's own track, whether main or spur, altered the interstate character of the engineer's work.

However, while cars may have an interstate character, this is true only while they are in interstate movement, and the interstate movement ceases when they reach the first distributing point in the state of their destination. Thus in *Chicago, etc. R. Co. v. Feightner (Ind.)* 114 N. E. 659, it was held that where the evidence did not show that cars after reaching a point of distribution would be sent out of the state it could not be said that a brakeman on a train taking them up and bound for a point within the state was engaged in interstate commerce. And similarly in *Missouri, etc. R. Co. v. Pace (Tex.)* 184 S. W. 1051, it was held that coal billed to a point in Texas from Oklahoma and there reshipped to other Texas points lost its interstate character on reaching its first destination and an engineer on the local train hauling the reshipment did not come within the statute.

A fireman on an engine belonging to an intrastate road who was killed after the

engine had assisted in moving trains carrying interstate traffic but at a time when it was merely reporting for duty at another point, has been held not to be within the act since he was not engaged in interstate commerce, at the precise time of the injury. *Hoag v. Ulster, etc. R. Co.* 177 App. Div. 433, 164 N. Y. S. 529. And it has been held that a conductor on a freight route between two points within a state could not be said to have been engaged in interstate commerce on his return trip because of the fact that on his outgoing trip the train carried freight destined to points without the state. *Illinois Cent. R. Co. v. Peery*, 242 U. S. 292, 37 S. Ct. 122, reversing 123 Minn. 264, 143 N. W. 724, and 128 Minn. 119, 150 N. W. 382, 1103. In that case it was said: "Of course the plaintiff treats the round trip as one, and the return as merely the necessary complement of the trip out. The conclusion is drawn that the plaintiff still was engaged in interstate commerce because the train out had cars destined to Tennessee. But on the other hand the trips out and back were distinct, in opposite directions, with different trains. The plaintiff's journey was confined wholly to Kentucky. Only the circumstance that the southbound train from Paducah carried freight destined to beyond Fulton caused him to be engaged in interstate commerce while on that trip. On the return when he was injured all the freight had domestic destinations. It is true that the greater certainty of getting traffic going south probably was the chief reason for the establishment of the circuit; but they got what they could coming back, generally a train or a part of a train. It seems to us extravagant to subordinate the northerly to the southerly journey so completely that if on the latter there happened to be a parcel destined beyond the state, the conductor should be regarded as still engaged in commerce among the states when going from Fulton to Paducah even though he had a full train devoted solely to domestic commerce. For it must be remembered that if the northerly movement is regarded as the incident of the southerly, that subordination is independent of the character of the commerce, and depends solely on the fact that southerly moving business, no matter what, induced establishing the route. Therefore it does not matter that the interstate traffic moving south was greater than, for purposes of illustration, we have supposed."

EMPLOYEE COUPLING, UNCOUPLING OR SWITCHING CAR.

Members of a switching crew engaged in making up a train for interstate service are engaged in interstate commerce within the meaning of the federal employers' liability act. *Hurley v. Illinois Cent. R. Co.* 133 Minn.

101, 157 N. W. 1005; Geer v. St. Louis, etc. R. Co. (Tex.) 194 S. W. 939.

And this is true although the cars contain no interstate shipment at the time of the injury, if they have been designated for such service. *Christy v. Wabash R. Co.* 195 Mo. App. 232, 191 S. W. 241, wherein it was said: "In this case, deceased was engaged in switching a car to a place in defendant's yards, where, it is true, it was to be placed in a local train and taken to a station a dozen miles away, but for the purpose of being loaded that day with an interstate shipment. No sound reason can be suggested why that was not interstate service. We think it was such service in a special and immediate sense. For the use to which the car was to be put was the already ascertained service of a specific shipment into another state; and that shipment was to be made on the day the car was being switched out of the yards for that use."

A conductor of a switch engine engaged in moving cars to be made up into an interstate train is so engaged in interstate commerce as to be within the act. *Southern R. Co. v. Fisher* (Ala.) 74 So. 580.

While an empty car loses its interstate character as soon as it reaches its destination in a state and subsequent movements of the car preparatory to sending it to another point in the state do not constitute interstate commerce, a car containing an interstate shipment continues its interstate character until the shipment is delivered to its final destination, and a switchman injured while switching such a car after its arrival at one point within the state preparatory to placing it in a local train to be sent to another point within the state, its final destination, is within the act. *Louisville, etc. R. Co. v. Meadors* (Ky.) 197 S. W. 440.

Likewise a member of a switching crew injured while coupling cars has been held to be engaged in interstate commerce where it appeared that one of the cars had been brought from without the state and before it was completely unloaded was moved temporarily but was to be returned to complete the unloading, the court holding that the service of the car in interstate commerce had not been completed. *Wagner v. Chicago, etc. R. Co.* 277 Ill. 114, 115 N. E. 201.

And so, a member of a switching crew engaged in moving a refrigerator car which had been iced preparatory to receiving an interstate shipment of fruit has been held to have been engaged in interstate commerce. *Alldread v. Northern Pac. R. Co.* 93 Wash. 209, 160 Pac. 429.

But a member of a switching crew removing cars from the shops to a shed to be iced has been held not to be within the act where it appeared that none of the cars had been

specifically designated for interstate service. *Chicago, etc. R. Co. v. Illinois Industrial Board*, 277 Ill. 512, 115 N. E. 647, wherein the court said: "It has been held that if the object of a switching movement is the placing of an empty car in a position to receive a load to be carried out of the state the car is engaged in moving interstate commerce from the moment the switching movement begins. (*Breske v. Minneapolis, etc. R. Co.* 115 Minn. 386.) This is only where the switching movement is directed for the express purpose of loading the particular car with material to be shipped out of the state. In this case no particular one or more of the fifteen cars were designed to be used to carry an interstate shipment at the time the conductor of the switching crew was ordered to move them to the storage track. It was not until these cars were again moved to the loading platform and it was known what material was ready to be loaded that it was determined that ten of them should be loaded for destinations outside the state and one to carry a shipment to a point within the state. The movement of the string of cars by the switching crew of which the deceased was a member was a local movement, and as none of these cars had at that time been selected to participate in an interstate shipment the deceased was not engaged in interstate commerce, and the circuit court properly approved and confirmed the award and decision of the industrial board. The icing of the cars does not change the situation. The same procedure in icing was required in all the shipments made by Armour & Co. whether interstate or intrastate, and was, in effect, a part of the equipment of the cars themselves."

EMPLOYEE ENGAGED IN CONSTRUCTION OR REPAIR.

The courts draw a distinction between the repair of rolling stock, tools and other appliances of a railroad which may or may not be used in its interstate service, and the repair of its tracks, bridges, etc., which though used also for intrastate commerce are necessarily used for interstate commerce. In the case of the repair of rolling stock, etc., the employee so engaged is held not to be within the act unless the instrument under repair is designated positively for use in interstate commerce. Thus in *Narey v. Minneapolis, etc. R. Co.* 177 Ia. 606, 159 N. W. 230, wherein it appeared that an employee engaged in repair work on an engine, which had been engaged in interstate commerce but which at the time of the injury was not selected for use in either intrastate or interstate commerce and which might be used in either, it was said: "As to the tracks, bridges, etc.,

they may be used for both interstate and intrastate commerce. In such case, even though the tracks are used for both, they are necessarily used for interstate commerce. In the case last supposed, the employment by one to keep the track in repair necessarily and directly contributes to its use for interstate commerce, and unless the track is kept in repair, interstate traffic could not be carried on at all. So, too, had it been shown that engine 446 was being prepared for an interstate trip. But an engine may be so used in intrastate commerce. In the instant case, had it been shown that plaintiff was, at the time he was hurt, engaged in preparing engine 446 for use by the defendant for a trip outside the state, the rule might apply, but, as stated, there is no such showing." To the same effect see the reported case.

In *New Jersey Central R. Co. v. Paslick*, 239 Fed. 713, 152 C. C. A. 547, wherein it appeared that an employee was injured while at work repairing a car belonging to another interstate carrier, the court, quoting and relying on the reported case, said: "If the repair of an engine in the intervals between its interstate occupations is not sufficiently close to commerce to be a part of it, the repair of a car, which moves only when the engine hauls it, is certainly no closer."

Likewise in *Hudson, etc. R. Co. v. Iorio*, 239 Fed. 853, 152 C. C. A. 641, the court, applying the rule as stated in the reported case to a case wherein it appeared that an employee was engaged in placing rails in a pit for future use, said: "It cannot be said that the rails which Iorio was engaged in storing against a use that was certainly not imminent, and might never occur, were at the moment engaged in, or practically part of, interstate commerce; for that commerce was going on without any present assistance, either from Iorio, or the rails on which he was working, or the men who were working with him. We therefore hold that the actual employment or use at the moment of injury of the thing upon which the person injured was working is the test of applicability of the statute, under circumstances such as shown here. By that test plaintiff below was not practically engaged in or a part of interstate commerce when he was hurt, and the judgment is reversed."

An employee engaged in repairing a car which was used during the previous week in interstate commerce but which was used in intrastate commerce after its repair has been held not to be within the act. *Loveless v. Louisville, etc. R. Co. (Ala.)* 75 So. 7.

Similarly an employee assisting in unloading wreckage from a car for the purpose of selecting that which is capable of repair is not brought within the act merely because

inspectors several days later designate the parts, through which he is injured, to be shipped out of the state for repair. *Schaeffer v. Illinois Cent. R. Co.* 172 Ky. 337, 180 S. W. 237, wherein it was said: "Can it, we may ask, with any pretense of reason be contended that where an employee of a common carrier is killed in unloading from a car in its yards wrecked material, a week before removed from the scene of the wreck, that it may be separated in parts for other employees to later inspect and determine what part of it, if any, shall be repaired for future use, that such employee was engaged in interstate commerce, because other employees, more than a month later, happened to decide that a particular part of the wrecked material, and the same which fell upon and killed the decedent, should be repaired for some sort of use in the carrier's business and even sent into another state for that purpose? In our opinion the evidence contained in the record fails to show that the work appellant's decedent was performing when the injuries that caused his death were received, was a service in interstate commerce, hence the action of the trial court in peremptorily directing a verdict for the appellees was proper."

But in *Chicago, etc. R. Co. v. Kindlesparker*, 234 Fed. 1, 148 C. C. A. 17, it was held that an engine used in both intrastate and interstate commerce partook of the character of both and retained such character while it was laid up for repairs, and so an employee injured while making such repairs comes within the federal act. That case however was decided prior to the decision in the reported case and may be considered as overruled by that case.

However, it has been held that where a workman is engaged in the repair of an engine or car used solely in interstate commerce he may maintain an action under the federal employers' liability act. *Baltimore, etc. R. Co. v. Branson*, 128 Md. 678, 98 Atl. 225; *Smiegal v. Great Northern R. Co.* 105 Wis. 57, 160 N. W. 1057.

Where the instrumentality under repair consists of the track, bridges, telephone or telegraph wires or other necessary general means of operation of a railroad engaged in interstate commerce, an employee injured while so engaged is generally held to be engaged in interstate commerce, and the fact that the road may also do an intrastate business is immaterial. Thus a section hand employed in repairing the track of a railroad engaged in both interstate and intrastate commerce is entitled to the benefits of the act. *New York, etc. R. Co. v. Winfield*, 244 U. S. 147, Ann. Cas. 1917D 1139, 37 S. Ct. 540, reversing 210 N. Y. 284, Ann. Cas. 1916A 817, 110 N. E. 614, 168 App. Div. 351, 153 N. Y. S. 499; *Treadway v. St.*

Louis, etc. R. Co. 127 Ark. 211, 191 S. W. 930; Denver, etc. R. Co. v. DeVella (Colo.) 165 Pac. 254. Likewise a section hand engaged in repairing an interstate track, who after "smoothing" the track was sent to assist in loading rails to be placed on the track, and was injured while so engaged, has been held to be within the act. Louisville, etc. R. Co. v. Williams, 175 Ky. 679, 194 S. W. 920. Similarly, a section hand engaged in repairing a spur track leading to scales on which interstate cars were weighed has been held to be engaged in interstate commerce within the meaning of the act. Dowell v. Wabash R. Co. (Mo.) 190 S. W. 939.

An employee engaged in removing wreckage from a track used by the railroad in both interstate and intrastate commerce has been held to be within the act. Denver, etc. R. Co. v. Wilson (Colo.) 163 Pac. 857; Schaeffer v. Illinois Cent. R. Co. 172 Ky. 337, 189 S. W. 237. And see Southern R. Co. v. Puckett, reported in full post, this volume, at page 69. In Canadian Pac. R. Co. v. Thompson, 232 Fed. 353, 146 C. C. A. 401, it was said: "The main defense, of course, was either that the Canadian Pacific Railway Company was not engaged in interstate commerce so far as this transaction was concerned, or that the interstate was not so engaged at the time when the accident occurred. The proofs, as we say, do not contravene the facts substantially as we have stated them. If there are any variances, they are too unimportant to be commented on so far as this case is concerned. In all this class of cases, the effort by the defendant corporations has been to split into fragments what was in fact a unity, and what was in fact a unitary occupation or enterprise. The Canadian Pacific Railway Company is notoriously and presumably a single enterprise, extending from the Atlantic Ocean to the Pacific Ocean, in part through the United States, but in the greater part through Canada. Both in the inherent purposes of the organization, and in its operation, there is one, single, consolidated, unitary essence; and so far as any person connected with trains operating thereon, in any way contributed to produce the result aimed at by the corporation, the corporation was a single, consolidated, international, interstate enterprise; and in all its essential aspects the train of cars employed in the present case for the present purpose, connecting, as it did international points, and all the persons employed on that train, were engaged in an international enterprise and operation. In this aspect there were no fragments, but all was combined in a consolidated and single purpose. . . . In the present case the interstate was employed as a conductor or brakeman running trains between

Brownville, in the state of Maine, and Megantic and McAdam Junction, in Canada, being east and west terminals in a foreign country, and where the train in which he was engaged was especially set up for and engaged in gathering up rails from interstate tracks, to be taken to other parts of the interstate tracks; and this was being done without any suggestion that they were to be left at intrastate points. It is therefore evident that the deceased was directly employed in an interstate enterprise, which the Canadian Pacific Railway Company as a unit had undertaken."

An employee engaged in cleaning out ditches along an interstate railroad track has been held to be within the act. Louisville, etc. R. Co. v. Blankenship (Ala.) 74 So. 960. And an employee engaged in cleaning out an ash pit used by both interstate and intrastate engines has been held to have been engaged in work on an interstate instrumentality and so to come within the act. Grybowski v. Erie R. Co. 89 N. J. L. 361, 98 Atl. 1085, affirming 88 N. J. L. 1, 95 Atl. 764.

So, an employee assisting an engineer in making a survey with a view to improving a curve in the track has been held to be engaged in interstate commerce. Southern R. Co. v. McGuin, 240 Fed. 649, 153 C. C. A. 447.

In Grand Trunk R. Co. v. Knapp, 233 Fed. 950, 147 C. C. A. 624, it was held that a carpenter riding in a train carrying equipment for the repair of a bridge used for interstate and intrastate commerce was within the federal act where it appeared that he was to assist in making the repairs. And in Louisville, etc. R. Co. v. Netherton, 175 Ky. 159, 193 S. W. 1035, a painter working on a bridge used in both interstate and intrastate commerce was held to be within the act.

A carpenter engaged in repairing a pump-house and pumping station used in interstate commerce has been held to be within the act. Newkirk v. Pryon (Mo.) 183 S. W. 682.

And so it has been held that an employee engaged in repairing a telegraph line used by the railroad in dispatching its trains, both intrastate and interstate, was engaged in interstate commerce and so was within the operation of the federal employers' liability act. Coal, etc. R. Co. v. Deal, 231 Fed. 604, 145 C. C. A. 490, affirming 215 Fed. 285 (writ of error granted to Supreme Court, Coal, etc. R. Co. v. Deal, 232 Fed. 1020, 146 C. C. A. 665); Southern Pac. Co. v. Industrial Acc. Commission (Cal.) 161 Pac. 1143; Collins v. Michigan Cent. R. Co. 193 Mich. 303, 159 N. W. 535.

However, a section hand engaged in helping to remove ties from the right of way and piling them for safekeeping and future use has been held not to have been engaged in

interstate commerce, and the fact that the ties were afterwards used on a section of track over which interstate commerce was hauled did not alter the rule. *Missouri, etc. R. Co. v. Watson* (Tex.) 195 S. W. 1177. So a section hand engaged in peeling railroad ties along the right of way for future use on the track has been held not to have been engaged in interstate commerce. *Karras v. Chicago, etc. R. Co.* 165 Wis. 578, 162 N. W. 923, wherein it was said: "It appears that the ties plaintiff was peeling had been purchased by defendant at Watersmeet, Mich., and shipped to this track section. They were dumped in piles of from thirty to fifty and more to be peeled and subsequently used where needed in the repair of the track. They were so used during the summer and up to some time in September. Ties with the bark on were not put into the track. Hence in order to be fully prepared for track repair they must be peeled. The peeling, therefore, was a part of the process of manufacture of the ties for the purpose intended. This process, in the case at bar, was carried on independent of, and separate from, a then immediate use of the ties in track repair. It was a preparation of them for future use. That it was done by the defendant upon its right of way, instead of by others elsewhere, or that the ties were destined for interstate commerce, cannot constitute the process of their manufacture interstate commerce work. To constitute that there must be an actual entering upon or engagement in such work. A mere manufacture or preparation of material which is destined at some time in the future at some place to be used in interstate commerce work is not enough."

Holding that a section hand employed ordinarily in replacing rails on an interstate track was not engaged in interstate commerce while merely loading old rails lying on the right of way, the court in *Cincinnati, etc. R. Co. v. Hansford*, 173 Ky. 126, 190 S. W. 690, said: "The federal employers' liability act does not necessarily apply to the same person in all the details of his employment, since one man may have duties including both interstate and intrastate commerce and he would be subject to the act while engaged in the one, and not in the other. . . . It will be observed that it nowhere appears that Hansford was engaged, either in taking out old rails or putting in new rails; the most that can be said from the proof is that Hansford was engaged in loading old rails that had, at some time, been taken out of the track and were lying on the right of way. This proof brings the case squarely within the decision in *Illinois Cent. R. Co. v. Kelly*, 167 Ky. 745, 181 S. W. 375, where it was held that a section hand, engaged in loading on a flat car old rails from the right of way,

precisely as in this case, was not engaged in interstate commerce."

A carpenter engaged in erecting a stove pipe to be used in a roundhouse where engines engaged in interstate commerce were kept was held in *Dunn v. Missouri Pac. R. Co.* (Mo.) 190 S. W. 966, not to be engaged in interstate commerce.

So a carpenter building forms into which concrete was to be poured to form a retaining wall for the tracks of a railroad engaged in both interstate and intrastate commerce has been held not to be within the act *Dickinson v. Illinois Industrial Board* (Ill.) 117 N. E. 438, wherein it was said: "His employment need not be directly in the transportation of goods from one state into another or in the operation or movement of trains. If he is engaged in the operation, maintenance, or repair of any of the instrumentalities used by the carrier in the transportation of goods from one state into another he is engaged in interstate commerce. Section men repairing a track, carpenters repairing a bridge, machinists and car repairers working on engines and cars, and hostlers caring for engines, are engaged in interstate commerce if the track, bridge, engines, and cars are used in interstate commerce. Their work has a direct and substantial connection with interstate transportation and is an essential part of it. This cannot be said of Olson's work. It had no connection, even remote, with transportation. It was preliminary to the erection of a structure which might eventually form a part of the roadbed used in interstate commerce. The forms were not instrumentalities of interstate commerce, and the retaining walls, which had not yet been built, could not be such instrumentalities until the filling which they were to retain and upon which the tracks were to rest had been deposited in place. Olson's work was a matter of indifference, so far as the interstate commerce in which the plaintiffs in error were engaged was concerned, though the structure to be erected might eventually become an instrument of such commerce."

In *Killes v. Great Northern R. Co.* 93 Wash. 416, 161 Pac. 69, it was held that a workman building a scaffold to be used in painting a freight shed used for interstate traffic was not engaged in interstate commerce. The court said: "The building of a scaffold in a freight shed upon which a workman is to stand while painting the roof has no direct or immediate connection with interstate commerce, nor is it a necessary incident in furthering the movement of interstate freight. It may be admitted that the freight shed is an instrumentality made use of in interstate commerce, but the respondent was not at work upon the freight shed. His act was at least one step removed from any con-

section with interstate commerce or any of its instrumentalities either directly or indirectly."

Following the decision of the Supreme Court in *Shanks v. Delaware, etc. R. Co.* 239 U. S. 556, 36 S. Ct. 188, 60 U. S. (L. ed.) 436, L.R.A.1916C 797, *affirming* 214 N. Y. 413, Ann. Cas. 1916E 467, 108 N. E. 644, that a machinist engaged in moving to a new location an overhead countershaft in a shop devoted to the repair of locomotives used in both interstate and intrastate commerce, was not engaged in interstate commerce, the court in *Castonguay v. Grand Trunk Ry. (Vt.)* 100 Atl. 908, held that a workman engaged in the repair of a roundhouse wall was not employed in interstate commerce, saying: "If he was then at work upon a direct and permanent instrumentality of such transportation, such as the road bed or a bridge, or a locomotive or car temporarily withdrawn from that service for repairs, he was within the protection of the act; if, on the other hand, he was working upon an indirect, remote, or possible instrumentality of such transportation, he was not within the act. We feel constrained to hold that this case is ruled by the *Shanks* case and not by the *Pedersen* case, and that *Castonguay's* relation to interstate transportation was too remote to bring him within the act. It seems clear that if a workman changing a shaft in a machine shop is too far removed from the actual transportation to be within the act, he would be equally so if he was repairing or replacing the shaft; and he would be equally so if he was changing the location of a window in the shop, or repairing it, or replacing it. The machine shop and the roundhouse are both parts of the necessary equipment of interstate railroads; but they are not so directly related to actual transportation as 'to be practically a part of it.' If *Shanks* was not engaged in interstate commerce, *Castonguay* could not have been, for he was one step further removed from actual transportation."

An employee engaged in loading sand and gravel at a gravel bank for repair of an interstate railroad, and who was killed by the falling of a portion of the bank on which he was at work, has been held not to have been engaged in interstate commerce. *Yazoo, etc. R. Co. v. Houston*, 114 Miss. 888, 75 So. 690, wherein the court basing its ruling on the decision in *Delaware, etc. R. Co. v. Yurkonis*, 238 U. S. 439, 35 S. Ct. 902, 59 U. S. (L. ed.) 1397, and distinguishing that case from *Pedersen v. Delaware, etc. R. Co.* 229 U. S. 146, Ann. Cas. 1914C 153, 33 S. Ct. 649, 57 U. S. (L. ed.) 1125, said: "It is insisted by appellee that all of the decisions of the supreme court since the decisions in the *Pedersen* and *Yurkonis* cases clearly indicate that the su-

preme court has intended to limit the influence of the *Pedersen* case rather than to extend it. Whether this be true or not is not for us to say, but since appellant stands squarely upon the *Pedersen* case, saying, 'If this case is sound, this case must be governed by the federal act,' we will examine the *Pedersen* case and its applicability to the present case. The gist of the *Pedersen* case, as interpreted by appellant's briefs, is that *Pedersen* was 'engaged in the repair of an interstate highway,' and for this reason he was 'employed in interstate commerce.' This analysis of the *Pedersen* case seems to be sound, but it seems to us that the Supreme Court of the United States in the *Yurkonis* case drew in the lines somewhat, by holding that *Yurkonis* did not bring himself within the federal act. He was mining coal intended to be used in interstate commerce, but the manner of receiving the injury was too remote to justify the conclusion that he was employed in interstate commerce. A consideration of the facts developed upon the trial of the instant case, taken most favorably for appellant, indicate that the deceased was employed in mining gravel for the ultimate repairing or building of the highway over which the interstate commerce of the railroad would be operated. *Yurkonis* was employed in mining coal to be used by the carrier to make steam power for the transportation of its commerce between the states, and yet the Supreme Court said: 'The manner of the receiving of the injury by plaintiff showed conclusively that it did not occur in interstate commerce.' May we not say the same about Mr. Houston? It seems to us that the character of the work and the manner in which the injury was received in the *Yurkonis* case and in the present case are strikingly similar. On the other hand, *Pedersen* was working directly upon the highway, and received his injury by a train operated on the highway. So, as we interpret the situation, this case is controlled by the principles of the *Yurkonis* case."

A laborer engaged in cutting a tunnel for an interstate railroad is not engaged in interstate commerce, where, the tunnel is not so far completed as to be used as an instrumentality of interstate commerce. *Raymond v. Chicago, etc. R. Co.* 243 U. S. 43, 37 S. Ct. 268.

EMPLOYEE SUPPLYING FUEL OR WATER.

An employee engaged in providing coal and water for trains used in interstate commerce is within the federal employers' liability act. *Guy v. Cincinnati Northern R. Co. (Mich.)* 164 N. W. 454.

So, an employee engaged in operating a pumping station, which furnishes water to be

used for both interstate and intrastate business has been held to be within the act. *Roush v. Baltimore, etc. R. Co.* 243 Fed. 712, wherein the test was said to be "whether the plaintiff, at the time of the accident, was engaged in interstate transportation, or in work so closely related thereto as to be practically a part thereof." "The pumping station," said the court, "was an instrumentality being used indiscriminately for interstate and intrastate commerce. The work being performed by the plaintiff was so closely related to interstate transportation as to be practically a part of it. He was not engaged in original or independent work too remotely connected with interstate transportation to be said not to be practically a part thereof. It is true, his work also was necessary in carrying on intrastate transportation, but when the efforts of the employee at the time he was injured may relate to either class of transportation, then he is within the act, and his right of action is controlled by it."

Similarly in *Collins v. Erie R. Co.* 245 Fed. 811, it was held that an employee engaged in pumping water for use by engines in interstate commerce was within the act provided it appeared that the water was for immediate use and its use was not dependent on remote possibilities.

In *Chicago, etc. R. Co. v. De Bord (Tex.)* 192 S. W. 767, it was held that a brakeman engaged in assisting in the placing of a coal car on an elevated track so that it could be unloaded into coal chutes from which engines used in interstate traffic were supplied was engaged in interstate commerce.

But in *Grovio v. New York Cent. R. Co.* 176 App. Div. 230, 162 N. Y. S. 1026, wherein it appeared that an employee was engaged in shoveling coal into engines at a coal chute or shoveling the coal from cars into the chute and that immediately before his injury he had been engaged in coaling a switch engine which was used for handling both interstate and intrastate business, it was held that he was not engaged in interstate commerce.

In *Chicago, etc. R. Co. v. Harrington*, 241 U. S. 177, 36 S. Ct. 517, 60 U. S. (L. ed.) 941, *affirming* (Mo.) 180 S. W. 443, it appeared that at the time an employee was killed he was engaged in causing the removal of coal from storage tracks to the coal shed or chutes by which the same would be delivered to locomotives used in interstate traffic. The Supreme Court held that the Act of Congress did not apply because there was no close or direct relation to interstate transportation in the taking of the coal to the coal chutes. Following *Chicago, etc. R. Co. v. Harrington*, *supra*, the court in *Kelly v. Pennsylvania R. Co.* 238 Fed. 95, 151 C. C. A. 171, wherein it appeared that a car-

penter was injured while causing the removal of lumber from storage tracks to certain coal chutes which he had been directed to repair, said: "What is there, then, in the case at bar from which it can be inferred that Kelly was, at the time he was killed, engaged in interstate transportation? His engagement in causing the transfer of the lumber from the storage tracks to the place where it was to be used does not connect him more closely with transportation than Harrington's engagement in taking coal from the storage tracks to the coal chutes. In neither case was there such close direct relation to interstate transportation as would require the application of the provisions of the law."

In *Lehigh Valley R. Co. v. Barlow*, 244 U. S. 183, 87 S. Ct. 515, *reversing* 214 N. Y. 116, 107 N. E. 814, it was held that where it appeared that coal brought from without the state had remained on sidings for several days before being switched to the coal chutes, it had lost its interstate character and therefore a member of the switching crew injured while placing the cars on the chutes was not engaged in interstate commerce.

EMPLOYEE GUARDING OR INSPECTING PROPERTY.

A flagman stationed as a watchman at a street crossing of a railroad engaged in interstate commerce is so closely connected with such commerce that his employment partakes of its nature and he may maintain an action for personal injuries under the federal employers' liability act. *Southern Pac. Co. v. Industrial Acc. Commission (Cal.)* 161 Pac. 1142; *West v. Atlantic Coast Line R. Co. (N. C.)* 93 S. E. 479.

And it has been held that the fact that the particular train which a gateman was attempting to protect and by which he was injured was an intrastate train did not affect his status as an interstate employee. *Southern Pac. Co. v. Industrial Acc. Commission (Cal.)* 161 Pac. 1139, wherein the court said: "The substantial ground for petitioner's claim that deceased was then engaged in interstate transportation is that he was engaged in keeping one of its instrumentalities of interstate commerce in condition for the carrying on of that commerce; or, to put it in a more concrete way, that he was then engaged in keeping petitioner's tracks at the crossing clear and unimpeded for the passage according to schedule of interstate passengers and freight carried by petitioner. It is settled by the decisions of the United States Supreme Court, the ultimate authority on such a question as the one before us, that a railroad track used indiscriminately by a carrier in both its interstate and intrastate commerce is an instrumentality of interstate commerce, and that, notwithstanding

its double use, those 'engaged in its repair or in keeping it in suitable condition for use' are, while so engaged, employed in interstate commerce. Such work, it is said, 'is so closely related to such commerce as to be in practice and in legal contemplation a part of it.' See *Pedersen v. Delaware, etc. R. Co.* 229 U. S. 146, 33 S. Ct. 648; 57 U. S. (L. ed.) 1125, Ann. Cas. 1914C 153. So there can be no question as to the character of the work where an employee is engaged in direct work upon an instrumentality in actual use for purposes of interstate commerce, such as actually repairing the railroad track or doing thereon any work designed to keep it in suitable condition for use. Thus it is clear that one employed in actually removing from the track any obstacles to the passage of trains caused by a derailment or other accident would be employed in interstate commerce, in view of the decisions of the United States Supreme Court. He would be directly engaged in the repair of and putting again into condition for use that instrumentality of interstate commerce. The question here is, in the light of the evidence, a very narrow one, and is simply whether the principle of these decisions is applicable to one whose duties are in part to keep the track free of such obstructions to the uninterrupted passage of trains according to schedule as may be caused by passing vehicles. So far as the relation of such employee to one attempting to cross the track is concerned, it may be conceded that there is no ingredient of interstate commerce, and that, if the only consequence to be avoided by the employment was that of injury to such a person, the act of Congress relied on would not be applicable. But in the light of the evidence it seems to us that the scope of the employment in which deceased was engaged at the time of the accident was broader, and extended to keeping the track itself in suitable condition for use as an instrumentality of interstate commerce. In view of the evidence, the work of such a crossing gateman or flagman, so far as the railroad is concerned, is similar, in principle, to that of the track walker, whose duty it is to see that the track is in safe condition for the passage of trains, to that of the employee in the signal tower, whose duty it is to supervise and give the signals for the passage of trains, and to that of the employee engaged in repairs on the automatic signal apparatus with which this petitioner's line is equipped. All such employees may fairly be said, it seems to us, to be directly engaged, in substantial part, at least, in keeping the track in suitable condition for use. There is, of course, no analogy between the case of one so engaged, and that of a trainman engaged in the operation of an exclusively intrastate train. The duties of the latter are solely

Ann. Cas. 1918B.—5.

with reference to the operation and safety of the particular train on which he is engaged, and he has no duty whatever to perform in regard to keeping any instrumentality of interstate commerce in condition for use. Such is the full scope of his employment, and it has no relation whatever to interstate commerce, close or otherwise. The duties of deceased, as we have seen, had to do directly with the keeping of an instrumentality of interstate commerce in suitable condition for the use of such commerce. And exactly as in the case of one engaged in repairing such an instrumentality after injury thereto has occurred, who concededly is engaged in interstate commerce, it is immaterial whether or not any interstate traffic was immediately to be had over the same. The deceased was actually engaged at the moment of the accident in protecting that instrumentality from injury. His situation in this regard was, in view of the evidence, the same as it would have been if he had been one of a number of guards stationed along the line of railroad to prevent third persons from removing the rails or unlawfully placing obstructions on the track. Certainly their work would not be held to be unrelated to the safety of the track as a highway of interstate commerce."

A car inspector who while riding on an interstate train discovered a fallen brake beam on one of the cars and was injured while aiding the conductor in repairing it, has been held to be engaged in interstate commerce. *Lynch v. Central Vermont R. Co.* 89 Vt. 363, 95 Atl. 683.

In *Anest v. Columbia, etc. R. Co.* 89 Wash. 609, 154 Pac. 1100, it was said of an inspector engaged in inspecting the main line track of an interstate railroad: "In the present case there could be no possible separation of decedent's inspection of appellant's track for the purpose of its intrastate commerce and of its interstate commerce. The two were obviously concomitant. His inspection was for the purpose of aiding and assisting the appellant in the operation of its trains, cars, and locomotives, and the carrying on of its business both of interstate and intrastate commerce."

But a night watchman charged with the duty of guarding tools and material for the construction of a new depot and track to be used in interstate commerce has been held not to be engaged in interstate commerce as tested by the rule that the employee at the time of the injury must be engaged in interstate transportation, or in work so closely related to it as to be practically a part of it. *New York Cent. R. Co. v. White*, 243 U. S. 188, Ann. Cas. 1917D 629, 37 S. Ct. 247, L.R.A.1917D 1.

A railroad detective riding on a train of cars which was being switched in the rail-

road yards has been held not to be engaged in interstate commerce where it did not appear that there were interstate cars in that vicinity. *Chicago, etc. R. Co. v. Illinois Industrial Board*, 273 Ill. 528, 113 N. E. 80, L.R.A.1916F 540, wherein it was said: "It is true that it is conceded that there were one or more cars within the yards at the time of the injury which contained interstate freight. Where these cars were located is not shown. If they were a part of the transfer cut which Stockton was engaged in inspecting or upon which he was hanging at the time of his injury the burden was upon plaintiff in error to show that fact. It must be assumed for the purposes of this case that none of the cars in this transfer cut contained interstate freight. Had plaintiff in error shown that at the time of the accident Stockton was actually inspecting cars containing interstate freight, or that cars containing such freight were at the moment within the line of his vision, a different question would be presented. For all this record shows, the cars containing interstate freight may have been one, two or three miles distant from Stockton. If such were the case he could not reasonably be said to have been at that time engaged in a work which was a part of the interstate commerce in which the carrier was engaged, and under such circumstances the accident to Stockton could in no way affect the handling of such interstate freight. At such a distance Stockton was not able to exercise any authority or supervision over such freight, and it might be broken into, pilfered or injured as effectively whether Stockton was injured or uninjured."

A person employed by a railroad to assist in a search for train robbers who had robbed an interstate train has been held not to have been engaged in interstate commerce so as to come within the act. *Alabama Great Southern R. Co. v. Bonner (Ala.)* 75 So. 986, wherein it was said: "Such an employment is not commerce of any kind, nor is it so related to or connected with interstate commerce as to bring the business or relation within the protection of any of the interstate commerce statutes, such as the one here sought to be invoked, authorizing the recovery of damages for the wrongful death of a servant."

EMPLOYEE GOING TO OR RETURNING FROM WORK OR TEMPORARILY DIVERTED THEREFROM.

Holding that an employee leaving the yards of a railroad after his day's work which consisted of switching both interstate and intrastate commerce, was within the federal act, the court in *Erie R. Co. v. Winfield*, 244 U. S. 170, 37 S. Ct. 556, reversing 88 N. J. L.

619, 96 Atl. 394, said: "In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. See *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 260 [Ann. Cas. 1914C 159, 34 S. Ct. 305, 58 U. S. (L. ed.) 591]. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for present purposes of no importance."

But compare *Jacoby v. Chicago, etc. R. Co.* 165 Wis. 610, 161 N. W. 751, 164 N. W. 88, wherein it was held that a car record clerk, who after completing his duties was injured while leaving the yards, was not at the time engaged in interstate commerce. The court distinguished the case from that where a fireman was injured while going from his engine to his boarding house, preparatory to returning to his engine for an interstate trip, on the ground that the car clerk was leaving for the day after finishing his duties and with no intention to return.

An employee who was injured while on his way for orders from his superior has been held not to have been engaged in interstate commerce at the time of his injury since the nature of his work was undetermined until his orders had been given, and it was further held that the fact that but for his injury he would have been given orders requiring him to engage in interstate commerce did not alter the rule. *Erie R. Co. v. Welsh*, 242 U. S. 303, 37 S. Ct. 116, affirming 89 Ohio St. 81, 105 N. E. 189.

So a fireman on his way to work on a switch engine who was killed while crossing the tracks has been held not to be engaged at the time in interstate commerce, though the initial work of the switch engine was interstate commerce, the court basing its opinion on the ground that the employee had not actually begun his duties at the time of his injury. *Knowles v. New York, etc. R. Co.* 177 App. Div. 262, 164 N. Y. S. 1.

In *McBain v. Northern Pac. R. Co.* 52 Mont. 578, 160 Pac. 654, it was held that, under the rule that the employment at the precise time of the injury is the test of the nature of the work, a brakeman who after the completion of his trip and before assignment to another was injured while going through the yards for material for use on a future trip, the nature of which was undetermined, could not be said to have been

engaged in interstate commerce. And it was further held that it was of no consequence that his work ordinarily had to do with interstate commerce to a much greater extent than with purely local shipments.

A car inspector while going through the yards in search of material for the repair of an interstate car has been held to have been engaged in interstate commerce. *Norfolk, etc. R. Co. v. Short*, 171 Ky. 647, 188 S. W. 786.

It has been held that a railroad carpenter who temporarily left his work and went across the tracks for the purpose of buying a newspaper and was injured while so doing was not at that time engaged in interstate commerce. *Illinois Cent. R. Co. v. Archer*, 113 Miss. 158, 74 So. 135.

A member of a train crew occupying a caboose while waiting to be called to duty is not engaged in interstate commerce before the call is actually made. *Pryor v. Bishop*, 234 Fed. 9, 148 C. C. A. 25, wherein it was said: "The deceased could as well have been at a city hotel; his only duty at the time was to be within call, either personal or telephonic. That he was on the company's property at the time of the injury was due, not to an obligation, but to a privilege, a license; in being there, he was acting, not as an employee, but as a licensee. If, however, he could be deemed to be in the employment of the company at the time of the injury, nevertheless he was not then actually employed in interstate commerce. His actual employment at the time was holding himself ready in the city of Chicago to respond to a call for service. That the call, when it came, would be for an interstate trip, does not make the waiting in Chicago an actual engagement in interstate commerce, within the terms of the federal act. Plaintiff's claim that, by the hitching on of the caboose in question to the transfer train, decedent's crew was called, and that his interstate service had thus actually begun, does not commend itself to our judgment. It was not, nor was it intended as such. Clearly the crew had not started with the caboose upon their home run. Neither does it appear from the evidence that the caboose and train were at the place of the injury for the benefit of defendant, or that they were wanted there at the time, or that there was any understanding that they should be at Landers at or near that time, or that they were at the place of the accident with other right than the mere sufferance of defendant, that being the most convenient way for them to get to Landers and secure sleep and other accommodations for the night, or that they were under any expectancy of a call, or that their acts in the premises had any bearing upon interstate commerce, or that the facts of the case brought the dece-

dent within the provisions of the federal employers' liability act. We are unable to discover from the evidence or the law upon what ground plaintiff's decedent's presence at or near Landers at the time of the accident can be said to have been a step in the performance of any actual service to defendant in interstate commerce. He was there in no sense under the direction of defendant growing out of the relation of master and servant. He was his own master. As was said in *Illinois Cent. R. Co. v. Behrens* [233 U. S. 473], *supra*: "That he [the servant] was expected, upon the completion of that task [moving intrastate cars], to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury." To hold that decedent was, at the time of the injury—some four or five hours before he was wanted by defendant—employed in interstate commerce, would practically make the defendant liable to him as engaged in interstate commerce at all times. Such is not the purpose of the act. The statute was enacted only with reference to those railroad employees who, while in the actual discharge of their duties in interstate commerce, are injured."

In *Bumstead v. Missouri Pac. R. Co.* 99 Kan. 589, 162 Pac. 347, the Kansas court extended the doctrine as announced in *Pryor v. Bishop*, *supra*, to include a freight conductor who, after actually being called about an hour and a half before the time for his train to leave and who was required to report thirty minutes before that time, was getting his breakfast in the caboose preparatory to reporting. The court, apparently ignoring the fact that the conductor had actually been called, which by inference at least from the case of *Pryor v. Bishop* was made a determining factor, said: "The plaintiff being required to report for duty thirty minutes before the time his train was to start and his time to begin, it is difficult to see how it can be accurately said that while dressing and getting breakfast and before the beginning of the thirty minutes-time which, according to his testimony, was to mark the beginning of his actual duties, he was performing any duty for the company or engaged in interstate commerce. The time preceding the beginning of his actual duties was his own and for his use in any way he chose. The collision occurred not while he was momentarily or temporarily diverted from the duties of his employment, but before the performance of such duties had begun. It must be held, therefore, that he was not within the terms of the act."

Where an employee engaged in interstate commerce left his engine for the purpose of

rescuing a pedestrian who had fallen on the main line track on which an interstate train was approaching, it was held that the nature of his employment was not destroyed by such act. *Hardy v. Atlanta, etc. R. Co.* (Ga.) 93 S. E. 18. And see *Southern R. Co. v. Puckett*, reported in full post, this volume, at page 69, wherein it was held that an employee engaged in removing wreckage from a track over which interstate traffic regularly passed was engaged in interstate commerce, and the fact that his primary object at the time was to assist in jacking up a wrecked car so as to rescue a fellow workman caught beneath it, did not alter the character of his work.

EMPLOYEE WORKING ON WATERCRAFT.

The federal employers' liability act extends only to railroads and so an employee injured while unloading a vessel does not come within the act although the vessel is owned by an interstate railroad. *Southern Pac. Co. v. Jensen*, 244 U. S. 205, Ann. Cas. 1917E 900, 37 S. Ct. 524, *reversing* 215 N. Y. 514, Ann. Cas. 1916B 276, 109 N. E. 600, L.R.A.1916A 403, wherein it was said: "The first Federal Employers' Liability Act (June 11, 1906, c. 3073, 34 Stat. 232) extended in terms to all common carriers engaged in interstate or foreign commerce, and because it embraced subjects not within the constitutional authority of Congress was declared invalid. Employers' Liability Cases, 207 U. S. 463 [28 S. Ct. 141, 52 U. S. (L. ed.) 297], January 6, 1908. The later act is carefully limited and provides that 'every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states and territories, or between the District of Columbia or any of the states and territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.' Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having direct and substantial connection with railroad operations, and not with another

kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto. It is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters merely because the ocean-going ship concerned happened to be owned and operated by a company also a common carrier by railroad. The word 'boats' in the statute refers to vessels which may be properly regarded as in substance but part of a railroad's extension or equipment as understood and applied in common practice."

OTHER EMPLOYEES.

A station employee injured while going to an interstate train to get the mail for his station has been held to be engaged in interstate commerce so as to come within the federal employers' liability act. *Lynch v. Boston, etc. R. Co.* (Mass.) 116 N. E. 401, wherein it was said: "The undisputed evidence shows that Lynch, after having lowered the gates at the crossing, passed in front of the engine to reach the opposite or southerly side of the train where he was required to go to receive the mail from the mail car. It is the only reasonable inference that when he was struck by the engine he was going in the performance of his duty to get the mail from the train. The fact that he was killed before he reached the mail car is not decisive. If he was struck while going to the car to perform an interstate duty in the course of his employment under the circumstances he was as much engaged in interstate commerce as if he had received the mail and was killed while in the act of carrying it to the station."

A hostler engaged in fitting out engines for interstate traffic has been held to be engaged in interstate commerce. *Hinson v. Atlanta, etc. Air Line R. Co.* 172 N. C. 646, 90 S. E. 772.

A workman employed in unloading freight from a train engaged in interstate commerce is entitled to the benefits of the federal employers' liability act. *Western Ry. of Alabama v. Mays* (Ala.) 72 So. 641.

A clerk directed to call a crew who were to take out an interstate train has been held not to be within the act. *Mitchell v. Louisville, etc. R. Co.* 194 Ill. App. 77, wherein it was said: "The courts have been liberal in the application of the law as to when employees are engaged in interstate commerce within the meaning of the act in question. The employee must be engaged in work on some of the instrumentalities of interstate commerce. If this is his employment, it makes no difference how important or how unimportant it may be or whether he is at the time actually driving the nail or handling that particular car. . . . However, on the

other hand, in so far as we have examined the authorities, the employee must at the time have something to do in furthering interstate commerce either in the repair of the road, cars, engines or trains, or moving trains, engaged in interstate commerce. It has never been held that because some one gave orders or directions to those so engaged that he was himself engaged in interstate commerce because he gave such orders. The connection with interstate commerce must be direct and not indirect or remote.

Appellee had no direct connection with interstate commerce. His duties were local and in no way connected with the interstate commerce. Call the men that were to perform those duties. If this is a part of interstate commerce every employee of a railroad company, no matter who he is, who directs the men so engaged comes within the law. This construction carried into all of these positions would defeat the intention and purpose of such a statute. Appellee was not engaged at the time of the injury in interstate commerce and under his declaration could not recover." It was further held in that case that the mere fact that the injured employee was expected on the completion of that task to engage in another which would have been a part of interstate commerce did not alter the rule.

A janitor in a general office of a railroad who was injured while breaking up coal to put in the furnace has been held not to be engaged in interstate commerce; although the business of the railroad was almost entirely interstate in character. *Great Northern R. Co. v. King*, 165 Wis. 159, 161 N. W. 371.

SOUTHERN RAILWAY COMPANY

v.

PUCKETT.

United States Supreme Court—June 11, 1917

244 U. S. 571; 37 S. Ct. 703.

Removal of Causes — Action under Federal Employers' Liability Act.

An action brought under the Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, c. 149, Fed. St. Ann. 1909 Supp. p. 584), as amended by the Act of April 5, 1910 (36 Stat. L. 291, c. 143, Fed. St. Ann. 1912 Supp. p. 335), cannot be removed from a state to a federal court upon the ground of diverse citizenship.

Master and Servant — Federal Employers' Liability Act — Employees within Act — Clearing Wreckage from Track.

An employee of an interstate railway carrier assisting in clearing up a wreck which was blocking the movement of cars in interstate commerce, who, while carrying blocks on his shoulder which were to be used in jacking up a wrecked car and replacing it upon the track, stumbled over some large clinkers which were on the roadway near the track, and in stumbling struck his foot on some old cross ties, overgrown with grass, as a result of which he was seriously injured, is employed in interstate commerce within the meaning of the Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, c. 149, Fed. St. Ann. 1909 Supp. p. 584), as amended by the Act of April 5, 1910 (36 Stat. L. 291, c. 143, Fed. St. Ann. 1912 Supp. p. 335), giving a right of recovery against the carrier for injury to an employee while so employed, although his primary object may have been the rescue of a fellow employee, pinned beneath the car.

[See note at end of this case.]

Review by Federal Court of State Decision — Negligence — Clinkers on Right of Way.

The Federal Supreme Court will not disturb the concurrent conclusion of two state courts in an action brought under the Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, c. 149, Fed. St. Ann. 1909 Supp. p. 584), as amended by the Act of April 5, 1910 (36 Stat. L. 291, c. 143, Fed. St. Ann. 1912 Supp. p. 335), that there was sufficient ground for attributing negligence to the railway carrier because of the presence of large clinkers in the path along which an employee was called upon to pass in the course of his duty, and over which he stumbled while carrying some blocks to be used in jacking up a wrecked car.

Error to Georgia Court of Appeals.

Action by H. E. Puckett, plaintiff, against Southern Railway Company, defendant. Judgment for plaintiff in City Court of Atlanta. Judgment affirmed by Court of Appeals of Georgia. Defendant brings error. The facts are stated in the opinion. **AFIRMED.**

Sanders McDaniel, E. R. Black and L. E. Jeffries for plaintiff in error.

Edgar Watkins, Spencer R. Atkinson, and E. W. Born for defendant in error.

[571] PITNEY, J.—Puckett recovered a verdict and judgment in the City Court of Atlanta against the Southern Railway Company [572] for damages arising from personal injuries sustained by him in August, 1911, while at work for the company in its yard at Atlanta, Georgia. As submitted to the jury,

the action was founded upon the Federal Employers' Liability Act of April 22, 1908, as amended by the Act of April 5, 1910 (35 Stat. 65, c. 149, Fed. St. Ann. 1909 Supp. p. 584; 36 Stat. 291, c. 143, Fed. St. Ann. 1912 Supp. p. 335). The judgment was affirmed by the Georgia Court of Appeals (16 Ga. App. 551), and a writ of error brings it under our review.

The record shows that a petition and bond for the removal of the cause to the appropriate federal court upon the ground of diversity of citizenship was filed in due time by the defendant and overruled by the trial court. An assignment of error based upon this ruling has been abandoned, and properly so, in view of our decision in *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 602, 35 S. Ct. 844, 59 U. S. (L. ed.) 1478.

Whether, at the time he was injured, plaintiff was employed in interstate commerce, is the only substantial question; there being no dispute that defendant at that time was a common carrier by railroad engaged in commerce of that character.

As detailed in the opinion of the Court of Appeals, the circumstances of the occurrence were as follows: Plaintiff had been engaged in inspecting cars which had been put into an interstate train—No. 75—that ran between Atlanta, Georgia, and Birmingham, Alabama; he had inspected about 25 cars, and there remained to be inspected about 12 cars which were to be placed in the same train; while plaintiff was waiting for these, a collision between other cars of defendant occurred in the yard nearby, and several tracks were blocked by the wreckage; one of defendant's employees named O'Berry was caught in the collision and pinned beneath a car; in obedience to the printed rules of the company, plaintiff went immediately to the scene of the wreck to render what assistance he could, and was there instructed by a superior employee to go and get a "jack" to assist in raising the wrecked car [573] so as to extricate O'Berry and clear the tracks of the wreckage; some of the remaining cars not yet placed in train No. 75 were to have been hauled over the tracks that were obstructed by the wreck, and on account of the obstruction it became necessary to detour them, whereby train No. 75 was delayed for about an hour; while plaintiff, assisting in clearing up the wreck, was carrying some blocks on his shoulder to be used in jacking up the wrecked car and replacing it upon the track, he stumbled over certain large clinkers which were on the roadway near the track, and, in stumbling, struck his foot against some old cross ties overgrown with grass, and in consequence fell and was seriously injured.

The court held that although plaintiff's primary object may have been to rescue his

fellow employee, his act nevertheless was the first step in clearing the obstruction from the tracks, to the end that the remaining cars for train No. 75 might be hauled over them; that his work facilitated interstate transportation on the railroad, and that consequently he was engaged in interstate commerce when injured.

We concur in this view. From the facts found, it is plain that the object of clearing the tracks entered inseparably into the purpose of jacking up the car, and gave to the operation the character of interstate commerce. The case is controlled by *Pedersen v. Delaware, etc. R. Co.* 229 U. S. 146, 152, Ann. Cas. 1914C 153, 33 S. Ct. 648, 57 U. S. (L. ed.) 1125; *New York Cent. R. Co. v. Carr*, 238 U. S. 260, 283, 35 S. Ct. 780, 59 U. S. (L. ed.) 1298; *Pennsylvania Co. v. Donat*, 239 U. S. 50, 36 S. Ct. 4, 60 U. S. (L. ed.) 139; *Louisville, R. Co. v. Parker*, 242 U. S. 13, 37 S. Ct. 4; *Pedersen v. Delaware, etc. R. Co.* supra, holds that a workman employed in maintaining interstate tracks in proper condition while they are in use is employed in interstate commerce; the other cases are to the effect that preparatory movements in aid of interstate transportation are a part of such commerce within the meaning of the act.

[574] Of course, we attribute no significance to the fact that plaintiff had been engaged in inspecting interstate cars before he was called aside by the occurrence of the collision. *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473, 478, Ann. Cas. 1914C 163, 34 S. Ct. 646, 58 U. S. (L. ed.) 1051; *Erie R. Co. v. Welsh*, 242 U. S. 303, 306, 37 S. Ct. 116.

It is contended that there was no sufficient ground for attributing negligence to defendant because of the presence of large clinkers in the path along which plaintiff, in the course of his duty, was called upon to pass. This is no more than a question of fact, without exceptional features, and we content ourselves with announcing the conclusion that we see no reason for disturbing the result reached by two state courts. *Great Northern R. Co. v. Knapp*, 240 U. S. 464, 466, 36 S. Ct. 399, 60 U. S. (L. ed.) 745.

Judgment affirmed.

The Chief Justice dissents.

NOTE.

The holding of the reported case is to the effect that an employee engaged in removing wreckage from a track over which interstate traffic regularly passes is engaged in interstate commerce within the meaning of the federal employers' liability act (Fed. St. Ann. 1909 Supp. p. 584), although his primary object at the time is to assist in jacking up

a wrecked car in order to rescue a fellow workman caught beneath it. For a general discussion of the employees entitled to the protection of the federal employers' liability act, see the note to Minneapolis, etc. R. Co. v. Winters, reported ante, this volume, at page 54.

MEEHAN ET AL.

v.

INGALLS.

Washington Supreme Court—May 6, 1916.

91 Wash. 86; 157 Pac. 217.

Sales — Seed — Warranty of Germinating Power — Evidence of Breach.

In an action for their price, evidence by defendant that seeds received in January would not grow when planted in good soil about April, with evidence that they were not properly kept after receipt, and that plaintiff had properly tested them before sending, is held not sufficient to support a verdict for counterclaim for breach of warranty of the seeds as capable of germinating.

[See note at end of this case.]

Appeal from Superior Court, Yakima county: PREBLE, Judge.

Action by Thomas B. Meehan et al., plaintiffs, against W. D. Ingalls, defendant. Judgment for defendant. Plaintiffs appeal. The facts are stated in the opinion. REVERSED.

Engelhart & Rigg for appellants.

Thomas H. Wilson and Guy O. Shumate for respondent.

[86] MOUNT, J.—This action was brought by the plaintiffs to recover \$302.60 from the defendant, being the agreed price of crab apple and pear seed sold to the defendant.

The defendant, for answer to the complaint, admitted that he ordered the seeds at the price alleged, but denied all the other allegations of the complaint; and as an affirmative defense alleged, in substance, that the defendant purchased the seed for planting and growing a nursery; that the plaintiffs knew the purpose for which the defendant purchased the seed; that the defendant planted the seed properly and cultivated the same, but none of the seeds germinated or grew. For a cross-complaint, the defendant alleged that he had been damaged in the sum of \$562 by reason of the fact that the seeds did

not germinate and grow, and by reason of preparing and cultivating the land upon which the seeds were planted. The reply denied the allegations in the affirmative answer and in the cross-complaint. Upon these issues, the [87] case was tried to the court without a jury, and a judgment was entered in favor of the defendant for the sum of \$127.53. The plaintiffs have appealed from that judgment.

The facts are as follows: On October 28, 1912, the appellants wrote a letter to the defendant stating that they had just received certain seeds, and quoting prices thereon. In this letter, it was stated as follows:

"This seed will be of the usual first class germinating quality that we have furnished in the past. There is none better. Prospects of a crop at the present writing are encouraging. Place your order early and have your quantity reserved. Seed will be ready for delivery latter part of January, 1913."

The respondent had dealt with the appellants for some time in seeds. Upon the letter heads of the appellants, was printed this statement:

"Guarantee: While we try to procure the very best seed on the market, we give no guarantee, either express or implied. Samples will always be furnished when applied for. If the seeds are not accepted on these terms, we must be notified at once. If they are kept it will be taken as proof that they are satisfactory."

On December 5, 1912, the defendant ordered the seeds in question from the appellants. The seeds were shipped by express, as directed, and were received by the respondent about the middle of January, 1913. The respondent, upon receiving the seeds, placed them in a creek to soak for about a week. He thereupon took them from the creek and put them in an ice-pack until the latter part of March, or the first of April, when they were planted.

After the appellants had shipped the seeds, which were sold on thirty days' time, they sent a statement of account to the respondent requesting payment. The respondent made no reply to this statement. Thereafter the appellants drew a draft upon the respondent, which the respondent refused to pay, but made no complaint concerning the quality of the seeds. Thereafter this action was brought. Then the appellants [88] were notified for the first time that the seeds did not germinate. Before the appellants sent the shipment of seeds to the respondent, the seeds were given the usual test to determine their character, and this test showed that the seeds were good and would germinate. The only evidence in the record that the seeds were not good and would not germinate is the fact that the seeds were planted in good soil in the usual method and did not grow. There is

evidence in the record to the effect that the proper method of treating seeds of this character is to wet them for a short time, and then to keep them on ice until they are planted. The expert who testified to these facts stated that wetting them for two days was the longest time required; and that, if the seeds after being wet are placed upon ice, and the ice pack is permitted to melt, the seeds will heat, and the heat will destroy the germinating quality of the seeds. The defendant's testimony shows that he placed these seeds in a creek and left them there for about a week; that he then placed them in an ice-pack; that the ice melted; and that he was required to and did renew the ice. We think it is apparent from these facts that there were at least two causes for the destruction of the germinating quality of the seeds after they were received by the respondent. If the seeds were left too long in water, they would germinate, and ice would then destroy the germination. And second, if they were properly placed upon the ice, and the ice was permitted to melt, the seeds would heat, and the heat would destroy the germinating quality. Both of these conditions are present in this case.

Assuming, without deciding, that there was an express warranty of the quality of the seeds, the testimony is not disputed that the usual test was applied to the seeds by the appellants to determine the germinating quality of the seeds, and this test showed the seeds to be good. There is no evidence to dispute the good quality of the seeds except that the seeds when planted did not grow. But as we have seen above, the method of handling the seeds by the respondent [89] after he received them is sufficient to show that it was through his own neglect and failure to properly treat the seeds that their germinating power was killed. We are satisfied, therefore, that the mere fact that the seeds did not grow after they received the treatment which it is conceded they received after they were in possession of the respondent, is not sufficient to show that the seeds were not good and capable of germinating at the time the respondent received them. We are satisfied, therefore, that the appellant was entitled to recover the agreed price of the seeds, and that a judgment should have been entered in favor of the appellants.

The judgment of the trial court is reversed, and the cause remanded with direction to enter a judgment in favor of the appellants for the amount claimed.

Morris, C. J., Ellis, Bausman, and Chadwick, JJ., concur.

NOTE.

Express or Implied Warranty on Sale of Seed.

Introductory, 72.

Existence and Scope of Warranty:

In General, 72.

Germinating Power, 74.

Correspondence to Name or Variety, 75.

Freedom from Noxious Seed, 79.

Disclaimer of Warranty, 80.

Remedies of Buyer on Breach, 82.

Damages for Breach:

Failure of Crop, 83.

Seed Not True to Name, 85.

Noxious Seed, 86.

Pleading, 86.

Evidence, 87.

Introductory.

In a broad sense a sale of seed does not differ from any other sale with respect to the application thereto of the law of warranty. But in the application there arise certain incidents peculiar to a sale of property of that character. Thus the purpose of the purchase is necessarily known to the seller, and the defects likely to exist are of a peculiar character and are ordinarily latent and incapable of discovery by inspection. Also, the fact, known to the seller, that the purpose of the buyer is to raise a crop from the seed, is deemed by most courts to create an exception to the general rule that prospective profits cannot be recovered for a breach of warranty. The closely related question of implied warranty on a sale of nursery stock is discussed in the note to *Grisinger v. Hubbard*, Ann. Cas. 1913E 87.

Existence and Scope of Warranty.

IN GENERAL.

The courts ordinarily apply to a sale of seeds the rule that where property is purchased for a specific purpose known to the seller there is an implied warranty of fitness for that purpose. *Shatto v. Abernethy*, 35 Minn. 538, 29 N. W. 325; *Flick v. Wetherbee*, 20 Wis. 392. And see *Gloster Oil Works v. Buckage Cotton Oil Co.* 87 Miss. 618, 40 So. 225. There is an implied warranty that seed is of "salable" or "merchantable" quality. *Gachet v. Warren*, 72 Ala. 292; *Frith v. Hollan*, 133 Ala. 583, 32 So. 494, 91 Am. St. Rep. 38, 57 L.R.A. 720. As was said in *Totten v. Stevenson*, 29 S. D. 71, 135 N. W. 715: "While it nowhere appears in the allegations of the counterclaim, or in plaintiff's reply thereto, the purpose for which said corn was bought, still defendant, without objection,

testified that plaintiff informed him and that he knew plaintiff purchased the same for seed. Under such evidence, in the absence of an express contract to the contrary, the law implies a warranty of the fitness of the merchandise sold for the purpose for which it was bought." In the leading case of *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13, it was said that there is an implied warranty that seed is free from any latent defect arising from the manner of its cultivation, harvesting or storing which renders it unfit for use. See also *Prentice v. Fargo*, 53 App. Div. 608, 65 N. Y. S. 1114. In *Landreth v. Wyck-off*, 67 App. Div. 145, 73 N. Y. S. 388, the foregoing rule was applied to seed which had degenerated by accidental cross fertilization.

In respect to a warranty of hop roots the court said in *Brooks v. McDonnell*, 41 Wis. 139: "It seems to us there was no error in leaving it to the jury to find, from all the facts and circumstances, what the parties intended by the words, the roots are 'all right and will grow;' whether this language amounts to a warranty of the quality of the roots, their power or ability to produce hops, or whether the warranty only related to the vitality of the roots and that they would grow. The words are sufficiently broad in their meaning to include quality; and it was for the jury to say, under the circumstances, in what sense they were understood and used by the parties. It is said that the growing quality was all the parties talked about or had in mind, and that whatever was said should be construed as referring to the one thing. But it seems to us the question whether or not the statement or representation made by Donahoe amounted to a warranty, and, if so, what was included in it, was a proper matter for the determination of the jury."

In *Gardner v. Winter*, 117 Ky. 382, 78 S. W. 143, 63 L.R.A. 647, it was held that where seed of a particular variety is ordered there is no implied warranty of its suitability. So in *Gachet v. Warren*, 72 Ala. 288, it was said: "The kind of oats suitable for his use, the purchaser selects—he does not rely on the judgment or skill of the seller to select for him. The judgment or skill of the seller is trusted only to providing oats of a designated species. When oats of that species were furnished, not unsalable, unmerchantable, the contract was performed by the sellers. And if there was a warranty, or representation by them, that the oats were of that species, the warranty or representation was not broken. The oats may not have produced as the buyer expected; his expectations were capable of disappointment, though the sellers kept the contract, made no false representations, and no warranty which was broken."

In *Ordway v. Olson*, 4 Sask. L. Rep. 343, it was held under a statute that no warranty of fitness was implied, the court saying: "Sec. 16 of the Sale of Goods Act provides that there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows: '(1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose. In the present case the plaintiff Harry Ordway did make known to the defendant the particular purpose for which the flax was required, but there was not a single word said either by himself or by See intimating to the defendant that they relied upon his skill and judgment to provide for them seed suitable for seed. At the time the contract was entered into the defendant agreed to sell to the plaintiffs all the flax he could spare out of the quantity then in his granary. As far as the flax on which he had a mortgage, which was the Christianson flax, they could take it if it suited them, after they had seen it. It was delivered to the defendant, and the plaintiffs examined it and said it suited them and that they would take it. There was nothing in the transaction which could be held as indicating that they were relying in the slightest degree upon the skill or judgment of the defendant. I, therefore, hold that the plaintiffs purchased the Christianson flax on their own judgment, and, that being so, the knowledge of the defendant that they were purchasing it to sow on their land does not raise an implied warranty on his part that it was reasonably fit for that purpose."

In *Coleman v. Simpson*, 162 App. Div. 335, 147 N. Y. S. 865, it was held that an affirmation that certain oats were "seed oats" amounted to an express warranty that they were free from such defects as would prevent them from being regarded in the trade as seed oats.

In *Ferry v. Ballinger*, 8 Kan. App. 756, 60 Pac. 824, it was held that a warranty that seed is "clean and satisfactory," the contract providing for an examination by the buyer to ascertain that it is "vital and fit for seed purposes," is not a general warranty of satisfaction.

With respect to a statement that seed potatoes were "a new variety" and "enormous bearers," it was said in *Fanning v. International Seed Co.* 89 Hun 146, 35 N. Y. S. 10: "The allegation in the complaint might be

true, but plaintiff would not have been deceived. It is true that proof, upon a trial, that a vendor represented goods to be of a particular kind or quality, may oftentimes enable a jury to see that the transaction was understood by the parties to be a warranty or a contract to deliver goods of a specific kind or quality, and render a verdict accordingly. But a representation is not necessarily, perhaps not usually, a warranty. Caveat emptor is the general rule."

GERMINATING POWER.

By the weight of authority a warranty of germinating power is implied in a sale of seed. *Ferris v. Comstock*, 33 Conn. 513; *Butler v. Moore*, 68 Ga. 780, 45 Am. Rep. 508; *Shaw v. Smith*, 45 Kan. 334, 25 Pac. 886, 11 L.R.A. 681; *Johnson v. Sproull*, 50 Mo. App. 121; *Moore v. Koger*, 113 Mo. App. 423, 87 S. W. 602; *Prentice v. Fargo*, 53 App. Div. 608, 65 N. Y. S. 1114; *Reiger v. Worth*, 127 N. C. 230, 37 S. E. 217, 80 Am. St. Rep. 798, 50 L.R.A. 362. See the reported case as to the sufficiency of evidence to show a breach of an express warranty of germinating power. As was said in *Shaw v. Smith*, supra: "The maxim of the common law, caveat emptor, is the general rule applicable to purchases and sales of personal property so far as the quality of the property is concerned; and under such maxim, the buyer, in the absence of fraud, purchases at his own risk, unless the seller gives him an express warranty, or unless, from the circumstances of the sale, a warranty may be implied. In the present case no express warranty was given, and the question then arises, Was there any implied warranty? At the time when the contract for the purchase and sale of the flax seed was entered into, such seed was not present so that it could be inspected by the purchaser, and when it arrived and was delivered to him the defect in the seed was not apparent, and was probably not discoverable by any ordinary means of inspection, and it was not discovered until after it was sowed and when it failed to germinate. When the original contract for the purchase and sale of the flax seed was made, the flax seed was purchased and sold for the particular purpose, known to both the buyer and the seller, of sowing it in a field and of raising a crop from it, and therefore this purpose was a part of the contract and demanded that the seed should be sufficient for such purpose. It in effect constituted a warranty on the part of the seller that the seed should be the kind of seed had in contemplation by both the parties when the contract was made. The purchaser had to rely upon the seller's furnishing to him the kind of seed agreed upon, and the seller in effect agreed

that the seed furnished should be the kind of seed agreed upon. The entire contract when made was executory, and it was to be executed and performed afterward, and to be performed in parts and at different times. The seller was first to furnish the seed, and he did so in about ten days after the contract was made, and of course the seed was to be a kind of seed that would grow. The purchaser was afterwards to sow it and to raise a crop. And afterward the purchaser was to sell, and the seller was to buy the crop upon certain terms and conditions expressed in the contract. We think there was an implied warranty on the part of the seller that the seed should be sufficient for the purpose for which it was bought and sold."

But in *Moore v. McKinlay*, 5 Cal. 471, the court said: "The plaintiff maintains, that the word 'seeds' thus used amounts to an express warranty; that it has an express signification, importing an article which will germinate or grow, and that it would be error to apply this term to any seeds not possessing these properties. And second, that if not an express warranty, the law will imply a warranty; or, in other words, raise the presumption that the article sold is merchantable and fit for the use for which it was sold. At common law, the rule caveat emptor applied to all sales of personal property, except where the vendor gave an express warranty, which is said to be such recommendations or affirmations, at the time of the sale, as are supposed to have induced the purchase. To constitute a warranty, no precise words are necessary; it will be sufficient if the intention clearly appear. During the time of Lord Holt, the doctrine was established, that to warrant, no formal words were necessary, and therefore a warranty might be implied, from the nature and circumstances of the case, and the maxim was thus introduced, that a sound price imports a sound bargain or warranty. This doctrine was afterward exploded by Lord Mansfield, since which time it has undergone some modifications in the English and American courts, tending in the former somewhat, and in some of the states of the Union, to the rule of civil law which implies that the goods sold are merchantable and fit for the purpose for which they were bought. The better opinion, however, I think, as deduced from English and American decisions, is that a warranty will not be implied, except in cases where goods are sold at sea, where the party has no opportunity to examine them, or in case of a sale by sample, or of provisions for domestic use."

In *Coleman v. Simpson*, 158 App. Div. 461, 143 N. Y. S. 587, a middleman ignorant of the character of the seed which he was selling

was held not to warrant its germinating power.

In a case where there was no warranty of germinating quality, failure to germinate has been held to be evidence of a breach of a warranty that seed was fresh. *Jacot v. Grossmann Seed, etc. Co.* 115 Va. 90, 78 S. E. 646, wherein the court said: "It is plain, however, that the affirmation of the fact that the seed were of the crop of 1910 was made by the plaintiff in error, and it was intended to influence the defendant in error as an affirmation of quality, and was so relied upon. There was no warranty of the germinating properties of the seed sold, but there was evidence that seed of good quality of the crop of 1910 were good, merchantable seed; that it was the well recognized course of business to buy of the crop of 1910 to be seeded in the season of 1911; and that the lapse of a year would not materially affect the quality of the seed. If this be true, then the fact established beyond doubt that the seeds had practically no germinating qualities strongly tended to prove that they were not grown in the season of 1910, and tended to prove a breach of the affirmation or warranty that they were seed of that years growth."

CORRESPONDENCE TO NAME OR VARIETY.

The courts are not altogether agreed as to whether the warranty which results from the furnishing of seed in response to a request for a particular variety is express or implied. In one case it has been said that it is immaterial which it is. *Gubner v. Vick*, 42 Hun 657, 6 N. Y. St. Rep. 4. The weight of authority is however that in any sale of seed specifically designated by name or variety the seller warrants that it is in fact of the kind or variety indicated. *Allan v. Lake*, 18 Q. B. 560, 83 E. C. L. 560; *Lovegrove v. Fisher*, 2 F. & F. (Eng.) 128; *Gachet v. Warren*, 72 Ala. 288; *Moody v. Peirano*, 4 Cal. App. 411, 88 Pac. 380; *Americus Grocery Co. v. Brackett*, 110 Ga. 480, 46 S. E. 657; *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 So. 410; *Phillips v. Vermillion*, 91 Ill. App. 133; *Gardner v. Winter*, 117 Ky. 382, 78 S. W. 143, 63 L.R.A. 647; *Shatto v. Abernethy*, 35 Minn. 538, 29 N. W. 325; *Cline v. Mock*, 150 Mo. App. 431, 131 S. W. 710; *Grafton-Stamps Drug Co. v. Williams*, 105 Miss. 296, 62 So. 273; *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425, 36 N. J. L. 262, 13 Am. Rep. 438; *Passinger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Van Wyck v. Allen*, 6 Daly 376, *affirmed* 69 N. Y. 61, 25 Am. Rep. 136; *American Warehouse Co. v. Ray* (Tex.) 150 S. W. 763; *Hoffman v. Dixon*, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916; *Ross v. Northrup*, 156 Wis. 327, 144 N. W. 1124.

In *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13, it was said: "It is claimed by the defendants that there was no breach of any warranty shown, assuming that a warranty was proved, for the reason that the seed sold were large Bristol cabbage seed. That the seed were Bristol cabbage seed is, as the defendants insist, established by the fact that they grew upon stocks of Bristol cabbage. The referee finds that the seed was raised upon Bristol cabbage stocks, but he further finds that these stocks were planted in the vicinity of stocks of other varieties of cabbage, and were fertilized by the pollen therefrom, and that, in consequence of the crossing of the varieties, the seed grown upon Bristol cabbage stocks became impure, and were not genuine Bristol cabbage seed, but lost that character and quality, and that the plants raised by the plaintiffs from the seed purchased from the defendants, with a very few exceptions, in consequence of such crossing, were of no known variety of cabbage, and were of no value except as food for cattle. The evidence on the part of the plaintiffs shows that they set out 105,000 plants raised from this seed, of which 100,000 lived and grew vigorously, but about 200 only produced Bristol cabbages. That the defendants intended to sell and the plaintiffs to buy seed, which under the proper cultivation, if it grew at all, would produce Bristol cabbages, is evident. The defendants knew that the plaintiffs were market gardeners, and desired this particular variety of seed. Bristol cabbages were regarded as a valuable variety for marketing. The defendants raised the seed, and it was not Bristol cabbage seed, within the meaning of the warranty, whatever its botanical or scientific designation might be, unless it would produce Bristol cabbages. Whether the seed was Bristol cabbage seed within the warranty, depends not upon the origin of the seed, or the stocks upon which it grew, but upon the fact whether Bristol cabbages as known in the market could be raised therefrom. The contention of the defendants that the warranty was not broken, if technically, or in the language of botanists, the seed was Bristol cabbage seed, cannot therefore be sustained."

In *Allan v. Lake*, 18 Q. B. 560, 83 E. C. L. 560, Lord Coleridge said: "As regards the first parcel, there is no doubt that the statement in the sold note, that the seed was Skirving's Swedes, was made by the defendant part of the contract. Then, is that statement a warranty or a mere representation? I think it is a warranty. If it had been limited to an assertion that the seed was turnip seed, that would without doubt be a warranty of the seed being turnip seed. And, in like manner, when the defendant described the seed as Skirving's, he undertook that it should answer that description."

In *Americus Grocery Co. v. Brackett*, 119 Ga. 489, 46 S. E. 657, with respect to a contract for the sale of "Texas red rust-proof seed oats" the court said: "Bargain and sale of a chattel of a particular description imports a warranty that the article sold is of that description. *Miller v. Moore*, 83 Ga. 684, 10 S. E. 360, 20 Am. St. Rep. 329, 6 L.R.A. 374; Civil Code, § 3558. It was for the jury to decide whether 'Texas red rust-proof seed oats' described a specific variety, regardless of where they were raised, as 'Irish' potatoes include those raised outside of Ireland; or whether the trade meaning included those grown in the state of Texas, deriving their special value from the character of the soil and climate."

In *Depew v. Peck Hardware Co.* 121 App. Div. 28, 105 N. Y. S. 390, wherein it appeared that a person ordering alfalfa seed received seed largely mixed with trefoil seed, the court said: "The seed itself was pure, what there was of it; but the trefoil was the predominating crop in the field where the sowing was made. The yellow blossoms extended all over the ten acres, and the several witnesses testified to the greater proportion of the trefoil over the alfalfa. For aught that appears, the alfalfa seed was of the best sort. The trouble is that the plaintiff purchased alfalfa seed and obtained trefoil and dodder in major quantities. The cases cited by the appellant to the effect that there is no implied warranty of quality, only in exceptional cases, do not apply to the facts presented in this record. The plaintiff paid for and supposed he was purchasing a valuable seed of a certain kind, and after the crop partially matured he discovered that he had obtained a worthless kind of seed and a valueless crop had resulted. He did not get what he bought. If the alfalfa seed had been defective, not up to the standard in quality, there would have been no implied warranty. A purchaser innocently buying seed, the kind of which he cannot ascertain by reasonable inspection, may assume in ordinary circumstances that he is getting what he purchased. The plaintiff knew nothing of alfalfa seed. He was not capable of making a discriminating inspection of it. Whatever inspection he made was fruitless. The evidence shows that the trefoil closely resembles the alfalfa seed. They are 'very similar in shape, color and size, . . . remarkably alike . . . in general appearance.' Only an expert can distinguish them, is the effect of the testimony of Mr. Stewart, the botanist of the state agricultural experiment station at Geneva. The authorities sustain the finding of the jury that there was an implied warranty by the defendant, surviving acceptance, that the seed sold the plaintiff was alfalfa seed."

In *Molcott v. Mount*, 38 N. J. L. 496. 20 Am. Rep. 425, wherein it appeared that on

an order for "early strap leaf red top turnip seed" seed producing turnips of another and inferior variety was furnished, the court said: "The seller in this case asserted, at the time of the sale, that the seed was of the species which the vendee was in search of. When he made this express assertion, he was aware that the vendee could have no opinion for himself on the subject, for the case states that the seed could not be distinguished by sight or touch. The vendee also knew that the vendor could not be stating the result of his own observation. The facts do not admit of the imperative inference that the assertion of the vendor was mere commendation of his goods, or even that it was the utterance of his view as an expert. If the seller had stated the exact truth, he would have said that he had bought the seed as seed of the specified kind, but that he did not know whether it was so or not. Instead of doing this, he made the positive assertion in question. From such an assertion under the circumstances in evidence, I think the court, although it was not bound so to do, had the right to infer that there was a warranty."

In *Hoffman v. Dixon*, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916, the facts were stated as follows: "Mr. Hoffman asked the clerk if they had rape seed for sale. He replied in the affirmative, whereupon Mr. Hoffman said he would take twenty-five pounds. The clerk thereupon produced a sack of seed and weighed out the desired amount in Hoffman's presence. Neither Hoffman, the clerk, the defendant, nor plaintiff knew rape seed from wild mustard seed, and each was wholly unaware of the ignorance of the others. Hoffman purchased the seed relying upon the fact that it was produced by the clerk, and sold to him as what he called for. The seed was delivered at plaintiff's farm and was there, either by him or by his authority, sowed upon his land. He did not examine the seed, and would not have been wiser if he had, as he was entirely unacquainted with the appearance of rape seed, as before indicated. He used the seed relying upon the fact that it was sold as rape seed. The seed was in fact wild mustard seed. It befouled plaintiff's land to his injury." The court said: "Applying the principle stated to the facts of this case, What was the contract between the parties? Upon what did their minds meet? The answer must be, that the defendant would sell to the plaintiff rape seed and that the seed delivered was of that kind. Opportunity on the part of the plaintiff to inspect does not militate against his right to insist upon the condition of the contract as to the identity of the article delivered being made good, since he relied wholly on his contract, not knowing whether the article he received answered such condition or not, and not

being chargeable with negligence because he did not know. In such a case the doctrine of implied warranty does not apply, but the doctrine of express warranty does. No particular form of expression or words is necessary to make an express contract of warranty. The word 'warranty' is not necessary to it. An affirmation of the fact as to the kind or quality of an article offered for sale, of which the vendee is ignorant but upon which he relies in purchasing such article, is as much a binding contract of warranty as a formal agreement using the plainest and most unequivocal language on the subject."

Where the seller of seed disavows any knowledge of its kind or variety, merely repeating what he has been told by his vendor, there is no implied warranty. *Kircher v. Conrad*, 9 Mont. 191, 23 Pac. 74, 18 Am. St. Rep. 731, 7 L.R.A. 471; *Yandell v. Anderson*, 163 Ky. 702, 174 S. W. 481. Compare *Keeler v. Green*, 51 Mont. 42, 149 Pac. 286, wherein it was said that it is the duty of a seller of wheat in filling an order for "spring wheat" to "know that the goods delivered were of that character and quality." In *Calhoon v. Brinker*, 17 Ohio Dec. 705, it was said: "Does a seedsman who gives a package marked with the name of a variety asked for warrant that from these seeds there will grow, if they grow at all, that variety? It seems to me that the law may be different in the case of a seedsman in a large city selling and delivering seeds from what it is where the seeds are bought from a farmer or a gardener who sells what he has grown. Without evidence on the subject, a court must not be blind to the ordinary facts of life, and the facts about the business of a seedsman in a large city are, that he handles chiefly goods which he gets from others, some of them from foreign countries. The evidence in this case is explicit that defendant did not himself produce these seeds. He said to plaintiff, 'They were raised for me.' In other words, 'I did not produce them, I got them from the producer;' and while it is not of much or any importance in this case, it might in some cases be important to determine whether the seeds were sold by a person in commercial business of selling seeds or by a gardener or a farmer selling that which he himself produced. The rule manifestly must be different. If one go to a farmer and ask him for certain seeds, the natural inference, the one which the producer has a right to draw, is, that the seeds furnished are those which the farmer himself has taken from the squash, and the case would be very different from that of a man who gets his material, perhaps in car load lots, from foreign states and foreign countries. Passing from the character of defendant's business and the manner in which he handles seeds, we come to the subject of the

seeds themselves. This is the determining thing in this case. And here we must recognize the facts of vegetable life, even without any evidence. We all know that no human being can take those seeds that were sold and tell what variety of the species they belong to until the fruit is ripened. We know that no one can tell by simple inspection whether the seed is alive or dead, whether or not it will germinate. We know that farmers in the spring time, in order to know whether or not seed will grow, put some of it in water to see whether or not it will germinate or sprout, as they call it. That is the sort of subject-matter that is being dealt with here. It is something of which the life and character is hidden and in mystery. No amount of diligence on the part of any of us would enable us to take these seeds as they were brought into this courtroom yesterday and tell what they would produce. In this case a special variety of squash seed was asked for. We all know that varieties are not permanently fixed qualities; that under different conditions of soil and climate they quickly change if not carefully protected against that. We know, for instance, that if a seed be planted in one lot and in a near-by lot there be a different variety of the same species the insects will fly from one to the other and carry the pollen from one to the other; and while one variety is planted a different variety is produced. Take the ordinary sweet corn that is used for the table and plant it near a field of common yellow corn and the first season the sweet corn will deteriorate by the transmission of the pollen, by insects or by the wind, from the other field. Considering the nature of this man's business, considering the nature of the subject-matter with which he was dealing, it seems clear that if all that had been done were what I have thus far enumerated, this court is of opinion there would be no warranty that the produce would be mammoth golden yellow bush squash."

But in *Grafton Stamps Drug Co. v. Williams*, 105 Miss. 206, 62 So. 273, the court said: "That the person from whom the seller had himself purchased the seed declined to warrant to him that it was true to name is immaterial, although this fact was known to the last purchaser; his warranty not being in any wise dependent upon the existence vel non of a warranty to the person from whom he himself purchased. At most, such a fact is only a circumstance, to be considered along with other evidence, if such there be, indicating that the last sale was made upon an express or implied agreement that no such warranty should result therefrom."

In *Rauth v. Southwest Warehouse Co.* 158 Cal. 54, 109 Pac. 839, it was said: "To make this rule applicable, the circumstances

must be such as to amount to a representation of fact on the part of the vendor that the article is of the particular kind or description. If the buyer in terms asks for the particular kind and the seller purports to comply with his request, he would probably be held to warrant the article as being of that kind, although he may not have made any declaration in words to that effect. In other words, the circumstances may be such as to make the acts of the vendor constitute such a representation. But in this case, as we have seen, there was no demand, in terms, for bearded barley. The demand of the buyers was simply for seed barley and they were given good seed barley of a kind not shown to be in any way different in quality from the common bearded variety theretofore grown in that locality. There is nothing in the evidence heretofore referred to upon which to found the conclusion of a representation or warranty that the barley was of the bearded kind, unless we can hold that the jury was warranted in concluding that there was a custom or usage in Orange county known to defendant or so notorious that one engaged in the grain business must be presumed to know it (2 Page on Contracts, sec. 604), to the effect that where the word 'barley' was used without qualification it meant only bearded barley and did not include beardless barley. An attempt was made to show such a custom or usage, but in addition to the fact that the evidence was directed to the existence of such a custom only at the time of the trial, which was nearly two years after the transactions, such evidence, in our judgment, fell far short of the degree of clearness and certainty essential to show a custom or usage so notorious that defendant must be presumed to have known it, for actual knowledge was not shown, to the effect that the term 'barley' did not include barley exactly like the common bearded variety ordinarily grown in Orange county except that it grew without the long bristles found on such barley."

In a few cases it has been held that on a sale of seed with equal opportunity for inspection by both parties there is no implied warranty of kind or variety. *Kingsbury v. Taylor*, 29 Me. 508, 50 Am. Dec. 607; *Lord v. Grow*, 39 Pa. St. 88; *Shisler v. Baxter*, 109 Pa. St. 443, 58 Am. Rep. 738. In *Lord v. Grow*, supra, it was said: "To the purchaser of goods on inspection, the language of the law is 'caveat emptor.' There may be a few exceptions, such as we have referred to, but a sale of such an article as wheat is not one of them. When the purchaser has seen it, and gets what he saw, no warranty is implied that it is properly described by the name which the vendor gives to it."

To create an implied warranty that seed is true to name it is not necessary that the

vendor should state in so many words that the seed is of that particular name. Thus a representation that seed barley is well threshed and the beards broken off amounts to an implied warranty that the seed is of the bearded kind. *Rauth v. Southwest Warehouse Co.* 158 Cal. 54, 109 Pac. 839. It has been held that a sale of "Arlington White spine cucumber seed" is a guaranty that the seed will grow that particular kind of cucumber. *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 So. 410.

Where a vendor represented seed to be "Wycklin's early flat Dutch cabbage seed" and the seed so resembled that kind, but proved to be totally unproductive, it was held that the representation by the seller amounted to a warranty that the seed was true to name. *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136.

It has been held that a sale of onion sets by description raises an implied warranty that the onion sets will not only answer the description, but that they are salable or merchantable. *Frith v. Hollan*, 133 Ala. 583, 32 So. 494, 91 Am. St. Rep. 54.

Where a vendor agrees to sell and deliver "rust proof oats" he impliedly warrants the oats to be of that kind and variety and it is immaterial that a sample of the oats is exhibited to the buyer for inspection if the oats delivered are of inferior quality. *Godden Seed Co. v. Smith*, 185 Ala. 296, 64 So. 100.

A representation made by the seller through a catalogue that a certain seed is "Comstock Spanish tobacco seed" is a warranty that the seed is true to name. *Ross v. Northrup*, 156 Wis. 327, 144 N. W. 1124.

The fact that the buyer inspects the seed before purchasing is immaterial, when its character cannot be ascertained by any reasonable inspection. *Grafton-Stamps Drug Co. v. Williams*, 105 Miss. 296, 62 So. 273.

A contract to sell half a ton of yellow mangel wurzel seed at a fixed price per pound, the same to be grown by the seller and to be of good growing stock, has been held to contain no implied warranty that the seed produced should be itself good, but merely that seed of a good growing stock should be sown and that everything should be done that was reasonably required in the growing of seed. *Pinder v. Button*, 7 L. T. N. S. (Eng.) 269, 11 W. R. 25.

In *Natchez Drug Co. v. Ratekin Seed House*, 165 Ia. 641, 146 N. W. 865, it was held that to recover under an implied warranty that seed was fit for the purpose for which it was sold there should be substantive evidence that it was not, in fact, fit for the purpose for which it was sold; that a mere complaint that it was unfit did not establish its unfitness.

In order to create an implied warranty from the description of seed the circumstances must be such as to amount to a representation of fact on the part of the seller that the seed is of that particular variety as described. Thus, in *Rauth v. Southwest Warehouse Co.* 158 Cal. 54, 109 Pac. 839, it appeared that the defendant showed the plaintiff a sample of barley and represented it to be clean seed barley such as was usually sown and raised in Orange county. The facts were held to be insufficient to show that the defendant represented the barley to be of the variety known as bearded barley.

An action for a breach of warranty has been held to be maintainable by seed merchants against seed brokers for warranting turnip seed to be rape seed, although it was sold by sample, where the two kinds of seed were so much alike that persons even in the business of seed selling might easily be deceived. *Lovegrove v. Fisher*, 2 F. & F. (Eng.) 128.

In *Wallis v. Pratt* [1911] A. C. (Eng.) 394, it appeared that the plaintiff bought seed of the defendant which was described as "common English sainfoin" with a condition however that "the seller gave no warranty express or implied as to growth, description or any other matters." The seed delivered to the plaintiff was not "common English sainfoin, but "giant sainfoin," a different and inferior seed. The plaintiff accepted the seed in the belief that it was as represented and resold it to other persons to whom he was obliged to pay damages for the mistake. It was held that the plaintiff was entitled to damages for a breach of warranty the condition in the contract notwithstanding.

In *Gardner v. Winter*, 117 Ky. 382, 78 S. W. 143, 63 L.R.A. 647, 25 Ky. L. Rep. 1472, an action for breach of warranty, it was held that where the plaintiff relied on his own judgment and experience in ordering of the defendants who were dealers in seed a specific article known as "western German millet seed," the question whether the seed sold to him was of that variety was for the jury.

It has been held that whether a representation descriptive of a particular kind of seed sold by a name which is known in the market, is an expression of judgment or opinion only, or is intended as a warranty, is a question of fact to be determined by all the circumstances of the case. *Wolcott v. Mount*, 36 N. J. L. 262, 20 Am. Rep. 438.

In an action for a breach of warranty that lily bulbs sold to the plaintiff by the defendant were not true to the name, it has been held to be a question for the jury whether the seller warranted that the bulbs were of a certain kind. *Edgar v. Joseph Breck, etc. Corp.* 172 Mass. 581, 52 N. E. 1083.

In *Cline v. Mock*, 150 Mo. App. 431, 131 S. W. 710, it appeared that the plaintiff

bought of the defendant "orange cane seed." The crop that grew therefrom consisted of broom and other kinds of cane. The plaintiff testified that he could not tell from an inspection of the seed, what kind they were, whether "orange cane seed" or a mixture of various kinds of cane seed with seed of broom corn. It was held that an instruction to the jury that if the buyer disclosed to the seller his intention to purchase an article for special use the seller impliedly warranted the article to be suitable for the purpose of its intended use, was proper.

In *Gubner v. Vick*, 42 Hun 657, 6 N. Y. St. Rep. 4, it appeared that the plaintiffs ordered seed from the defendant's catalogue which described it as "excelsior large flat Dutch" with an assurance to purchasers that they would get good seed. The seed turned out to be mixed and a large portion of it failed to head and a portion of it failed to head properly. It was held that the law would assume on a contract for a particular quality of seed that it would produce the vegetable named.

FREEDOM FROM NOXIOUS SEED.

There is an implied warranty that seed is free from noxious admixture. *Moore v. Koger*, 113 Mo. App. 423, 87 S. W. 602; *Bell v. Mills*, 78 App. Div. 42, 80 N. Y. S. 34.

In *Shatto v. Abernethy*, 35 Minn. 538, 29 N. W. 325, it was said: "The jury might conclude that the warranty or undertaking of the defendants did not extend beyond the fact that the grain was 'genuine Saskatchewan fife wheat;' but, in view of the admission in the answer, it may be assumed further that it was furnished for the express purpose of being used for the production of a crop for seed, and hence, that, by implication, if not expressly, the defendants warranted it reasonably fit for that purpose. Considering the undertaking of the defendants to be such as is thus indicated, the conclusion implied from the verdict, that there was no breach of the warranty, is fairly sustained by the evidence. Except for the presence of other seeds, it was what was known as Saskatchewan fife wheat. The evidence of the plaintiff went to show that a large part of the bulk, estimated as high as 40 per cent, was composed of other kinds of wheat, and of other seeds, with some smut. The evidence on the part of the defendants, from several witnesses, shown to have been apparently capable of testifying to the fact, tended to prove that it was without smut, and with very little admixture of other seeds or of other wheat. As to the amount of impurities in this seed, and whether for that reason it was unfit for the purpose contemplated, or failed to fulfil the requirements of the contract, the case was properly submitted to the jury."

As to the duty of the buyer to examine it was said in *Fox v. Everson*, 27 Hun (N. Y.) 355: "Whilst the representations made by a vendor respecting the property sold may relieve the purchaser from the use of that care, caution and observation that he would ordinarily be bound to exercise in the purchase of property, still it will not do to permit the vendee, having the property before him and defects plainly visible, to shut his eyes and rely solely upon the representations. In the case under consideration at the time of making the purchase the plaintiff did not have an opportunity to see and examine the seed. His eyesight was defective: his glasses were left at home and without their aid he was unable to see. He was, therefore, at the time excused from making the examination and had a right to rely upon the representations of the vendor. This excuse, however, did not exist after he had taken the seed home where he had the opportunity of inspecting it before spreading it over his farm. It is possible that on making such an inspection he would not have discovered the presence of plantain seed. If, however, it was plainly visible and easily distinguished from the clover seed, it is probable he would have discovered it."

Disclaimer of Warranty.

It is of course legitimate for the parties to a sale of seeds to agree that there shall be no warranty and a disclaimer of warranty by the seller assented to by the buyer prevents the implication of any warranty. *Coates v. Harvey*, 2 N. Y. S. 5, 17 N. Y. St. Rep. 389; *Jacot v. Grossman Seed, etc. Co.* 115 Va. 90, 78 S. E. 646; *Leonard Seed Co. v. Crary Canning Co.* 147 Wis. 166, Ann. Cas. 1912D 1077, 132 N. W. 902, 37 L.R.A.(N.S.) 79. So a purchase of seeds is presumed to be made by the buyer with a knowledge of a general custom of the trade that no warranty is given by seedsmen. *Blizzard v. Growers' Canning Co.* 152 Ia. 257, 132 N. W. 66.

In *Leonard Seed Co. v. Crary Canning Co.* 147 Wis. 166, Ann. Cas. 1912D 1077, 132 N. W. 902, 37 L.R.A.(N.S.) 79, it was said: "The contract for the sale of the peas contained the following provisions: 'It is also understood and agreed that the party of the first part [plaintiff] does not give, and its agents and employees are forbidden to give, any warranty, express or implied, as to description, quality, productiveness, or any other matter, of any seeds delivered or to be delivered by it, and that it is not and will not be in any way responsible for the crops.' Counsel for the appellant admit 'that plaintiff is freed by the terms of this contract from all liability as to the seed in question being good or bad, large or small, wrinkled or smooth, black or white, wormy or sound, vital or dead.'

But counsel argue that the peas furnished under the contract must be the 'advancer' variety, and that plaintiff was not relieved by its contract from liability for damage resulting from furnishing peas other than 'advancer' peas. It was practically conceded on the argument that the clause quoted was intended to exempt the plaintiff from such liability as was sought to be enforced against it under the counterclaim in this action. The concession was advisedly made. The peas to be delivered under the contract were described therein as 'advancer' peas. But the contract provided that no warranty, express or implied, was given that the peas furnished should be of the description named therein. If a dealer in seed peas can exempt itself from liability for selling bad, wormy, or dead peas to a grower, no good reason is apparent why it cannot go further and say that it will not be responsible in the event of an intermixture of other peas with the variety agreed to be furnished. Neither of the parties here is under guardianship or incompetent to contract. There is no claim that the contract signed was not the one agreed upon or that both parties did not fully understand what they were agreeing to. Plaintiff plainly undertook to relieve itself from liability in case of intermixture, and defendant agreed that it should be relieved. It is not claimed that the contract is void because contrary to public law or to public policy, and, if not, effect should be given to it. The vendee might reject and refuse to receive the peas if they were not 'advancer' peas, or it might well be that, in the event of the shipment being made in bad faith and with the purpose and intention of committing fraud upon the vendee, an action for damages for the fraud would lie, but we have no such case before us. If it be conceded that the contract is one-sided, it must also be conceded that the parties had a right to make a one-sided contract if they saw fit."

But in *Wallis v. Pratt* [1911] A. C. (Eng.) 394, Lord Loreburn said: "It is agreed that this was a sale, both parties to which intended that common English sainfoin was to be delivered. It is agreed that it was a condition of the contract that that stuff should be delivered, but it is said that the defendants were absolved from the liability arising from the fact that something different from common English sainfoin was delivered, by virtue of a particular clause in the contract. The clause, so far as relevant, is to this effect: 'Sellers give no warranty expressed or implied as to growth, description or any other matters.' Now this sainfoin which was delivered turned out to be a different kind of goods; and when that was found out an action was brought against the defendants as sellers, to which they pleaded the clause I have read."

A general disclaimer of warranty does not have the effect of abrogating an express warranty. *Edgar v. Joseph Breck, etc. Corp.* 172 Mass. 581, 52 N. E. 1083, wherein it was said: "The general printed warning on the bill-head that the defendant did not warrant seeds could have no effect unless it led to the inference that the old contract had been rescinded and a new one substituted by mutual agreement. Even if the bill had been receipted it would not have excluded proof of the warranty." In *Godden Seed Co. v. Smith*, 185 Ala. 296, 64 So. 100, it was said: "This printed matter, which concerned the terms on which defendant sold its seeds, was circumstantial and evidential only. It was a matter of inference whether the plaintiff had in mind the matter of these billheads when he entered into the agreement for the purchase of the oats. On the whole, the jury might have inferred that he did not." So in *Coates v. Harvey*, 2 N. Y. S. 5, 17 N. Y. St. Rep. 389, it was held that a general custom is of no effect as against an express warranty.

To render a disclaimer of warranty of any effect it must be brought to the notice of the buyer. *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 So. 410. Thus in *Landreth v. Wyckoff*, 67 App. Div. 145, 73 N. Y. S. 388, it was said: "To rebut any implication of warranty, the plaintiffs rely largely upon a notice printed in small type at the upper left-hand corner of the bill which they rendered to the defendant, which notice is in these words: 'D. Landreth & Sons give no warranty, express or implied, as to the description, quality, and productiveness, or any other matter, of any seeds they send out, and they will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned.' The defendant testified that, although he received the bill before planting the seeds, he did not then observe this disclaimer, and, indeed, had never seen it until it was brought to his attention upon the trial. Whatever might have been its legal effect if he had become cognizant of its existence and purport before using the seeds, it cannot be deemed to have entered into or altered the contract between him and the seed growers under the circumstances."

So in *Bell v. Mills*, 78 App. Div. 42, 80 N. Y. S. 34, it appeared that in a sack of seed oats there was inclosed a card containing a disclaimer of a warranty. The buyer testified that he did not see or read it until after the seed was sowed. The court said: "It is said, however, as to the fine print upon the cards found in the oats, that it was there, and the plaintiff was bound to read it and to know what it was. The claim made by the plaintiff is that he did not know or understand that this fine print upon the bottom of

Ann. Cas. 1918B.—6.

the card was designed to be a contract, binding upon the parties, containing the terms and conditions upon which the oats were to be accepted by him and sowed. If the fine print matter was to be regarded as such a contract, it must have been assented to by the plaintiff; otherwise, the minds of the parties did not meet, and under all the circumstances it could hardly be held as a matter of law that he was bound to know or understand that it was intended as such a contract, and to read or know its contents. It was very likely a question for the jury whether, coming to him as it did, he was bound to read it and know its contents, and that receiving it and accepting the oats without objection amounted to an assent to the terms thereof as a contract under which the oats were accepted and sowed."

In *American Warehouse Co. v. Ray* (Tex.) 150 S. W. 783, it was said: "The testimony of Gerlach and Robinson as to the custom and usage in regard to implied warranty of seed sold was properly excluded. The law implied a warranty from the representation of appellant that the seed were of a certain kind, and that implication could not be set aside by testimony of a custom and usage of trade, which was not known to buyers. It would present a singular proposition of law if a dealer in seeds should contract to deliver cabbage seed and should actually deliver radish or turnip seed, and then escape liability on his implied warranty by proof that dealers in seed had adopted a rule or custom not to be bound by any implied warranty. Such a custom would be in contravention of law and justice, and would be null and void. *Dwyer v. Gulf, etc. R. Co.* 69 Tex. 710, 7 S. W. 504. No effort was made to show that appellee had any knowledge of such custom, or contracted with it in view."

In *Ross v. Northrup*, 156 Wis. 327, 144 N. W. 1124, the court said: "There is no doubt that the vendor may sell without warranty. *Leonard Seed Co. v. Crary Canning Co.* 147 Wis. 166, 132 N. W. 902. Were the goods so sold to Morton? He had the defendant's catalogue before him when he placed the order and ordered from it. He so testifies. The defendant knew that he ordered from the catalogue, because one of the two items called for was ordered by the catalogue number. Between the cover and the first page of the catalogue was a blank order sheet for customers to detach and use in ordering seeds. Immediately above the blank spaces in which the order was to be written was a printed statement to the effect that defendant gave 'no warranty, express or implied, as to description, quality, productiveness, or any other matter of any seeds . . . they send out, and will not be in any way responsible for the crop.' On the first page of the cata-

logue proper there was printed in large type the words 'General suggestions to customers.' There were a dozen such suggestions made, the first word or words in each instance, indicating the nature of the suggestion, being printed in large, heavy type. One of these headings consisted of the word 'Disclaimer' so printed, and immediately following it was a statement substantially like the one quoted above. The two packages ordered from the defendant were wrapped in one bundle and shipped by express. One side of the shipping tag contained the name and address of the consignee. On the reverse side there was printed in red ink and in conspicuous type the following words, which were underscored as indicated: '*Northrup, King & Co. do not give, and their agents are forbidden to give, any warranty, express or implied, as to description, quality, productiveness, or any other matter of any seeds, bulbs or plants they send out, and will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned and money paid for same will be promptly refunded.*' The goods were shipped on April 8th and were followed by an invoice two days later. There was printed near the head of the invoice a statement like that contained in the catalogue to the effect that the goods were sold without warranty. In reference to this invoice the respondent claims that it was not received until after the seed had actually been delivered to the plaintiff. There is some testimony given by Morton to the effect that the invoice was not received until the day after the seed was delivered and some testimony which would indicate that the seed had not been delivered when the invoice came. We accept the statement that there had been an actual delivery before receipt of the invoice. But what of it? It is not claimed that any use had been made of the seed in the meantime. The relation of principal and agent existed between the plaintiff and Morton. The latter could communicate with the former by telephone; at least he testified that he telephoned plaintiff when the seed arrived. The invoice was retained without objection; so was the seed, and the seed was thereafter paid for in the usual course of business. Morton testified that he did not read or pay any attention to any of these nonwarranty provisions. If Morton had observed the conditions printed on the invoice it would certainly have been his duty to inform his principal of them. The defendant having the right to sell without warranty, it seems clear that it did all that could in reason be required of it to advise the purchaser of the condition upon which the seed was sold. Of course it is easy to imagine other things which it might have done which would be better calculated to give

notice, but if those things had been done and had proved inefficacious, still other things might be suggested which would surely acquaint Morton with the conditions of sale. The business was transacted by mail. Where the book from which the order was given, the shipping tag, and the invoice, all stated these conditions, it would seem to be unreasonable to hold that any blame attached to the defendant if Morton failed to observe all of these things. The evidence is quite convincing to show that there was a disclaimer of warranty printed on the bag containing the tobacco seed also but there was a sufficient conflict in the evidence on this point to make the question one for the jury, and it found that there was none."

But in *Seattle Seed Co. v. Fujimori*, 79 Wash. 123, 139 Pac. 866, it was said: "There is, also, in this record, evidence that a general custom prevails in the seed trade of making all sales subject to the conditions named on the printed slips. This coupled with the evidence that the printed slips were placed in each bag of seed, is sufficient to support the finding that the sale was made without warranty or condition, and warranty or condition that the seed was true to name could not be inferred. *Blizzard v. Growers' Canning Co.* 152 Ia. 257, 132 N. W. 66; *Leonard Seed Co. v. Crary Canning Co.* 147 Wis. 166, 132 N. W. 902, Ann. Cas. 1912D 1077, 37 L.R.A. (N.S.) 79. In each of these cases, as in the one before us, there was no evidence that the purchaser read the printed matter denying any express or implied warranty similar to the language on the printed slips in this case, but the court in each instance held the purchaser was bound."

Remedies of Buyer on Breach.

In an action for the balance of the purchase price of onion sets it has been held that the buyer on discovering the bad condition of the sets had the right to rescind the sale within a reasonable time, or to return them and avail himself of the damages he had suffered, either by bringing his cross action for the breach of warranty or by proving their real value in abatement of a recovery of the price. *Frith v. Hollan*, 133 Ala. 583, 32 So. 494, 91 Am. St. Rep. 54.

A statement in a contract for the sale of seed, if intended to be part of the contract, is a condition, on the failure of which the purchaser may repudiate the contract; or if a rescission has become impossible it may be treated as a warranty, for a breach of which an action for damages will lie. *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438. Where a buyer agrees to pay for seed immediately on the receipt thereof and on ascertaining that it is vital and fit for seed pur-

poses, he cannot arbitrarily reject the seed, if it is clean and vital, merely because the contract provides that the seed shall be satisfactory to the buyer. *Ferry v. Ballinger*, 8 Kan. App. 756, 60 Pac. 824.

If the quality of the seed purchased is not as required by the contract of sale the buyer may refuse to receive the seed. *Gloster Oil Works v. Buckeye Cotton Oil Co.* 87 Miss. 618, 40 So. 225.

Where a purchaser of seed corn who has paid for the seed in advance seeks to rescind the contract because of the breach of an express warranty as to the quality of the seed, he must, before he can recover back the purchase price, prove a breach of the warranty. *Totten v. Stevenson*, 29 S. D. 71, 135 N. W. 715.

Damages for Breach.

FAILURE OF CROP.

It is held generally that where there is a breach of warranty in the sale of seed the measure of damages is the difference between the value of the crop raised and the value of the crop which would have been raised on the same land if the seed had been of the kind represented. *Wagstaff v. Shorthorn Dairy Co.* 1 Cab. & El. (Eng.) 324; *Page v. Pavey*, 8 C. & P. 769, 34 E. C. L. 628; *Randall v. Raper*, El. Bl. & El. 84, 96 E. C. L. 84; *McMullen v. Free*, 13 Ont. 57; *Crutcher v. Elliott*, 13 Ky. L. Rep. (Abstract) 592; *Grafton-Stamps Drug Co. v. Williams*, 105 Miss. 296, 62 So. 273; *Oliver v. Hawley*, 5 Neb. 439; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438; *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425; *Schutt v. Baker*, 9 Hun (N. Y.) 556; *Gubner v. Vick*, 42 Hun 657, 6 N. Y. St. Rep. 4; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *White v. Miller*, 78 N. Y. 393, 34 Am. Rep. 544; *Landreth v. Wyckoff*, 67 App. Div. 145, 73 N. Y. S. 388; *Depew v. Peck Hardware Co.* 121 App. Div. 28, 105 N. Y. S. 390; *Ford v. Farmers' Exch.* 136 Tenn. 287, 189 S. W. 368, L.R.A.1917B 1106; *Fuhrman v. Interior Warehouse Co.* 64 Wash. 159, 116 Pac. 666, 37 L.R.A.(N.S.) 89. See also *Crutcher v. Elliott*, 13 Ky. L. Rep. (Abstract) 592; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *Fuhrman v. Interior Warehouse Co.* 64 Wash. 159, 116 Pac. 666, 37 L.R.A.(N.S.) 89; *Stewart v. Sculthorp*, 25 Ont. 544. Compare *Hurley v. Buchi*, 10 Lea (Tenn.) 346; *Buckbee v. P. Hohenadel Jr. Co.* reported in full post, this volume, at page 88; *Van Wyck v. Allen*, 6 Daly (N. Y.) 376.

The court in *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438, stated the reason for the rule as follows: "The cardinal principle in relation to the damages to be compensated

for on the breach of a contract that the plaintiff must establish the quantum of his loss, by evidence from which the jury will be able to estimate the extent of his injury, will exclude all such elements of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty. For instance, profits expected to be made from a whaling voyage, the gains from which depend in a great measure upon chance, are too purely conjectural to be capable of entering into compensation for the nonperformance of a contract, by reason of which the venture was defeated. For a similar reason, the loss of the value of a crop for which the seed had not been sown, the yield from which if planted would depend upon the contingencies of weather and season, would be excluded as incapable of estimation, with that degree of certainty which the law exacts in the proof of damages. But if the vessel is under charter, or engaged in a trade, the earnings of which can be ascertained by reference to the usual schedule of freights in the market, or if a crop has been sowed on the ground prepared for cultivation, and the plaintiff's complaint is, that because of the inferior quality of the seed, a crop of less value is produced, by these circumstances the means would be furnished to enable the jury to make a proper estimation of the injury resulting from the loss of profits of this character. In this case the defendants had express notice of the intended use of the seed. Indeed, the fact of the sale of seeds by a dealer, keeping them for sale for gardening purposes, to a purchaser engaged in that business, would of itself imply knowledge of the use which was intended, sufficient to amount to notice. The ground was prepared and sowed, and a crop produced. The uncertainty of the quantity of the crop, dependent upon the condition of weather and season, was removed by the yield of the ground under the precise circumstances to which the seed ordered would have been exposed. The difference between the market value of the crop raised, and the same crop from the seed ordered, would be the correct criterion of the extent of the loss. Compensation on that basis may be recovered in damages for the injury sustained as the natural consequence of the breach of the contract. *Randall v. Raper*, El. Bl. & El. 84 [96 E. C. L. 84]; *Lovegrove v. Fisher*, 2 F. & F. (Eng.) 128."

In *Schutt v. Baker*, 9 Hun (N. Y.) 556, it appeared that the defendant sold to the plaintiff a quantity of hop roots with the knowledge that the plaintiff was purchasing them for cultivation, warranting them to be female or production roots. A large number of them proved to be male or unproductive roots. On the question of the measure of damages the court held that the plaintiff was

entitled to recover all the damages sustained by him including the difference between the value of the crop actually raised and that of the crop that would have been raised had all the roots been female or productive ones.

The general rule has been held to apply to a case where the seed was to be furnished by the lessor of farming land who agreed that if the seed should prove defective he would assume the whole risk of a failure of the crop. *Flick v. Wetherbee*, 20 Wis. 392.

Speculative damages in an action for a breach of a warranty in a sale of seed have been held not to be recoverable where the plaintiff purchased potatoes from the defendant which were represented as "early rose" when in fact they were a later and different kind. *Hurley v. Buchi*, 10 Lea (Tenn.) 346.

In *Passinger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753, the measure of damages was held to be the value of a crop of the seed as represented such as would ordinarily have grown that year, minus the expense of raising the crop as well as the value of the crop actually raised therefrom. See to the same effect *Dunn v. Bushnell*, 63 Neb. 568, 88 N. W. 693, 93 Am. St. Rep. 474.

But it has been held in an action to recover damages for a breach of warranty in a sale of seed, that in measuring the damages the cost of producing the crop would not be deducted from the value of the crop raised. *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136, *distinguishing* *Passinger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753.

If the purchaser of the seed discovers that it is of a quality inferior to that warranted he may recover as damages the difference between the purchase price of the seed as warranted and the market price of the seed which he actually receives. *Dunn v. Bushnell*, 63 Neb. 568, 88 N. W. 693, 93 Am. St. Rep. 474.

In a case wherein it appeared that seed received by the purchaser produced a crop of cucumbers of inferior quality, and of less value than would have been produced had the warranty been complied with, it was held that the measure of damages was the difference between the market value of the crop raised and the crop that would have been raised had the seed been as ordered; and hence that a claim by the purchaser for the value of the seed, the expense of planting, and the rental value of the land was practically less than he was entitled to recover. *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 So. 410.

In a few jurisdictions however the courts refuse to allow the value of the expected crop to be taken into consideration and hold that the damages recoverable include only the cost of the seed, the expense of planting and cultivation, and the rental value of the land.

Ferris v. Comstock, 33 Conn. 513; *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 So. 410; *Shaw v. Smith*, 45 Kan. 334, 25 Pac. 886, 11 L.R.A. 681; *Reiger v. Worth*, 127 N. C. 230, 37 S. E. 217, 80 Am. St. Rep. 798, 52 L.R.A. 362; *Totten v. Stevenson*, 29 S. D. 71, 135 N. W. 715; *American Warehouse Co. v. Ray* (Tex.) 150 S. W. 763.

The court in *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 So. 410, stated the rule thus: "Where the seeds bought prove to be worthless, however, that is where they wholly fail to germinate or grow after having been planted, and no crop results from the wrong seeds, the evidence of the probable produce of the right seeds in the land and the year in question would be lacking; and the rule that the plaintiff must establish the quantum of his loss, by evidence from which the jury will be able to estimate the extent of his injury, will exclude all such elements of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty. In such a case, therefore, the only damages recoverable are the price paid for the seed, the expenses in preparing the soil for the seed and for planting the same, together with the loss sustained from having his land lie idle for the year, or for such time as the use of it was lost."

In *Butler v. Moore*, 68 Ga. 780, 45 Am. Rep. 508, it appeared that the plaintiff purchased of the defendant a certain German millet seed. The defendant warranted that the seed was good and that it would germinate and grow, but the seed wholly failed to do so. In an action for the damage sustained by the breach of warranty, the court held that the loss of prospective profits on the land planted with the seed could not form a part of the damages; but that the plaintiff might recover for the purchase money of the seed with interest and expenses, such as the cost of hauling of the seed and other necessary expenses incurred after the contract was entered into. The court said: "We are well aware that a different rule, as to the measure of recovery, prevails in many of the other states of the Union, as was so ably and earnestly pressed upon this court by the counsel for plaintiff in error. It was insisted that the great public policy that should control an agricultural state should not lag behind her sister states, who have recognized a more liberal rule in favor of those engaged in cultivating the soil; and that such is the policy of many of the states is made manifest in the authorities produced and relied upon by counsel for plaintiff in error. 71 N. Y. 118 (27 Am. Dec. 19); 36 N. J. 262; 34 N. Y. 634; 13 How. 344; 19 Johns. 331; 35 Barb. 17; 8 Taunt. 535; 34 E. C. L. 628. It is insisted the states announcing the rule contended for are each commercial states, with the national

bias of the courts in favor of the salesman as against the farmer, and so much stronger the necessity and reason for the same to be recognized by an agricultural state like our own. This is an argument that might be well addressed to the lawmaking power, and not to this court, in view of the unbroken line of decisions made on this question."

In an action for breach of warranty on the sale of seed, an allowance by a referee of interest on the damages from the time the crop would have been harvested and sold has been held to be erroneous since the demand was unliquidated, and the amount could not be determined by computation simply or by a reference to the market values. *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13.

It has been held, however, that in an action for a breach of warranty on a sale of onion seed which failed to germinate, the plaintiff was entitled to recover as damages the amount paid for the seed, the value of his labor in preparing the ground for the seed, and interest on the several amounts. *Ferris v. Comstock*, 33 Conn. 513.

Commenting on the rule governing the measure of damages in an action for a breach of warranty of the fitness of seed for planting, the court in *Butler v. Moore*, 68 Ga. 780, 45 Am. Rep. 508, said: "It is merely a suit on the warranty of the merchantable quality of the goods, which the law imposes, or on the express warranty of the fitness of the seed for planting, as alleged by the plaintiff, and in such a suit we are constrained to hold, in conformity with the repeated rulings of this court, as referred to, that if the seed were worthless, the measure of damages would be the purchase money with interest and any expenses incurred in complying with the contract after the same was entered into, such as the hauling of the seed, preparing the lands for planting, sowing and rolling said seed, and such other necessary expense incurred after the entering into said contract."

SEED NOT TRUE TO NAME.

Where seed is not of the kind or variety which the seller warranted it to be the buyer is entitled to recover the difference between the crop actually raised and that which would have been produced by seed of the variety ordered. *Moody v. Peirano* (Cal.) 84 Pac. 783; *Americus Grocery Co. v. Brackett*, 119 Ga. 489, 46 S. E. 657; *Edgar v. Joseph Breck*, etc. Corp. 172 Mass. 581, 52 N. E. 1083; *Grafton-Stamps Drug Co. v. Williams*, 105 Miss. 296, 62 So. 273; *Cline v. Mock*, 150 Mo. App. 431, 131 S. W. 710; *Dunn v. Bushnell*, 63 Neb. 568, 88 N. W. 693, 93 Am. St. Rep. 474; *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425, affirming 36 N. J. L. 262, 13 Am. Rep. 438; *White v. Miller*, 78 N. Y. 393,

34 Am. Rep. 544; *Landreth v. Wyckoff*, 67 App. Div. 145, 73 N. Y. S. 388; *Depew v. Peck Hardware Co.* 121 App. Div. 28, 105 N. Y. S. 390; *Ford v. Farmers' Exchange*, 136 Tenn. 287, 189 S. W. 368, L.R.A.1917B 1106; *American Warehouse Co. v. Ray* (Tex.) 150 S. W. 763; *Fuhrman v. Interior Warehouse Co.* 64 Wash. 159, 116 Pac. 666, 37 L.R.A.(N.S.) 89; *Buckbee v. P. Hohenadel, Jr. Co.* reported in full, post, this volume, at page 88.

In *Randall v. Raper*, El. Bl. & El. 84, 96 E. C. L. 84, Earl, J., said: "The question is, what amount of damages is to be given for the breach of this warranty. The warranty is, that the barley sold should be chevalier barley. The natural consequence of the breach of such a warranty is that, the barley which has been delivered having been sown and not being chevalier barley, an inferior crop has been produced. This damage naturally results from the breach of the warranty: and the ordinary measure of it would be the difference in value between the inferior crop produced and that which would have been produced from chevalier barley: that is not inconsistent with *Hadley v. Baxendale*, 9 Exch. 341."

In *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425, affirming 36 N. J. L. 262, 13 Am. Rep. 438, in answer to the contention that the measure of damages as stated included an allowance for speculative or conjectural profits, the court said: "The seller in this case asserted, at the time of the sale, that the seed was of the species which the vendee was in search of. When he made this express assertion, he was aware that the vendee could have no opinion for himself on the subject, for the case states that the seed could not be distinguished by sight or touch. The vendee also knew that the vendor could not be stating the result of his own observation. The facts do not admit of the imperative inference that the assertion of the vendor was mere commendation of his goods, or even that it was the utterance of his view as an expert. If the seller had stated the exact truth, he would have said that he had bought the seed as seed of the specified kind, but that he did not know whether it was so or not. Instead of doing this, he made the positive assertion in question. From such an assertion, under the circumstances in evidence, I think the court, although it was not bound so to do, had the right to infer that there was a warranty."

In *Passinger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753, the court said: "In the present case it cannot be doubted, that the damages which this plaintiff has sustained are such as arise naturally from the breach of the defendant's warranty. His engagement was, that the seed he sold was Bristol cabbage

seed, and would produce Bristol cabbages. It may, therefore, have been reasonably supposed to have been in the contemplation of the parties, that if the seed was not Bristol cabbage seed, and would not consequently produce Bristol cabbages, that damage would necessarily accrue to the plaintiff, and would be a natural consequence of such breach."

In *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13, it was said: "The character of the season, whether favorable or unfavorable for production; the manner in which the plants set were cultivated; the condition of the ground; the results observed in the same vicinity where cabbages were planted, under similar circumstances; the market value of Bristol cabbages when the crop matured; the value of the crop raised from the defective seed; these, and other circumstances, may be shown to aid the jury, and from which they can ascertain approximately the extent of the damages resulting from the loss of a crop of a particular kind."

NOXIOUS SEED.

Where by the admixture of noxious seed injury results to the soil the buyer is entitled to recover therefor in addition to the loss of his crop. *Depew v. Peck Hardware Co.* 121 App. Div. 28, 105 N. Y. S. 390; *McMullen v. Free*, 13 Ont. 57; *Carlstadt Development Co. v. Alberta Pac. Elevator Co.* 4 Alberta L. Rep. 366. In *McMullen v. Free*, supra, it was said: "In the present case it is competent for the plaintiff to prove that the natural and normal result of sowing the unclean seed bought from the defendant as good and proper seed, was to introduce upon his land such an injurious and irradicable root as to affect the land more or less permanently, and for that he is entitled to such substantial damages as the jury may find. This element of damages is not speculative, or too remote to be disregarded, but would flow in the ordinary course of things from the act of the defendant, dealing as he is said to have done with the plaintiff. There should be a new trial, reserving the costs as usual." But in *Oliver v. Hawley*, 5 Neb. 439, it was held that if the buyer knows before sewing seed that there is an admixture of noxious seed he cannot recover for consequential damages.

Concerning the duty of the buyer to minimize the damage it was said in *Fox v. Everson*, 27 Hun (N. Y.) 355: "If, after the plaintiff had discovered that plantain was growing upon his farm, he could, by reasonable means, have rooted it out, and prevented its further growth, it was his duty to have done so. He would not be justified in lying idle and permitting the noxious weed to seed and spread over his entire farm, and thus en-

hance his damages. He is only entitled to recover such damages as he has actually sustained, and that necessarily would be expected to follow from the sale of the impure seed."

A tenant cannot claim for permanent damage to the soil by noxious seeds. *Vannoy v. Givens*, 23 N. J. L. 201.

Pleading.

Allegations in a complaint that the defendant sold to the plaintiff wheat for spring seeding and warranted it to be spring wheat, that the plaintiff sowed it and tended it properly, but no crop was produced because it was fall wheat and therefore worthless to the plaintiff, that the plaintiff could not ascertain that it was not spring wheat as warranted, and that the defendant knew or could with reasonable diligence have ascertained that it was not spring wheat, have been held to be sufficient to charge a breach of warranty of the kind and quality of seed sold. *Keeler v. Green*, 51 Mont. 42, 149 Pac. 286.

In an action for damages for a breach of warranty of seed an allegation by the plaintiff that the defendant warranted the wheat to be "white Australian" wheat and that it produced a crop of hay inferior to that which would have been grown had said seed wheat been of the variety mentioned, has been held to be sufficient on demurrer. *Moody v. Peirano* (Cal.) 84 Pac. 783.

In an action for a breach of warranty in a sale of western German millet seed, two paragraphs in a complaint, one counting on a breach of express warranty as to the variety and the other on a breach of implied warranty as to the quality of the variety, have been held not to be inconsistent. *Gardner v. Winter*, 117 Ky. 382, 78 S. W. 143, 63 L.R.A. 647, 25 Ky. L. Rep. 1472.

In *Fanning v. International Seed Co.* 89 Hun 146, 35 N. Y. S. 10, it was held that a complaint for a breach of contract of sale alleging that the defendant sold potatoes representing that they were a new variety, enormous bearers, etc., was insufficient to show that the potatoes were warranted to be a new variety. The court said: "The allegation in the complaint might be true, but plaintiff would not have been deceived. It is true that proof upon a trial that a vendor represented goods to be of a particular kind or quality, may often times enable a jury to see that the transaction was understood by the parties to be a warranty or a contract to deliver goods of a specified kind or quality, and render a verdict accordingly. But a representation is not necessarily, perhaps not usually, a warranty. Caveat emptor is the general rule."

Evidence.

It has been held that where a purchaser claims that seed corn sold to him by the defendant was unfit in germinating quality, evidence as to the poor grade of corn raised that year was properly excluded as immaterial. *Totten v. Stevenson*, 29 S. D. 71, 135 N. W. 715, wherein the court said: "We are also of the opinion that there could be no prejudicial error, based on the rejection of this testimony, because it was wholly immaterial for any purpose. That corn raised during the year 1909 was generally poor and of a low grade was wholly immaterial to the issues. The subject of the sale was the particular corn of defendant; and what other corn, raised by some other person, or in some other year, was generally, as to soundness and grade, could have no possible bearing upon the quality of defendant's corn, agreed to be sold to plaintiff. It is a matter of common knowledge that corn may generally be very poor and of low grade any year, and still some persons may have and raise corn of the very best quality."

In an action for a breach of warranty on the sale of seed, declarations of the defendant's agent made eight months after the sale, and not connected with any business then being transacted, to the effect that the seed was defective and not genuine, due to improper cultivation, was held to be inadmissible. *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13, wherein the court said: "The general rule is, that what one person says, out of court, is not admissible to charge or bind another. The exception is in cases of agency; and in case of agency, the declarations of the agent are not competent to charge the principle, upon proof merely that the relation of principle and agent existed when the declarations were made. It must further appear that the agent, at the time the declarations were made, was engaged in executing the authority conferred upon him, and that the declarations related to, and were connected with, the business then depending, so that they constituted a part of *res gestae*."

In an action for the breach of an alleged warranty that certain broom corn seed was of the quality known as "Tennessee evergreen," evidence of statements or representations made by the defendant to a third person concerning the seed was held to be admissible. *Phillips v. Vermillion*, 91 Ill. App. 133. In that case the court said: "Over the objection of the appellants the court admitted evidence of the statements or representations made by defendants to Shea concerning broom corn seed being Tennessee evergreen. This, we think, was misleading and prejudicial error. It was not pertinent to the issue, nor was it claimed that the seed was sold to Shea for the particular kind of seed in ques-

tion, for he purchased seed elsewhere; and even if the statement were true, it would prove nothing material affecting the alleged contract of warranty with appellee. The only inference that could be drawn from such evidence by the jury would be, that having made the statement to Shea, it was probable it was also made to appellee, and herein was the misleading quality of the evidence."

Where the plaintiff in an action for breach of warranty on the sale of seed seeks to recover as damages only the cost of preparing the ground and sowing the seed and the rental value of the land, the evidence should be restricted to those amounts, although the plaintiff had he so claimed would have been entitled to the value of the crop which would have been raised if the seed had been of the kind represented. *Crutcher v. Elliott*, 13 Ky. L. Rep. (Abstract) 592.

Where a florist sues a seed dealer for a breach of warranty that lily bulbs sold by the defendant to the plaintiff would grow a certain kind of lily, evidence of the price paid for a quantity of lilies at a retail store was held to be inadmissible on the question of market value as uninstrusive with regard to growers' prices. *Edgar v. Joseph Breck, etc. Corp.* 172 Mass. 581, 52 N. E. 1083.

In a suit for damages for breach of warranty on the sale of seed, where the question was whether the defendant sold the plaintiff "white Australian wheat," the defendant having testified that he had sold a third person the same kind of wheat that he sold to the plaintiff, evidence by the third person that he bought wheat of the defendant at about the time when the plaintiff bought his wheat, and that the crop when grown proved to be different from "white Australian wheat," was held to be relevant to show that the wheat sold to the plaintiff was not of that variety. *Moody v. Peirano* (Cal.) 84 Pac. 783. But in that case it was also held that the testimony of a third person that the defendant sold wheat to him in the same season that the wheat was sold to the plaintiff was inadmissible, the court saying: "The evidence as to representations and warranties made to third parties was clearly *res inter alios acta*. Such evidence did not tend to prove that defendant warranted the wheat he sold to plaintiff. The fact that defendant, in answer to questions put by plaintiff in cross-examination (also over defendant's objections), had testified that he had not warranted the wheat sold to Main to be white Australian, did not make such evidence admissible. When a witness is cross-examined as to collateral matters not testified to in chief, the party conducting the cross-examination is bound by the answers of the witness as to such matters, and cannot contra-

dict such answers by other evidence for the purpose of impeaching the witness."

Evidence that the seller produced cucumbers from the seed contracted for, as samples, and sent them to the purchaser before the delivery of the seed, has been held to be admissible to show notice of the actual nature of the seed to be delivered. *Buckbee v. P. Hohenadel Jr. Co.* reported in full, post, this volume, at page 88.

In *Depew v. Peck Hardware Co.* 121 App. Div. 28, 105 N. Y. S. 390, *affirmed* 197 N. Y. 528, 90 N. E. 1158, an action for breach of warranty on the sale of seed, it was held that where the defendant was allowed to give proof that the plaintiff's damage was due to trefoil growing on the roadside abutting the plaintiff's field and not because trefoil was mixed in the alfalfa seed sold by the defendant, expert testimony as to the amount of trefoil in the seed was competent in rebuttal.

BUCKBEE

v.

P. HOHENADEL, JR., COMPANY.

United States Circuit Court of Appeals,
Seventh Circuit—January 5, 1915.

224 Fed. 14.

Verdicts — Direction of Verdict — Effect of Motion — Court Authorized to Find Facts.

In an action for breach of contract in failing to furnish the variety of cucumber seed ordered, a request by both parties for a directed verdict at the conclusion of all the evidence operates as a request that the court find the facts, and the facts as found are conclusive upon the parties; the reviewing court being limited to the correctness of the conclusions of law thereon.

[6 Ann. Cas. 545; 13 Ann. Cas. 372; Ann. Cas. 1913C 1342.]

Same.

That a motion for a directed verdict operates as a request that the court find the facts, and is conclusive upon the parties upon appeal, does not prevent consideration of the inadmissibility of rejected evidence, nor waive exceptions to the rulings of law thereon.

Sales — Seeds — Warranty of Correspondence to Name or Variety — Evidence of Breach.

In an action for breach of contract in failing to furnish the variety of cucumber seed purchased, testimony by some of plaintiff's witnesses that they had not known the name of the brand ordered to be used to designate a certain variety of seed does not make plain-

tiff's evidence so uncertain as to render the direction of a verdict in his favor erroneous, where numerous witnesses sustained plaintiff's contention as to the designation.

[See note at end of this case.]

Same.

Where seed is sold to a dealer under a warranty that it is of a special variety, and the dealer in turn sends it to a grower, the warranty is carried forward to the ultimate purchaser, if it appears that such understanding was part of the first sale, and the measure of damages for breach of warranty is the difference in market value between the crop produced and such crop as the specified variety of seed would have produced under like conditions.

[See note at end of this case.]

Same.

The purchaser of seed warranted to be of a specified variety, and which he resells to a grower, may recover from the dealer the actual loss due to misrepresentation as to the variety although he has not liquidated his liability to the subvendee for breach of warranty.

[See note at end of this case.]

Same.

In an action for damages for failing to deliver cucumber seed bought under a written contract as being "Improved Chicago Pickling," evidence that the purchaser was informed as to the kind of seed actually furnished, that it had been developed from seed purchased from a certain company, and that he agreed that it should be labeled, "Improved Chicago Pickling," is improperly excluded; it being in explanation, and not in variation, of the terms of the written contract.

[See note at end of this case.]

Same.

In an action for damages for failing to deliver "Improved Chicago Pickling" cucumber seed under a written contract, evidence that the seller produced cucumbers from the seed contracted for as samples and sent them to the purchaser previous to the delivery is admissible to show notice of the actual nature of the seed to be delivered.

[See note at end of this case.]

Error to United States District Court, Western Division of Northern District of Illinois: CARPENTER, Judge.

Action by P. Hohenadel, Jr., Company, plaintiff, against H. W. Buckbee, defendant. Judgment for plaintiff. Defendant brings error. REVERSED.

[15] The plaintiff in error, Buckbee, was defendant below in the suit of P. Hohenadel, Jr., Company, a Wisconsin corporation, as plaintiff, for recovery of damages upon contract. On trial of the issues to a jury verdict was directed by the trial court and so rendered against [16] the defendant for \$12,921.40 damages assessed in favor of the

plaintiff, and this writ of error is brought for reversal of the judgment awarded thereupon. The material questions raised by the assignments of error are stated in the ensuing opinion, and the issues under the pleadings are well summarized in the brief of defendant in error, as follows:

"The declaration set out in haec verba in the second count two contracts, the first of October 17, 1903 and the second of October 23, 1903. The first contract was in the form of an order and acceptance for 300 pounds of 'Chicago Pickle' cucumber seed at the price of 70 cents per pound for future delivery, f. o. b. Rockford, net cash, 30 days, 1½ per cent discount for cash in 10 days. The second contract was for \$3,500 pounds of cucumber seed, 'Improved Chicago Pickling,' upon the same terms. The declaration then alleged that the plaintiff, at the time of making such contracts, was acting as the agent for P. Hohenadel, Jr., but that the fact of such agency was not disclosed to defendant at the time of making either of said contracts, and further alleged that the cucumber seed mentioned in the contracts as 'Chicago Pickle' and 'Improved Chicago Pickling' were known as and were one and the same, and that the second contract was an extension and further order under the first contract, and said two contracts were treated by the plaintiff and defendant as one order, and the deliveries thereunder were made as if under one and the same contract.

"The declaration then alleged that 2,500 pounds of cucumber seed were delivered under the said contracts on March 4, 1904, and 1,300 pounds on March 9, 1904, and the plaintiff thereupon paid the defendant the purchase price of the said cucumber seed, and that neither at the time of the purchase nor at the time of delivery could the plaintiff, by an examination or inspection of said cucumber seed, tell or ascertain whether said cucumber seed were of the variety or kind known as 'Chicago Pickle' or 'Improved Chicago Pickling,' and that such variety of seed was specially adapted for producing a high grade of cucumbers for pickling, and that the kind of cucumber seed could not be ascertained until the seed were planted and cucumbers grown therefrom; that the defendant did not keep and perform its said contracts and warranties as to the quality of said seed, and the seed delivered were not 'Chicago Pickle' or 'Improved Chicago Pickling' cucumber seed, but said seed were then and there of an inferior variety of cucumber seed, that would not produce, when planted, cucumbers specially adapted to the production of a high grade of cucumbers for pickles; that both P. Hohenadel, Jr., and the plaintiff were engaged in the business of selling cucumber seed, and in the business of planting and growing

cucumbers for pickling, and in pickling the same, as defendant then and there well knew, and it was then and there a custom and usage well known to the defendant for the purchasers of seed, in order to sell said seed and obtain a crop therefrom, to contract to take all of the cucumbers produced from such seed, and that, relying upon the warranties aforesaid, P. Hohenadel, Jr., sold said cucumber seed to P. A. Marsh under a like warranty; that Marsh sold said cucumber seed to others, including numerous producers of cucumbers, and at the time of such sale contracted with some of the producers to purchase from them the whole product of said seed; and that, in consequence of the plaintiff's breach of warranty, the said Marsh was compelled to take the product of said cucumber seed, and, in consequence, suffered great damage, and said P. Hohenadel, Jr., incurred large liability and suffered damage in the sum of \$30,000. To this declaration the defendant pleaded the general issue, non assumpsit, 'that he did not promise in the manner and form as the plaintiff has . . . in its additional counts . . . complained.'"

James G. Elsdon for plaintiff in error.

John M. Zane for defendant in error.

Sitting: BAKER, SEAMAN, and KOHLSTAAT, Circuit Judges.

[17] SEAMAN, J. (after stating the facts).

—The judgment against the defendant below, plaintiff in error Buckbee, arose under his contracts for sale and delivery to the plaintiff corporation, P. Hohenadel, Jr., Company, of cucumber seed of specified variety, and the verdict in favor of the plaintiff (directed by the trial court) awards recovery pursuant to two propositions, in substance: (1) That the evidence establishes delivery of a different variety of seed, not adapted to the purpose contemplated by the contract; and (2) that damages are proven and recoverable for the difference in market value between the crops produced from the seed so delivered and such crops as the variety of seed specified in the contracts would have produced under like conditions. Thus, in one or another form of presentation, the tenability of both of these propositions requires determination under the assignments of error. Other material questions arise upon rulings against the reception of testimony offered on behalf of the defendant. For consideration, however, of both propositions above stated, involving substantially the merits of the issues under the pleadings, this question arises for settlement at the threshold of inquiries under the assignments, namely: To what extent and for what tests, is the evidence reviewable thereupon?

1. The verdict against the defendant was directed by the court, and the general rule in such case, both of reviewability of the entire evidence and of the tests to be applied thereto, is unquestionable. But in the present record both the bill of exceptions and assignments of error disclose motions on behalf of the defendant, described in assignments 1, 2, 3, and 4 as denied by the court, as follows:

(1) "To direct a verdict in favor of the defendant, at the conclusion of the plaintiff's case;" (2) "to strike plaintiff's evidence and to direct a verdict in favor of the defendant at the conclusion of all the evidence;" (3) "to direct a verdict for the sum of \$300 against the defendant at the conclusion of plaintiff's case;" (4) "to direct a verdict for the sum of \$300 against the defendant at the conclusion of all the evidence."

It is manifest, therefore, that the defendant expressly submitted and "affirmed that there was no disputed question of fact which could operate to deflect or control the question of law," and that the rule stated and upheld in *Beuttell v. Magone*, 157 U. S. 154, 157, 15 S. Ct. 566, 567, 39 U. S. (L. ed.) 654, is applicable and controlling for answer to the foregoing inquiry, namely:

"This was necessarily a request that the court find the facts, and the parties are therefore concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof."

We are not advised of any decision of the Supreme Court which tends to disturb this ruling, and it appears to have been uniformly adopted and enforced by the Circuit Courts of Appeals in the various circuits whenever the effect of such motions has arisen. The following precedents with their citations are deemed sufficient for mention: *Chrystie v. Foster*, 61 Fed. 551, 26 U. S. App. 67, 9 C. C. A. 606; *Magone v. Origet*, 70 Fed. 778, 35 U. S. App. 744, 17 C. C. A. 363; *U. S. v. Bishop*, 125 Fed. 181, [18] 60 C. C. A. 123; *Phenix Ins. Co. v. Kerr*, 129 Fed. 723, 64 C. C. A. 251, 66 L.R.A. 569; *Love v. Scatterd*, 146 Fed. 1, 77 C. C. A. 1; *Bradley Timber Co. v. White*, 121 Fed. 779, 58 C. C. A. 55; *Century Throwing Co. v. Miller*, 197 Fed. 252, 257, 116 C. C. A. 614. Both of the above-mentioned requests for direction of verdict "at the conclusion of all the evidence" were necessarily predicated on the defendant's submission and assurance that the evidence raised no issue of fact for determination within the exclusive province of the jury, that conclusions of law were alone involved

therein, and that the ruling of the court accordingly was directly invoked on behalf of the defendant below. On such state of the record, not only administration of justice, but the entire line of authorities referred to, concur in denial of his right, as plaintiff in error, to have that submission reopened for review of the testimony, except to ascertain whether evidence appears in support of the ultimate conclusions of law thereupon in favor of plaintiff below.

We do not understand, however, that these motions affect in any manner the assignments of error for rejection of testimony offered on behalf of the defendant in the course of the trial, and the contentions in support of the judgment, that errors of law therein (if committed) were either waived or otherwise cured by such motions, must be overruled. The submission above described involved alone the effect of the testimony which was received and entered into denial of the motions, so that it can neither embrace the offers of rejected testimony, nor waive exceptions duly preserved to the rulings of law thereupon.

2. Whatever of conflict appears in the testimony, therefore, in reference to the first proposition above mentioned as one of fact which was upheld by the trial court for direction of verdict in favor of the plaintiff, the contention of reversible error in such ruling is untenable, as we believe, for the reason that the record exhibits considerable testimony (to say the least) in support of the ruling therein. When the testimony introduced by plaintiff upon that issue is read and analyzed for its bearing within the above-stated rule, we believe sufficient evidence is presented for the required proof of every element embraced in such issue, namely, that the contract specified a distinct variety of seed, well known for production of the quality of cucumbers for pickling purposes thereby contemplated; that instead thereof the defendant delivered a different variety, not ascertainable from inspection of the seed; and that the product thereof was inferior and not adapted to the known purpose of the contract. It is unquestionable that the plaintiff's case (both under its declaration and testimony) rests on these averments of meaning of the terms "Chicago Pickle," as used in one contract, and "Improved Chicago Pickling" as used in the second contract: That both "are one and the same variety, which produces a character of cucumber" as described, and that both were the identical variety of seed which had long theretofore been well known in the trade as "Westfield's Chicago Pickle." While the testimony of numerous witnesses supports each of these contentions, it further appears that four of the witnesses introduced for the plaintiff on that issue [19] testified in sub-

stance that they had not known the term "Improved Chicago Pickling" to be so used; and referring to these instances of failure to sustain the averments, together with testimony adduced by the defendants, the contention is pressed for reversal that uncertainty is thus established in the contract terms, whereby the direction of verdict was erroneous. We are of opinion, however, that neither the instances of failure referred to nor the defendant's testimony can affect the inquiry above defined of support for the direction; and it may well be remarked in this connection that other evidence appears in support thereof, including catalogues published by the defendant which may bear interpretation in favor of the alleged identity of the contract terms. The various contentions of error, therefore, in finding the above-stated premise of fact, must be overruled.

3. The remaining premise upon which verdict was directed, as above mentioned, involves both findings of ultimate fact and the conclusions of law on which the award of damages rests. Upon the questions of fact raised the rule heretofore stated is equally applicable and renders their solution free from difficulty. But the conceded and undisputed state of facts presents a question or questions of law upon the character and measure of damages recoverable thereupon, which may not be clearly settled by the authorities. We proceed, therefore, to their consideration under the finding of fact that the seed delivered were neither of the variety contracted for nor adapted to produce the pickling cucumbers for which the purchase was made within the contemplation of both parties.

The general rule to be applied for recovery of damages in the event thus stated, when the seed is sold to the purchaser as grower of the product, is settled by the authorities (both English and American) as the loss suffered in the production of a crop therefrom; and the great preponderance of authority upholds the measure of damages in such cases, as adopted by the trial court, to be the difference in market value between the crop actually produced and that which would have been produced had the seed been of the variety specified in the contract. We do not understand that this view of the general current of authority is controverted, although precedents are cited as tending to introduce other elements; but we believe the measure above stated to be both well founded and the established rule, so that citation or review of the authorities is not needful thereupon. It proceeds on the reasonable view that the crop actually raised may rightly furnish the prima facie test of the amount of crop which would have been raised from the stipulated variety, and thus becomes nei-

ther speculative nor remote for estimation of damages. This rule, however, as above formulated, imposes the element of direct contract between the seller and the grower of the seed, not present in the case at bar, and applicability of like measure of damages to various conditions which are presented raises important questions not entirely involved in any of the authorities called to our attention. Authorities are cited for extension of the rule to sales made to a dealer for resale to growers of the seed, under like representations, for like measure of damages against the primary vendor, when actually incurred through the resale. But the damages [20] awarded herein are predicated on extension of such measure beyond their direct scope.

The undisputed evidence establishes this state of facts: The seed delivered under the contract was neither planted by the plaintiff, as purchaser, nor were the crops therefrom raised under its direction, nor for its benefit; but the purchase was made by it, without notice thereof to the defendant, for the individual use and benefit of P. Hohenadel, Jr., for purposes of resale to other dealers. It was so sold and delivered by Hohenadel to one Marsh, as "Chicago Pickling seed"—Marsh being engaged in the pickling business and in contracting with producers for cucumber crops and seed furnished by himself. Marsh delivered this seed to numerous growers for such production of crops for his use; and of such deliveries the proof is limited to identification of growers and crops as to 565 pounds of seed planted, together with one lot of seed hereinafter mentioned for which damages were liquidated at \$300. The remaining portions of seed delivered under the contract, not thus identified, do not enter into the award of damages. While it is contended on behalf of the defendant that these identifications were not complete, we believe sufficient identification appears to that end. The only proof, however, that damages were actually paid, either by plaintiff or by Hohenadel, to indemnify Marsh for his loss, was a single payment of \$300 for loss on the lot of seed above referred to, which constitutes the item for which award of damages in favor of the plaintiff was requested on behalf of the defendant, as hereinbefore stated, so that the proof in that respect is not open to controversy herein. For the remaining amount of damages awarded, the following further facts appear: When the suit was commenced, the corporation was joined with Hohenadel (its undisclosed principal in the contract) as co-plaintiffs, and such damages had neither been paid to Marsh, nor had liquidation or adjustment thereof with him occurred in any form. The issues were brought to trial during the lifetime of Hohenadel, without liquidation or

adjustment thereof with Marsh, but resulted in a mistrial. Prior to the present trial Hohenadel died, having made no adjustment in any form with Marsh, nor does any specific claim appear to have been made by Marsh for damages (other than the \$300 paid as above mentioned) while Hohenadel was living; and the only evidence of specific claim therefor appears as a claim filed by Marsh against the estate of the deceased, pending hearing in the proper county court in probate. The declaration, however, expressly avers, not only grounds for, but fact of, his liability to Marsh.

For application of the measure of damages awarded by the verdict to the above state of facts, the authority mainly relied upon is an English decision (1858) of unquestionable importance—*Randall v. Raper*, 4 Jur. N. S. 662, El. Bl. & El. 84, 96 E. C. L. 84, 120 Eng. Rep. (Reprint) 438—which does not appear to be qualified or disaffirmed in any decision, English or American, called to our notice. The issues presented are thus stated in the head note:

"Defendant sold to plaintiff barley warranted to be 'Chevalier's seed barley.' Plaintiff sold it to other persons with the same warranty. The seed [21] turned out to be not according to warranty. The subpurchasers, who had sown the seed, made claims on plaintiff for the damages which they had sustained, but such claims had not been paid by plaintiff."

The opinion by Lord Campbell, C. J., clearly states the rulings thereupon, as follows:

"It has been contended that if the plaintiff had paid to the subpurchasers the full amount of the damages which they have sustained from the breach of the warranty, still he would not have been entitled to recover them. The true rule on the authorities is, that the plaintiff must show that the damage which he seeks to recover naturally arose from the breach of contract complained of. In this the damage sustained by the subpurchasers was the natural—yea, the necessary—consequences from the breach of contract by the defendant. The defendant sold the barley with a warranty that it was 'Chevalier's seed barley;' if it was not, it would not, when sown, produce grain of that quality, quite independently of soil or climate. The difference in value between the inferior crop grown and that which would have been produced if the seed had been as warranted is the natural and necessary loss from the breach of the warranty. Therefore, the defendant having warranted the barley as 'Chevalier's seed barley,' if the plaintiff had been sued by the subpurchasers, he would have been obliged to pay damages to that extent, and these he would have been entitled to recover from the defendant.

"But the main point brought before us is whether the plaintiff can recover as damages an amount which he has not paid to the subpurchasers, and for which they have only made claim not enforced by legal proceedings. We cannot lay down a rule that a mere liability, which has not been enforced, will not give a right to recover damages. Cases of extreme hardship might occur if such were the rule, and no authority has been cited to show that a liability to pay damages is not enough to sustain a right to damages. The cases which were cited are not in point. If liability to pay damages may be a ground of recovering special damage, why should not the liability be estimated by the jury? And that is all that has been done in this case. They have estimated the probable loss which the subpurchasers may recover from the plaintiff. The demand having been made, there is an easy mode of ascertaining the amount; and it is almost an inevitable consequence that the demand would be enforced. Therefore I am of opinion that the verdict ought to stand."

Concurring opinions are strongly expressed by Justices Erle and Crompton; and Justice Wrightman concurs, as having "no doubt on the principle enunciated and that if the claims of the subpurchasers had been paid by the plaintiff, he might have recovered them from the defendant," but expresses doubt whether recovery is authorized for a claim of damages neither paid nor liquidated, with this remark: "I do not press this doubt further than to mention it."

In 3 *Sutherland on Damages* (3d ed.) § 675, the eminent author thus states the rule as applicable to a purchase for resale:

"Where seeds are sold with a warranty that they are of a kind identified by a particular name, with notice that the purchaser intends to sell them again to persons who will purchase for the purpose of sowing them, if the warranty is untrue there seems to be no difference in principle as to the subject of damages between such a sale and one with such warranty where the purchaser is known to buy for the purpose of sowing them himself. The warranty to one buying seed to sell again justifies him in warranting it accordingly to his customers; and as they have recourse to him for damages estimated by the standard mentioned in the first paragraphs of the preceding section, that is also the measure of his loss as against his vendor."

In *Passinger v. Thorburn*, 34 N. Y. 634, 639, 90 Am. Dec. 753, the opinion by Davies, C. J., reviews the rulings in *Randall v. Raper*, supra, and states:

[22] "This is the well-settled law in this country, it having been held that, where an article is sold with a warranty, and the vendee resells with a like warranty, the sum

paid by him in an action by his subvendee for a breach of that warranty is prima facie evidence of the amount which he will be entitled to recover from his vendor in an action in his own behalf. *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166; *Armstrong v. Percy*, 5 Wend. (N. Y.) 535; *Blasdale v. Babcock*, 1 Johns. (N. Y.) 518. And this court, in *Muller v. Eno*, 14 N. Y. 597, held that a purchaser may recover for a breach of a warranty, although he has sold the goods and no claim has been made on him, and that it was not necessary for him to show the price on the resale. That price may be evidence of the damages, but does not furnish the rule in respect to them."

We are impressed with no doubt that the doctrine on which damages are awarded for misrepresentation in the sale of seed is equally applicable to both classes of sale, as upheld in *Randall v. Raper*; that no substantial distinction exists to authorize one rule of just recovery when sale is made directly to the grower, and a different and plainly inadequate measure when sold to a dealer for resale to growers of the seed. The seller who gathers and packs the seed for sale is necessarily required to know its variety for the intended use by growers, and his warranty thereof, whether directly made to the grower or to the intermediate dealer for resale to growers, may justly render him chargeable for the damages suffered by the growers, when the circumstances of his sale authorize the inference that the warranty was to be thus carried forward to the growers. Indemnity for misrepresentations so carried forward is within the contemplation of his contract of sale to the dealer, and allowance thereof is not open to the objection of remote or speculative damages.

Under the facts above stated, the vendee Marsh undoubtedly stands in the relation of producer of the crop, which he obtained through placing out the seed with the actual growers; and the distinction from the facts involved in *Randall v. Raper* arises out of the intervention of Hohenadel as the actual vendee. Although the purchase was made for his use and benefit, such purpose was not disclosed to the defendant in making the contract. Nevertheless the negotiations were entirely with Hohenadel, who drafted and executed the contract on the part of the corporation, and the question whether the defendant understood that the seed as warranted by him was to be resold to a grower, as averred in the declaration, does not impress us to be materially affected by such personal relation of Hohenadel in the transaction. The crucial inquiry was of defendant's understanding of such purpose of direct resale to the grower, and thereupon we believe the finding, under circumstances in

evidence, is not reviewable on the present inquiry.

On the other hand, however, we are of opinion that the principle of the rule for this extraordinary allowance of growers' damages, requires its limitation as defined in the above quotation from *Sutherland on Damages*. The warranty direct to the growers imposes such liability per se. Not so in the case of sale to a dealer, wherein various interpositions may arise before ultimate sale to growers, all beyond oversight on the part of the original seller; and without his concurrence, either express or implied, for carrying forward the warranty [23] to a grower, we believe the ordinary liability for breach of contract must arise, which does not extend to loss suffered by the grower. So, in making such sale, he may either decline or accept the extraordinary liability involved in a sale to the grower. But if he warrants to the dealer, with the understanding that resale is to be made directly to growers of the seed, he may rightly become bound for the loss thus brought directly within the contemplation of his sale and warranty. The issue raised herein as to such understanding on the part of the defendant in making the contracts, must be determined from the evidence, circumstantial or direct, with the burden resting on the plaintiff to establish such understanding as an issue of fact. In the event, therefore, of submission to a jury, on retrial of all issues (as hereinafter directed), instructions will become needful, in conformity with the foregoing opinion, upon such issue of fact as may be presented by the evidence for assessment of damages under one or the other rule.

We are of opinion, therefore, that the foregoing considerations authorized the rule of damages adopted herein, unless the above-stated facts, that the plaintiffs had neither paid nor adjusted the damages suffered by the grower of the crops, bar recovery of indemnity on their behalf of the alleged liability incurred through the sale to the grower; and the question of right to recover thereupon, beyond the above-mentioned \$300 item of damages which was paid, remains for determination. That such recovery is authorized without prepayment of the plaintiff's liability to the subvendee is expressly decided (as above shown) in *Randall v. Raper*, supra, but the contentions of error in like ruling herein are in substance: (a) That it is unsupported by any other authority; and (b) that its doctrine is unreasonable and open to serious abuse. We believe neither of these propositions is tenable. Like rule is uniformly recognized and applied for recovery of the amount of medical or other professional services incurred by the injured party, under circumstances which create liability

against the defendant therefor, whether actually paid or adjusted or merely an outstanding liability. It is likewise applied for recovery of damages upon breach of warranty in sale of chattels, within the general rule, in *Muller v. Eno*, 14 N. Y. 597, and cases there cited—referred to in *Passinger v. Thorburn*, *supra*, as equally applicable to the present inquiry. For analogous application, see *Smith v. McNair*, 19 Kan. 333, 27 Am. Rep. 117; *Denton v. Fisher*, 102 Md. 386, 62 Atl. 627, 3 L.R.A. (N.S.) 465; *Western Twine Co. v. Wright*, 11 S. D. 521, 78 N. W. 942, 44 L.R.A. 438; also citation in 19 Cyc. 641, for like rule under reinsurance contracts between insurance companies. Nor are we advised of any just reason to require payment or adjustment of damages suffered by the subvendee (as grower) in loss of crops prior to the suit against the original seller. The recovery therein must be measured by the actual loss due to the misrepresentation, to be established by proof through the grower and other witnesses. We are of opinion, therefore, that the ruling thereupon was not erroneous.

4. Assignments of error, however, for rejection of testimony offered on behalf of the defendant, raise questions of vital importance [24] for submission of the issues, if error, is well assigned. The main assignment sets forth the offer as made, as follows:

"45. The court erred in refusing the offer of the defendant (the plaintiff, by his counsel, stating in open court that he made no objection because such proposed testimony was presented in the form of an offer, and such offered testimony having been reduced to writing and filed in the cause and then and there brought to the court's attention before the jury retired) to prove by the witness John T. Buckbee, that at the time of the negotiations for and the making of the contract of October 23, 1903, covering the 3,500 pounds of cucumber seeds and other seeds, made at Janesville, Wis., that the samples of Westerfield Chicago Pickle cucumber seed were presented by him to Mr. Hohenadel; that a sample of the seed which Buckbee was then advertising in his catalogue of 1903 as Improved Chicago Pickling was presented; that this latter seed was the seed developed by Buckbee, defendant, from the seed earlier purchased by him from the Haskell Seed Company of Rockford, Ill., which was going out of business; that the price quoted to Mr. Hohenadel on the Westerfield Chicago Pickle cucumber seed was 85 cents per pound; that the price quoted on the other seed was 70 cents per pound; that the witness told to Mr. Hohenadel the history of the seed secured from Haskell and advertised by Buckbee as Improved Chicago Pickling; that his information was that it had been

developed from the same original stock from which the Westerfield had been developed; that the witness described to Mr. Hohenadel the kind of cucumber that it would raise in the pickling stage, and described it as somewhat thicker and lighter shade than the Westerfield Chicago Pickle cucumber; that Mr. Hohenadel asked the witness what they called it; that the witness told him that they were advertising it as Improved Chicago Pickling cucumber seed; that the witness told him that they had grown this seed themselves, Buckbee growing the seed, and the quantity they had; that there was further conversation in regard to other seeds not involved in this suit but covered by the contract; that thereupon Mr. Hohenadel dictated and had written by his stenographer and typewriter the contract of October 23, 1903, in evidence; that, previous to dictating that, Mr. Hohenadel had stated that he would take 3,500 pounds of that seed; that they would label it in the contract 'Improved Chicago Pickling;' that that name was inserted in the contract by Mr. Hohenadel, and it was agreed between the witness and Mr. Hohenadel that the seed was developed from the seed purchased from the Haskell Seed Company, and should be delivered under the contract; that Mr. Hohenadel requested in the same conversation that 300 pounds covered by the contract of October 17, 1903, should be filled with the same kind of seed; that the 3,800 pounds of his kind of seed was afterwards, in the latter part of February or early part of March, shipped to the Hohenadel people under Hohenadel's direction, and invoiced to them as per invoices in evidence; that afterwards, and during the winter of the season following, for the purpose of testing this seed that was delivered in February or March to Hohenadel, the witness planted it in his greenhouse and tested it for germination and for quality; that, as shown by letter in evidence, Mr. Hohenadel was notified of this; that the seed that was germinated was of the variety delivered to Hohenadel; that after the plant grew, and the fruit was set and fully developed, samples of it were sent to Mr. Hohenadel previous to the delivery of the seed; that at that time, in 1903 and 1904, the witness knew of no other strain or variety or kind of cucumber seed that was advertised or being sold under the name of Improved Chicago Pickling. As a part of such offer, and identified by the same witness, page 27 of the Buckbee catalogue of 1903 was offered as defendant's Exhibit 2, and also page 27 of the Buckbee catalogue of 1904 was offered as Defendant's Exhibit 3, copies of which exhibits are set forth and included in the bill of exceptions in the action."

Understanding of the force of these offers requires reference to the following antecedent

matters of record. The one contract in suit named the subject-matter thereof as "300 pounds cucumber Chicago Pickle," while the second contract named 3,500 pounds "cucumber [25] seed, Improved Chicago Pickling." On the part of the plaintiff, the contentions were (as stated in its brief), that one Westerfield had developed, long prior to the contracts, "a certain variety of cucumbers, which are especially desirable for pickling purposes," as described; that eventually "production of this type of cucumber resulted in the sale of cucumber seed, called indifferently, 'Westerfield Chicago Pickle,' or 'Chicago Pickle,' or 'Improved Chicago Pickling;'" and that both contracts intended such "Westerfield" variety as their subject-matter. Many seedmen, introduced as witnesses in support of such contention, so testified, although other witnesses upon the same side testified, in substance, either otherwise or that such other designations of the Westerfield variety were unknown to them in the trade. Numerous witnesses (seedmen) testified on the part of the defendant, in substance, that the contract terms were not understood in the trade as designations of the Westerfield variety. By way of foundation for the above offer, the witness Buckbee had been interrogated as to the negotiations and transactions between the parties on October 23d, when the second contract was made, and the record shows extended discussion, both on the part of court and counsel, upon the admissibility of testimony embraced in the subsequent offer. Thereupon the ruling of the court excluded the testimony, stating, "Whatever transpired prior to the execution of the written contract is absolutely immaterial," and, in substance, that it must be excluded as violative of the cardinal rule against varying the terms of the contract as written. For preservation of all questions raised by such rulings, the trial judge suggested the making of the offer and stated, "Let the record show that there is no objection made to the evidence because it is in the form of an offer," and counsel for plaintiff assented to such entry.

The foregoing immediate circumstances of the offer are material for two purposes: (a) As evidence that all substantial questions involved therein were duly presented and entered into consideration for the ruling to exclude the testimony; and (b) that it clearly meets the objection urged by counsel for plaintiff (elaborately discussed in the oral argument and supplemental briefs), in substance, that it raises no question of error in the exclusion, for the alleged reason that the offer embraces matter which was inadmissible in any view of the rejection of other matters contained therein, and is thus brought within the rule that rejection by the trial

court as an entirety was authorized in the absence of segregation of matters so embraced therein. We believe the record is sufficient to present the important question upon the merits, whether the defendant was deprived of substantial rights by such exclusion.

In the enforcement of contracts which have been reduced to writing, either in formal instruments or in letters or memoranda adopted between the parties, one of the most frequent questions of difficulty arises out of tenders of proof of the nature described in the above offer. Issues are numerous in such cases, which both require and authorize proof of negotiations and attending circumstances out of which the contract grew, either for identification of subject-matter not sufficiently described in the writing, or for interpretation of contract [26] terms which are ambiguous or uncertain without explanation of the sense in which they are employed in the contract. Thus, where the writing is "expressed in short and incomplete terms, parol evidence is admissible to explain that which is per se unintelligible, such explanation not being inconsistent with the written terms." 1 Greenleaf on Ev. § 282. For instances of the above-defined character the principle is well recognized, both in law and in equity, that the meaning the parties "intended to convey by the words they employed in the written instrument" may thus be ascertained and enforced. *Id.* This doctrine is entirely apart from and beyond the range of operation of the other elementary rule, which cannot be departed from in the enforcement of written contracts, that such contract between the parties cannot be varied or set aside by parol testimony, and that all prior negotiations and understanding of the parties (in the absence of fraud or mistake) are presumptively merged in the writing. It neither involves nor permits violation thereof when rightly understood and applied, each being consistent with the other in object and enforcement. In other words the rule invoked for the above-mentioned offer of testimony is exclusively applicable when ambiguity or uncertainty appears in the contract terms, and in such event parol proof is admissible for the sole purpose of ascertaining the meaning of terms so employed on which the minds of the parties presumptively met in making the contract. It thus serves the needful object of placing the court, "in regard to the surrounding circumstances, as nearly as possible in the situation of the party whose written language is to be interpreted." *Id.* § 295a.

So understood, application of this principle is free from difficulty whenever the controversy over the contract terms is strictly limited as above defined; but confusion is not infrequent, either in presentation of issues upon such terms or in the contentions of

counsel in respect thereof, which tends to create difficulty in the way of placing offers of parol proof within one or the other of these cardinal rules, and we believe such confusion appears in the extended argument of counsel (and citations as well) in support of the ruling under consideration. We come, therefore, to the inquiry whether the issues upon the contract in suit render the rejected proof admissible.

Both pleadings and evidence concur in establishing the fact, if otherwise questionable on reading the contracts or orders in suit, that the subject-matter of each—named “Chicago Pickle” in the one contract and “Improved Chicago Pickling” in the other—requires extrinsic evidence for identification as a known variety of cucumber seed, and the entire controversy between the parties hinges primarily on the meaning of these terms as employed in the respective orders. The plaintiff for support of its contention that both were used alike to designate “Westerfield Chicago Pickle”—an old and well-known variety “especially desirable for pickling purposes”—introduced (as heretofore mentioned) various seedmen who testified that the names were so used and known in the trade. This testimony was controverted, but, irrespective of such disagreement, we understand the alleged usage to constitute circumstantial evidence only of the meaning [27] of the uncertain terms employed in the writing; that, although uniform usage may have strong probative force in the issue of fact thus raised, other circumstances attending the making are equally admissible to ascertain the mutual intention of the parties therein. The foregoing offer of proof by the witness John T. Buckbee (who made the contract on behalf of the defendant for “Improved Chicago Pickling”) clearly embraces full explanation to Hohenadel that the variety tendered for purchase was “Haskell” seed described with certainty; that he then quoted the “Westerfield” variety at 85 cents per pound, and the “Haskell” at 70 cents per pound, as optional for purchase; that Hohenadel selected the “Haskell” tender accordingly for purchase; that they then adopted, as designation for the seed so purchased, the arbitrary name “Improved Chicago Pickling,” as theretofore applied by the defendant; that “the witness knew of no other strain or variety or kind of cucumber seed that was being sold under” such name; and that the name was so “inserted in the contract by Mr. Hohenadel.”

We are of opinion that the testimony thus offered was admissible for submission upon the above-defined issue, and that error is well assigned for its rejection. In reference to objections urged to other matters embraced

in the offer, we are not impressed with the alleged defects therein as substantive or requiring specific mention.

Another ground of error in rejection of the offer of proof is discussed in the argument and requires consideration in reference to the issue of damages. The contention in substance is this: That not only in the above-recited features of the offer, but in the further offer to prove that the defendant subsequently produced cucumbers from the variety of seed contracted for, which were sent to Hohenadel “previous to the delivery of the seed” under the contract, such evidence was admissible to prove notice to the plaintiff of the actual nature of the seed to be delivered, that the party “damned by the other party’s breach” of the contract “is bound to use all reasonable means not to enhance his damages,” and that proof of such notice would bar recovery of the special damages sought and awarded by the verdict. We believe these propositions (which were raised as well before the trial court) must be upheld for admissibility of the testimony so offered on that issue, irrespective of applicability of the offer for interpretation of the contract, and that the ruling was erroneous for that cause.

Other errors are assigned for rulings in rejection or reception of testimony, but none of these rulings impresses us to require specific mention. Those rejecting testimony in line with the above-mentioned offer are covered by the foregoing ruling of admissibility for interpretation of the contract, and the remaining objections are believed to be without substantial merit.

The judgment of the District Court is reversed accordingly, and the cause remanded, with direction to grant a new trial.

Rehearing denied May 25, 1915.

NOTE.

The reported case holds that where a dealer of seeds agrees to furnish a distinct variety of seed and the purchaser resells the seed to a grower, the purchaser may recover from the dealer the actual loss due to the misrepresentation as to the variety, although the purchaser’s liability to the subvendee is still unliquidated; and that the measure of damages for the breach is the difference between the market value of the crop actually raised and the crop that the specified seed would have produced under the same conditions. For a comprehensive discussion of the subject of express or implied warranty on the sale of seed, see the note to *Meehan v. Ingalls*, reported ante, this volume, at page 71.

LEAVEA

v.

SOUTHERN RAILWAY COMPANY.

Missouri Supreme Court—December 2, 1915.

266 Mo. 151; 181 S. W. 7.

Witnesses — Competency — Transaction with Person Since Deceased — Action for Tort.

In a suit against a railroad for an assault committed by the road's alleged agent, deceased prior to the action, plaintiff is incompetent as a witness to the assault made upon him, under Rev. St. 1909, § 6354, providing that, in actions where one of the original parties to the contract or cause of action is dead, the other shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him.

[See note at end of this case.]

Appeal from St. Louis Circuit Court:
WITHBROW, Judge.

Action by William Leavea, plaintiff, against Southern Railway Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **REVERSED.**

Samuel B. McPheeters for appellant.

Frank A. Thompson and Guy A. Thompson for respondent.

[152] RAILEY, C.—Plaintiff brought suit in the circuit court of the city of St. Louis, Missouri, to recover damages on account of injuries, claimed to have been inflicted upon him, in the form of an assault, by an alleged agent of defendant, while acting within the scope of his employment. Since said assault, and before the trial in the circuit court, the alleged agent, Teague, departed this life.

Notwithstanding the prior death of Teague, who is charged with having made the assault and thus created the cause of action, plaintiff was permitted, over the objection and exception of defendant, to detail in evidence, at the trial, his version of the controversy and the assault made upon him. To the offer of this evidence concerning all that was said and done by Teague, defendant's alleged agent and watchman at the time, an objection and exception was interposed, on the ground that Teague, the other party to the transaction in issue and on trial, was dead. The trial court overruled said objection and permitted plaintiff to testify as to what was said and done between himself and Teague.

Upon the trial in the circuit court, the jury returned a verdict in favor of plaintiff for \$999, as compensatory damages, and \$1000 as exemplary damages, and judgment was entered. **Ann. Cas. 1918B.—7.**

tered accordingly. Defendant filed a motion for new trial and in arrest of judgment in due time. The trial court ordered a *remittitur* so as to reduce the compensatory damages to \$500 and the exemplary damages to same amount. Thereupon the court, after a *remittitur* was entered, rendered judgment for \$1000, and overruled defendant's motion for a new trial and in arrest of judgment. The case was duly appealed to the St. Louis Court of [153] Appeals, and the latter reversed and remanded the cause, on the ground that the trial court erred in permitting plaintiff to testify, over defendant's objection, to the transactions and conversations which occurred between himself and Teague, after the latter had died.

The opinion of the Court of Appeals was written by Judge Nortoni, and concurred in by each of the other judges of said court. The latter, deeming the conclusion reached, to be in conflict with the opinion of Judge Broadus, in *Drew v. Wabash R. R. Co.* 129 Mo. App. 459, on identically the same question, certified the case to this court, as provided by law under such circumstances. Counsel for appellant, at the oral argument of said cause here, announced with commendable fairness, that the only question before us was whether the *testimony* of plaintiff in regard to the transactions and conversations between himself and Teague, was *competent* under our statute.

The controversy is thus narrowed down to a construction of section 6354, Revised Statutes 1900, which reads as follows:

"No person shall be disqualified as a witness in any civil suit . . . ; Provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him."

We have carefully examined the opinion of Judge Broadus in the *Drew* case supra, in connection with many other authorities in respect to the same subject, and have been unable to reach the conclusion, that the disqualification called for in the above section of our statute does not apply in actions *ex delicto*. We can conceive of no good reason for applying the provisions of said section to actions upon contract, which [154] would not apply with equal force to circumstances like those in the case at bar. We are therefore of the opinion, that the *Drew* case does not properly declare the law in respect to the foregoing matter and should not be followed.

The opinion of the St. Louis Court of Appeals herein, is reported in 171 Mo. App. 24 et seq. It contains a full statement of the case and presents an able review of the prin-

ciples of law in regard to the matter under consideration. The conclusion reached by the above court, in its treatment and disposition of this cause, is accordingly affirmed.

In the recent case of *Eaton v. Cates* (Mo.) 175 S. W. 1. c. 953, we construed section 6354, supra, in accordance with the views of the St. Louis Court of Appeals supra. Cogent reasons for observing the above construction of said section of our statute will be found discussed in *Chandler v. Hedrick*, 187 Mo. App. 1. c. 670, 173 S. W. 93; *Diggs v. Henson*, 181 Mo. App. 34, 163 S. W. 565; *Bone v. Friday*, 180 Mo. App. 577, 581, 167 S. W. 599; *Taylor v. George*, 176 Mo. App. 1. c. 222, 223, 161 S. W. 1187; *Leavea v. Southern R. Co.* 171 Mo. App. 1. c. 27, 153 S. W. 500; *Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458; *Williams v. Edwards*, 94 Mo. 447, 7 S. W. 429, as well as other cases in this State.

The judgment of the St. Louis Court of Appeals is therefore affirmed, and the cause reversed and remanded with directions to the circuit court to proceed with the case in accordance with the views here expressed.

Brown, C., not sitting.

PER CURIAM.—The foregoing opinion of *Railey, C.*, is hereby adopted as the opinion of the court. All of the judges concur.

NOTE.

Rule Excluding Testimony Relating to Transaction with Decedent as Applicable to Action Ex Delicto.

General Rule.

A statute excluding the testimony of the surviving party, where one of the original parties to a contract or cause of action is dead, applies to an action in tort as well as to an action on contract. *Fischer v. Morse*, 9 Gray (Mass.) 440; *Darks v. Scudder-Gale Grocer Co.* 146 Mo. App. 246, 130 S. W. 430; *Burns v. Polar Wave Ice, etc. Co.* (Mo.) 187 S. W. 145; *Irwin v. Nolde*, 164 Pa. St. 205, 30 Atl. 246. And see the reported case. See also *Anderson v. Louisville, etc. R. Co.* 134 Ky. 343, 20 Ann. Cas. 920, 120 S. W. 298. *Compare Baxter v. Knowles*, 12 Allen (Mass.) 114; *Entwhistle v. Feighner*, 60 Mo. 214; *Drew v. Wabash R. Co.* 129 Mo. App. 459, 107 S. W. 478.

In *Irwin v. Nolde*, supra, an action for trespass, the court said: "The first and second assignments of error relate to the admission of the testimony of plaintiff, who was objected to as a witness, to matters occurring during the life of the defendants and to conversations had with them. He was allowed to testify, the reason stated by the learned judge in support of his ruling being that in

actions of trespass and tort either party may be a witness notwithstanding the death of the other, and that 'it is only in cases of contract where one party to the contract is dead, by the policy of the law the other party is not allowed to testify.' We see no valid ground for the distinction made. The plaintiff would not have been a competent witness before the Act of 1869, and he came within the letter of the proviso of sec. 1 of that act as to 'actions by or against executors, administrators, or guardians,' and he was excluded by sec. 5, clause E, of the Act of 1887. The act makes no distinction between different classes of civil actions. *Nolde*, as a de facto trustee, was a party to the thing or contract in action, a right connected with the property; and the plaintiff was a surviving party as well as a person whose interest was adverse to the right of the deceased party. He was within the letter and spirit of the excluding clause of the act, and was clearly incompetent to testify."

Application of Rule.

In *Burns v. Polar Wave Ice, etc. Co.* (Mo.) 187 S. W. 145, it appeared that the plaintiff while driving a team collided with the defendant's wagon. In an action for the damages sustained by the plaintiff the trial court permitted the plaintiff to testify although the driver who drove the defendant's vehicle at the time of the accident had since died. On appeal the court followed the ruling of the reported case, holding that the plaintiff should not have been permitted to testify to the acts of the driver which it was claimed caused the accident rendering the defendant liable.

In *Darks v. Scudder-Gale Grocer Co.* 146 Mo. App. 246, 130 S. W. 430, it appeared that the defendant through its salesman sold to the plaintiff's husband and his partner some ginger extract. The extract contained wood alcohol from the use of which the plaintiff's husband died. In an action for death by wrongful act brought by the widow of the deceased, the partner of the husband was permitted to testify that the salesman of the defendant represented that the extract was used for medicinal purposes and was harmless, though the salesman was then dead. While the testimony was held to be admissible for the reason that the statute does not disqualify a witness to testify in a matter in which he is not interested, the court said: "In *Drew v. Wabash R. Co.* 129 Mo. App. 466, 107 S. W. 478, the Kansas City court of appeals declares that the statute does not apply in an action ex delicto, but is limited to actions on contracts. We fail to see the difference in principle, whether the action be on the contract, or in tort. If in either case, the

terms of the contract are a material issue to be determined, then it seems to us the same rule should apply. It is not necessary, however, to determine this question, as we put our holding on another theory." See also the reported case wherein the Drew case is overruled.

The rule has been applied in an action for fraud in inducing the plaintiff to sell shares of corporate stock for less than their value. *Wagner v. Binder* (Mo.) 187 S. W. 1128.

In *Baxter v. Knowles*, 12 Allen (Mass.) 114, it appeared that the plaintiff was the owner of certain articles of furniture which she bought with her own money, with her husband's approval. On the husband's death the defendant as his executor converted the property to his own use. The plaintiff brought an action in trover and offered herself as a witness to prove her case. Holding that her testimony was improperly excluded, the court said: "The defendant contends that the plaintiff's husband was an original party to the contract from which her cause of action arises. But how does her cause of action arise from a contract? The action is tort. The cause of action is a wrong which she alleges was done by the defendant personally. She does not sue him in a representative capacity. She charges him with having unlawfully disposed of her property. The only connection which her cause of action has with a contract is found in the fact that she acquired the property by a contract, as she offered to prove. But it was not a contract with the defendant or his testator under which she claimed title, but with Adams & North. She offered to prove that she bought the articles of furniture, except the tea-set, from Adams & North, before her marriage; that she paid for them with her own money, drawn from the savings bank; that they never were her husband's property, his only concern with the matter being that he aided her in selecting them, and took the money for her to pay for them. . . . It was a mere begging of the question for the defendant to argue that the plaintiff could not be a witness, because the furniture had been the property of the husband, and the wife must have acquired it by a contract with him. She denied that it ever was his property. She claimed that she bought it before marriage of Adams & North, when his assent to her purchase, and aid in it, would add nothing to her title, and formed no part of any contract. It was mere approval and acquiescence, not making him in any sense a party. If the defendant had shown that the title to the furniture was ever in Mr. Baxter, and that the plaintiff acquired it by a contract with him, it would have constituted a valid defense. But this must have been the result of the whole case, after all the evidence was heard, to be found by the jury, and was not to be

assumed upon the mere suggestion of the defendant for the purpose of excluding evidence. We are of opinion that under the statute which regulates the competency of witnesses, the plaintiff's testimony was admissible as to the furniture, the part of her cause of action which was separable and distinct from the rest, and which was not derived from a contract another party to which was dead." *Compare Fischer v. Morse*, 9 Gray (Mass.) 440.

In an action for damages for wrongfully ejecting a passenger, the testimony of the plaintiff concerning the statement of the conductor who put him off the train and who was dead at the time of the trial has been held to be inadmissible under a statute which provided that no person should testify for himself concerning any verbal statement or transaction with a person since deceased. *Anderson v. Louisville, etc. R. Co.* 134 Ky. 343, 20 Ann. Cas. 920, 120 S. W. 298, 301.

A statute providing that "in all suits by or against heirs or devisees, founded upon a contract with or demand against the ancestor, to obtain title to or possession of property, real or personal, of, or in right of, such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor," has been held not to apply to actions sounding in tort. It has accordingly been held that testimony of a widow concerning matters which occurred prior to her husband's death are admissible in a suit for damages for an injury which caused the husband's death, since the action is not founded on a contract or brought in the right of a decedent. *Louisville, etc. R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; *Cincinnati, etc. R. Co. v. Cregor*, 150 Ind. 625, 50 N. E. 760. The court in *Louisville, etc. R. Co. v. Thompson*, supra, considering the statute said: "We said in our former opinion, that even if it were conceded that the widow of Andrew Eichler was not a competent witness, no material error was committed in permitting her to testify, and we still adhere to that view; but we are prepared to go further, and hold that she was a competent witness, for the statute does not apply to cases of tort resulting in the death of the husband. Neither section 498 nor section 499 of the code applies to a case like this, for the widow is not a party to the record, nor is her interest adverse to the estate, and the case is not one between heirs. The case is not 'founded on a contract with or demand against the ancestor,' or 'to obtain title to or possession of property, real or personal,' but is an action to recover damages for a tort causing the ancestor's death."

It has been held that in an action for damages for killing the plaintiff's husband the defendant might testify since there was no

contract or cause of action to which the husband was a party. *Entwhistle v. Feighner*, 60 Mo. 214, wherein the court said: "In the present case there was no contract or cause of action to which the deceased husband was a party. The proviso in the statute was enacted for the purpose of putting parties on an equal footing, and not allowing a living party to give his version of a contract when he could not be confronted by the other party in consequence of death. When the husband was killed, then it was for the first time that the cause of action accrued to the plaintiff as his widow. Had the husband survived, this action never could have been brought. It is an action in which plaintiff and defendant only could be parties, for it did not arise till after the husband's death."

ANDREWS

v.

CITY OF SOUTH HAVEN.

Michigan Supreme Court—July 23, 1915.

187 Mich. 294; 153 N. W. 827.

Municipal Corporations — Operation of Electric Lighting Plant — Competition with Citizen — Sale of Fixtures.

Under Const. art. 8, § 23, authorizing municipalities to own and operate public utilities for supplying water, heat, etc., and Comp. Laws 1897, §§ 3258, 3269, and 3270, authorizing municipalities to acquire and operate gas and electric light plants, a city which operates its own electric light plant is entitled to do all those things naturally connected with and belonging to the running of such a business, and so may sell, if necessary, light fixtures.

[See note at end of this case.]

Same.

A taxpayer is not entitled to have a city enjoined from engaging in selling electrical appliances as a part of its business of furnishing electric light, where it did not appear that any increase in taxation resulted or that money was misappropriated.

[See note at end of this case.]

Appeal from Circuit Court, Van Buren county: DES VOIGNES, Judge.

Action by Albert E. Andrews, plaintiff, against City of South Haven, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

Thomas J. Cavanaugh for appellant.
Fred C. Cogshall for appellee.

[295] **STEELE, J.**—This is an appeal to review a decree sustaining defendant's demurrer to complainant's bill, filed to restrain alleged *ultra vires* municipal trading, and dismissing the same.

In outline, the material facts disclosed by said bill are as follows: Complainant, who is a resident property owner and taxpayer of the city of South Haven, where he maintains a regular place of business, and is engaged in selling and installing electrical fixtures, bulbs, supplies, wiring, etc., and equips buildings to [296] use electrical current for lighting and other purposes, charges that defendant is engaged in like business in excess of its corporate authority, in competition with him, unlawfully using public funds for that purpose. Defendant is a city of the fourth class, organized, existing, and "doing business supposedly" under the Constitution of this State and Act No. 215, Pub. Acts 1895. There is in said city a private gas plant which supplies the community with gas for lighting purposes. The city owns and, through its board of public works, operates, a municipal lighting plant from which it supplies itself and inhabitants with electric lights. It keeps on hand, purchased with public money raised by taxation and transferred to a fund for that purpose, a stock of electrical fixtures and accessories similar to those dealt in by complainant, which it sells to its inhabitants, also furnishing to them, for hire, its regularly employed electricians to install wiring and electrical equipment in their private residences and places of business, advertising that it will perform such work, furnish and install fixtures, supply attachments, light bulbs, and all electrical accessories, for private individuals on their premises, in their private residences or places of business, substantially at cost. The bill further alleges that, as a result of the city thus engaging in competition with complainant, he is suffering, and will continue to suffer, irreparable loss and damage; charges that it is not essential or necessary for the city to engage in such business in order to supply its inhabitants with light, and that under the charter it has no authority to do so; therefore prays for an injunction restraining said municipality from "engaging in and carrying on the business aforesaid in the manner aforesaid, and from using the funds of the city raised by taxation for other purposes to buy supplies and keep them for sale and to pay the electricians for the purpose of disposing of their time to [297] private individuals for hire in the manner aforesaid, and from keeping and selling to private individuals wire, fixtures, bulbs, electrical

supplies, or accessories in any amount or of any kind whatsoever."

The direct and only question raised by this bill and the demurrer to it is the right of the city, while operating its electric plant and supplying its inhabitants with current, to also in that connection do electrical wiring on their private premises and furnish fixtures and other accessories essential and convenient in using electricity.

The corporate power of a city to own and operate a municipal electric plant and supply its inhabitants at prescribed rates light, heat, and power is conferred by statute and the Constitution. In the act under which defendant was incorporated, authority to supply light is conferred, and by the Constitution, adopted later, heat and power are included as follows (section 23, art. 8):

"Subject to the provisions of this Constitution, any city or village may acquire, own and operate, either within or without its corporate limits, public utilities for supplying water, light, heat, power and transportation to the municipality and the inhabitants thereof."

The general act providing for incorporation of cities of the fourth class (chapter 88, 1 Comp. Laws), under which defendant was organized, contains various provisions upon the subject of municipal lighting. Section 3258 (2 How. Stat. [2d ed.] § 5784) confers the power as follows:

"It shall be lawful for any city incorporated or reincorporated under the provisions of this act to acquire by purchase or to construct, operate and maintain, either independently or in connection with the water works of such city, either within or without the city, works for the purpose of supplying such city and the inhabitants thereof, or either, with gas, electric or [298] other lights at such times and on such terms and conditions as hereinafter provided."

By section 3266 (2 How. Stat. [2d ed.] § 5792) authority is given the common council to enact such ordinances and adopt such resolutions as may be necessary to carry that object into effect, and to protect and control the property owned and used for that purpose. The act also provides for a board of public works with authority to fix rates, subject to direction of the council, charged, amongst other things, with the following "duty, power and responsibility" (section 3269 [2 How. Stat. (2d ed.) § 5795]):

"Second. The construction, management, supervision and control of such electric or other lighting plants as are or shall be owned by the city."

Section 3270 (2 How. Stat. [2d ed.] § 5796) provides:

"The said board shall have power to make and adopt all such by-laws, rules and regula-

tions as they may deem necessary and expedient for the transaction of their business, not inconsistent with the ordinances of the city or the provisions of this act."

In this inquiry the governmental powers of a city, by which it regulates and controls its citizens in a sovereign capacity, are not involved. The question raised here relates only to the proprietary or business powers of the city, by means of which it may act and contract for its own private advantage and that of its inhabitants combined. In the exercise of the latter powers, the municipality, acting through its officers, is governed by the same rules which control a private individual or business corporation under like circumstances. *Omaha Water Co. v. Omaha*, 147 Fed. 1, 77 C. C. A. 267, 12 L.R.A.(N.S.) 736, 8 Ann. Cas. 614. In such case the fact that a city engaging in a certain line of activity, commercial in its nature, competes with and thereby damages [299] one of its inhabitants in his business, does not entitle him to relief, for the city owes him no immunity from competition.

The electric light plant which defendant owned and operated, although a municipal public utility, was a business concern or enterprise. In its operation and business management the city had the right and power to do those things naturally connected with and belonging to the running of such a business which a private corporation would have in the same connection. *Pond on Public Utilities*, § 8. The power to engage in this municipal business activity for the public welfare is necessarily conferred in general terms. To go into details of administration and specify each particular thing which could or could not be done would be unwise and practically impossible. As to details and methods of conducting such authorized business, involving exercise of special knowledge and business judgment, there must be many implied powers. A strict, illiberal, or narrow construction which might hamper the exercise of a reasonable discretion by the municipal authorities in such matters, because the power is given in few words, is not, with perhaps a few exceptions, the tendency of decisions in most jurisdictions. The courts as a rule are not disposed to interfere with the management of an authorized business, conducted by the municipal authorities presumably in the interest and for the benefit of the city and its inhabitants, unless dishonesty or fraud is manifest, or the vested power which its implied discretion has been clearly exceeded or grossly abused. In *Torrent v. Muskegon*, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715, Justice Campbell, in writing the opinion, foreshadowed the rule which, by the great weight of authority, is applied in construing general powers to a

municipality to engage in certain modern business activities for the public welfare, saying in part:

[300] "If cities were new inventions, it might with some plausibility be claimed that the terms of their charters, as expressed, must be the literal and precise limits of their powers. . . . There are many flourishing cities whose charters are very short and simple documents. Our verbose charters, except in the limitations they impose upon municipal action, are not as judiciously framed as they might be, and create mischief by their prolixity. But if we should assume that there is nothing left to implication, we should find the longest of them too imperfect to make city action possible."

In *Henderson v. Young*, 119 Ky. 224, 83 S. W. 583, where the issue was the right of the city to furnish electricity for light and other purposes to customers beyond the city limits, it is said:

"In the management and operation of its electric plant, a city is not exercising its governmental or legislative powers, but its business powers, and may conduct it in the manner which promises the greatest benefit to the city and its inhabitants in the judgment of the city council; and it is not within the province of the court to interfere with the reasonable discretion of the council in such matters."

Little direct authority is to be found upon the exact question raised by the facts disclosed in complainant's bill. The two cases cited by counsel for complainant most favorable to his contention are *Atty.-Gen. v. Leicester Corp.* 74 J. P. (Eng.) 385, and *Keen v. Waycross*, 101 Ga. 588, 29 S. E. 42. The first-named involved the right of the "undertakers," representing the municipal corporation which was authorized to supply electrical current only at the consumer's terminals, to deal in and furnish wiring, electrical fittings, lamps, and other accessories. The court held they could not, basing its decision upon limitations found in the legislation and provisional order in connection therewith having the force of law, saying in part:

"I also think that there is nothing in the sections of [301] the act of 1847 inconsistent with the construction of 'supply' in the act of 1882 contended for by the plaintiff—namely, that it means the supply of energy to the consumer at his terminals. . . . When we turn to the provisional order, the interpretation, in my opinion, becomes still plainer, 'consumer's terminals' is there stated to mean 'the ends of the electric lines situate upon any consumer's premises and belonging to him at which the supply of energy is delivered from the service lines.' The undertakers have power to charge for supply of energy and for meters and fittings, but for

furnishing and laying lines they have no power to charge except in special cases. By clause 21 of the provisional order, however, they are bound to give a supply of energy on demand, and, if the wiring of the house and provision of fittings is part of the supply, they would be compellable to do it without remuneration, and I think there is force in the plaintiff's argument that this cannot have been intended by the legislature. In my opinion, 'supply,' within the meaning of the act and order, is completed at the consumer's terminals."

While that opinion is upon the same subject as the instant case, the controlling reason for the decision has little application here. In that case distinct restrictions were placed upon the authority given the undertakers, or borough officials, by the wording of the act and provisional order, which defined and limited the scope of their action in express terms, the exact meaning of which was declared, to exclusion, as the court found, of the implied power claimed.

In *Keen v. Waycross*, supra, it was held that the city of Waycross did not have implied authority under its charter, which authorized the erection and maintenance of a system of waterworks and connecting the city's mains with pipes of water consumers, to engage in a general plumbing business, sell plumbing supplies and material to private citizens, and do contract work in placing the same upon their premises. By analogy, it can be said that certain of the reasons [302] stated in that opinion tend to support the construction contended for by complainant in this case. That opinion followed the rule of strict construction; it being said, in part:

"Unless the city of Waycross can show express legislative authority to engage in the business in which it has embarked, the acts of its officials of which the plaintiff complains are clearly *ultra vires*. We have no doubt that, under the act of 1889, upon which the city rests its defense, its board of commissioners have ample power to take such steps as are needful in order to render the waterworks system of the city efficient and beneficial to the public. (See Acts of 1889, p. 829.) But the position of the city that, to bring this result, it was necessary to engage in the plumbing business, is utterly untenable, because obviously not well founded in fact. It might as reasonably be urged that, in order to satisfy its patrons, it was necessary for the city to embark in the ice business, as an incident to its right to supply good drinking water to its citizens."

Subsequently, however, that court recognized embarking in the ice business as an incident to the right of a city to supply good drinking water to its citizens, in *Holton v.*

Camilla, 134 Ga. 560, 68 S. E. 472, 31 L.R.A. (N.S.) 116, 20 Ann. Cas. 199, where it was contended that the city had "no right to embark in a purely private and commercial business of manufacturing or dealing in a common commodity of commerce, such as ice; and therefore the use of public funds raised by taxation for that purpose will be illegal." While other questions not material here were involved in that case and discussed, the court in disposing of the above objections said, amongst other things:

"The object in bringing, by means of a waterworks system, water in pipes from a distance for use in supplying the needs of a city, is not alone to obtain a sufficient quantity, but also to secure that which is freer from impurities than it is possible to obtain in the city itself. . . . Upon what principle could the doctrine [303] rest that liquid water may be delivered by the city to its inhabitants by flowage through pipes, but that water in frozen blocks cannot be delivered by wagons or otherwise? If the city has the right to furnish its inhabitants with water in liquid form, we fail to see any reason why it cannot furnish it to them in a frozen condition. . . . Nor do we see any rational objection on the idea that the city will be engaging in a manufacturing enterprise. The city might perhaps equally as well be said to be manufacturing when by the use of a filtering process it changes impure water into that which is pure. When, in connection with its waterworks system, it produces ice, it merely, by certain processes, changes the form and temperature of a part of the water supplied by that system. We do not think the operation by the city of Camilla of an ice plant in connection with its waterworks system, for the purpose of furnishing ice to its inhabitants, is in violation of the sections of the Constitution referred to in the plaintiff's petition, or that it is illegal for any reason."

Water sent through pipes to a customer's residence or place of business is water delivered to him ready for use in its then condition. He may heat or cool it, drink or bathe in it, and make whatever use of it he desires. But electric current delivered to him at his residence or place of business as it is transmitted over the wires, in its then condition, neither affords him heat, power, or light without further mediums and appliances. The statute and Constitution do not in terms limit the service to supplying the energy, but authorize the city to supply its inhabitants with water, light, heat, power, and transportation. It may well be contended that furnishing to customers taking electric-

ity the necessary devices or equipment to produce heat, power, or light from the current is naturally incidental to and an implied power connected with the business of operating an electric light plant. It does not appear that the municipality in so doing is conducting the business by different methods or under other rules [304] than those which are observed by and control private business corporations or private individuals in the operation of an electric plant.

The old law of municipal trading, involving the propriety and expediency of authorizing a municipality to engage in general business in competition with its citizens conducting a private business of like kind, has little bearing here; but the rule remains that taxation can only be for public purposes and municipalities have no express or implied power to engage generally in private business. We are past the general question of the validity of legislation authorizing municipal ownership and operation of plants and their necessary equipment to furnish the concentrated population of cities with certain general needs and conveniences, like water, light, heat, transportation, telephone service, etc.; and it is held that the court will not interfere with any reasonable exercise of the implied powers to operate such plants in a business way, and as any private corporation could or would.

The bill does not show that complainant has sustained or will suffer any loss or damage as a taxpayer by reason of what is charged. No increase of taxation for that purpose is shown. He does allege an improper use, in that connection, of money raised by taxation for that purpose, to buy the electrical appliances furnished customers at, approximately, cost. Whether this was as a whole profitable in operating the plant by reason of increased sale of electricity, or otherwise, is not shown. To entitle him to equitable relief as a taxpayer, present or prospective damages must be shown. *Baker v. Grand Rapids*, 142 Mich. 687, 106 N. W. 208.

We conclude that the learned chancellor who first passed upon this demurrer correctly determined complainant's bill did not show that the defendant exceeded its implied discretionary power in the operation of this [305] plant, nor state a case which entitled him to equitable relief by injunction.

The decree sustaining said demurrer and dismissing complainant's bill is affirmed, but without costs.

Brooke, C. J., and Kuhn, Stone, Ostrander, Bird, and Moore, JJ., concurred.

The late Justice McAlvay took no part in this decision.

NOTE.**Right of Municipality to Enter Into Business Competition with Citizen.**

Business Other than Public Utility, 104.
Public Utility:

In Absence of Exclusive Private Franchise, 106.

After Grant of Exclusive Private Franchise, 112.

Right of Citizen to Injunctive Relief, 118.

Business Other than Public Utility.

The primary design of the creation of a municipal corporation is that it may perform certain public functions as a subordinate branch of government; and, while it is invested with full power to do everything incident to a proper discharge thereof, no right to do more can ever be implied. Accordingly, in the absence of express legislative sanction, such a corporation has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals. In other words, its legitimate duty is to deal with public affairs, and not those which are purely private and entirely unconnected with a proper administration of its governmental duties. *Keen v. Waycross*, 101 Ga. 588, 29 S. E. 42.

Thus in holding that a municipality may not engage in competition with private ice companies by entering into the business of manufacturing and selling ice, the court in *Union Ice, etc. Co. v. Ruston*, 135 La. 898, Ann. Cas. 1916C 1274, 66 So. 262, L.R.A. 1915B 859, said that the operation of the municipal ice scheme would be to make the street and other railroads, banks and other large taxpayers who were at the same time small consumers of ice pay in part for the ice to be furnished to the small taxpayers, as soda water stands, who were at the same time large consumers of ice, with the result that the pockets of the large taxpayers would be gone into by the town or city to enable it to drive out of business and destroy the existing ice companies. *Compare Holton v. Camilla*, 134 Ga. 560, 20 Ann. Cas. 199.

So a municipality may not engage in the plumbing business and sell supplies and materials to private citizens, and do contract work in placing the same on their premises, under a power conferred on the municipal authorities to do everything essential to the establishment and maintenance of the city's waterworks system, to provide for proper sanitation, and to promote the general success of the enterprise. *Keen v. Waycross*, 101 Ga. 588, 29 S. E. 42.

In the reported case, however, it is held that a municipality has the right, while

operating an electric plant and supplying itself and its inhabitants with current, to do electrical wiring on private premises and to furnish fixtures and other accessories essential and convenient in using electricity, though its acts in so doing are in competition with a citizen and taxpayer engaged in selling and installing electrical fixtures, bulbs, supplies, wiring, etc., and in equipping buildings to use electrical current for lighting and other purposes.

In *Atty.-Gen. v. Leicester* [1910] 2 Ch. (Eng.) 359, 80 L. J. Ch. 21, 103 L. T. N. S. 214, [1910] W. N. 169, 74 J. P. 385, 26 Times L. Rep. 568, cited in the reported case, it was held that the installation of electricity and the providing of lamps and fittings was a separate business incidental to the use, but not to the supply, of electricity, and hence was not within the meaning of the word "supply" as used in the Electric Lighting Act, 1882 (45 & 46 Vict. c. 56, s. 10), and the provisional order of the board of trade thereunder, giving a municipal corporation, "the undertakers," for the supply of electricity within the area of their borough, general powers to do all such acts and things as might be necessary and incidental to such supply. The court held that "supply" meant the supply of electricity to the consumer at his terminals, i. e., the meter on his premises, at which point the powers of the municipality ceased. The question of competition, however, between the municipality and a citizen was not discussed. That decision was followed in *Atty.-Gen. v. Sheffield*, 106 L. T. N. S. (Eng.) 367, 76 J. P. 185, 10 L. G. R. 301, [1912] W. N. 68, 56 Sol. J. 326, 28 Times L. Rep. 266. And to the same effect see *Atty.-Gen. v. Ilford Urban Council*, 84 L. J. Ch. (Eng.) 860, 13 L. G. R. 44.

With respect to the right of a municipality to buy coal and wood as fuel and to sell them to its citizens the decisions are somewhat in conflict. The conclusions reached in the cases discussing that power may be summarized as follows:

First. It is beyond the power of a municipal corporation to engage in the sale of commodities which are and can be easily conducted by private business concerns in competition with one another, and which can be sufficiently regulated thereby. *Laughlin v. Portland*, 111 Me. 486, Ann. Cas. 1916C 734, 90 Atl. 318, 51 L.R.A.(N.S.) 1143; *Opinion of Justices*, 155 Mass. 598, 30 N. E. 1142, 15 L.R.A. 809; *Opinion of Justices*, 182 Mass. 605, 66 N. E. 25, 60 L.R.A. 592; *Baker v. Grand Rapids*, 142 Mich. 687, 106 N. W. 208. See also *In re Opinion of Justices*, 211 Mass. 624, 98 N. E. 611, 42 L.R.A.(N.S.) 221.

Second. The sale of fuel falls within the class of commodities mentioned, and there is no necessity why cities and towns should

undertake this form of business any more than many others which have always been conducted by private enterprises. Opinion of Justices, 155 Mass. 598, 30 N. E. 1142, 15 L.R.A. 809; Opinion of Justices, 182 Mass. 605, 66 N. E. 25, 60 L.R.A. 592; Baker v. Grand Rapids, 142 Mich. 687, 106 N. W. 208. See also In re Opinion of Justices, 211 Mass. 624, 98 N. E. 611, 42 L.R.A.(N.S.) 221. Compare Laughlin v. Portland, 111 Me. 486, Ann. Cas. 1916C 734, 90 Atl. 318, 51 L.R.A.(N.S.) 1143.

Third. In regard to "a condition in which the supply of fuel would be so small and the difficulty of obtaining it so great, that persons desiring to purchase it would be unable to supply themselves through private enterprises, it is conceivable that agencies of government might be able to obtain fuel when citizens generally could not." Under such circumstances, the municipality may constitute itself an agent for the relief of the community. Laughlin v. Portland, 111 Me. 486, Ann. Cas. 1916C 734, 90 Atl. 318, 51 L.R.A.(N.S.) 1143. Separate opinion of Barker, J., in Opinion of Justices, 155 Mass. 598, 30 N. E. 1142, 15 L.R.A. 809; Opinion of Justices, 182 Mass. 605, 66 N. E. 25, 60 L.R.A. 592.

In the case last cited it was said: "The fourth question presents greater difficulties. Evidently it is suggested by the painful experiences in attempting to procure fuel, from which we have lately been suffering. The questions are accompanied by copies of bills and resolves pending before the general court, one of which is entitled, 'An act to authorize cities and towns to buy and sell fuel in certain emergencies.' This question must be interpreted in reference to the conditions to which it refers, and in reference to the remedy which it suggests. The only proposed remedy to which it relates is the establishment by a city or town of fuel or coal yards, or the purchase of coal, wood or other fuel, for the purpose of selling it to the inhabitants of the city or town, or to others. The only condition referred to in the question is 'an extraordinary emergency,' and the conditions referred to in the accompanying bill are 'a scarcity of fuel and a pressing need thereof,' and 'a reasonable ground of belief that such a condition will occur in the near future.' It hardly can be contended that the remedy suggested by the question can have any effect upon the primary cause of all our troubles in this particular. That cause relates to sources of supply beyond the boundaries of this state. There is no reason to expect that any similar cause will arise within this state to affect such small sources of supply as exist here. If it is possible to conceive of the existence of such a cause arising hereafter in this commonwealth, it can be

dealt with effectually, not by the establishment of municipal yards for the sale of fuel at retail, but by some different kind of legislation which will make it impossible for either of two parties to a controversy like that which lately existed in a neighboring state, to refuse all proposals for an equitable determination of the rights of the parties, and thus to bring both to the verge of ruin, and to imperil the industries, and to some extent the lives and health of communities far away from the neighborhood of the conflict. Looking to the possible consequences of the emergency for which a remedy is desired, they can be divided into four classes: First, an increase of the number of those who fall into distress and are in need of relief from the public authorities, because they have no means to buy fuel at a greatly increased price. Secondly, increased expenditure, to their serious detriment, by those who have the means to buy. Thirdly, a possibility of a famine in fuel, such as to make it impossible reasonably to supply the needs of the community for comfortable living. Fourthly, a scarcity falling short of a famine but so great as to create wide-spread and general distress in the community which cannot be met by private enterprise. The first of these possible consequences does not call for legislation. Cities and towns now have ample power to provide in any reasonable way for paupers, whether it be by furnishing out-door relief or by support in almshouses, and whether their need of relief is permanent or caused by a temporary condition. It is equally true that the second of these consequences does not justify taxation of those who do not have occasion to buy coal, for the benefit of those who do. The use of the money of taxpayers for such a purpose would not be a public use, but a use for the special pecuniary benefit of those who happen to be affected by the state of the coal market. The third possibility, that of an absolute famine in fuel because of the lack of a supply and the impossibility of obtaining a sufficient quantity reasonably to satisfy the needs of the community, would be a condition which would warrant the expenditure of the public money under appropriate legislation, if the legislature could discover a way through public agencies to supply the people. But it is difficult to see how the method referred to in the question could produce this result. If at any time there was an impossibility of obtaining supplies because the supplies were not here and could not be bought elsewhere, the opening of a city coal yard would furnish no relief. Such an establishment could not work a miracle of creation. In reference to an anticipated possible famine, the procurement and storage of a supply in time of plenty might be a remedy or an alleviation if the

dread anticipation should become a reality, but the maintenance of a city fuel yard to conduct the business of buying and selling in a time of plenty, would have no tendency to avert a famine, or to relieve from its consequences if one should come. We are not called upon to consider whether the legislature would deem it advisable, if it has the power, to authorize cities and towns to build storehouses in which to keep large quantities of fuel in anticipation of a possible famine. In regard to the fourth of the possible consequences, a condition in which the supply of fuel would be so small, and the difficulty of obtaining it so great, that persons desiring to purchase it would be unable to supply themselves through private enterprise, it is conceivable that agencies of government might be able to obtain fuel when citizens generally could not. Under such circumstances we are of opinion that the government might constitute itself an agent for the relief of the community, and that money expended for the purpose would be expended for a public use. We do not think that we are expected to determine whether there might be any other conceivable emergency which would call for an affirmative answer to this question. Considering the question only in reference to the accompanying bills and the conditions to which we suppose it relates, our answer is in the negative, except in reference to the fourth of the above-mentioned possible consequences. As to that, we are of opinion that if the supposed conditions exist in any city or town, it may be authorized, under proper legislation, to sell fuel with the limitations above stated, so long as these conditions continue."

In *England* it has been held that the invasion by a municipal corporation engaged in supplying gas or water and restricted to certain limits, into another township supplied with the same commodities by a private company, and the entering into competition with it, inflicts no private wrong by the transgression of those limits which entitles the private company to an injunction. *Stockport Dist. Waterworks Co. v. Manchester*, 9 Jur. N. S. 266, 7 L. T. N. S. 545, 11 W. R. 156; *Pudsey Coal Gas Co. v. Bradford*, L. R. 15 Eq. 167, 28 L. T. N. S. 11, 21 W. R. 286.

Where it appeared that the provisions of a city charter, with the general statutes, gave the municipal authorities, as incident to the city's ownership of the property, the lawful right to let or use the auditorium of the city hall for theaters, operas, concerts, lectures, dances, shows, or other entertainments, for profit or otherwise, it was held that there was no ground for holding that a person might nevertheless restrain its lawful use for those purposes merely because it lessened the profits which otherwise would accrue to him

by the letting and use of his own hall for similar purposes. The court held that if such a person was in fact injured by such diminution of customers, the injury was necessarily too remote and inconsequential to be the basis of an action, and hence was *damnum absque injuria*. *Stone v. Oconomowoc*, 71 Wis. 155, 36 N. W. 829.

The general power of a municipality to engage in various phases of business activity, without reference to the element of competition, is discussed in the following cases and the notes thereto:

—furnishing fuel, *Laughlin v. Portland*, Ann. Cas. 1916C 734;

—furnishing ice, *Holton v. Camilla*, 20 Ann. Cas. 199; *Union Ice, etc. Co. v. Ruston*, Ann. Cas. 1916C 1274;

—owning and conducting an opera house, *Egan v. San Francisco*, Ann. Cas. 1915A 754;

—establishing and conducting a moving picture theater, *State v. Lynch*, Ann. Cas. 1914D 949;

—constructing or purchasing a lighting plant, *Keenan v. Trenton*, Ann. Cas. 1916B 519;

—erecting a hall for public meetings, *Wheelock v. Lowell*, 12 Ann. Cas. 1109, 124 Am. St. Rep. 543;

—establishing or licensing markets or market stalls in a public street, *State v. Burkett*, Ann. Cas. 1914D 345;

—constructing and operating a telephone system, *Spangler v. Mitchell*, Ann. Cas. 1918A 373.

Public Utility.

IN ABSENCE OF EXCLUSIVE PRIVATE FRANCHISE.

The general power of a municipality to own or operate a public utility is not within the scope of the present discussion. Since a franchise is ordinarily necessary to the operation of a public utility within a municipality, the question of competition resolves itself into that of the right to enter into competition with an individual or corporation to whom a franchise to use the streets of the municipality for the purpose of rendering the same public service has previously been granted.

The granting of a franchise to a public service company for the establishment and maintenance of its plant on certain terms and conditions for a period of years, by a state or some municipality thereof, without any express or necessarily implied grant of exclusive rights or privileges, as an express stipulation that the franchise should be exclusive or that the city would not establish such a plant of its own, does not deprive a municipality of the right to erect and oper-

ate its own works for the same purpose and engage in the same public service within the city during the contractual term. And this is true, although it may thereby injure or practically destroy the business of the grantee of the franchise. The decisions so holding stand on the rule that, in a contract with a state or municipality conferring a power or privilege on a private corporation affecting the general rights and interests of the public, the grant or privilege must be clearly conferred, all implications, doubts and ambiguities being resolved against the grant or privilege claimed.

United States.—Hamilton Gaslight, etc. Co. v. Hamilton, 146 U. S. 258, 13 S. Ct. 90, 36 U. S. (L. ed.) 963, *affirming* 37 Fed. 832; Long Island Water-Supply Co. v. Brooklyn, 166 U. S. 685, 17 S. Ct. 718, 41 U. S. (L. ed.) 1165, *affirming* 143 N. Y. 596, 38 N. E. 983, 26 L.R.A. 270; Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354, 22 S. Ct. 400, 46 U. S. (L. ed.) 585, *affirming* 161 N. Y. 154, 55 N. E. 562, 46 L.R.A. 687, which *affirmed* 33 App. Div. 642, 54 N. Y. S. 1115; Joplin v. Southwest Missouri Light Co. 191 U. S. 150, 24 S. Ct. 43, 48 U. S. (L. ed.) 127, *reversing* 101 Fed. 23, 113 Fed. 817; Helena Water Works Co. v. Helena, 195 U. S. 383, 25 S. Ct. 40, 49 U. S. (L. ed.) 245, *affirming* 122 Fed. 1, 58 C. C. A. 381; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 26 S. Ct. 224, 50 U. S. (L. ed.) 353; Thomson Houston Electric Light Co. v. Newton, 42 Fed. 723; Westerly Waterworks v. Westerly, 75 Fed. 181, 80 Fed. 611; Bartholomew v. Austin, 85 Fed. 359; 52 U. S. App. 512, 29 C. C. A. 568; Bienville Water Supply Co. v. Mobile, 95 Fed. 539, *affirmed* 175 U. S. 109, 20 S. Ct. 40, 44 U. S. (L. ed.) 92, and 186 U. S. 212, 22 S. Ct. 820, 46 U. S. (L. ed.) 1132; Colby University v. Canandaigua, 96 Fed. 449 (*affirming* 69 Fed. 671, and referring to a similar unreported decision on the same facts which was *affirmed* in 90 Hun 605, 35 N. Y. S. 1104, *appeal dismissed* 149 N. Y. 619, 44 N. E. 1121); Cunningham v. Cleveland, 98 Fed. 657, 39 C. C. A. 211; Tillamook Water Co. v. Tillamook City, 139 Fed. 405, *affirmed* 150 Fed. 117, 80 C. C. A. 71; Meridian v. Farmer's Loan, etc. Co. 143 Fed. 67, 6 Ann. Cas. 599, 74 C. C. A. 221, *reversing* 139 Fed. 673; Madera Waterworks v. Madera, 185 Fed. 281; Washington-Oregon Corp. v. Chehalis, 202 Fed. 592; Glenwood Springs v. Glenwood Light, etc. Co. 202 Fed. 678, 121 C. C. A. 88, L.R.A.1915C 438. *Compare* Columbia Ave. Sav. Fund, etc. Co. v. Dawson, 130 Fed. 162, *reversed* on other grounds 197 U. S. 178, 25 S. Ct. 420, 49 U. S. (L. ed.) 713; Mercantile Trust, etc. Co. v. Columbus Waterworks Co. 130 Fed. 180.

Arizona.—Phoenix Water Co. v. Phoenix, 9 Ariz. 430, 84 Pac. 1095.

California.—Clark v. Los Angeles, 160 Cal. 30, 116 Pac. 722.

Colorado.—Thomas v. Grand Junction, 13 Colo. App. 80, 56 Pac. 665.

Illinois.—Rogers Park Water Co. v. Chicago, 131 Ill. App. 35.

Kansas.—Humphrey v. Pratt, 93 Kan. 413, 144 Pac. 197.

Louisiana.—Houma Lighting, etc. Mfg. Co. v. Houma, 127 La. 726, 53 So. 970.

Minnesota.—Long v. Duluth, 49 Minn. 280, 51 N. W. 913, 32 Am. St. Rep. 547.

Missouri.—Memphis Electric Light, etc. Co. v. Memphis, 196 S. W. 1113.

Nebraska.—Minden-Edison Light, etc. Co. v. Minden, 94 Neb. 161, 142 N. W. 673.

New York.—In re Long Island Water Supply Co. 143 N. Y. 596, 38 N. E. 983, 26 L.R.A. 270, *affirmed* 166 U. S. 685, 17 S. Ct. 718, 41 U. S. (L. ed.) 1165; Skaneateles Water Works Co. v. Skaneateles, 161 N. Y. 154, 55 N. E. 562, 46 L.R.A. 687, *affirming* 33 App. Div. 642, 54 N. Y. S. 1115, and *affirmed* in 184 U. S. 354, 22 S. Ct. 400, 46 U. S. (L. ed.) 585. See also Stolz v. Syracuse, 59 Misc. 600, 111 N. Y. S. 467, *affirmed* 134 App. Div. 993, 119 N. Y. S. 1146.

Ohio.—State v. Hamilton, 47 Ohio St. 52, 23 N. E. 935, *followed* in Hamilton Gaslight, etc. Co. v. Hamilton, 146 U. S. 258, 13 S. Ct. 90, 36 U. S. (L. ed.) 963. See also State v. Cincinnati Gas Light, etc. Co. 18 Ohio St. 262.

Pennsylvania.—Lehigh Water Co.'s Appeal, 102 Pa. St. 515, *affirmed* 121 U. S. 388, 7 S. Ct. 916, 30 U. S. (L. ed.) 1059; Potts v. Philadelphia, 195 Pa. St. 619, 46 Atl. 195; Boyertown Water Co. v. Boyertown, 200 Pa. St. 394, 50 Atl. 189; Hastings Water Co. v. Hastings, 216 Pa. St. 178, 65 Atl. 403; Tarentum Water Co. v. Tarentum, 230 Pa. St. 148, 79 Atl. 402; Bethlehem City Water Co. v. Bethlehem, 231 Pa. St. 454, 80 Atl. 984; Hughes v. Parnassus, 23 Pa. Co. Ct. 196; Fleetwood Water Co. v. Fleetwood, 19 Pa. Dist. 418.

Rhode Island.—Smith v. Westerly, 19 R. I. 437, 35 Atl. 526.

Texas.—Crouch v. McKinney, 47 Tex. Civ. App. 54, 104 S. W. 518; Joy v. Terrell, 138 S. W. 213.

Washington.—North Springs Water Co. v. Tacoma, 21 Wash. 517, 58 Pac. 773, 47 L.R.A. 214.

Canada.—Calgary v. Canadian Western Natural Gas, etc. Co. 32 West. L. Rep. (Alberta) 558, 9 West. W. Rep. 252, 25 Dominion L. Rep. 807.

Nor, under such a contract or franchise will a city be prevented from preparing for the construction of or from constructing its own works for use after the expiration of the franchise. Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354, 22 S. Ct. 400, 46 U. S. (L. ed.) 585, *affirming* 161 N. Y. 154, 55 N. E. 562, 46 L.R.A. 687, which

affirmed 33 App. Div. 642, 54 N. Y. S. 1115; *Joplin v. Southwest Missouri Light Co.* 191 U. S. 150, 24 S. Ct. 43, 48 U. S. (L. ed.) 127, *reversing* 101 Fed. 23, 113 Fed. 817; *Helena Water Works Co. v. Helena*, 195 U. S. 383, 25 S. Ct. 40, 49 U. S. (L. ed.) 245, *affirming* 122 Fed. 1, 58 C. C. A. 381; *Vicksburg v. Henson*, 231 U. S. 259, 34 S. Ct. 95, 58 U. S. (L. ed.) 209, *reversing* 203 Fed. 1023, 121 C. C. A. 664; *Bienville Water Supply Co. v. Mobile*, 95 Fed. 539, *affirmed* 175 U. S. 109, 20 S. Ct. 40, 44 U. S. (L. ed.) 92, and 186 U. S. 212, 22 S. Ct. 820, 46 U. S. (L. ed.) 1132; *Griffith v. Vicksburg*, 102 Miss. 1, 58 So. 781.

In *North Springs Water Co. v. Tacoma*, 21 Wash. 517, 58 Pac. 773, 47 L.R.A. 214, the court said: "Appellant maintains that the operation of the city's water system within the district that appellant has been supplying will injure, and may destroy, the value of its property, and that the franchisees under which it is operating are contracts made with the city and that the city, by its intended extension of its own water system, will become a competitor of appellant, and that such competition is a violation of the contract contained in the franchises granted by the city; and it invokes the protection of the state constitution and of the Federal Constitution (§ 10, art. 1, and § 1, art. 14, of amendments). . . . It is conceded by the learned counsel for appellant that the city was without power to grant any exclusive franchise to appellant; that, after appellant received its franchise, the same rights and privileges could be granted to any other person or private corporation. Indeed, it appears from the record that at the time appellant's grantor, Mullen, obtained the franchise to supply water in the certain district mentioned and in the city, a franchise to supply water and light to the city had theretofore been granted to the Tacoma Light & Water Company. Thus, at any rate, it was understood by all parties when Mullen obtained his franchise, that he might meet the competition of other private water companies. The power granted to the city under the Act of February 4, 1886, was to purchase or condemn waterworks or gas works within the corporate limits for public use; and subdivisions 7 and 8 of § 48 also authorized the city by ordinance to erect and maintain waterworks, or to authorize the erection of the same, for the purpose of furnishing the city with a sufficient supply of water. . . . It is contended with much earnestness by counsel for the appellant that the grant to the city was to construct waterworks, or to authorize the construction of the same by others; that it was empowered to pursue either method in obtaining waterworks, and that the grant was in the alternative. Both

methods, however, could not be employed at the same time. . . . While it is true that supplying water to the inhabitants of the city and to itself does not originate in an exercise of the ordinary police powers of a municipal corporation, yet in this state, since the territorial organization, and it may be also said that generally in this country, municipal charters very generally confer this power upon cities. The respondent city was authorized, under its charter of 1886, to supply itself and its inhabitants with pure, fresh water. In the exercise of this power it could exercise a choice of modes. It could purchase or condemn any existing system, or it could grant the right to any person or corporation to lay mains and pipes and furnish water, or it could erect a system itself. There does not seem to be any prescription in its charter of the method, and there is no cogent implication that the city is restricted to any specific method in its power to build and operate waterworks. It would seem, therefore, that the city council could not absolutely bind the city in the future so that it could not exercise one of its specifically granted powers under its charter; and the well-known and accepted rule, that in grants of this character doubts must be resolved in favor of the public, requires more than mere negation to infer that the council has attempted to estop the city from the fair exercise of such granted power. The familiar rule that a privilege creating a monopoly cannot be given without the grant from the sovereign, the legislature, has been extended in this state, and that power taken from the legislature by the constitution; and § 8 of article 1 of the constitution . . . is also pertinent in considering the general policy of the state. We do not think the grant of the power to construct, or authorize others to construct, works to supply water to a city and its inhabitants, is in the alternative; but the original grant authorized it to provide water for the city, without limitation of the manner in which it may be done. . . . So, if it be conceded that the respondent city was authorized by the terms of its charter to make a contract that it would not itself supply water to the inhabitants in the limited district where the appellant's mains and pipes were placed, it did not make such agreement. There are no words of exclusion in the privilege granted appellant by the ordinance. There are no words of limitation upon the right of the city. There apparently is no plain inference that can be raised from the ordinance that such was the intention of the parties. If such intention existed, it would doubtless have been expressed in the contract. . . . As before observed, the city of Tacoma, in the ordinance which conferred the franchise upon

appellant, did not expressly or by necessary implication agree not to erect its own waterworks, and the circumstances surrounding the parties at the time were not such as to impel the inference that such contract was in contemplation by them."

In *Thomson Houston Electric Light Co. v. Newton*, 42 Fed. 723, it was said: "The theory of the complainant is that under this statute the city had the option given it in regard to electric plants, and that it could originally have erected the same by vote of the people, but, having elected to authorize private parties so to do, it is estopped from afterwards entering the field as a competitor; that while the complainant has not an exclusive right under its agreement with the city, and cannot object to the city authorizing other private companies or persons to erect and maintain electric plants in the city, yet complainant has the right to enjoin the city from undertaking the work, because the city can, through the exercise of its taxing power over the property in the city, including that owned by complainant, raise money for the running of the plant, instead of being compelled to provide the same by charging for the use of the light, and thus the city can practically drive complainant out of the field, and destroy the value of its plant, which was erected in the city by an agreement with the municipal authorities. There is great force in the suggestion thus made. It is doubtless true that, if the city enters the field by the erection of its own plant, it will have an advantage over the complainant; yet it does not follow that the court can interpose and restrain the city from erecting the contemplated plant. As already stated, the city did not grant any exclusive rights to complainant; and the latter, when it erected its plant, took the chance as to future competition. All that is now shown is that the city proposes to erect an electric plant, and to raise the money for so doing by the issuance of bonds in the sum of \$14,000. The statute confers the right so to do upon the city, and I can see no ground justifying the court in interposing by injunction, and preventing the city from establishing its proposed plant. The suggestion that the city may use its taxing power so as to prevent complainant from fair competition on its part is a suggestion only, and not the averment of a fact. The city may establish such rates for the lights furnished by it as to enable the complainant to fairly compete therewith. If it cannot do so, and the city can supply its citizens at a lower rate, are not the latter entitled to the benefit thereof? It is entirely possible that the proposed action of the city may cause loss to the complainant. But there is no ground justifying action by the court short of holding that, by the mere

action of the city in authorizing the complainant to establish its plant without any grant of exclusive rights, the city thereby deprived itself of the right to erect an electric plant for the benefit of its citizens; and this extreme ground I am not prepared to take."

In *Tillamook Water Co. v. Tillamook City*, 139 Fed. 405, *affirmed* 150 Fed. 117, 80 C. C. A. 71, it was said: "In brief, the contract in the present case provides for no exclusive right in the complainant to supply water to the city and its inhabitants. It contains no covenant by the city that it will not erect waterworks of its own, or that it will abstain from granting such right to a competing company during the life of the contract; and the fact that the contract contains a covenant that the water company shall furnish water to the inhabitants of the city of Tillamook for a fixed period of time does not by implication restrain the city from erecting waterworks of its own."

In *Washington-Oregon Corp. v. Chehalis*, 202 Fed. 591, it appeared that the language of the franchise, which it was contended was exclusive, was as follows: "The city of Chehalis . . . hereby agrees that this ordinance and franchise and the rights contained and granted thereby . . . shall continue in full force for a period of thirty years, . . . during which time the city of Chehalis agrees not to contract with any other person or persons, corporation or corporations, for a supply of water." The court held that the city had not, by the franchise in question, precluded itself from erecting a water system of its own during the life of the franchise.

In *Thomas v. Grand Junction*, 13 Colo. App. 80, 56 Pac. 665, the court said: "By constructing waterworks of its own, a city may become its competitor in the sale of water to the citizens, but the city did not undertake, either in terms or by legal implication, to in any manner protect it from competition in this respect. The holder of the franchise would have the same objection if the city, instead of building its own works, granted another franchise to another individual or company, and plaintiff's counsel concede that this might be done. The city by its construction does not destroy the franchise of the company. It might and probably would impair its value, but of course the company could not complain, because the city had not by its contract bound itself to protect it from competition, nor precluded itself from the exercise of its right of construction."

In *Glenwood Springs v. Glenwood Light, etc. Co.* 202 Fed. 678, 121 C. C. A. 88, L.R.A. 1915C 438, the facts on which the company based its claim that the city was precluded

from constructing and operating a system of waterworks to supply its inhabitants with water in competition with the system of the company were as follows: The contract contained a grant by the city of a legal franchise to furnish water in the town for all purposes, for the purpose of supplying the town of Glenwood Springs and its inhabitants with water for fire, domestic and other purposes, a grant of the right to lay its mains and pipes in the streets and alleys of the town, a grant of an exclusive right to furnish the town with water from fire hydrants for fire purposes, flushing sewers and supplying water for sprinkling streets from sprinkling carts, an agreement that the town would not take water from hydrants or water for any public purpose furnished by any person or persons other than the grantees of the franchise, an agreement by the town to pay the grantees specified prices for the use of a certain number of fire hydrants and to protect by proper ordinances the grantees in their use of the streets, alleys, and public places of the town in the construction and use of their buildings, mains, pipes, and waterworks and in the collection of their water rates. The court said, in denying the contention: "The argument is that by virtue of the provisions of the contract of 1887 which have been recited, and which by the extension agreement of 1905 remain in force until 1927, the city cannot, without the impairment of the obligation of its agreement, construct and operate waterworks of its own, and thereby compete with the company, that its competition would be more effective than that of private parties and might be destructive, and that, as it has the power of taxation, it may compel the company to contribute toward the expense of the construction and operation of a town plant that might destroy its property. When, however, all is said and considered, the real question is, What is the contract between these parties? If the contract is that during its continuance the town will not construct and operate a system of waterworks in competition with that of the company then the construction and operation of such a system would work an impairment of the obligation of its agreement. If, on the other hand, the contract is limited to a grant of the franchise to construct and operate a system of waterworks to supply the town and its inhabitants with water, to a grant of the use of the streets and alleys for this purpose, and to an exclusive right to furnish to the town at fixed rates all the water it shall use during the life of the contract for public purposes, such as the extinguishment of fires, the flushing of sewers and the sprinkling of the streets, the construction and operation of waterworks by the town to supply its inhabitants with water would be neither

a violation of its agreement nor an impairment of the obligation thereof. Counsel for the company concede that the contract is not exclusive; that notwithstanding its provisions the town may lawfully grant to third persons the right to build and operate waterworks to supply the inhabitants with water in competition with the system of the company. In the absence of an express and clear stipulation to that effect, and the contract contains none, it is difficult to conceive that the parties to this agreement intended to exclude the town when they did not exclude others. They inserted in the agreement a plain provision that the town would take and pay for water from the hydrants of the grantees and that it would not take water for public purposes from any other party. But they inserted no stipulation that the town would not construct and operate a system of waterworks to supply its inhabitants with water in competition with the system of the grantees, and the logical inference is that they intended to make no such agreement. The exclusion of the grantor from the right to compete with the grantee does not inhere in a quasi municipal grant or contract unless it is clearly stipulated therein or necessarily implied therefrom, and in this grant it is neither and the town is not precluded thereby from constructing and operating a system of waterworks in competition with the company for the purpose of supplying its inhabitants with water."

In *Memphis Electric Light, etc. Co. v. Memphis* (Mo.) 196 S. W. 1113, the court said: "The franchise involved in this case expressly provides that it is not to be construed as exclusive. It contains no language expressly prohibiting the city from exercising its power to construct and operate a lighting plant during the franchise term. It simply grants to appellant the right to operate its plant during twenty years. Had appellant desired to exclude the city from competition with it, assuming the city is empowered to contract to abstain from such competition, it should have sought a franchise plainly effecting that result. The contract it secured does not do so, and, whatever the effect upon appellant may be of competition with a municipal plant, we cannot now add to the franchise stipulations the parties did not insert when they framed it."

In *State v. Hamilton*, 47 Ohio St. 52, 23 N. E. 935, it was said: "The only material question in this case is whether, upon the facts as above stated, the city of Hamilton has corporate power to erect its own gas works for the purpose of furnishing the public lighting to the city. . . . Section 2480 provides that, if gas companies when required by the council to lay pipes and light streets, alleys, public grounds or buildings,

refuse or neglect for six months after being notified by the authority of the council, to comply with such requirement, the council may lay pipes and erect gas works for lighting such streets, alleys, or public grounds, and all other streets, alleys, and public grounds not already lighted; and such companies shall thereafter be precluded from using or occupying any of the streets, alleys, public grounds or buildings not already furnished with gas pipes of such companies. Section 2482 provides that, a neglect to furnish gas to the citizens, and other consumers of gas, or to the corporation, by any company, in accordance with the prices fixed and established by the council, from time to time, shall forfeit all rights of such company under the charter of which it was established; and the council may proceed to erect, or by ordinance empower any person to erect, gas works for the supply of gas to such corporation and its citizens. . . . Section 2486 enacts that, "The council of any city or village shall have power, whenever it may be deemed expedient and for the public good, to erect gas works at the expense of the corporation, or to purchase any gas works already erected therein." . . . It is urged in behalf of the Hamilton Gaslight Company, that the legislature has declared in sections 2480 and 2482 certain conditions under which the council may build gas works, and that in the absence of those conditions the city has not such power while there are gas works in the municipality that have complied with all the provisions of the law, and met all the demands made upon them. Such an expression of the legislature will, it is said, exclude the right of a city to erect gas works under any other circumstances. Those two sections designate what refusal or neglect on the part of gas companies to meet the requirements of the law would work a forfeiture of their rights under their charter, and authorize the council to lay pipes, and erect gas works, and exclude a gas company already in operation from occupying any streets not already furnished with gas pipes of such companies; but such authority is very different from the general power conferred upon the council by section 2486, to construct gas works without reference to the manner in which an existing company may use its franchise. Section 2486, in plain language, gives the power to the council, either to erect gas works or to purchase such works already erected. The authority granted is not coupled with any condition or contingency, but is to be exercised when the council may deem it expedient and for the public good. The language is free from ambiguity. The discretionary power would hardly seem consistent with the limitation sought to be imposed, that the council can build gas works only where there

are no gas works in the municipality; or where gas companies already organized, refuse or neglect to comply with the requirements of the law as to lighting or laying pipes, or neglect to furnish gas to citizens. The interest of the city may demand that a gas company established and doing business, although complying with all statutes and ordinances, should not continue to enjoy exclusive possession of the field of operation. And it may be deemed expedient, and for the public good, to discourage the growth of a monopoly, by the city's erecting its own gas works, or encouraging the incorporation of a competing company. Certainly, it would not be a doubtful public policy to place the city on an independent basis, by clothing it with the power of building its own gas works if an emergency should arise, although there might be a company within the municipality, which fully discharged all its corporate duties. Indeed, the provision in section 2485, rendering it unlawful to give or continue to any gas company the exclusive privilege of using the streets, would seem designed not merely to prevent the sole occupation of the streets by one company as against another, but also to secure to the municipality the use of the streets, should it conclude to avail itself of the right, granted by the following section, of erecting gas works. It is conceded that a municipality within which a gas company has been already formed, may, by a vote of its citizens and by ordinance, authorize the operation of another gas company within its borders. Rev. Stats. section 3551. The municipality may also purchase the gas works of the newly organized company. But it is contended that if two such companies exist at the same time, in the same municipality, and occupying the same territory, the municipal authorities though purchasing could not operate the works of one in opposition to the other; that after such purchase, the law will not permit the city to use its own property for the purpose of lighting its streets for the public safety and convenience, unless it either buys out the other company, or the other company goes out of existence, or fails to discharge its statutory duty. The statute, it is evident, is not susceptible of such an interpretation, nor has the legislature, in our judgment, hampered by such limitations and conditions, the right of a city to purchase and operate the works of one of two competing gas companies within its borders. And if it may own and use without restriction the plant of one such company, it may well be inquired, why may not the city, so far as the other company is concerned, be authorized to erect its own gas works, whenever it may be deemed expedient and for the public good. In its present form, section 2486 was passed many years after the

two sections which are reproduced in section 2480 and section 2482. Between the earlier and later statutory provisions we discover no repugnancy, and the canons of statutory construction do not require that either should prevail over the other. The authority given to municipalities by the later section, is distinct from and independent of the power granted by the two antecedent sections."

The foregoing decision was followed in *Hamilton Gaslight, etc. Co. v. Hamilton*, 146 U. S. 258, 13 S. Ct. 90, 36 U. S. (L. ed.) 963, *affirming* 37 Fed. 832.

AFTER GRANT OF EXCLUSIVE PRIVATE FRANCHISE.

Where a municipality has the power to exclude itself during the term of a contract from competition with a public service company and has granted in an ordinance, and the company has accepted, an exclusive right of furnishing a public utility to the city and its inhabitants, or the municipality has bound itself not to erect, maintain or become interested in any other system whereby that utility is to be furnished, it will be restrained from directly or indirectly impairing or destroying the value of the franchise by entering into competition with its grantee during the continuance of that contract by the establishment of a system or plant of its own. *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 19 S. Ct. 77, 43 U. S. (L. ed.) 341, *affirming* 60 Fed. 957; *Vicksburg v. Vicksburg Waterworks Co.* 202 U. S. 453, 6 Ann. Cas. 253, 26 S. Ct. 660, 50 U. S. (L. ed.) 1102. See also *Vicksburg v. Henson*, 231 U. S. 259, 34 S. Ct. 95, 58 U. S. (L. ed.) 209, *reversing* 203 Fed. 1023, 121 C. C. A. 664.

In *Vicksburg v. Vicksburg Waterworks Co.* supra, the court said: "The suit was brought by the Waterworks Company, claiming an exclusive right as against the city under a contract with it for the construction and maintenance for a period of thirty years of a system of waterworks, which exclusive contract, it was alleged, would be practically destroyed if subjected to the competition of a system of waterworks to be erected by the city itself, which was in contemplation under authority of an act of the legislature of Mississippi. . . . We shall proceed to consider whether the language of the contract is such as to prevent the city, during the period named therein, from erecting a waterworks of its own. . . . Without resorting to implication or inserting anything by way of intentment into this contract, it undertakes to give by its terms to Bullock & Company, their associates, successors and assigns, the exclusive right to erect, maintain and operate waterworks, for a definite term, to supply water for public and private use. These are

the words of the contract and the question upon this branch of the case is, conceding the power of the city to exclude itself from competition with the grantee of these privileges during the period named, has it done so by the express terms used? It has contracted with the company in language which is unmistakable, that the rights and privileges named and granted shall be exclusive. Consistently with this grant, can the city submit the grantee to what may be the ruinous competition of a system of waterworks to be owned and managed by the city, to supply the needs, public and private, covered in the grant of privileges to the grantee? It needs no argument to demonstrate, as was pointed out in the *Walla Walla* case, that the competition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the grantee upon different terms and would not likely conduct the business unless it could be made profitable. We cannot conceive how the right can be exclusive, and the city have the right at the same time to erect and maintain a system of waterworks, which may and probably would practically destroy the value of rights and privileges conferred in its grant. If the right is to be exclusive, as the city has contracted that it shall be, it cannot at the same time be shared with another, particularly so when such division of occupation is against the will of the one entitled to exercise the rights alone. It is difficult to conceive of words more apt to express the purpose that the company shall have the undivided occupancy of the field so far as the other contracting party is concerned. The term 'exclusive' is so plain that little additional light can be gained by resort to the lexicons. If we turn to the *Century Dictionary* we find it defined to mean 'Appertaining to the subject alone; not including, admitting or pertaining to any other or others; undivided; sole; as, an exclusive right or privilege; exclusive jurisdiction.' We think, therefore, it requires no resort to implication or intentment in order to give a construction to this phase of the contract; but, on the other hand, the city has provided and the company has accepted a grant which says in plain and apt words that it shall have an exclusive right, a sole and undivided privilege. To hold otherwise in our view would do violence to the plain words of the contract, and permit one of the contracting parties to destroy and defeat the enjoyment of a right which has been granted in plain and unmistakable terms. On the authority of the *Walla Walla* case, the city had the power to exclude itself for the term of this

contract, giving the words used only the weight to which they are entitled, without strained or unusual construction, and we think it was distinctly agreed that for the term named the right of furnishing water to the inhabitants of Vicksburg under the terms of the ordinance was vested solely in the grantee, so far at least as the city's right to compete is concerned. Any other construction seems to us to ignore the language employed and to permit one of the parties to the contract to destroy its benefit to the other. We think the court below did not err in reaching this conclusion."

In *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 19 S. Ct. 77, 43 U. S. (L. ed.) 341, *affirming* 60 Fed. 957, it was said: "Nor do we think the contract objectionable in its stipulation that the city would not erect waterworks of its own during the life of the contract. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect waterworks of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn and pay for the waterworks of the company at any time during the existence of the contract. Taking sections 7 and 8 together, they amount simply to this: That if the city should desire to establish waterworks of its own it would do so by condemning the property of the company and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants; but that it would not enter into a direct competition with the company during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith. An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding twenty-five years. In establishing a system of waterworks the company would necessarily incur a large expense in the construction of the power house and the laying of its pipes through the streets, and, as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden changes of public opinion to
Ann. Cas. 1918B.—8.

which all municipalities are more or less subject, the city might resolve to enter the field itself—a field in which it undoubtedly would have become the master—and practically extinguish the rights it had already granted to the company."

Although the general rule is that unless the municipality has excluded itself in plain and explicit terms from competition with a waterworks or other company during the period of the contract, it cannot be held to have done so by mere implication (see the preceding subdivision of this note), it has been held in two instances that, where the contract did not in terms express an agreement that the city would not, during the life of the contract, erect its own system for the purpose of supplying its inhabitants with water, it could not be doubted that such was the fair implication and reasonable intendment of the contract. *Columbia Ave. Sav. Fund, etc. Co. v. Dawson*, 130 Fed. 152, *reversed* on other grounds, 197 U. S. 178, 25 S. Ct. 420, 49 U. S. (L. ed.) 713; *Mercantile Trust, etc. Co. v. Columbus Waterworks Co.* 130 Fed. 180. In the case first cited the court said: "The city, having induced the expenditure of money on faith of the promise that it would grant the exclusive use of the streets for the laying of pipes and mains by the water company, and having contracted to pay for the use of water for fire protection for a term of years, will not be permitted, in equity, to disregard its agreements by itself entering into ruinous competition with the other party before the expiration of the contractual term."

It is well settled that under the *Pennsylvania* statutes giving municipalities the power to adopt either of two methods for the supply of water, i. e., to build their own works, or to contract with a private corporation for the same purpose, if a municipality adopts the method of contracting with a private company, it exhausts its power on that subject, and hence cannot build a plant of its own and enter into competition with the company. *White v. Meadville*, 177 Pa. St. 643, 35 Atl. 695, 34 L.R.A. 567, *overruling* *In re Milvale*, 162 Pa. St. 374, 29 Atl. 641, 644; *Metzger v. Beaver Falls*, 178 Pa. St. 1, 35 Atl. 1134; *Wilson v. Rochester*, 180 Pa. St. 509, 38 Atl. 136; *Welsh v. Beaver Falls*, 186 Pa. St. 578, 40 Atl. 784; *Tyrone Gas, etc. Co. v. Tyrone*, 195 Pa. St. 566, 46 Atl. 134; *Troy Water Co. v. Troy*, 200 Pa. St. 453, 50 Atl. 259; *Warren Water Co. v. Warren*, 200 Pa. St. 504, 50 Atl. 250; *Bennett Water Co. v. Millvale*, 200 Pa. St. 613, 50 Atl. 155, judgment *affirmed* on rehearing 202 Pa. St. 616, 51 Atl. 1098; *Potter County Water Co. v. Austin*, 206 Pa. St. 297, 55 Atl. 991; *Carson v. Austin*, 206 Pa. St. 303, 55 Atl. 1135; *Pennsylvania Water Co. v. Pitts-*

burg, 226 Pa. St. 624, 75 Atl. 945; Mellon v. Pittsburgh, 227 Pa. St. 7, 75 Atl. 956. Compare Centre Hall Water Co. v. Centre Hall, 186 Pa. St. 74, 40 Atl. 153 (no contract); Boyertown Water Co. v. Boyertown, 200 Pa. St. 394, 50 Atl. 189 (no contract); Phillipsburg Water Co. v. Phillipsburg, 203 Pa. St. 562, 53 Atl. 347 (exclusive privilege lost by company); Hastings Water Co. v. Hastings, 216 Pa. St. 178, 65 Atl. 403 (no contract); Dorrance v. Bristol, 224 Pa. St. 464, 73 Atl. 1015 (exclusive privilege lost by company); Tarentum Water Co. v. Tarentum, 230 Pa. St. 148, 79 Atl. 402 (no contract); Bethlehem City Water Co. v. Bethlehem, 231 Pa. St. 454, 80 Atl. 984 (no contract). The reason of the rule was well stated in Welsh v. Beaver Falls, 186 Pa. St. 578, 40 Atl. 784, wherein it was said that where a contract is made with a private water company, authorized usually only to build its works and maintain its plant at one place, it would be grossly inequitable to hold that the municipality, after inviting the construction of such works, and contracting with the company for the water supply, could at any time thereafter destroy them, by constructing its own works, in the absence of an explicit statutory right. In Pennsylvania Water Co. v. Pittsburgh, 226 Pa. St. 624, 75 Atl. 945, the court said: "The whole effort of the appellant is to distinguish the present case from the Meadville case because of a single fact which appeared in the latter but does not appear in this. In the Meadville case the water company was incorporated under the original Act of April 29, 1874, which conferred upon such companies the exclusive right to provide water within the district for which they were chartered. Here the water company was incorporated subsequent to the amendment of June 2, 1887, P. L. 310, which denies such exclusive privilege to companies thereafter incorporated. The doctrine of the Meadville case needs no other vindication or exposition than is to be found in the opinion. All that is required here is a simple restatement of what the case does decide. In that as in every case the power of the municipality to provide a supply of water rested in express legislative grant. It was the extent of this grant, and what limitations, if any, were imposed on its exercise, that were the questions under consideration. The case decided that the grant left it optional with the municipality to provide water in one of two ways, either by constructing a water system of its own, or through an independent agency; that it could not employ both methods at the same time, and that when it had provided a water supply by contract with an independent agent, it was without power to employ the alternative method, so long as the right of the inde-

pendent agent to supply the water continued and was being rightfully exercised. This was the whole of the decision; and it was made to rest fundamentally and exclusively on the ground that the municipality having once provided a supply of water for its inhabitants by one of the methods, the power granted it was exhausted. The decision puts no limitation whatever on the contracting power of the municipality where it has elected to get its water supply through an independent company; nor does it confine the municipality to that particular method for any longer period than during the existence of the contract between it and the independent agent. Where it does so contract the terms of the contract are for the municipality to define. It may, as was the case here, grant to the water company the privileges of the public streets for an indefinite term, in which case, the privilege continues so long as the company furnishes an adequate and suitable supply, or it may contract for a long or a short term as it prefers, and repeat the process as often as occasion requires. With the expiration of the term fixed by the contract the power of choice between methods revives, and the municipality becomes free as ever to adopt thereafter the method it formerly rejected. Now when the ground of the decision—viz., the exhaustion of power in the municipality, that is, the exhaustion of privilege of choice between methods,—is considered, what room can there be for supposing that it is authority only in cases where the company contracted with has under the law an exclusive privilege? Does not exhaustion result just as certainly where the contract for the supply is with a company not having an exclusive privilege as where it is with one having an exclusive privilege? Exhaustion follows when the object has been accomplished, no matter what the privileges of the agent employed to accomplish it. Any such distinction as is here insisted upon between companies, in this particular connection, would be arbitrary in the extreme, without any justification whatever in reason. Certainly no warrant can be found for it in the Meadville case. Not only so, but at best the distinction is most unsubstantial, when considered as affecting the rights of the municipality. It goes no deeper than this; in the one case the exclusive privilege is derived from express legislative grant; in the other, like exclusiveness necessarily results, against the municipality, for the reason that the latter having made its contract with the company for a water supply through it, has exhausted all the power it had for the time being to employ the other method; not that having contracted with one company, it may not give to another company the right to enter upon the streets and lay pipe; but it may not, whether there

be one or several companies supplying the inhabitants with water, build waterworks of its own to compete with the companies which entered with its consent. . . . Again, the exclusive privilege, as against the municipality, in any water company having a contract with the municipality, we think necessarily results from quite other considerations as well. Take the present case: The Pennsylvania Water Company by ordinance was given the right to enter upon the streets of the borough with its mains and pipes for the purpose of supplying the inhabitants with water; it did so enter, and at a great cost to itself supplied and placed in position the necessary equipment, and has continued to meet every requirement of its contract with regard to the supply. It will not be pretended that the borough, if it still had a separate existence, could recall the franchise which it gave the company before its expiration, or that it could interfere with the company's mains and pipes in any such way as would prevent the company from furnishing a supply of water to all who desired it. Suppose, however, it were allowed to build and employ waterworks of its own, what would be the result? Competition? No, not competition—which would be bad under any condition as a gross perversion of municipal function—but absolute and total destruction of the company's property, as complete as would result from a forcible tearing up of the mains and pipes and casting them aside. We can do no better in this connection than repeat what was said by Mr. Justice Dean in the Meadville case, page 61: 'If anything be manifest, it is, that if two water mains be laid side by side on the same street, equally accessible to the householder on each side, conveying double the quantity needed, with double sets of hydrants, pumping stations, offices, salaries and expenses, one or the other must be abandoned. No community will pay double for any article of necessity or luxury. If the property holder must, by compulsory taxation, support the municipal system, he will not voluntarily support the private corporation system; such a conflict of interests will inevitably bankrupt the system which depends on the voluntary patronage of the public. We hesitate to assume, every court is bound to hesitate long before assuming, the legislature intends by grants to distinct corporations for public purposes, there shall arise such conflict in the exercise of the franchises as will result in practical destruction of property of any citizen without compensation. It is a cardinal rule of construction between older and younger grants of franchises, the sovereign does not intend the younger shall infringe on the older; but to assume these franchises can be in existence and in operation at the same time, is to

assume the commonwealth has granted precisely the same thing to the municipality that it had already granted to the water company; for in a business view, the contemporaneous exercise of the franchise is impossible.' It is clear, that except as a contract with a water company for a water supply gives an exclusive right, as against the municipality, this must result—while the municipality may not violently tear from its place the property of the company and so deprive the company of its rights, it must be allowed to accomplish by indirection a result equally destructive and disastrous. The law will not aid in the accomplishment of any such end. For the reasons above given we think the distinction pressed upon our attention is unsubstantial and therefore unimportant." To the same effect see *Mellon v. Pittsburgh*, 227 Pa. St. 7, 75 Atl. 956.

Where a city has no power to grant a perpetual exclusive franchise to a water company for the privilege of laying water pipes for public use beneath the surface of the highways of the city, the word "exclusive," used in the contract, does not have the effect of an agreement on the part of the city not to construct and maintain a system of waterworks in competition with the water company. *Sioux Falls v. Farmers' Loan, etc. Co.* 136 Fed. 721, 69 C. C. A. 373, *reversing* 131 Fed. 890; *Rogers Park Water Co. v. Chicago*, 131 Ill. App. 35. See also *Westerly Waterworks v. Westerly*, 75 Fed. 181, 80 Fed. 611. In the case first cited the court said: "In discussing this branch of the case, the circuit court said: 'The word "exclusive" in the contract between the city and W. S. Kuhn is insufficient to raise the implication that the city, by the use of said word, thereby agreed to renounce its power to construct waterworks itself; because (1) such is not the ordinary meaning of the word; (2) because it is conceded that under the law the word "exclusive," if given its usual interpretation, would render the exclusive feature of the contract void; (3) because the express provision of the contract of the city to take water for a term of years raises the contrary implication that after the expiration of that twenty years both parties intended that the city should be free to exercise its power to construct and maintain waterworks, or to obtain its water in any other lawful way.' We concur in this view. It is difficult to see the force of the contention that, on account of once making a contract with the plaintiff for twenty years, the city irrevocably bound itself by an implied contract never to construct and maintain a waterworks system of its own. While it is doubtless true that the erection of such plant by the city will render the property of the water company less valuable, yet the city

was not bound by the contract to refrain from exercising its power to construct and maintain waterworks after the expiration of the twenty-year period provided in the contract. The contract by its terms ceased to have effect after April 9, 1904, and the subsequent construction and operation of waterworks by the city for its own benefit and the benefit of its citizens would not, we think, be a violation of any of the express or implied provisions of the contract. The city undoubtedly had the power, by an express contract, to renounce its authority to construct and maintain waterworks itself during the time which it would be proper and lawful to grant the privilege to a third party."

In *Rogers Park Water Co. v. Chicago*, 131 Ill. App. 35, the court said: "But even with the word 'exclusive' in the ordinance given full force and effect as a legal and valid provision, we think still that it would be by 'mere implication' that it could be held that the village of Rogers Park by its use had shut out itself and the city of Chicago, by annexation its successor in public duties to the inhabitants of its territory, from the exercise of one of the most necessary and ordinary of municipal functions. To our mind the granting of an 'exclusive' right and privilege to one person means that the grantor will not grant the same right and privilege to another person—not that he binds his own hands otherwise."

In *Brenham v. Brenham Water Co.* 67 Tex. 542, 4 S. W. 143, it appeared that the city passed an ordinance granting to a water company "the right and privilege, for the term of twenty-five years from the date of the adoption of this ordinance, of supplying the city of Brenham and the inhabitants thereof with water for domestic or other uses and for the extinguishment of fires." In holding that this ordinance granted the water company the exclusive right and privilege of supplying water to the city for twenty-five years, but was invalid, as being a contract beyond the power of the city to make, the court said: "Taking all the laws into consideration, we cannot doubt the power of the city to make some contract through which the city might be furnished with water. It becomes necessary, for the proper determination of this case, to ascertain the character of the contract on which the rights of the parties depend. The subject-matter of the contract was one over which the city had control solely under the power confided to it as a municipal government, to be exercised for the public good, and not under any private corporate right or proprietorship. The first section of the ordinance professes to give and to grant a right and a privilege to the water company to supply the city and its inhabitants with water for the period

of twenty-five years. Was it intended to make this right and privilege exclusive for that period of time? This must be ascertained from the language of the ordinance, the surroundings of the parties, and the purpose sought to be accomplished. The ordinance, in terms, professes to give and to grant a right to do certain things and therefore to receive certain benefits for a quarter of a century, i. e., to confer a claim to do certain things, and to receive a fixed compensation, which may be enforced for that period. It not only professes, in general terms, to confer such a right, but, as if to emphasize it, and to fully illustrate the character of right intended to be granted, it terms it a privilege. The word 'privilege,' as used in the ordinance, is evidently not used in the technical sense in which it is used in the civil law, or even under the common law, where used in the sense of 'priority,' but was intended to be given its ordinary signification, meaning a right peculiar to the person on whom conferred, not to be exercised by another or others. This right is to supply the city and its inhabitants with water, for their varied uses for twenty-five years, at fixed prices in enumerated cases, and at such prices as the water company and inhabitants may agree upon in other cases. The word 'supplying' must be considered in its connection with a view to ascertain whether it was used in its primary sense or in one more restricted; and, so considered, we can have no doubt that it was used in its primary sense, intending thereby to give the water company the right and privilege to furnish to the city and its inhabitants what water might be needed or necessary to be furnished through such a system. In the ordinance under consideration it can mean no less than to furnish all the water the city and its inhabitants may need to have furnished under the power given to the city through its charter, and this for the period of twenty-five years. It would do violence to the context to give to the word any other meaning. If nothing more appeared than we have considered, to give character to the contract and to illustrate the nature of the right intended to be secured through it, it seems to us that there is no escape from the conclusion that the parties contracted and intended to contract that the right of the water company should be exclusive. The fifth and sixth sections of the ordinance, however, if there were doubt, it seems to us would remove it. The water company obligated itself to erect and maintain a given number of fire hydrants on the mains which it absolutely agreed to put down, and for the use of these the city agreed to pay the sum of three thousand dollars per year for the period named. It further obligated itself to extend its mains, if

requested to do so by the city, and upon each mile of such extension to erect not less than ten fire hydrants, for each one of which the city promised to pay a rental of sixty dollars per annum, as provided in the fifth section. Was the city, in this and in another part of the ordinance to which we have referred, agreeing to receive and the company to furnish the entire quantity of water to be used for fire and other enumerated public purposes during the twenty-five years? The contract, in terms, obligated the city to pay for this, for the full period, whether it used the water or not, and thus made the only right valuable to the water company in so far exclusive. If the city refused to take the water, and obtained it elsewhere—if the contract was valid, and the parties are to be supposed to have so considered it—then the city would but assume a double burden, which it cannot be conceived that the city ever contemplated. The language of the contract, the surroundings of the parties and their evident purpose, forbid the belief that they either intended to make the right and privilege of the water company other than an exclusive right to furnish and be paid for all the water the city and its inhabitants might need to have furnished through a system of waterworks for the full period of twenty-five years. Does the charter of the city of Brenham or that of the water company confer upon the city the power to make such a contract? . . . No express power is conferred upon the city, through either or both of the charters, to make a contract through which the water company could become entitled to the use of the streets, and to have the exclusive right to furnish the city and its inhabitants with water at a fixed rate for twenty-five years; and we do not see that power to make such a contract was necessary or essential to the proper exercise of the power expressly given. Under charters containing grants of power less full and express than are contained in the charter of the city of Brenham, it has been held that power existed to erect and operate waterworks under the control and ownership of the municipality when it deemed it necessary to the public good. The legislature had given power to the city of Brenham to erect, control and regulate waterworks, and this it may exercise, if it has or may have the pecuniary ability, unless restrained by the contract under consideration. . . . Will not the contract under consideration, if valid, have the effect, not only to embarrass the city government in the exercise of the power conferred upon it, but to withdraw from it the right to provide, in any other authorized way, water for public purposes and the use of its inhabitants, which was the sole purpose for which the power to erect, maintain and regulate waterworks was

given to it? It seems so to us; for, as we have before said, the contract in effect assumes to give an exclusive right—assumes to surrender to a private corporation for a period of twenty-five years the power which the legislature conferred on the municipal government. The power given to a municipal corporation to contract in relation to a given subject-matter, does not carry the implication that it may contract, even with reference to that, so as to render it unable in the future so to control any municipal matter over which it is given power to legislate as may be deemed best. . . . There is, however, another question involved in this case which will be examined, reaching further than the one we have considered, and involving not only the power of the municipal corporation to make the contract sued on under the terms of the charters of both corporations, but involving the question of the power of the legislature, directly or indirectly, to confer upon the water company such rights and privileges as it claims under the contract. . . . A grant which gives to one or an association of persons an exclusive right to buy, sell, make or use a given thing or commodity, or to pursue a given employment, creates a monopoly. There are, however, certain classes of exclusive privileges which do not amount to monopolies, and a consideration of these and the grounds on which they stand is not now necessary. The right to exercise the exclusive privilege need not extend to all places, it is enough that it is to operate in and to the hurt of one community. It need not continue indefinitely so as to amount to a perpetuity; it is enough that it be an exclusive privilege for a period of time, of the character forbidden. The more general is its application as to places and persons, and the longer it is to continue, the more hurtful it becomes. In the case before us, the contract, as we have seen, gives the exclusive right to sell to a community, for public purposes, for the period of twenty-five years, thus affecting all the inhabitants in their common right directly, and in their individual rights at least indirectly. This right to sell for public purposes carries with it, through the contract, the obligation to buy for public uses. It gives the exclusive right to sell to the inhabitants of the city for the same period, for all the private uses for which they may need water, in such ways and to be so applied as it can be only by a system of waterworks, which is a denial in effect to the inhabitants of the right to buy for these private purposes from any other water company. Such an exclusive right prevents competition and tends to high prices, all matters affecting which the contract before us surrenders the right further to regulate for a quarter of a century. It has been

said, in cases to which we will hereafter refer, that there can be no monopoly in the use of a street to lay down gas or water mains or pipes, because it is not a matter of common right to use streets for such purpose. This may be admitted without affecting the question before us. When such use, however, is but a means to the exercise of an exclusive right to sell water, and to compel a city or its inhabitants to buy it, it will be found difficult to separate the means from the end intended to be accomplished. A system of water or gas works may be operated in a town or city as well by one individual as by a private corporation, if he have the ability. No corporate franchise is necessary to that purpose. It is an occupation in which any person may engage if he has the means, which may and ordinarily will involve the right to use streets and other public grounds. This means to accomplish the purpose can ordinarily be acquired only through permission given directly or indirectly by the state; but cases may arise in which no such consent would be necessary. Such a franchise, when granted, is one of the feeblest character, and from its nature subject at all times to control. Some conflict of authority exists as to whether such contracts as that under consideration create monopolies. The question has arisen in several cases in which gas and water companies asserted exclusive right to use streets for laying down mains and pipes under charters granted which, in terms, gave exclusive right. . . . The exclusive rights, given by the contract before us, lead to the same results as a monopoly in any other matter, and whether a monopoly or not is best ascertained by the results which are brought about by a contract or law and the exercise of rights the one or the other may profess to confer. We are of the opinion that the exercise of the exclusive rights conferred on the water company produce the same results as would the exercise of an exclusive right which would fall within the most exacting definition of a monopoly, and that the allowance or creation of such exclusive rights is contrary to the spirit of the constitution of this state." To the same effect see *Altgelb v. San Antonio*, 81 Tex. 436, 17 S. W. 75, 13 L.R.A. 383.

Right of Citizen to Injunctive Relief.

It has been held that while a municipality has no right, in the absence of express legislative authority, to engage in business enterprises and to compete with its citizens, a person engaged in a similar business who asserts that the competition of the city is causing him injury and damage, has no legal or equitable ground of complaint, though in his capacity of citizen and taxpayer he is entitled to injunctive relief. *Keen v. Way-*

cross, 101 Ga. 588, 29 S. E. 42, wherein the plaintiff sought to restrain the municipality from competing with him in the plumbing business. The court said: "It was insisted, however, that, conceding the city had no right to conduct the business in question, this was a matter with which the plaintiff had no concern, and therefore he had no legal ground of complaint. Regarding the plaintiff merely in his capacity as a plumber, this point is well taken. Thus viewing him, the only effect of the city's action was to interfere, by way of competition, with a monopoly which he seems to have previously enjoyed. This immunity from the harassment of competition was but the result of mere chance, and he could assert no property right therein; for the law recognizes in no one a right to create or maintain a monopoly. 'The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the [city] damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the [city] is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights' as a licensed plumber entitled to pursue his calling in the city; for the municipality 'is not shown to owe him any duty,' in that capacity, 'which it has not performed.' . . . But it by no means follows that, as 'a citizen and taxpayer of the city of Waycross,' the plaintiff will not be heard to complain, or is without redress. 'It is the prevailing rule that taxpayers may enjoin municipal corporations and their officers from transcending their lawful powers or violating their legal duties in any mode which will injure the taxpayers,—such as making an unauthorized appropriation of the corporate funds, or an illegal disposition of the corporate property.' 2 Beach on Injunctions, § 1300. 'Following out the theory which regards the municipal corporation as a trustee for the inhabitants, it is almost, if not quite universally, conceded by the courts in the United States, that, in the event of the failure of the state law officer to intervene by virtue of his statutory or implied power to protect the interest of the state and of the corporators, any property holder or municipal taxpayer may resort to equity to prevent municipal corporations or officials from exceeding their lawful powers or neglecting or violating their legal duties, under any circumstances where the taxpayer's interest will be injuriously affected. And this is the privilege of the taxpayer, though it is not expressly conferred upon him by statute.' In private corporations, it is well settled that 'if the directors will not protect the rights of the creditors and stockholders, then the latter may and should at-

tend to their own interests. There is no reason whatever why a different rule should be applied to municipal corporations, in which the taxpayers are the beneficiaries upon whose shoulders will ultimately fall the loss and expense which is caused by illegal, fraudulent or tortious acts, or by the inertness and general malfeasances of the municipal authorities.' Tiedeman on Mun. Corp. § 395. So, at the instance of citizens and taxpayers, courts exercising equitable jurisdiction will 'set aside and annul any and every illegal public official action or proceeding of county, town, or city authorities, whereby a debt against such county, town, or city would be unlawfully created, the public burden upon the community would be unlawfully enhanced, and the amount of future taxation would be unlawfully increased. . . . In the face of every sort of objection urged against a judicial interference with the governmental and executive function of taxation, these courts have uniformly held that the legal remedy of the individual taxpayer against an illegal tax . . . was wholly inadequate; and that to restrict him to such imperfect remedy would, in most instances, be a substantial denial of justice.' 1 Pom. Eq. Jur. § 260, pp. 347, 348. In this connection, see also 2 High on Injunctions, §§ 1239, 1269, 1271; Tied. on Eq. Jur. § 483; and the general conclusion announced by Judge Dillon in vol 2, § 922, of his admirable work on Municipal Corporations, after a painstaking review of the decisions, English and American, bearing upon the subject now under discussion."

But to entitle a complainant to equitable relief as a citizen and taxpayer on the ground that the municipal corporation is engaged in a similar business in competition with him, present or prospective damage must be shown by him; and an injunction will not be granted where no such showing is made. *Baker v. Grand Rapids*, 142 Mich. 687, 106 N. W. 208; *Stone v. Oconomowoc*, 71 Wis. 155, 36 N. W. 829. And see the reported case.

JAMES

v.

STATE.

Alabama Supreme Court—June 17, 1915.

193 Ala. 55; 69 So. 569.

Criminal Law — Evidence — Intoxication as Bearing on Intent.

Accused, charged with murder in the first degree, may show that he was so intoxicated

at the time of the killing as to be incapable of understanding that he was committing a crime, to disprove existence of specific intent essential in murder in the first degree.

Evidence of Intoxication — Admissibility.

It is not competent for witnesses of accused to testify that his intoxication rendered him, at the time of the killing, incapable of understanding that he was committing a crime, since that is a conclusion for the jury.

Same.

That accused, relying on intoxication at the time of the killing, offered a witness a drink shortly before the killing, is immaterial.

Same.

That accused, relying on intoxication at the time of the killing, had been drinking at other times, does not show incapacity to commit murder at the time of the killing, and questions as to his condition as to drinking on prior occasions are properly excluded.

Same.

A witness, testifying that accused, relying on the defense of intoxication, was drinking and acted queerly just before the offense, may not testify that he considered accused mentally unbalanced at that time.

Insanity as Defense — Proof — Conclusions of Witness.

That the mind of accused, relying on insanity, had not been very strong since he had a fever a year before the offense, was properly excluded, as the mere opinion of the father of accused, seeking to so testify.

Same.

A nonexpert witness, testifying to the insanity of accused, must state what acts of accused he has seen, and then give his opinion as to his sanity, but cannot testify that he has seen acts of insanity.

Same.

A witness for accused, relying on the defense of insanity produced by intoxication, may not testify that while accused is drinking his reason is dethroned, or that he then displays acts of insanity, or is not responsible for what he does.

Condition on Prior Occasion.

That accused, relying on insanity produced by intoxication, was on another occasion, when drunk, in such condition that no one could do anything with him, is properly excluded as irrelevant.

Insanity as Defense — Drunkenness.

Insane conduct or mania resulting from present intoxication of accused, charged with murder, does not excuse the crime; and where there was no evidence to show any fixed insanity, resulting from drunken habits or otherwise, abnormal conduct and conditions of accused, associated with present drunkenness, may not be shown.

[See 19 Ann. Cas. 1169.]

Judicial Notice — Inheritable Nature of Insanity.

The court judicially knows as an established truth of medical science that many forms of insanity are inheritable, and may

recur in various individuals collaterally descended from a common source.

Insanity — Proof — Insanity of Relatives.

Evidence of the insanity of one or more members of accused's family, immediate or collateral, is not admissible, except in connection with other evidence directly showing that accused is insane.

[See note at end of this case.]

Same.

That the mother of accused and a maternal aunt were sent to the asylum may not be shown in defense of the insanity of accused, in the absence of anything to show the sort of asylum they were sent to, or why they were sent, and what their mental condition was at the time.

[See note at end of this case.]

Same.

Opinions of witnesses acquainted with the relatives of accused, relying on insanity, that insanity runs in the family, are incompetent, because mere conclusions.

[See note at end of this case.]

Same.

The mere fact that a maternal aunt of accused, relying on insanity, is insane, and confined in an insane asylum, may not be shown in support of the defense of insanity, unaccompanied by any evidence of the nature, extent, duration, or symptoms of her mental disorder.

[See note at end of this case.]

Test of Irresponsibility — Knowledge of Consequences.

That accused was, at the time of the killing of decedent, so mentally unbalanced as not to know the consequences of his act, is not per se a palliation of murder, under a plea of not guilty, nor an excuse therefor, under a plea of insanity.

Instructions as to Insanity — Instruction Properly Refused.

A charge that if the jury believe that, at the time accused shot decedent, his conduct and acts were such that he was so mentally unbalanced that he did not know the consequences, that fact should be considered in determining the verdict, is properly refused, as misleading, and as singling out evidence for the consideration of the jury without stating any proposition of law.

Same.

An instruction that evidence that accused, relying on the defense of intoxication at the time of killing decedent, was intoxicated at the time, was admitted as bearing on the question of premeditation and deliberation, and if, after consideration of the facts, the jury have a reasonable doubt of the guilt of accused, they must acquit him, is properly refused, because misleading in its suggestion of acquittal because of accused's intoxication, while on the evidence there could be no acquittal on the plea of not guilty.

Same.

A charge requiring an acquittal of murder in the first degree, if accused was so drunk or mentally unbalanced as to cause him to turn a deaf ear to reason, is properly refused.

Burden of Proof as to Insanity.

A charge requiring the acquittal of accused, if the evidence leaves in the mind of the jury any reasonable doubt of his sanity, was properly refused.

[See 3 Ann. Cas. 926; 15 Ann. Cas. 95.]

Appeal from Circuit Court, Cullman county: **SPEAKE**, Judge.

Criminal action. George James convicted of murder in first degree and appeals. **AFFIRMED.**

[57] Aside from the general issue, defendant also interposed the plea of not guilty by reason of insanity. Defendant was 18 years of age at the time of the killing, and the undisputed evidence shows that he entertained sentiments of hostility toward deceased, and that he killed him at night with a shotgun furtively fired through a window, while deceased was in his own home and seated in the midst of his family.

The state's witness Aaron testified on the cross-examination that defendant was at witness' house just before the murder; that he was drinking, and had a bottle of whisky, but he could not say he was drunk—he could walk straight, and he smelt whisky on his breath. The trial judge excluded defendant's question: "Did he offer you a drink?" The witness further stated that he had known defendant for 10 years, and that prior to the killing, and shortly before that occasion defendant passed him several times and looked like he had been drinking. The trial judge then excluded the following question: "What was his condition with reference to whether or not he had been drinking?" "Had he not been drinking pretty heavily for several days [58] prior to the killing?" "Tell the jury whether or not (just before the killing) in your opinion, the defendant was so much intoxicated as to be wholly unconscious of his acts." "And tell the jury, in your opinion, whether you considered him (at that time) mentally unbalanced."

The state's witness McCoy testified on cross-examination that he did not see defendant on the day of the killing, but had seen him frequently before that, and that he was well acquainted with the family of the mother of defendant, the Higginbothams. The trial judge then excluded these questions: "Insanity runs in the Higginbotham family doesn't it?" "The defendant's mother and sister were sent to the asylum, were they not?" "On other occasions, when he was drunk, was he so drunk as to be unconscious?"

Defendant's father testified for him that defendant had a spell of fever the year before, and also that he drank a good deal. The trial judge then excluded the following questions asked by defendant: "Since that fever, has

his mind been strong or not?" "Since that fever, have you seen any acts of insanity?" "While in that condition [drinking]: (1) Is his reason dethroned? (2) Does he display any acts of insanity? (3) Is he responsible for what he does?"

Defendant's mother testified for him that she was present "Christmas a year ago" when he and his father had some trouble, and defendant was drunk, wild as a bear, and, further, that nobody could do anything with him like he is when he is drinking; affects his mind; don't know anybody." The judge excluded the expressions, "no one could do anything with him," and "affects his mind." The witness further stated that defendant nearly died the year before, and was in bed [59] three weeks with a spell of fever. The court then excluded the following question asked by defendant: "What was the condition of his mind after he got up?" He also excluded questions as to whether insanity ran in witness' family, and whether his sister is not now insane, and confined in the lunatic asylum at Tuscaloosa.

The following charges were refused to defendant:

(1) "If you believe from the evidence that at the time the fatal shot was fired by defendant that his conduct and acts were such that he was so mentally unbalanced or insane that he did not know the consequences, then you should take such into consideration in determining your verdict."

(2) "If you believe from the evidence that although you believe beyond all reasonable doubt that defendant is guilty of murder in the first degree, yet if you believe from the evidence that defendant was so mentally unbalanced that he did not know the consequences of his act, you should find him not guilty."

(3) "Evidence that the accused was intoxicated at the time of the killing, if you find such evidence has been offered in this case, is admitted for your consideration as bearing on the question of premeditation and deliberation; and if after a careful consideration of all the facts and circumstances in the case you have a reasonable doubt of defendant's guilt, you should find him not guilty."

(4) "If you believe from the evidence that, at the time the alleged fatal shot was fired by defendant, he was drunk or mentally unbalanced to such an extent as to cause defendant to turn a deaf ear to reason, you should not convict defendant of murder in the first degree."

[60] (5) "While defendant is required to prove that he was of unsound mind at the time of the homicide by the preponderance of the evidence, it is also true that upon the consideration of the testimony of the whole case, the state's as well as the defendant's,

if any reasonable doubt remained in the minds of the jury, the verdict should be not guilty."

(6) "The legal presumption of sanity may be overcome by evidence tending to prove insanity of the accused, which is sufficient to raise a reasonable doubt of his sanity at the time of the commission of the act for which he is sought to be held accountable; but when that is done the presumption of sanity ceases, and the burden is upon the state, which is then required to prove his sanity, as an element necessary to constitute crime, beyond a reasonable doubt."

Daniel W. Troy, Talbert Letcher, P. M. Brindley and C. L. Price for appellant.

W. L. Martin and J. P. Mudd for appellee.

SOMERVILLE, J.—(1, 2) It was competent for the defendant to show that he was intoxicated to such a degree as to render him at the time of the killing incapable of understanding that he was committing a crime; this for the purpose only of disproving the existence of the specific intent or mental state which is an essential ingredient of murder. *Waldrop v. State*, 185 Ala. 20, 64 So. 80; *Walker v. State*, 91 Ala. 76, 9 So. 87. But it was not competent for defendant's witnesses to testify that his intoxication produced that result, since that was a conclusion to be drawn by the jury from the evidence. *Armor v. State*, 63 Ala. 173.

[61] (3-5) The fact that defendant offered the witness Aaron a drink before the killing was not material, and was properly excluded. And the mere fact that he had been drinking at other times had no tendency to show his incapacity to commit murder on the occasion in question; hence the questions to Aaron as to defendant's condition with reference to whether he was drinking on prior occasions were properly excluded. But the ruling was harmless in any case, as the witness had already testified that defendant looked like he was drinking. It may be that, had defendant offered to show that he had been "drinking pretty heavily for several days prior to the killing," with the explanation that he proposed to show fixed insanity as a result of long-continued drunken habits, this would have been competent as a link in such a chain of proof. But this purpose did not appear. Upon the predicate merely that defendant was drinking and acting queerly just before the killing, the trial judge properly refused to allow this witness to say whether he considered him "mentally unbalanced" at that time.

(6, 7) That defendant's mind had not been "very strong" since he had the fever the year before was obviously a mere opinion of the witness (defendant's father), and was of no

probative value upon the issue of insanity vel non. Its exclusion was proper. Nor could the witness state that he had seen "acts of insanity" since the fever. He should have stated what acts of defendant he had seen, and then he might properly have given his opinion as to his insanity. *Rembert v. Brown*, 14 Ala. 360.

(8) So it was not permissible for this witness to state that while defendant is drinking his reason is dethroned, or that he displays acts of insanity, or that [82] he is not responsible for what he does. *Henningburg v. State*, 153 Ala. 13, 45 So. 246. Even if general results, thus drawn by the witness from other occasions, were relevant, these were conclusions to be drawn by the jury and not by the witness.

(9) The fact that on another occasion when defendant was drunk nobody could do anything with him was clearly irrelevant, and was properly excluded.

We have examined with due care all of the excluded testimony offered by defendant to show incapacity to commit murder, or to support his plea of insanity. In every case it was properly excluded, either because it related to irrelevant occasions, or was inadmissible opinion, or because the witness giving his opinion omitted the necessary predicate of facts, or was not sufficiently qualified by observation and knowledge. *Parrish v. State*, 139 Ala. 28, 42, 36 So. 1012; *Dominick v. Randolph*, 124 Ala. 557, 564, 27 So. 481; *Odom v. State*, 174 Ala. 4, 56 So. 915; *Henningburg v. State*, 153 Ala. 13, 45 So. 246.

(10) In this connection it is to be noted that insane conduct or mania resulting merely from present intoxication is not the insanity which excuses crime. *Gunter v. State*, 83 Ala. 96, 109, 3 So. 600; *Parrish v. State*, 139 Ala. 47, 36 So. 1012; *Buswell on Insanity*, 449. All of the alleged abnormal conduct and conditions of defendant, offered to be shown by the several witnesses, were directly associated with present drunkenness, excepting only the instance of fever above referred to. So there was in fact no evidence before the court tending to show any fixed insanity, resulting from drunken habits or otherwise.

(11) In some of the early cases it has been held that proof of insanity among the relations of the defendant is admissible only in connection with expert testimony [63] that insanity is in fact hereditary. *Reg. v. Tucket*, 1 Cox C. C. (Eng.) 103; *State v. Simms*, 68 Mo. 305. We think, however, that courts must now judicially know, as an established truth of medical science, that many forms of insanity—or, at least, the physical and neurotic conditions which tend to produce or invite such forms—are transmissible from parents to children, and may recur in the various

individuals collaterally descended from a common source. *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162, and note, 174; *Baxter v. Abbott*, 7 Gray (Mass.) 71, 81.

(12) But, while evidence of the insanity of one or more members of the defendant's family, immediate or collateral, is admissible to show the hereditary taint in his own blood, such evidence is never admissible, except in connection with other evidence directly tending to show that the defendant is himself insane. *State v. Cunningham*, 72 N. C. 469; *Laros v. Com.* 84 Pa. St. 200, 209; *State v. Van Tassel*, 103 Ia. 11, 72 N. W. 497; *Watts v. State*, 99 Md. 30, 57 Atl. 542; *People v. Smith*, 31 Cal. 466; *Murphy v. Com.* 92 Ky. 485, 18 S. W. 163; *Snow v. Benton*, 28 Ill. 306; *Guiteau's Case*, 10 Fed. 161, 167; *Whart. & Stille's Med. Jur.* § 377; *Clev. Med. Jur. of Ins.* 528. For, as said by Bynum, J., in *State v. Cunningham*, supra: "To allow such evidence to go to the jury as independent proof of the insanity of the prisoner would be of the most dangerous consequence to the due administration of criminal justice, since there are but few persons, it is ascertained, who have not had ancestors or blood relations, near or remote, affected by some degree or mental aberration."

But, independently of this consideration, the questions by which defendant sought to show hereditary insanity were either inapt or legally objectionable.

[64] (13) The fact that defendant's mother and a maternal aunt "were sent to the asylum," there being nothing to show what sort of asylum they were sent to, why they were sent, and what was their mental condition at the time, was patently inadmissible.

(14) So also the opinions of witnesses, however well acquainted they might be with defendant's maternal relatives, that "insanity runs in the family," were utterly incompetent, not only because they were mere conclusions, but because the witnesses were not qualified to give their opinions on such a subject.

(15) Defendant offered to show by his mother that her sister is "now insane, and confined in the lunatic asylum at Tuscaloosa." It may be that the bare fact that a parent of the defendant is insane and under confinement on that account would be admissible as tending to show hereditary insanity in the defendant, which however, we need not now decide; but we think the bare fact that a maternal aunt is insane, and confined in an insane asylum, without any evidence to show the nature, extent, duration, or symptoms of her mental disorder, and nothing to suggest that it has arisen from causes or conditions which are transmissible, as distinguished from those which are purely personal or ephemeral, does not furnish any rational basis upon which the jury could infer the

existence of hereditary insanity in the family of defendant.

"It is doubtless the general and well-established rule, that, where the mental soundness of an individual is in question, the sanity of the blood relations in the ancestral line may be shown as tending to establish the fact in issue (*Walsh v. People*, 88 N. Y. 458); but that rule does not permit indiscriminate and unexplained evidence of diseases afflicting such relations and affecting [65] their mental faculties. There must be evidence tending to show at least that such diseases are hereditary or transmissible. *Reichenbach v. Ruddach*, 127 Pa. 564, 18 Atl. 432; *State v. Van Tassel*, 103 Ia. 6, 72 N. W. 497; . . . It is a scientific fact of common knowledge that the transmissibility of the malady known a 'general paresis' depends to a great extent upon the conditions underlying the disease. . . . Whether the particular form of the disease from which the testatrix and her family suffered was of such a transmissible character that she might be said to have derived it from her ancestors cannot be determined from the evidence in the record, and it is therefore difficult to see how the testimony of the physicians (that her mother and brother were afflicted with general paresis) was really pertinent to the issue whether the testatrix was possessed of testamentary capacity." *In re Myer*, 184 N. Y. 54, 76 N. E. 920, 6 Ann. Cas. 26, and note collecting the authorities.

(16, 17) Charge 1, refused to defendant, instructs the jury that if, "at the time the fatal shot was fired by the defendant, his conduct and acts were such that he was so mentally unbalanced or insane that he did not know the consequences, then you should take such into consideration in determining your verdict." The fact that one who kills is at the time so mentally unbalanced as not to know the consequences is not per se a palliation of murder under the plea of not guilty, nor is it an excuse therefor under the plea of insanity. A man's mind may be temporarily unbalanced by fear, or hatred, or other causes, not associated with mental disease; and equally the most intelligent and responsible man may not perceive all the consequences of his act. Neither of these phrases is apt, and the [66] charge could only have misled and confused the jury. Moreover, it is objectionable as singling out evidence for the consideration of the jury, without stating any proposition of law.

Refused charge 2 requires a verdict of not guilty if defendant "was so mentally unbalanced that he did not know the consequences of his acts," and was properly refused for reasons just above stated. The legal tests of criminal irresponsibility by reason of insanity have been frequently stated and applied

in accordance with the leading case of *Parsons v. State*, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193, and we need not now restate the law. However, this charge was fully covered by defendant's given charge 4.

(18) Refused charge 3 is palpably misleading in its suggestion of complete acquittal because of defendant's intoxication. On the undisputed evidence there could be no acquittal on the plea of not guilty.

(19) Refused charge 4 required an acquittal of murder in the first degree, if the defendant was so drunk or mentally unbalanced as "to cause him to turn a deaf ear to reason." Its refusal was proper, and needs no comment.

(20) Refused charges 5 and 6 require the acquittal of defendant, if the evidence leaves in the mind of the jury any reasonable doubt of his sanity. This is not the law in this state, and these charges could not be properly given.

An examination of the entire record discloses no error of law of which defendant can complain, and the judgment must be affirmed.

Affirmed.

All the Justices concur.

ON REHEARING.

(July 2, 1915.)

[67] *SOMERVILLE, J.*—We have examined with due care the several questions now urged for our consideration.

(21) 1. It must be observed that, at the stage of the trial when the court excluded the defendant's question to the state's witness Aaron, "Had he not been drinking pretty heavily for several days previous to the killing?" there was no testimony before the court that defendant was drunk in any degree on the day of killing, nor at any other time. It is, of course, to be conceded that, when there is evidence of drunkenness, its probable degree may be illustrated by showing that it was immediately preceded by protracted and heavy drinking, yet proof of the latter fact alone does not even prima facie show that it was in fact followed by any degree of drunkenness or insanity. See *Snead v. Scott*, 182 Ala. 97, 62 So. 36; and *Sharp v. State*, 193 Ala. 22, 69 So. 122. Had this question been propounded at a later stage of the trial, it might have been error to exclude it.

2. For the same reason the defendant's condition "relative to drinking" on several occasions shortly preceding the killing, but disconnected therewith in continuity, was, when sought to be elicited from this witness, prima facie irrelevant. Moreover, though the meaning of this question is somewhat obscure, we are satisfied, as already stated, that it had been already fairly answered, to the extent of the witness' knowledge, by his statement

that on these occasions "he seemed to be drinking."

(22) 3. While mental emotions, as well as physical sensations, are usually exhibited by facial expressions, [68] and, when relevant, a witness who observed a person's facial expression is generally allowed to say that it indicated any of the ordinary and familiar mental emotions or physical sensations which common knowledge informs us may be thus visibly indicated (*Stone v. Watson*, 37 Ala. 279; *Carney v. State*, 79 Ala. 17; *Long v. Seigel*, 177 Ala. 338, 58 So. 380; *Barlow v. Hamilton*, 151 Ala. 634, 44 So. 657, and cases cited), yet the question of whether a person looked natural or unnatural does not come within the reason of that rule. Any one of a hundred things might cause a person to look unnatural, without in any way evidencing an insane mental condition. Such an opinion by this witness was, at least upon the issues here involved, too vague and too conjectural as to its significance to be of any material probative value.

We are impelled to adhere to our conclusions on the original hearing.

All the Justices concur.

NOTE.

Admissibility, on Issue of Sanity, of Evidence of Insanity of Ancestors or Kindred.

The recent cases are in accord with the holding in *Matter of Myer*, 184 N. Y. 54, 6 Ann. Cas. 26, that since it is a well-established fact of medical science that many forms of insanity are inheritable, proof of the insanity of ancestors or kindred of a person whose sanity is under investigation is admissible. *Wear v. Wear* (Ala.) 76 So. 111; *Dillman v. McDanel*, 222 Ill. 276, 78 N. E. 591, 113 Am. St. Rep. 400; *Martin v. Beatty*, 254 Ill. 615, 618, 98 N. E. 996; *Fish v. Poorman*, 85 Kan. 237, 240, 116 Pac. 898; *State v. Warner* (Vt.) 101 Atl. 149. And see the reported case. *Compare Owen v. Groves*, 145 Ga. 287, 38 S. E. 964.

In *State v. Warner*, supra, the defendant was convicted of first degree murder. The defense was insanity and evidence was introduced tending to show insanity in the family. The court said: "When a respondent puts his mental condition in issue by the introduction of evidence tending to show his insanity, he opens an inquiry that may take a very wide range; how wide depends upon the circumstances of the case in hand. . . . Broadly speaking, his whole life may be canvassed for evidence bearing upon the question, and his ancestry and family history may be investigated. In this very case, the respondent properly introduced evidence tending to

show insanity in his ancestors, and asked the jury to believe that the seeds of the malady came to him by inheritance."

Evidence of ancestral insanity, however, is circumstantial and in order to render it admissible there must be prior proof of insanity of the person whose mental condition is in issue. Thus in *Fish v. Poorman*, 85 Kan. 237, 240, 116 Pac. 898, it was said: "Plaintiffs also offered proof, which the court rejected, showing that several relatives of Mrs. Sherwood were insane, and that one of them, Elizabeth Powell, her mother's sister, died in an insane asylum. This class of testimony is generally held admissible on the recognized principle of the hereditary character of insanity, but only in corroboration of proof that a particular person is or was insane."

But proof of a taint of insanity in a person's family without actual evidence of insanity in the person himself will never be allowed to overcome the presumption of his sanity. By the weight of authority such proof is said to be competent only when there is other proof tending to establish the insanity of the person in question. . . . We think the testimony here should have been admitted."

So in *Wear v. Wear* (Ala.) 76 So. 111, the court said: "Two of the assignments (11 and 12) complain of the admission of evidence by Mrs. Partain to the effect that her grandfather, decedent's father, was insane before his death, and that decedent's brother was then insane. Where there is other proof tending to establish the want of mental capacity of a person whose mental capacity is under investigation to make a will, it is competent to show in that connection that ancestors and blood relatives of the person under inquiry had become insane."

Contrary to the holding of the reported case, that evidence of the insanity of ancestors or kindred is not admissible unless the particular form of insanity is shown to have been transmitted to the person whose sanity is questioned, is the case of *Dillman v. McDanel*, 222 Ill. 276, 78 N. E. 591, 113 Am. St. Rep. 400. It was contended in that case that a will had been obtained by undue influence and that at the time of making the will testator was of unsound mind. Evidence was introduced tending to show that an aunt of the testator had been insane for eighteen months and that a cousin had been and was at the time of trial mentally deranged. The evidence was objected to on the ground that the insanity from which the aunt had suffered was not of a kind that was hereditary. The court, however, ruled that the evidence was properly admitted, saying: "Wesley R. Baldrige, a witness for contestants, was permitted, over objection, to testify that Jane Devin, a paternal aunt of the deceased, was

'crazy' for a period of eighteen months and then recovered, and it is urged that this evidence was incompetent for the reason that it was not supplemented by any evidence showing that the insanity from which the aunt suffered was of a kind that was hereditary, and that in any event the disease could not have been transmitted from her to the deceased. The precedents are not a unit on this question, but we think the greater weight of authority is that, where the sanity or insanity of an individual is the subject of judicial investigation, and there is other evidence tending to show mental unsoundness, it is competent to show the insanity of his collateral blood relations, not further removed than uncles and aunts, without making proof that the insanity from which they suffered was hereditary in character. . . . There was also evidence, which was received without objection, that Sarah E. Hudelson, a cousin of the deceased, had been insane for a great many years and was so at the time of the trial." The foregoing holding was recognized in *Martin v. Beatty*, 254 Ill. 616, 618, 98 N. E. 996, wherein evidence that two brothers, two sisters, and a nephew of the testator had been insane was held properly admitted.

In *Owen v. Groves*, 145 Ga. 287, 88 S. E. 964, proof, based on general repute in the family, that a brother of the testatrix had died insane, was rejected as hearsay.

PACIFIC POWER AND LIGHT COMPANY

v.

WHITE ET AL.

Washington Supreme Court—April 20, 1917.

96 Wash. 18; 164 Pac. 602.

Sales — Warranty — Duration — When Contract Executed.

A contract of September 8th in terms: Articles of agreement between named persons witnesseth that the parties of the first part have bargained and agreed to sell and do hereby sell to the party of the second part all the stock of a certain company for \$25,000, of which \$1,000 is to be paid at once, and balance on or before September 17th, and on receipt of stock, and the parties of the first part agree and warrant that the company's liabilities did not on September 1st exceed \$11,500, after allowing for claims then due it, and if they do exceed it, the excess shall be deducted from the purchase price, and the parties of the first part will on or before September 13th furnish a statement

of the liabilities, and then the party of the second part shall have privilege of verifying it by books, accounts, and other papers and records of the company, so that, if possible, it may be done by September 17th—is not, when an audit was furnished, an executed contract passing title, but still an executory contract, as regards consideration for the warranty of September 19th, that the liabilities did not exceed the amount shown by the audit, which before proceeding further with the consummation of the purchase the party of the second part required certain of the parties of the first part to execute; the party of the second part not being required to consummate the purchase till protected in some satisfactory way against any undisclosed liabilities of the company.

Consideration for Warranty.

A warranty that there are no undisclosed liabilities against a company given by a part of the owners of its stock, whereby one having an executory contract of purchase thereof is induced to proceed to a consummation of it when not legally bound to do so, has consideration.

Construction of Warranty — Meaning of "Liabilities."

"Liabilities" of a corporation, warranted in a contract of sale of its stock and in a separate warranty not to exceed a certain amount, are not limited to contractual liabilities, but include those for torts.

Duration — Continuing Warranty.

A warranty on which sale of the stock of a corporation is made against its liabilities, undisclosed or contingent or otherwise, exceeding a certain amount, is continuing.

Agency — Undisclosed Principal — Rights in Warranty to Agent.

A warranty on which sale is made to one in fact acting as agent inures to the benefit of the undisclosed principal.

[See note at end of this case.]

Sales — Warranty — Distinction between Warranty and Guaranty.

A contract inducing consummation of purchase of the stock of a corporation, whereby part of the sellers warrant that the corporation's liabilities do not exceed a certain amount, is one of warranty, and not of guaranty, being an absolute undertaking in praesenti, as well as in futuro.

Action on Warranty — Necessary Parties.

Though sale of the stock of a corporation is by all the stockholders, only those stockholders who execute a warranty against liability that the corporation's liabilities do not exceed a certain amount, whereby the purchaser is induced to consummate his purchase, are necessary parties to action on the warranty.

Appeal from Superior Court, King county: FRATER, Judge.

Action by Pacific Power and Light Company, plaintiff, against W. H. White et al.,

defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

Kerr & McCord for appellant.

Charles E. Patterson, Tom S. Patterson and Hurlbut & Neal for respondents.

[19] **PARKER, J.**—This is an action to recover damages upon a warranty. The demurrer of the defendants, White and Campbell, to the complaint of the plaintiff, Pacific Power & Light Company, having been sustained by the superior court and the plaintiff having elected to stand upon its complaint and not plead further, judgment of dismissal was rendered against it. From this disposition of the cause, the plaintiff has appealed to this court.

Counsel for appellant amplified its complaint to a considerable extent in response to a motion and demand in that behalf made by counsel for respondents. This was done before the ruling of the trial court upon respondents' demurrer. We therefore view the complaint as so amplified, as the superior court did, in determining the question of the sufficiency of the facts so pleaded to constitute a cause of action entitling appellant to relief. The controlling facts so appearing may be summarized as follows: In the negotiations leading up to and in the making of the two contracts here involved, Chas. D. Fullen was acting as agent for appellant. This fact of Fullen so acting as agent for appellant, we assume, was then unknown to respondents and all the other parties to the contracts, since the contracts themselves and the pleadings are silent upon that question. The first of the contracts reads:

"Articles of agreement, made and entered into this 8th day of September, A. D. 1910, by and between W. H. White, Thos. F. Jack, of Seattle, Washington, for themselves and A. H. Campbell, of Toppenish, Washington, for himself and [20] as agent for Herbert Wright and W. P. Taylor, parties of the first part, and Chas. D. Fullen, of Seattle, Washington, party of the second part.

"Witneseth: That the parties of the first part have bargained and agreed to sell and do hereby sell unto the said party of the second part the entire capitalization and all of the stock of the Reservation Electric Company, a corporation, organized under the laws of the state of Washington and engaged in operating and conducting an electric light plant in the town of Toppenish, Washington, said stock carrying with it the entire assets of every kind and nature of the said Reservation Electric Company, together with all the rights, franchises, privileges and good will belonging

thereto, for and in consideration of the sum of \$25,000, of which the sum of \$1,000 is paid at the time of the signing of this agreement, and the balance of said sum, to wit, \$24,000, is to be paid on or before September 17, A. D. 1910, and on the receipt by said party of the second part of the shares of stock representing the capitalization hereinbefore referred to.

"The said stock shall be deposited with the Scandinavian American Bank of Seattle, Washington, and when the entire amount thereof is so deposited, the said party of the second part shall pay the said sum of \$24,000 to the parties of the first part on or before the 17th day of September, A. D. 1910.

"The parties of the first part agree and warrant that the liabilities of said corporation did not and shall not exceed the sum of \$11,500 on the 1st day of September, A. D. 1910, after allowing for all accounts and claims due to the said corporation on that date; and in the event that said liabilities exceed said amount, then the same, so far as the excess over \$11,500 is concerned, shall be deducted from the purchase price of said stock. The parties of the first part, through A. H. Campbell as secretary and manager, are to furnish to the party of the second part a statement showing the said liabilities as herein before mentioned, on or before the 13th day of September, A. D. 1910, and then the said party of the second part shall have the privilege of verifying the same by examination of the books, accounts and other papers and records of the said Reservation Electric Company, so that if possible the same may be done before September 17, 1910. If the indebtedness as above determined is less than \$11,000, then the said party of the second part [21] is to pay to the said parties of the first part the difference between \$11,000 and the indebtedness as determined, the understanding being, that the entire cost of said plant to said party of the second part, including the liabilities of said corporation, shall not be less than \$36,000.

"In Witness Whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written.

"W. H. White (Seal)

"Thos. F. Jack (Seal)

"A. H. Campbell (Seal)

"Chas. D. Fullen (Seal)."

After this contract was entered into, an audit was made of the books of the Reservation Electric Company, which showed liabilities of that company to the extent of \$12-506.03. Appellant, before proceeding further with the consummation of the purchase of the stock, required respondents to execute and deliver a contract of warranty reading as follows:

"Seattle, Sept. 19, 1910.

"Mr. Chas. D. Fullen

"Seattle, Wash.,

"Dear Sir: We have examined the statement of Price, Waterhouse & Co., certified public accountants, as to Reservation Electric Company, dated Sept. 17, 1910, a copy of which was furnished to us, and we are prepared now to say and warrant, that at the close of business for the month of August, 1910, the accounts and bills payable, after deducting the accounts receivable, did not and do not exceed the sum of \$12,506.03.

"In addition thereto, we represent and state to you that then there were no other undisclosed or contingent liabilities existing against said company in excess of said amount.

"We further represent to you that there has been no unusual or unnecessary expenditures made during the month of September other than those in the ordinary course of business and which were necessary for carrying on the business of said Reservation Electric Company, as no increase has been made in the liabilities of said company, of which you have not been fully advised.

"Respectfully yours,

"W. H. White

"A. H. Campbell

"Thos. F. Jack."

[22] This is the warranty here sued upon. We quote from the contract of September 8th as bearing upon the question of the consideration for the execution of this warranty contract. The sale of the stock was thereupon on that day consummated by delivery thereof to Chas. D. Fullen and the payment of the purchase price as contemplated by the contract of September 8. Appellant "was induced to purchase said stock, and did purchase said stock, and pay said valuable consideration therefor, by reason of said statements, warranties and representations made by said defendants, and believed that said statements, representations and warranties were true, and relied thereon."

In January, 1910, the Reservation Electric Company became liable to one White for damages for personal injuries received by him as the result of the negligence of that company, which liability was unknown to Chas. D. Fullen and appellant, his principal, at the time of the consummation of the sale of the stock on September 19th, and was not included in the \$12,506 liabilities of that company then disclosed by respondents and warranted by them to be all the liabilities of that company. Thereafter, in October, 1910, an action was commenced against the Reservation Electric Company by White to recover damages for which it was so liable to him. Trial of that action in the superior court

resulted in a judgment against that company in favor of White for the sum of \$3,000, which judgment was thereafter affirmed by this court. *White v. Reservation Electric Co.* 75 Wash. 139, 134 Pac. 807. Immediately upon the commencement of that action in the superior court, appellant notified respondents, and each of them, of the fact of its commencement and called upon them to defend the Reservation Electric Company and save it harmless from that liability. The Reservation Electric Company was ultimately compelled to pay that judgment. It is for damages so resulting to appellant in the impairment of the value of the stock of the Reservation Electric Company purchased by appellant from respondents that [23] recovery is sought in this action upon the warranty contract of September 19, 1910.

It is contended by counsel for respondents that: "The contract of Sept. 19th is a nullity because, prior to that time, the contract of sale was completed and title to the property had passed, so that there was no consideration whatever for this contract." It is true that the sale contract of September 8th contains the words "have bargained and agreed to sell and do hereby sell." Should we look no further to the provisions of that contract, it might well be argued that it became an executed contract passing title upon its being signed by the parties thereto. There are, however, other provisions therein which we think render it plain that both the vendors and the purchaser had something more to do before that contract could be regarded as executed and passing title. Respondents did not make delivery of the stock, nor were they required to do so until the final payment of the purchase price was made by appellant. This of itself might be regarded as merely the retention of control over the stock for the purpose of securing the purchase price, and, therefore, not inconsistent with the passing of title upon the signing of the contract. But respondents also had something to do as a prerequisite to the perfection of their right to have the purchase of the stock consummated. By the terms of that contract, they and their associates warrant that the "liabilities" of the Reservation Electric Company did not exceed the sum of \$11,500. They also agreed to furnish evidence of the amount of the liabilities of that company. They also agreed that the amount of such liabilities was to become finally determinative of the exact amount of the purchase price, \$25,000 being only tentatively stated as the amount of the purchase price in the contract. Plainly, by the terms of the contract, appellant was not compelled to blindly accept the information to be furnished by respondents as conclusive. It was before the acceptance by appellant of this information to be furnished by respond-

ents and their [24] associates, before payment of the balance of the purchase price, and before delivery of the stock, that appellant demanded and received from respondents the warranty contract of September 19th which induced it to consummate the purchase. Assuming for the present that the liability of the Reservation Electric Company to White was one which respondents and their associates were required to disclose and warrant against under the contract of September 8th, it is plain that appellant was not required to consummate the sale under that contract until it was protected against liabilities of the nature which White had against that company, either by deducting the amount of such liabilities from the purchase price or in some other manner satisfactory to appellant, and the fact that that liability was not known to appellant at the time surely did not lessen its right to be protected against it. Such expressions as "do sell," "have sold," and "hereby sell," used in a contract of sale and which, standing alone, might indicate a present sale and passing of title, are not conclusive upon that question when used in a contract of sale other provisions of which negative the idea of title passing upon the signing of such a contract. As to when title passes under such a contract becomes a question of intention to be gathered from all of its terms. It seems clear to us, in the light of the things which, by the terms of the contract, respondents were required to do before appellant was required to consummate the sale, that the contract of September 8th did not become an executed one or pass title until after the execution of the warranty contract of September 19th, and that, when that warranty contract was executed, respondents' rights had not become so fixed and determined that they could have compelled the consummation of the sale without the doing of anything further on their part.

In the early case of *Meeker v. Johnson*, 3 Wash. 247, 257, 28 Pac. 542, Judge Dunbar, speaking for the court touching the effect of the word "sold" upon the question of passing title, as used in a sale contract, said:

[25] "It is true that the formal word 'sold' is used in this contract . . . ; but so it is in a great majority of contracts of this kind where it is not claimed by either party that they are anything more than executory contracts. This may be, and doubtless is, one expression among others, to indicate the intention of the parties; but it is only one, and is not conclusive when the other conditions in the contract indicate a different intention."

See also *North Pacific Lumbering, etc. Co. v. Kerron*, 5 Wash. 214, 31 Pac. 595; *Pacific Coast Elevator Co. v. Bravinder*, 14 Wash. 315, 44 Pac. 544; *North Idaho Grain Co. v. Callison*, 83 Wash. 212, 145 Pac. 232; 6 R. C. L. 590; 35 Cyc. 281.

Having concluded that the sale contract of September 8th was still executory and had not resulted in the passing of title to the stock at the time of the execution of the warranty contract of September 19th, we think it follows that there was ample consideration to support the latter contract, since it appears by the allegations of the complaint that appellant was induced to proceed to a consummation of the sale contract by the execution of the warranty contract, at a time when it was not legally bound to do so; that is, at a time when respondents had not done all they were required to do under the terms of the sale contract entitling them to have the sale consummated. *Congar v. Chamberlain*, 14 Wis. 258.

It is contended in respondents' behalf that the warranties contained in the contracts of September 8th and September 19th have no reference to any liability of the Reservation Electric Company other than contractual liabilities. The provision in the contract of September 8th for the furnishing by respondents of a statement of the liabilities of that company, and the privilege of appellant to verify the same by an examination of the books of that company before the consummation of the sale, and the fact that the determination of the total amount of the liabilities of the company was to control the exact amount of the purchase price, might seem to furnish some ground for this contention; but when [26] the contract of September 8th is read as a whole, we think it is rendered plain that appellant was induced to purchase the stock of the Reservation Electric Company in reliance upon the fact that every liability of that company should be disclosed before the consummation of the sale by the payment of the purchase price. It is plain that liabilities of the Reservation Electric Company growing out of torts would lessen the value of the stock which was the subject of the sale, just as effectually as liabilities growing out of contract. It seems quite plain to us that appellant entered into the contract of sale with respondents, having in view that every liability of every nature which would affect the value of the stock would be disclosed before the consummation of the sale, and that all parties to the contract were proceeding upon that theory. We think that the word "liabilities," as appearing in both contracts, is there used in its broad sense and was intended by all parties to the contracts to include every debt or obligation of the Reservation Electric Company which would impair the value of the stock of that company. Bouvier defines "liability" as "responsibility; the state of one who is bound in law and justice to do something which may be enforced by action." Plainly, according to the allegations of the complaint, White's cause of action for damages was then such a

liability against the Reservation Electric Company and one which materially impaired the value of the stock of that company.

It is contended by counsel for respondents that the warranties contained in the contracts are not continuing warranties. Looking alone to the sale contract of September 8th, there might be some ground for this contention, in view of the fact that the terms of that contract seemed to contemplate that the total amount of the liabilities should be first ascertained and the purchase price determined accordingly. It seems to us, however, that the warranty in the contract of September 19th is plainly a continuing warranty. Indeed, it was manifestly not for the purpose of warranting against [27] then disclosed liabilities, since they were to be then taken into consideration in the fixing of the purchase price. It could serve no purpose if not a continuing warranty looking to the future protection of appellant against other existing liabilities. Even if the warranty in the contract of September 8th was not strictly a continuing warranty, the uncompleted duty of respondents and their associates under that contract to disclose all the liabilities of the Reservation Electric Company constituted sufficient consideration for the execution of the warranty of September 19th, which plainly is a continuing one.

We have assumed so far, for convenience of discussion, that appellant is in fact the purchaser under the contract of September 8th. It is contended by counsel for respondents that appellant can in no event have the benefit of the warranty it here sues to recover upon, because it is not the beneficiary named therein, and its interest in the transaction being only that of an undisclosed principal, it has no greater rights than an assignee of its agent, Chas. D. Fullen. Counsel invoke the general rule that a warranty in the sale of personality does not run with the property, and the assignee of the purchaser cannot avail himself of such warranty as against the original seller, citing 35 Cyc. 370. It seems to us that appellant does not stand in the shoes of an assignee or grantee of its agent, Fullen, in view of the fact that Fullen was, at the time of the execution of both contracts, in fact acting for appellant as its agent. This fact appearing by the allegations of the complaint, we think appellant's rights are controlled by another rule of law, well stated in 2 C. J. 873 as follows:

"As a corollary to the principle that the rights of the other contracting party are not affected by the disclosure of a theretofore unknown principal, it is a well established general rule that, where an agent on behalf of his principal, enters into a simple contract as though made for himself, and the existence of the principal is not disclosed, the contract

Ann. Cas. 1918B.—9.

inures to the benefit of the principal who may appear [28] and hold the other party to the contract made by the agent. By appearing and claiming the benefit of the contract, it thereby becomes his own to the same extent as if his name had originally appeared as a contracting party."

Of course, the rights of the other contracting party as against the agent, with whom he thinks he is dealing as principle, might impair the undisclosed principal's rights. This, however, is not a question to be here considered. As the facts here appear, respondents' burdens and obligations under their contract of warranty of September 19th are not increased in any respect by appellant, as the undisclosed principal, claiming under that warranty, any more than as if Fullen himself were claiming under it. Respondents are not going to be subjected to successive suits for any one breach of their warranty by successive assignees or grantees of the purchaser of the stock, which is apparently the main reason for the rule of not allowing recovery upon a warranty other than by the one to whom it was given, as pointed out by Justice Lamar in *Smith v. Williams*, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220. In this connection, counsel also invoke the rule that no one can acquire any rights under a special "guaranty" other than the one who is expressly referred to or necessarily embraced in the description of the persons to whom the guaranty is addressed, citing 20 Cyc. 1429. We think it plain, however, that the contract here involved is one of warranty and not of guaranty. While these words are often somewhat indiscriminately used, they do not carry the same meaning or refer to obligations of the same legal nature. In 12 R. C. L. 1056, the difference in legal effect between a warranty and a guaranty is stated as follows:

"It seems that derivatively the words 'warranty' and 'guaranty' import the same kind of transaction, and they are still loosely employed as though they were synonymous. In legal conception, however, a guaranty is distinguishable from a warranty. Each is an undertaking by one party to another to indemnify or make good the party assured against some possible default or defect in the contemplation of the [29] parties; but a guaranty is understood, in its strict legal and commercial sense, as a collateral warranty, and often as a conditional one, against some default or event in the future, whereas the term 'warranty' is generally understood as an absolute undertaking *in praesenti* as well as *in futuro*, against the defect, or for the quantity or quality contemplated by the parties in the subject-matter of the contract. In the sale of a commodity, an undertaking by the seller to answer for defects therein is con-

strued as a warranty, though the seller uses the term 'guarantee.'"

A guarantor might be quite willing to enter into a contract guaranteeing payment of an obligation in the future by one person and yet be quite unwilling to guarantee such payment by another. In other words, the guarantor's burden might be quite different in the one case from what it would be in the other. So it will not be presumed that he intends to be bound except for the obligation of the person named in the guaranty contract. There has not come to our attention any decision or other authority holding to the view that an undisclosed principal to a contract of warranty like that here involved cannot have the benefit of such warranty to the same extent as if it were any other simple contract obligation on the part of the warrantor. We are of the opinion that appellant is entitled to the benefit of this warranty if the allegations of its complaint are true and respondents have no affirmative defense impairing such right, either against it or its agent, Chas. D. Fullen, assuming that it dealt with Fullen without knowledge of his agency for appellant.

Some contention is made in respondents' behalf that there is a defect of parties. This contention, however, proceeds upon the theory that this action is based upon the sale contract of September 8th as well as the warranty contract of September 19th, it being conceded by counsel for respondents that if the action rests upon the warranty contract of September 19th alone, there is not a defect of parties. What we have said, we think, leads to the conclusion that the cause [30] of action is, and can be, rested upon the warranty contract of September 19th. The sale contract of September 8th is of no consequence here except as having a bearing upon the question of consideration for the execution of the warranty contract of September 19th. In other words, the first contract is here to be considered only for the purpose of determining whether or not it was completely executed and had passed title to the stock before the execution of the warranty contract.

We conclude that the facts stated in the complaint are sufficient to constitute a cause of action entitling appellant to recover upon the contract of warranty executed by respondents on September 19, 1910. The order sustaining the demurrer to appellant's complaint and the judgment of dismissal are reversed and the cause remanded for further proceedings.

Ellis, C. J., Mount, Fullerton, and Holcomb, JJ., concur.

NOTE.

Warranty to Agent as Inuring to Benefit of Undisclosed Principal.

Where a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue on it; the defendant in the latter case being entitled to be placed in the same position at the time of the disclosure of the principal as if the agent had been the real party in interest. See the note to *Powell v. Wade*, 55 Am. St. Rep. 916. It follows as a corollary to that rule, that any benefit or advantage derived by the agent in the nature of a warranty either express or implied inures to the benefit of the undisclosed principal. *Cushing v. Rice*, 46 Me. 303, 71 Am. Dec. 579; *Beebe v. Robert*, 12 Wend. (N. Y.) 417, 27 Am. Dec. 132; *Kelly Asphalt Block Co. v. Barber Asphalt Pav. Co.* 211 N. Y. 68, 105 N. E. 88, L.R.A.1915C 256, *affirming* judgment 153 App. Div. 907, 137 N. Y. S. 1125, which *affirmed* 136 App. Div. 22, 120 N. Y. S. 163; *Woodward v. Stieff*, 171 N. C. 82, 87 S. E. 955; *Ross v. Northrup*, 156 Wis. 327, 144 N. W. 1124. And see the reported case. See also *Carter v. Harden*, 78 Me. 528, 7 Atl. 392.

In case of a purchase or exchange of goods by an agent, even if the principal is not disclosed, and the bill of sale is made to the agent himself, the property, immediately on the execution of the contract, vests in the principal, and the right of action on an implied warranty or on fraudulent representations made to the agent, is in the principal. *Cushing v. Rice*, 46 Me. 303, 71 Am. Dec. 579.

In *Kelly Asphalt Block Co. v. Barber Asphalt Pav. Co.* 211 N. Y. 68, 105 N. E. 88, L.R.A.1915C 256, *affirming* judgment 153 App. Div. 907, 137 N. Y. S. 1125, which *affirmed* 136 App. Div. 22, 120 N. Y. S. 163, wherein an undisclosed principal sued for damages for a breach of implied warranty on a contract of sale, it was held that while the fact that the seller would not have made the contract if it had known who the real buyer was, might have justified it in refusing to perform on learning the truth, having executed the contract the seller could not escape liability thereon for a breach of an implied warranty in the absence of any fraud in the making of it.

In *Ross v. Northrup*, 156 Wis. 327, 144 N. W. 1124, which is not directly in point as the question there involved was the existence or nonexistence of a warranty, it was held that the plaintiff's rights must be measured by those of his agent, and if he was an undisclosed principal his rights on a warranty could be no greater than that of his agent.

SCHMIDT

v.

MARCONI WIRELESS TELEGRAPH
COMPANY OF AMERICA.New Jersey Court of Errors and Appeals—
June 15, 1914.

86 N. J. Law 183; 90 Atl. 1017.

**Corporations — Issue of New Stock —
Preferential Rights of Stockholders.**

A corporation increasing its capital stock may offer the stock at par to its bona fide stockholders who appear to be such on the books of the corporation, and it need not accept the subscription of any other person. [See note at end of this case.]

**Evidence — Weight — Uncontradicted
Testimony.**

An assignee suing on a claim, who has not been led to expect that a fact defeating a recovery on the claim would be attempted to be proved by an admission of his assignor, does not, by failing to contradict testimony of a witness as to admissions of the assignor, admit the truth of the testimony, but that is for the jury.

Appeal from Circuit Court, Hudson county.

Action by George W. C. Schmidt, plaintiff, against Marconi Wireless Telegraph Company of America, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **REVERSED.**

Aaron A. Melniker for appellant.
Griggs & Harding for respondent.

[184] GUMMERE, C. J.—On April 18th, 1912, the defendant corporation, having resolved to largely increase its capital stock, offered to its stockholders of record the right to subscribe for twenty-five shares of new stock, to be issued at par, for every share held by them respectively. On that day one Parsons appeared on the books of the company to be a holder of one hundred and thirty-five shares, and she assigned her right to subscribe to Levy Brothers, the power to make such an assignment being conferred upon stockholders by the corporation. Levy Brothers, within the time limit fixed by the company, subscribed for three thousand three hundred and seventy-five shares, and paid the required deposit. The money was subsequently returned to them, and their subscription refused, upon the ground that Miss Parsons was not, on April 18th, 1912, or at any time thereafter, a stockholder of the defendant corporation, having sold her stock a considerable time before the date mentioned. Levy Brothers, conceiving that the action of the

defendant corporation in refusing their subscription was without legal justification, claimed that they were entitled to be paid by the latter the difference between the price at which they subscribed for the stock, and its market value after it was issued, and this claim being repudiated by the company, they assigned to the appellant, Schmidt, any right of action growing out of the refusal of the company to accept their subscription. At the trial the defendant company called as a witness John W. Griggs, its president and general counsel, who testified that prior to the assignment to the plaintiff he had an interview with Levy Brothers, or some of them, with relation to their subscription and its rejection, in which he told them that the company had received information that Miss Parsons had sold and parted with all her right in the stock which stood in her name several years before the issue of the new stock had been determined upon, and was then told by them that such was the fact, but that the persons who had bought the stock were in South America, and that as they were, in a measure, clients of theirs (the Levy Brothers) [185] they thought they ought to make the subscription to protect them, although they had no authority from their clients to take such action in their behalf. At the close of the case the trial court held that the proof was conclusive that at the time of the assignment by Miss Parsons to Levy Brothers of her right to subscribe to the new issue, she was not a stockholder of the defendant corporation, and had no interest therein, and that, this being so, the corporation was clearly within its rights in refusing Levy Brothers' subscription, notwithstanding the fact that Miss Parsons appeared as a stockholder upon the books of the company. So holding he directed a verdict in favor of the defendant; and from the judgment entered thereon the plaintiff appeals.

We concur in the view of the trial court that the defendant corporation was under no legal obligation to accept the subscription of any person who was not, at the time when the new stock was offered for sale, a bona fide holder of stock in the company, or exercising the rights of such a holder. The right to subscribe depended upon a double condition—*first*, that the subscriber was in fact a stockholder of the company; and *second*, that he appeared to be such on the books of the company. But we cannot agree that it was so conclusively established that Miss Parsons was not the owner of stock at the time she made the assignment to Levy Brothers, as to make that essential fact one to be determined by the court rather than by the jury. There is nothing in the pleadings, or the proofs, to indicate that the plaintiff who was the assignee of Levy Brothers, had any knowledge

that they had made the admission of the nonownership of stock by Miss Parsons testified to by Mr. Griggs, or that he had reason to anticipate that there would be any attempt made to prove her nonownership by the admission of his assignors. None of the members of the firm of Levy Brothers were called as witnesses, and it does not even appear that they were in court at the trial. Not having been led to expect that the fact of nonownership by Miss Parsons would be attempted to be proved by the admission of his assignors; not even having any knowledge, so far as the case shows, that Levy Brothers [186] had any information upon this subject, he apparently was compelled to permit the testimony of Mr. Griggs to go unchallenged. It cannot, therefore, be said that by his failure to controvert it he impliedly admitted its truth. Of course the testimony of a man whose character for truth and integrity is so universally known as that of Governor Griggs would always be accepted as a correct recital of the facts spoken to as he remembered them. But it will hardly do to say that the character of a witness is the determining factor upon the question whether the facts testified to by him shall be determined by the court or by the jury. It cannot be that where the character of the witness for truth and veracity is known by the court to be unimpeachable, the facts sought to be established by his testimony are to be determined by the court, but that where in the judgment of the court, the witness is not entitled to full faith and credit, the facts sought to be proved by him must be determined by the jury. No such rule of evidence exists. In every case where the issue depends upon the determination of facts the existence of which is not admitted, the jury, and not the court, must determine them.

We conclude, therefore, that it was error for the judge to take from the jury the question whether or not Miss Parsons, at the time of her assignment to Levy Brothers, was or was not the owner of stock in the defendant company, and that, for this reason, the judgment must be reversed.

For affirmance: None.

For reversal: The Chancellor, Chief Justice, Swayze, Trenchard, Bergen, Minturn, Kalisch, Bogert, Vredenburgh, White, JJ.—10.

NOTE.

Right of Stockholder to Preference in Subscribing for New Stock.

Introductory, 132.

General Rule, 132.

Waiver of Right of Preference, 133.

Remedies, 133.

Introductory.

The present note reviews the recent decisions passing on the right of a stockholder to a preference in subscribing for new stock. The earlier cases are collected in the notes to *Stokes v. Continental Trust Co.* 9 Ann. Cas. 738, and *Humboldt Driving Park Assoc. v. Stevens*, 33 Am. St. Rep. 654.

General Rule.

The recent authorities recognize the general rule that in case of the issue of new stock by a corporation shareholders have a preferential right to subscribe for the new stock in proportion to their original holdings before subscriptions are received from strangers. *Snelling v. Richard*, 166 Fed. 635; *Bates v. United States Machinery Co.* 216 Fed. 140, 132 C. C. A. 384; *Kingston v. Home L. Ins. Co. (Del.)* 101 Atl. 898; *Bennett v. Baum*, 90 Neb. 320, 133 N. W. 439; *Whitaker v. Kilby*, 55 Misc. 337, 106 N. Y. S. 511, *affirmed* 122 App. Div. 895, 106 N. Y. S. 1149; *Sommer v. Armor Gas, etc. Co.* 71 Misc. 211, 128 N. Y. S. 382; *Bond v. Atlantic Terra Cotta Co.* 137 App. Div. 671, 122 N. Y. S. 425; *Strickler v. McElroy*, 45 Pa. Super. Ct. 165; *Martin v. Gibson*, 15 Ont. L. Rep. 623. See also *Waters v. Waters*, 130 App. Div. 678, 115 N. Y. S. 432; *Sovereign Bank v. McIntyre*, 44 Can. Sup. Ct. 157.

The foregoing rule has been applied in cases where the directors of a corporation issue new stock, in order to gain control of the corporate affairs. *Strickler v. McElroy*, 45 Pa. Super. Ct. 165; *Whitaker v. Kilby*, 55 Misc. 337, 106 N. Y. S. 511; *Martin v. Gibson*, 15 Ont. L. Rep. 623.

Thus in *Strickler v. McElroy*, 45 Pa. Super. Ct. 165, it appeared that the directors issued to themselves an undisposed of portion of increased capital stock. The court said: "The plaintiff was at that time the owner of 152 shares of the stock of the company and this action was brought to recover his proportion of the profit derived by the defendants from the sale of the stock to themselves. To support his claim he relies on the generally accepted principle relating to the administration of the business of a corporation that where the capital stock is increased and is about to be issued every existing stockholder then has the right to subscribe at par for such a proportion of the stock to be issued as his holdings bear to the amount of stock then outstanding. The rule is thus stated by some of the text-writers: 'If the capital stock is increased by the proper authorities the right to take the additional shares vests in the stockholders pro rata.' Taylor on Corporations, sec. 569 (5th ed.) 'When a capital stock of a corporation is increased by the

issue of new shares, each holder of the original stock has a right to offer to subscribe for and demand from the corporation such a proportion of the new stock as the number of shares already owned by him bears to the whole number of shares before the increase.' 1 Cook on Corporations sec. 286 (6th ed.). And this applies to such part of the original capital stock as is issued long after business is commenced by the company. "Those who are shareholders when an increase of the capital stock is effected enjoy a right to subscribe to the new stock in proportion to their shares and before subscriptions may be received from outsiders.' 23 Am. & Eng. Enc. of Law 853."

In *Whitaker v. Kilby*, 55 Misc. 337, 106 N. Y. S. 511, affirmed 122 App. Div. 895, 106 N. Y. S. 1149, it appeared that the directors of a corporation, without knowledge on the part of the other shareholders, had issued new stock which they themselves purchased. It was held that all stockholders should be given an equal right to subscribe for their proportional share of the stock, the court saying: "So far as regards the issue of stock, the plaintiff is entitled to relief. Directors cannot, with secret knowledge of the existence of a contract which they claim to be of great value, issue treasury stock of the corporation and buy it in themselves, particularly when the transaction converts them from minority to majority stockholders. Such a transaction is in the highest degree inequitable. All stockholders should be given knowledge of contracts affecting the value of the stock, and should be allowed to subscribe for their proportional share of the new issue."

In *Bates v. United Shoe Machinery Co.* 216 Fed. 140, 132 C. C. A. 384, wherein it appeared that a stockholder had transferred his shares of stock in the defendant corporation to a person whose application for a transfer on the books had been wrongfully refused, it was held that the transferee should be considered as a record holder on the books of the company and entitled to his pro rata share of the new stock issued. See also the reported case as to the necessity of recording a transfer.

In *Bond v. Atlantic Terra Cotta Co.* 137 App. Div. 671, 122 N. Y. S. 425, it was held that where new stock was issued in payment for property purchased by the corporation, the stockholders had no preferential right to acquire the stock. The court said: "A stockholder may not be deprived of his right to participate in the management of the affairs of the corporation by voting on his stock in the same manner and to the same extent as other stockholders in the proportion that his holdings bear to theirs; and his share or interest in the corporation cannot be affected (unless the statutory law expressly

so provided before he became a stockholder) without his consent or (except in the case of stock issued for property) without affording him an opportunity to purchase a share or interest, in proportion to his holdings, in any increase of the capital stock so as to enable him, if he so desires, to retain the same proportionate share or interest in the corporation."

Waiver of Right of Preference.

Where an issuance of new stock is authorized, a stockholder who declines to take any of the increase waives his right thereto, and the waiver is binding on a subsequent transferee. *Hall v. Hall*, 30 Ohio Cir. Ct. Rep. 826. In that case the action was to set aside a sale of 54 shares of capital stock which was an uncalled for portion of an increase. The plaintiff contended that the sale was unauthorized and the shares should have been distributed pro rata among the shareholders. However, it appeared that the plaintiff had purchased the stock under which the new shares were claimed since the time of the increase and that the original holders thereof had declined at the time of the increase to purchase the new shares. It was held that by so doing they impliedly waived their right thereto, so that the stock became treasury stock, and that their transferee took subject to the waiver.

However in *Sommer v. Armor Gas, etc. Co.* 71 Misc. 211, 128 N. Y. S. 382, it was held that failure to pay for new stock, which had been allotted pro rata among the shareholders, before a certain date fixed by resolution, did not amount to a waiver of the right of preference no attempt having been made to dispose of it. The court said: "The right of existing stockholders to subscribe for increased capital stock must be exercised within a fixed or reasonable time, and mere failure to exercise such right within such time bars the stockholder from contesting a disposition of the stock to someone else, nothing more. It seems that defendant might, after September twenty-second, and before plaintiff's demand, have disposed of her shares, at par or otherwise, without incurring any legal liability by reason thereof. . . . Until plaintiff declined to take the shares, or consented to the action of the defendant in withholding them from her, plaintiff was entitled to demand and receive her shares on payment therefor, as long as the new stock remained undisposed of."

Remedies.

Equity will aid a stockholder who has been deprived of his right to a proportional share of new stock issued. *Snelling v. Richard*, 186 Fed. 635; *Bates v. United Shoe Machin-*

ery Co. 216 Fed. 140, 132 C. C. A. 384; Whitaker v. Kilby, 55 Misc. 337, 106 N. Y. S. 511; Martin v. Gibson, 15 Ont. L. Rep. 623. In the case first cited it was held that the plaintiff was entitled to an injunction restraining the directors from issuing any of the new stock. The court said: "The amended bill prays that the corporation and the directors be enjoined from issuing any of the new stock without first affording complainants a reasonable opportunity to subscribe therefor in proportion to their present holdings. This is their right, and if they avail themselves of it they will retain control of the company. . . . The motion for a preliminary injunction is granted."

Where directors of a corporation subscribed for all of a new issue of capital stock so that they might gain control of the company it was held in Martin v. Gibson, 15 Ont. L. Rep. 623, that the action of the directors deprived the minority holders of their right to the stock and the directors should be restrained from voting on the increase. The court said: "I am of opinion that the minority shareholders were not required to submit to the form of application proposed by the circular letter issued. They were invited to state whether they desired to increase their holdings, and it was on terms that such shares might be allotted as to the directorate seemed desirable and necessary. There was no recognition of any right on the part of existing shareholders to claim a pro rata division of the proposed new issue, and at this time, by the appropriation of the 350 shares, the minority had become less than one-third in value of the shareholders. Therefore, I do not hold the plaintiff to be precluded by the limited opportunity afforded by the circular from now seeking relief in respect of the total issue and allotment of the new stock. The action of the directors is left open to the investigation of the court. . . . It may be that it was not in the immediate and direct contemplation of the directors to oust the minority from their place of vantage, but this was the inevitable effect of what was done; and, while this consideration helps to eliminate the element of fraud, it does not lessen the injurious effect of the partial allotment. I do not find any fraud to be established, and it is not necessary to allege it in order to get relief. The costs have been but little—if at all—increased in this regard, so that costs of the action may be awarded to the plaintiffs: excluding any costs arising from the charge of fraud. The judgment should be so framed as to restrain voting upon the increased capital shares, and declaring that the allotment to the five directors and their appointees was in excess of the powers of the directors. If necessary, the allotment may be vacated so that the whole

increased issue may be laid open to be properly disposed of, having regard to the interests of all the shareholders. It has not been necessary to consider the doctrine of 'inherent right' which is discussed and upheld in the American cases, but I am inclined to think that the same conclusion as has been arrived at in this case would have held good, even if no element of the plus-one-third minority had entered into consideration, on the general principle and guide, in dealing with the distribution of new stock and the claims of existing shareholders, that 'quality is equity.'"

CITY OF ST. LOUIS

v.

NASH.

Missouri Supreme Court—January 6, 1916.

266 Mo. 523; 181 S. W. 1145.

Statutes — Legislative Definitions — Effect.

A legislative body may within limits define the objects affected or designed to be by its own enactments, and the supreme court is ordinarily bound, in construing its acts or ordinances, to follow its own definitions.

[See Ann. Cas. 1914B 186.]

Words and Phrases — Meaning of "Tent."

An ordinance of the city of St. Louis defined a "building" as any structure for the support, shelter, or inclosure of persons, and defined buildings of the fourth class as any building not of the first three classes, and provided that no fourth-class building should be built within the fire limits. Defendant constructed a moving picture theater, ninety-seven feet long, fifty-eight feet wide, with a height along the center of thirty feet, using telegraph poles joined by a wire cable and guy cables to support and attach a canvas covering and at the rear built a stage of wood, with wings composed partly of wood and partly of canvas, made a floor of boards nailed to cross-pieces sunk in the ground, equipped the stage and the whole structure with electric lights, the front with doors of wood and glass, and a ticket booth of wood, and furnished it with stoves for heating and with benches to seat 640 persons, which, if a building, was a building of the fourth class. Rev. St. 1909, § 8057, declares that words in statutes are to be regarded as used in their plain, usual, and everyday meaning. It is held that the structure was not a "tent," defined as a pavilion or portable lodge consisting of canvas, etc., supported and sustained by poles used for sheltering persons from the weather, especially soldiers in camp,

in that it lacked the element of portability and was constructed of other materials than those ordinarily used in tents, but was a "building" within the intent of the ordinance. [See note at end of this case.]

Validity of Ordinance.

Such ordinance was referable to the police power, and was not invalid on the ground of its unreasonableness.

Error to St. Louis Court of Criminal Correction: CLARK, Judge.

Proceeding against Michael Nash for violation of ordinance of City of St. Louis. Judgment for defendant. City brings error. The facts are stated in the opinion. REVERSED.

William E. Baird and *Truman P. Young* for plaintiff in error.

Taylor R. Young and *Edward W. Foristel* for defendant in error.

[524] *FARIS, P. J.*—This is a case growing out of the prosecution of defendant in error for an alleged violation of an ordinance of the city of St. Louis. Being cast in the police court and likewise in the Court of Criminal Correction to which it appealed, the city [525] brings the case here by writ of error. Since, throughout, no change has occurred in the parties, we will for charity's sake refer to them as the plaintiff and the defendant, respectively.

The section of the city ordinances which the complaint alleges that defendant violated, reads thus:

"Sec. 341. No fourth-class buildings shall hereafter be built within the district known as the fire limits, as hereafter defined, except such buildings as are provided for in sections 342 and 343 of this article." (Here follows a description of the fire limits.)

When the case reached the Court of Criminal Correction a motion to quash the complaint was filed by defendant, but action thereon was deferred by the learned judge *nisi* till he had heard the case on the merits. Thereupon the case was presented below upon agreed facts, which the court heard and thereafter entered an order quashing the complaint. Therefore, though we follow the language of the court *nisi* in stating that the motion to quash was sustained, it is plain that the case was actually heard and decided on the merits.

The agreed facts are lengthy; but since in the view we take of the controversy, alone, the method of the construction and physical nature of the structure erected and used by defendant is important, we will not burden the statement of the case with more of the facts than will but suffice to illuminate this single point. Specifically, defendant was

prosecuted for erecting and using as a moving-picture theatre, a certain structure which plaintiff contends violated the provisions of the section of the city ordinances which we quote above. The erection and use of the structure within the fire-limits were admitted. It is therefore manifest that the whole case turns on the nature of the structure so erected by defendant. The agreed facts [526] thus describe the materials of which it was constructed, the manner of construction thereof and the purposes for which it was used, viz.:

"Said shelter or structure is ninety-seven feet in length and fifty-eight feet in width, and has a height along the center of thirty feet, and a height along the sides, between the ground and the eaves, of eight feet. It is supported by two telegraph poles fourteen inches in diameter firmly set in the ground, one at the front end, facing Jefferson Avenue, on the inside, about ten feet west of the entrance, and in the center thereof. The other on the outside and west of the west end thereof. Said telegraph poles are thirty-five feet high, and between them is stretched a wire cable an inch and a half or two inches in diameter. To said cable are attached ropes which extend down to the top of the canvas cover and support the same. Also at intervals of eight feet, ropes extend down from the center of the top of the cover of said shelter or structure to the sides and bottom thereof, and most of them are connected with wooden posts securely driven in the ground and which are located about ten feet outside of the canvas cover, which keeps the covering taut. There are thirty of said poles upon each side of said shelter or structure, one-half of which are eight feet in height and the remainder twelve feet in height. Said poles are about three and one-half inches in diameter, and in the center of the top thereof is an iron peg securely driven therein, about one-half inch in diameter and eight inches in length and which projects above the top of the said pole about five inches. The canvas covering is composed of 12-ounce Army Duck Canvas. At the front end of said shelter or structure two wire cables or guy cables extend from the top of the front telegraph pole, one to the northeast corner of the lot upon which said shelter stands, and the other to the southeast corner. Said cables are attached to [527] posts firmly embedded in the ground fifteen feet outside of said shelter. At the rear end of said structure or shelter are three guy cables which extend from the top of the telegraph pole at the rear of said structure to posts firmly embedded in the ground, one of them at the northwest corner of the lot upon which said shelter or structure is located, another at the southwest corner and another at the west and near the center of

the west end of said lot. The front and rear ends of said shelter or structure are supported by two poles, eighteen feet high, at each end thereof, which support the canvas cover at a point fifteen feet from the top of the cover on each side and at the end thereof. At the rear end of said shelter or structure is located a stage or platform, built of wood, upon each side of which are wings or dressing rooms composed partly of wood and partly of canvass. Inside of said structure or shelter are rows or tiers of seats in bench form. Between said rows of seats there is one aisle down the center six feet wide, and on each side of said shelter or structure there is also an aisle eight feet wide. There are sixty-four benches, each of which will seat ten people, so that said shelter or structure has a seating capacity of six hundred and forty persons. The said shelter or structure is equipped with electric lights set in iron conduit for lighting in the evening, and the stage or platform is also equipped with electric footlights set in conduit. Said shelter or structure is constructed in such a way that the sides can be raised up in the summer time and lowered in the winter time, and in the winter time the said sides are lowered, and at all places, except exits, when the sides are lowered, are banked along the outside with earth sufficient to shut out drafts. Said shelter or structure is equipped with four so-called cannon, or heavy cylindrical, stoves for heating, one stove being placed in each corner thereof, and the stovepipe goes out [528] through a hole in the side, which is fortified with asbestos and tin, and projects ten feet outside of the canvas cover. The floor of said structure or shelter is of earth and cinders, except that in front of each seat there is a board plank eight inches wide upon which the audience rest their feet. And in each aisle there is a board walk eight feet wide composed of one by two boards laid flat on the ground and nailed to cross pieces sunk in the ground. And between the ticket office and the east side of said shelter or structure are also similar boards laid in like manner. The seats are built of wood, in the form of benches. Along the street line or entrance to the lot upon which said shelter or structure stands is a series of door panels, composed of wood and glass, and consisting of eight such door panels. Six of said panels swing on hinges, and may be opened for the admission or exit of persons. Immediately inside of said outside entrance is an open space of ten feet where there exist two brick columns with wood jambs upon which two swinging doors are hung, composed of wood with glass windows, about seven feet in width and eight feet high. Between the two entrances there is a booth made of wood seven feet high and in the shape of a half moon,

and is located outside of the shelter or structure. After passing through said inside entrance doors the audience are admitted into a small corridor or chamber, with a canvas cover, with canvas sides, which leads through a canvas curtain directly into the main auditorium. In the summer time these doors and the corridor are done away with, and the audience simply pass from the ticket office into the main auditorium. There they are seated for the purpose of witnessing exhibitions of moving pictures, etc. One exhibition is held every evening, and further, there is an exhibition every Sunday afternoon. Such, in general, is the description of the structure or shelter in question."

[529] It is clear that if the erection and use of the structure above-described violate the provisions of section 341 of the ordinances, the court *wis* erred; if it does not, he was right. Let us look to this point.

I. Confining the case to yet narrower limits, it is obvious that the question turns on whether the described structure is or is not a "building" within the purview of the section of the fire limits ordinance set forth, *supra*, and which plaintiff alleges defendant violated. If it is a building it is conceded to be such a one as is by the city ordinances designated, "of the fourth-class," the erection of which, at the place where defendant built and maintained the structure in controversy, is absolutely forbidden by said section 341. Plaintiff urges that the structure is a building; defendant just as strenuously contends that it is a tent. This, in a nutshell, is the concrete point confronting us.

The city ordinances define buildings of the several classes thus:

"Building of the First Class' shall be taken to mean a building of fire-proof construction throughout, the structural parts of which are wholly of brick, stone, or tile, concrete, iron or steel, or other equally substantial and incombustible materials. 'Building of the Second Class' shall be taken to mean a building of mill or slow combustion construction, wherein all floors and roofs are constructed of heavy dressed timber, exposed beams, girders and planking and supported upon masonry walls, or on wooden or fire-proofed iron or steel columns. 'Building of the Third Class' shall be taken to mean any building not of the first or second class, the external and party or division walls of which are wholly of brick, stone or other equally substantial and incombustible materials. 'Building of the Fourth Class' shall be taken to mean [530] any building not of the first, second or third classes." [Sec. 336, R. C. St. Louis.]

There is but little doubt we opine that within limits not necessary here to discuss (since obviously the boundaries are wide

enough to include the facts here), a legislative body may define the objects affected or designed so to be by its own enactments, and that we are bound ordinarily in construing its acts or ordinances to follow its own definitions. [State v. Allison, 155 Mo. 325, 56 S. W. 467.] Therefore we note that a "building" is thus defined by the ordinances of plaintiff city:

"'Building' shall be taken to mean any structure for the support, shelter, or enclosure of persons, animals or chattels; and when separated by division walls without openings, then each portion of such building shall be deemed a separate building." [Sec. 336, R. C. St. Louis.]

So again narrowing the limits of the question and the scope of the instant inquiry, we need only to ascertain whether the structure in question was a building within the purview of the above definition.

Defendant strenuously insists that the structure in controversy is a tent, and that a tent is not a building. *Quod erat demonstrandum*. We may question this position from two angles: (a) Can it be maintained upon the facts, and (b) if it can be so maintained will the legislative definition nevertheless include it and make of it a building when, absent the definition, it was before but a tent?

The lexicons, under the statutory admonition that words found in statutes are to be regarded ordinarily as being used in their plain, usual and everyday meaning (Sec. 8057, R. S. 1909), define the word "tent" thus: "A pavilion, or portable lodge consisting of skins, canvas or some strong cloth stretched and sustained by poles, used for sheltering [531] persons from the weather, especially soldiers in camp." [Webster's Int. Dic.]

The above definition of the lexicographers is in line with that of the courts, as witness the Texas Court of Criminal Appeals which defines a tent thus: "A 'tent,' in the ordinary acceptation of the word, is a pavilion, portable lodge, or canvas house, inclosed with walls of cloth and covered with the same material." [Killman v. State, 2 Tex. App. 222, 28 Am. Rep. 432.] Likewise pertinent to the question whether a tent is a house, and therefore a building, the curious may consult the cases of *Novell v. Boston Academy*, 130 Mass. 209; *Blakemore v. Stanley*, 159 Mass. 6, 33 N. E. 689; *Favro v. State*, 39 Tex. Crim. 452, 46 S. W. 932, 73 Am. St. Rep. 950; *Williams v. State*, 105 Ga. 814, 32 S. E. 129, 70 Am. St. Rep. 82; *State v. Poole*, 65 Kan. 713, 70 Pac. 637; *People v. Stickman*, 34 Cal. 242.

Analyzing the facts of construction in the light of the definitions, *supra*, but leaving out of view the dimensions of this structure,

which are ninety-seven by fifty-eight by thirty feet, we observe that it seems to lack portability, in that it is supported by telegraph poles fourteen inches in diameter "set firmly in the ground." These telegraph poles are bound together by a two-inch wire cable, which serves as, and in lieu of, a ridge-pole. From these telegraph poles other wire cables, five in all, called guy-cables, run down to an attachment to other posts "firmly embedded in the ground." Likewise a departure touching the sort of materials used in construction is noted. For at the rear of the structure there is "a stage built of wood, upon each side of which are wings or dressing rooms composed partly of wood and partly of canvas." This stage and the whole structure for that matter, is equipped with electric lights, and at the front of the stage there are footlights set in a conduit. Practically the whole of the floor, in fact all space, except that on which the seats sit, is covered [532] with boards. Such floor is constructed for the most part of one by two boards laid flat and nailed to cross-pieces sunk in the ground. The front of the structure which abuts on the street, is made of eight door panels, which swing on hinges and which are made of wood and glass. Just inside of the outside entrance there are two brick columns with jambs of wood, to which are hung doors of wood and glass, seven feet wide and eight feet high. Between the row of eight wood panels and the row made up of the brick columns and swinging doors there is a crescent shaped booth made of wood, which apparently serves as a place for selling tickets. But this should suffice for an iteration of points of dissimilarity between this structure and a tent. The others may be picked out of the description which we print in our statement. It will be seen that the element of portability is sadly lacking, and that other materials, to wit, wood and glass and brick, have been added to the skin and canvas-covering of the genus tent, connoted by the definitions of the cases and of the lexicographers. Clearly this structure cannot be made a tent merely by calling it a tent, even though touching a matter to an extent analogous, one Squeers of Dotheboys Hall sapiently observed that "there is no law to prevent a man from calling his house a hall if he wants to do so." [Nicholas Nickleby, reported by Charles Dickens.]

So, examined by the touchstone of similarity of earmarks, we must conclude that the structure in controversy is not a tent, as the latter word is generally understood. In passing we may say that the word "tent" as used in our statutes, numerouslly cited to us by defendant, means "tent" as the word is ordinarily understood, and therefore the language of those statutes is in no way pertinent to contradict what we say above

[533] II. We turn to the definition then to determine if we can, whether within the purview of the ordinances of the plaintiff city, it is a building. We need consider only the first part of the definition, to wit: "'Building' shall be taken to mean any structure for the support, shelter, or enclosure of persons, animals, or chattels," and leave off the last, to wit: "and when separated by division walls without openings, then each portion of such building shall be deemed a separate building;" for obviously if we conclude that it is a building we are not called on to proceed further and rule that it is two buildings, even though the facts that there is a wooden stage at one end and a wood and glass ticket office and entrance at the other, seem pertinent to this view.

Looking at the legislative definition and measuring the structure here thereby, there is no escape from the conclusion that it is a building *within the purpose and intent of the fire-limits ordinance*, and so we rule.

III. Neither do we think that the ordinance is void for that it is unreasonable. Defendant urges this, saying, if we understand his contentions, which are somewhat vague, that should we hold that the ordinance includes a structure of the sort here in question, then such a construction renders the ordinance void because it is unreasonable and unduly burdensome. Such ordinances are referable to the police power, through an invocation of which alone are they sustainable. We are not advised wherein the alleged unreasonableness lies; neither do the cases cited by defendant throw any light upon the point. Speaking generally we may say that if such structures as that here under discussion are not to be regulated and their erection either forbidden, or at least controlled, by ordinance, there seems to be nothing in this case at least which would prevent the construction of inflammable and [534] unsightly conglomerate sheds of the same sort anywhere and everywhere in the city, and the carrying on therein of permanent businesses of whatever sort indefinitely. Such a condition is unthinkable. We need not take up space considering this phase of the case, but disallow it out of hand.

Let the case be reversed and remanded, with directions to the court *nisi* to overrule the motion to quash the complaint and to retry the case in such wise as is not inconsistent with the views herein expressed. All concur.

NOTE.

Legal Meaning of "Tent."

The reported case seemingly decides that it is the element of portability and the na-

ture of the materials, which will determine the legal meaning of a "tent," and that since the first element was lacking in the structure under consideration and the materials were other than those ordinarily used in the construction of tents it was therefore a building within the meaning of a statute relating to municipal fire limits.

In *Callahan v. State*, 41 Tex. 43, it was held that theft from a tent was not within a statute relating to the theft of property "from a house." The structure under consideration "consisted of two forks driven in the ground with a ridge pole across which was stretched a piece of ducking; this was closed at one end by another piece of cloth hung up and was open at the other end." The court said: "Such a structure as that described by the witness would in common language be called, as it was called by the witnesses, a tent; never a house. It is not necessary in this case to make the effort to determine the exact point when a structure, from its construction and uses, would cease to be a tent, and would be taken and understood to be a house, according to the usual acceptance in common language of the word 'house;' for, as described by the witness, it comes so nearly not being even a tent, as that term is understood in common language, that it cannot be other than a tent. However difficult it might be to define in words the exact difference in some possible cases between a house and a tent, it can readily be conceived that there are houses that cannot be called, taken, or understood to be tents, and tents that cannot be called, taken, or understood to be houses; and this is one of them."

But in *Killman v. State*, 2 Tex. App. 222, 28 Am. Rep. 432, a prosecution for keeping a disorderly "house," it was held to be proper to refuse the following instructions: "1st. A house is any building, edifice, or structure inclosed with walls, and covered, whatever may be the materials used for building. A tent does not come within the meaning of house. 2d. If, therefore, from the evidence in this case the jury find that the place which the defendant is charged with keeping a disorderly house was not a house as defined above, but a tent, they will acquit the defendant." The court said: "A tent, in the ordinary acceptance of the word, is a pavilion, portable lodge, or canvas house, inclosed with walls of cloth and covered with the same material. One of the definitions of a house, given by Webster in his invaluable dictionary, is that it is 'a place where guests are received and entertained for compensation.' The description given by the witnesses of the structure in which defendant is charged with keeping a disorderly house is that 'it is a large tent of canvas, supported by poles let into

the ground; the walls and roof are of canvas, the floor is of plank.' The defendant kept the place, had a bar there, received the money over the counter, and all the women who resorted there were prostitutes or whores.

. . . The decision in [the] case [of Callahan v. State] was mainly made to depend upon the particular facts and circumstances of that particular case; that the structure therein described, from which the property was stolen, could in no manner be considered a house. The language quoted, however, does in our opinion equally as well convey the idea that there are tents which can be called, taken, and understood to be houses, and the tent described in this case we think is, if there ever was such an one, just one of those tents. . . . We can well imagine why such a building as that described in Callahan v. State would not be considered such a house as would support a charge of theft from a house. The prominent controlling idea connected with that offense was that everything contained in the building was, and should be, protected securely and sacredly by the walls inclosing it; which idea could not attach to a structure which, in the language of the court, 'came so near not even being a tent . . . that it could not be other than a tent.' The controlling idea in the offense under consideration is that the structure is a place 'kept for the purpose of public prostitution, or as a common resort for prostitutes and vagabonds.' To hold that such a house could not be kept in a tent, and especially in such a tent as that described in the evidence in this case, would be in effect to close up all bawdy and disorderly houses, simply because they were made of wood, brick, or stone, and to give free and unrestrained license to all those who desire to carry on the illegal business in pavilions of the richest material, or tents of ordinary canvas or cloth, no matter how large and commodious, or how many and richly-furnished rooms or compartments they might contain. Such structures are more apt to become disorderly nuisances than houses of brick or stone, owing to the facility with which noises made within could be heard from without. . . . Taking the whole instruction together, as asked, we do not think the court erred in refusing to give it."

A tent was held to be a "private residence" in Hooper v. State (Tex.) 105 S. W. 816, wherein the court reversed a judgment convicting one for gaming in violation of a statute prohibiting gaming in a place other than a private residence. And see Hipp v. State, 45 Tex. Crim. 200, 75 S. W. 28, 62 L.R.A. 973.

In Blakemore v. Stanley, 159 Mass. 6, 33 N. E. 689, the erection of a tent was held to be in violation of the terms of a deed which restricted the grantee from erecting a

"building" to cost not less than a specified sum, far in excess of the cost of the tent. See also Favro v. State, 39 Tex. Crim. 452, 46 S. W. 932, 73 Am. St. Rep. 950, wherein it was held that a wagon sheet stretched over forked poles, which poles were nailed to planks, and the planks in turn nailed to stakes driven in the ground, the structure being used as a residence, was a house, within a burglary statute defining a house, as any building or structure erected for public or private use, of whatever material constructed.

In Tatum v. State, 156 Ala. 144, 47 So. 339, the defendant was convicted on an affidavit charging him with betting "at a game played with cards or dice, in a public house, highway or some other public place, or an outhouse where people resort," in violation of a statute against gaming. The evidence tended to show that the playing took place in a tent where any and all persons could come in and did come in without invitation or knocking at any time of the day or night, thus making it a "public place" within the meaning of the statute against gaming. In Davys v. Douglas, 4 H. & N. (Eng.) 180, 28 L. J. M. C. 193, 7 W. R. 327, wherein it was held that a booth theater which was of a portable nature, carried by a company of strolling players from place to place, and which was constructed of canvas and wood, was not a "house or other place of public resort for the public performance of stage plays" within a statute. To the same effect see Fredericks v. Howie, 1 H. & C. (Eng.) 381. See also Fredericks v. Payne, 1 H. & C. (Eng.) 584, 32 L. J. M. C. 14, 8 Jur. N. S. 1109, 7 L. T. N. S. 329, 11 W. R. 36.

STATE EX REL. BURNS

v.

LINN.

Oklahoma Supreme Court—December 14, 1915.

49 Okla. 526; 153 Pac. 826.

Municipal Corporations — Charter — Effect as Superseding State Laws.

The provisions of the charter of the city of Tulsa, adopted under the authority of section 3a, art. 18, of the constitution (section 329, Williams' Ann. Const.), and section 539, Rev. Laws 1910, supersede all laws of this state in conflict with such charter provisions, in so far as such laws relate to merely municipal matters.

Same.

Such charter provisions do not supersede the general laws of the state of general concern, in which the state has a sovereign interest, and where the provisions of said charter conflict with the general laws of the state of this character, such laws will prevail.

Relation of State to Municipality — Enforcement of Laws.

The state has a sovereign interest in the enforcement of its general laws against the traffic in intoxicating liquors, against gambling and prostitution, within the territorial limits of the city of Tulsa.

Municipal Officers — Removal — Failure to Enforce Laws.

The state may impose upon the local officers of the city of Tulsa specific duties in the matter of the enforcement of the laws of the state having force and effect within the city, and may provide penalties for failure to discharge such duties, and in respect to the duties so imposed the municipality and its officers are the agents of the state, and subject to its command and control at all times, and may be removed for a failure to enforce such laws.

[See note at end of this case.]

Procedure for Removal — Charter Remedy Not Exclusive.

The provisions in the charter of the city of Tulsa for the removal of the chief of police of such city are not exclusive, but such authority is cumulative to and concurrent with the jurisdiction vested in the district court by the general laws of the state.

Statutes — Requisites — Certainty.

The provisions of chapter 39, as amended by chapters 26 and 133, Session Laws 1913, are not void for uncertainty in respect to the duties therein imposed upon police officers.

Public Officers — Who Are State Officers — Officer of Municipality.

The general rule, in the absence of special constitutional provision, is that all officers whose duties pertain to the exercise of the police power of the state are in that sense state officers, and under the control of the legislature, even though they may be officers of a municipality and charged with the enforcement of the local police regulations of such municipality.

Original action for writ of prohibition. Foster N. Burns, relator, against Conn Linn, District Judge, defendant. The facts are stated in the opinion. WRIT DENIED, AND PETITION DISMISSED.

Pat Malloy, McAdams & Haskell and R. B. Thompson for relator.

S. P. Freeling, Smith O. Matson and J. H. Miley for defendant.

[527] **HARDY, J.**—On November 12, 1915 there was presented to the district court of Tulsa county, by a grand jury duly impaneled therein, an accusation in writing

charging the plaintiff, as chief of police of the city of Tulsa, with habitual and willful neglect of duty and willful maladministration in office, in that he failed and refused to perform the duties expressly enjoined on him in reference to the enforcement of the prohibition laws of this state and the laws with reference to gambling and the keeping of bawdyhouses or the renting or letting of buildings for such purpose, in which accusation it was alleged that the plaintiff had knowingly, willfully, and unlawfully failed, neglected, and refused to enforce the laws mentioned, and had knowingly allowed and permitted violations thereof, both as to violations of the liquor laws and laws against gambling, and that he had likewise allowed and permitted a large number of houses to be let, rented, and operated as bawdyhouses, and had allowed and permitted a large number of women to openly, continuously, and notoriously maintain and operate houses of prostitution in said city, in violation of the law, and had for many months prosecuted a system whereby the keepers of such houses and inmates thereof were compelled to forfeit a bond or pay at intervals a fine to the city of Tulsa, with the implied understanding between [528] them and the plaintiff that they should receive immunity from arrest and prosecution for a period of about one month from the date of each payment, and that said sums were accepted in reality as a license whereby such persons paying the same were permitted to violate the laws in regard to such violations, and the grand jurors prayed the court for judgment and decree ousting and removing the plaintiff from office, and that pending a hearing thereof plaintiff be suspended until final determination be had.

Plaintiff filed in this court his petition for a writ of prohibition against defendant, as judge of the district court of Tulsa county, prohibiting him from hearing said accusation and from removing him from office in accordance with the prayer thereof. To this petition is attached a copy of the accusation, setting out in detail the various acts alleged against him. The defendant filed a demurrer to the petition, and upon the issues thus joined the matter was submitted to the court.

The question presented is whether, under the provisions of the charter of the city of Tulsa, which contains provisions for the removal from office of various city officials, the jurisdiction of the city is exclusive, or whether, under the general statutes of this state, jurisdiction is vested in the court to entertain that proceeding. The plaintiff contends that the provisions of the charter and the ordinances adopted thereunder, authorizing a removal of the city officers, confer exclusive jurisdiction upon the city, and that such charter provisions and ordinances supersede and

displace the general laws of the state in reference to such matters, and that plaintiff, as chief of police of the city of Tulsa, is not amenable to said general laws, nor subject to the jurisdiction of the [529] district court in the trial of the accusation presented by the grand jury.

The city of Tulsa, under section 3a, art. 18, of the Constitution (Williams' Ann. Const. section 329), duly adopted a charter prepared as therein provided, which was approved by the Governor and became the organic law of the city. By this charter provision was made for the organization, conduct, and control of a system of police and other city officials, and for the removal from office of such officials; and thereafter ordinances were adopted by said city, organizing a police force, providing for the appointment, prescribing the duties, and fixing the salaries of the chief of police and other members of the police force, and regulating the manner of their removal. That it was within the power of the city under its charter provisions to adopt these ordinances is not questioned, and defendant concedes that by virtue thereof in matters purely local and municipal the provisions of the charter and ordinances govern. He insists, however, that under the general statutes of this state it was the duty of plaintiff, as chief of police of said city, in addition to his duties under the ordinances of said city, to enforce the general laws of the state referred to, within such city, and that for a failure or neglect thereof he was subject to removal under the general laws of the state.

By section 3631, Rev. Laws 1910, it is made the duty of all police officers to enforce all of the provisions of chapter 39 of said laws, relating to intoxicating liquors, which chapter has been amended by chapters 26 and 133, Sess. Laws 1913, and it is provided that, should any such officer fail or refuse to perform any duty required by the provisions of such chapter, he shall be removed from office as therein provided; and said section authorizes [530] the filing of a petition in the district court of the county wherein such officer resides, in the name of the state, on the relation of any citizen thereof, upon the recommendation of a grand jury, or on the relation of the board of county commissioners, and the procedure for hearing and determining such proceeding when instituted is set out therein. And it is further provided by section 3633 that all police officers in any city or town, having notice or knowledge of any violation of such chapter, shall notify the county attorney of the fact of such violation, and furnish him the names of persons by whom such violations can be proven, and for a failure or neglect of official duty in that respect such officer may be removed from office, as provided by law. By section 2510 it

is made the duty of all police officers to inform against and prosecute all persons whom they believe from credible information to be offenders against the gambling laws of the state, and it is provided that any such officer failing or omitting to do so may be punished by a fine of not exceeding \$500, and not less than \$50. By sections 2467 and 2469 the keeping of a bawdyhouse, or knowingly letting a building for such purpose, is prohibited, and the punishment prescribed therefor. Section 5592 provides that:

"Any officer not subject to impeachment, elected or appointed to any state, county, township, city, town, or other office, under the laws of the state may, in the manner provided in this article, be removed from office for any of the following causes: First. Habitual or willful neglect of duty. . . . Sixth. Willful maladministration."

Section 5593 provides the manner of removal and authorizes an accusation in writing by the grand jury to the district court of the county in which the officer is elected, and the procedure for the trial thereof is set out [531] in subsequent sections of said article. By the provisions of section 3a, art. 18, of the Constitution, when a charter has been adopted in the manner therein provided, such charter becomes the organic law of such city and supersedes any existing charter and all amendments thereof, and all ordinances inconsistent therewith. It is provided, however, in the same section that said charter shall not be in conflict with the Constitution and the laws of the state. Section 539, Rev. Laws 1910, which was in force when the charter was adopted, provides that where such charter has been framed, adopted, and approved, when any of its provisions shall be in conflict with any law or laws relating to cities, in force at the time of the adoption and approval thereof, the charter provisions shall prevail, and operate as a repeal or suspension of such law or laws, to the extent of such conflict, and further provides that such charter shall be consistent with and subject to the provisions of the Constitution, and not in conflict therewith, and not in conflict with the laws relating to the exercise of the initiative and referendum and other general laws of the state not relative to cities of the first class.

These constitutional and statutory provisions have been construed by this court in a number of cases, and it has been the uniform holding of the court that the provisions of a charter adopted and approved in accordance with such constitutional and statutory provisions become the organic law of such municipality and supersede the laws of the state in conflict therewith in so far as they attempt to regulate merely municipal matters. *Owen v. Tulsa*, 27 Okla. 264, 111 Pac. 320; *Lackey*

v. State, 29 Okla. 255, 116 Pac. 913; Mitchell v. Carter, 31 Okla. 592, 122 Pac. 691; Oklahoma R. Co. v. Powell, 33 [532] Okla. 737, 127 Pac. 1080; In re Simmons, 4 Okla. Crim. 662, 112 Pac. 951. And it has been further held that such charter provisions, where they conflict with the general laws of the state, must give way, and, while they may run current with the general laws of the state, they may not run counter thereto. Board of Education v. State, 26 Okla. 366, 109 Pac. 563; State v. Cummings, 47 Okla. 44, 147 Pac. 161.

The charter of the city of Tulsa was under consideration by this court in the case of Owen v. Tulsa, supra, and by the Criminal Court of Appeals in Re Simmons, supra, and it was held in each case that the provisions of said charter did not supersede the general laws of the state not relating to cities. This being the construction placed upon these provisions and upon the Tulsa city charter, it then becomes necessary to determine whether the laws with reference to intoxicating liquors and gambling and prostitution above set out are matters that are merely municipal in their nature, or whether they are such matters as are of concern to the state at large, and in which the state has a sovereign interest for the benefit of the people of the state generally. The history of the prohibition laws of this state is well known, and it is only necessary to make a brief reference thereto. One of the terms of the Enabling Act required that the state, as one of the conditions of statehood, should prohibit the manufacture, sale, barter, giving away, or otherwise furnishing intoxicating liquors, except as therein authorized, within that part of the state then known as the Indian Territory, and also the Osage Indian reservation and all other parts of the state which existed as Indian reservations on the 1st day of January, 1906, for a period of 21 years from the date of the admission of the [533] state into the Union. In accordance with this requirement, at the time the proposed Constitution was voted upon, a separate prohibition article was submitted to the people, which was adopted, and has ever since been a part of the organic law of this state. The laws against gambling and prostitution are general, and intended to operate throughout the entire state, and such statutes are police regulations necessary for the maintenance of the public peace and the good order of society, and are matters in which every citizen of the state has an interest, and are not local and confined to the municipality of Tulsa, to be regulated by its charter provisions and ordinances to the exclusion of the general laws of the state upon the subject. In Thurston v. Caldwell, 40 Okla. 206, 137 Pac. 683, the present Chief Justice, in discussing a similar question then under consideration, said:

"But even those who press this view most extremely acknowledge the absolute supremacy of the Legislature in many matters of chiefly local interest, in which, nevertheless, the state has a sovereign interest, among which may be mentioned state control over local police protection. . . ."

See also In re Ambler, 11 Okla. Crim. 449, 148 Pac. 1061.

In Lackey v. State, supra, this court approved and followed the rule in Missouri, construing a similar provision in the Constitution of that state (section 16, art. 9), authorizing cities of more than 100,000 inhabitants to frame charters for their local government, consistent with and subject to the Constitution and laws of that state. The Missouri court holds that a charter adopted by a city under the authority of the constitutional provision mentioned superseded the statutes of the state [534] where they conflicted as to purely municipal regulations. Kansas City v. Marsh Oil Co. 140 Mo. 458, 41 S. W. 943; Brunn v. Kansas City, 216 Mo. 108, 115 S. W. 446. But where such provisions conflict with the general laws of the state in matters where the state has a sovereign interest, or affect matters of general concern, the state laws control. State v. Kansas City Police Com'rs, 184 Mo. 109, 71 S. W. 215, 88 S. W. 27. The Legislature passed laws creating a board of police commissioners for the city of St. Louis, and in discussing such laws, in State v. Mason, 153 Mo. 23, 54 S. W. 524, the court said:

"Laws like these and those of other states providing a metropolitan police system for large cities are based upon the elementary proposition that the protection of life, liberty, and property and the preservation of the public peace and order in every part, division, and subdivision of the state, is a governmental duty which devolves upon the state, and not upon its municipalities, any farther than the state in its sovereignty may see fit to impose upon or delegate it to the municipalities. The right to establish the peace and order of society is an inherent attribute of government, whatever its form, and is co-extensive with the geographical limits thereof, and touching every part of its territory."

The Minnesota decisions are in harmony with the rule in Missouri, and in the case of State v. Robinson, 101 Minn. 277, 112 N. W. 269, 20 L.R.A.(N.S.) 1127, the court, after discussing the relative powers of a city under a charter form of government and of the state for handling various matters of purely municipal concern, with which the state did not concern itself, said:

"But in so far as the general laws of the state operate and have force and effect within the municipality, and the officers thereof are charged with their enforcement, the municipality and its officers are the agents, and subject [535] to the command and control,

of the state government at all times. The Legislature may impose upon the local officers specific duties in the matter of the enforcement of the laws of the state and prescribe penalties for a failure to perform the same. Indeed, the efficient administration of the law, adopted for the welfare of the state at large, renders it imperative that the state, as guardian for the people as a whole, should possess and exercise this . . . control. Its absence would lead to a failure of law enforcement, so essential to the good order of society and the protection of property and property rights. That the state, when creating a municipal subdivision for local self-government, retains this general supervisory control over the affairs thereof, except so far as expressly or by fair implication surrendered, there can be no serious question."

The general rule, in the absence of special constitutional provision, is that all officers whose duties pertain to the exercise of the police power of the state are in that sense state officers, and under the control of the Legislature, even though they may be officers of a municipality and charged with the enforcement of the local police regulations of such municipality. 28 Cyc. 296. Counsel at the bar in oral argument of this case declined to discuss the question as to whether the enforcement of the prohibition and gambling laws and laws against prostitution were purely municipal, or whether they affected the state at large, taking the position that the sole question for our determination was one of jurisdiction, being whether the general laws of the state enacted for the removal of delinquent police officers are valid and operate within the territorial limits of the city of Tulsa, or whether the provisions of the charter and ordinances are exclusive. We have already shown that it is within the power of the state to enact laws for the police protection of its citizens, which laws shall be effective [536] throughout the state and all of its subdivisions, and coextensive in their operation with the territorial limits of the state, and that such laws would be effective in the city of Tulsa, and the provisions of the charter and ordinances of said city could not operate as a repeal thereof. It is true that the city might enact ordinances, not inconsistent with the state laws, regulating such matters within its territorial limits, and make suitable provisions for the enforcement thereof, and provide for the removal of officers charged with the duty of enforcing such regulations who should fail in the discharge of that duty. This does not mean, however, that the state has completely abdicated all authority in the premises and delegated full and unrestricted control over such matters to the local officials. If the contention of plaintiff be admitted, it destroys the uniformity and efficiency of the police

power of the state, leaves these matters subject to the sole management of the local authorities, and would permit a condition to exist in a city with such charter entirely different from and at variance with the conditions in other parts of the state; and if the officers of a city which has adopted a charter are not in sympathy with the enforcement of such laws, or other laws of like character, were the enforcement of said laws left entirely in their hands, it is easy to see that such laws, or indeed any law, might become a dead letter, and their enforcement a farce, and wholesale violations thereof might occur with the knowledge and consent of the city officials.

Neither can we give our consent to the contention that the provisions in the charter for the removal of the city officers is exclusive, and arrests the jurisdiction of the court to hear the accusation presented by the grand jury. While under the provisions of the charter the [537] petitioner might be removed in accordance therewith by the board of city commissioners, this does not necessarily oust the jurisdiction of the court to proceed in the manner complained of. The authority in the board of commissioners may exist concurrent with the jurisdiction of the court. The proceedings before the board are of an administrative character (*Coffey v. Superior Ct.* 147 Cal. 525, 82 Pac. 75), while the procedure in the district court is judicial in its nature, and must be conducted in the manner pointed out in the statute. Such remedies are cumulative and are concurrent, and the court has jurisdiction to hear and determine the accusation presented, notwithstanding the provisions of the charter and ordinances. This question was presented to the Supreme Court of Minnesota in the case of *State v. Robinson*, supra, and that court held that the charter provisions did not oust the jurisdiction of the court to entertain proceedings for the removal of the mayor of the city of St. Cloud. The case of *Coffey v. Superior Ct.* supra, involved a like question. The charter of the city of Sacramento made provision for the control of city officers charged with misconduct and for their removal from office. The Penal Code of the state also made provision for the removal of delinquent officers. The court held the charter provisions and the provisions of the general law to be concurrent, that the removal was not purely a municipal affair, and that the superior court had jurisdiction under the general laws, which was consistent and concurrent with the jurisdiction of the city under the provisions of the charter.

Plaintiff cites the case of *Dinan v. Superior Ct.* 6 Cal. App. 217, 91 Pac. 806, and *Craig v. Superior Ct.* 157 Cal. 481, 108 Pac. 310, holding that charter provisions [538] for the removal of police officers supersede the gen-

eral law conferring jurisdiction upon the superior court. Both of these were California cases, and were decided after the case of Coffey v. Superior Ct. After the decision in the Coffey Case the Constitution of California was amended by adding to section 16, article 20, the following proviso:

"Provided, however, that in the case of any officer or employee of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employee shall control."

And section 8½, article 11, of the Constitution of that state expressly provided that it should be competent to make provision in freeholders' charters—

"for the manner in which, the times at which, and the terms for which the members of the boards of police commissioners shall be elected or appointed, and for the constitution, regulation, compensation, and government of such boards and of the municipal police force."

These provisions are not found in our Constitution. Other decisions holding that the power to remove municipal officers vested in the governing bodies of the municipality and that vested by the general laws in the courts are concurrent and are not exclusive the one of the other, are as follows: *Mancker v. Faulhaber*, 94 Mo. 430, 6 S. W. 372; *State v. Walbridge*, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663; *State v. Wells*, 210 Mo. 618, 109 S. W. 758; *State v. Noblesville*, 157 Ind. 31, 60 N. E. 704; *State v. Adams*, 46 La. Ann. 830, 15 So. 490; *State v. Civil Dist. Ct. Judge*, 50 La. Ann. 655, 23 So. 886.

Plaintiff also relies upon the case of *Hodges v. Tucker*, 25 Idaho 563, 138 Pac. 1139, decided by the [539] Supreme Court of Idaho. The case is not in point, for the reason that in section 7459, Rev. Code of Idaho, no provision was contained relating to municipal officers, and the court held that there was no attempt or intention, either expressed or from which a presumption could be entertained, to confer jurisdiction upon the district court to hear and determine a case growing out of a violation of a city ordinance or a neglect of duty to enforce a city ordinance, in cities that had organized and accepted the provisions of the Black Law. The matters complained of in that case were a failure to enforce certain ordinances of Boise City relative to the keeping and maintaining of bawdy-houses. The court further decided that Laws 1911, c. 82, known as the Black Law, indicated an intention upon the part of the Legislature to provide a complete system within itself, in which provision was made for the removal of the officer in question, and that the procedure therein was exclusive.

The case of *Hilzinger v. Gillman*, 56 Wash. 228, 105 Pac. 471, 21 Ann. Cas. 305, decided

by the Supreme Court of Washington, was to the effect that the provisions in the charter of the city of Everett for the recall of certain officers was valid and not in conflict with the provisions of the Constitution of that state (article 5, section 3) providing that all officers not liable to impeachment should be subject to removal for misconduct and malfeasance as provided by law.

Counsel contend that section 5592 only applies to officers elected or appointed under the laws of the state, and inasmuch as plaintiff holds office under the city charter, and was not elected or appointed under the state laws, said section has no application, and confers no jurisdiction upon the district court to entertain the proceedings [540] therein pending. Section 3631 contains complete procedure for the removal of police officers failing to enforce the prohibition laws of the state, independent of section 5592. Section 3633 imposes certain duties upon police officers, and for a failure or neglect of duty in the enforcement of chapter 39 relating to intoxicating liquors authorizes their removal in the manner provided by law. This has reference to the procedure contained in sections 5592 and 5593, authorizing the removal of the officers therein named for the causes and in the manner specified. By the inclusion in its charter of provisions for the removal of its police officers the city might take to itself exclusive jurisdiction for the removal of such officers for neglect of duty in enforcing its local regulations and for causes purely municipal, but by the adoption of such charter could not relieve such officers from the obligation to discharge the duties imposed upon them by the general laws of the state, nor deprive the state of its authority to compel an enforcement of such laws by a removal of the officers charged with the enforcement thereof for neglect or failure in that respect.

The language of the California court in *Conn v. Richmond*, 17 Cal. App. 705, 121 Pac. 714, 719, quoted in *Dunham v. Ardery*, 43 Okla. 623, Ann. Cas. 1916A 1148, 143 Pac. 331, L.R.A.1915B 233, to the effect that the tenure of office and method of removing city officials were purely municipal matters, was written by that court after the California Constitution had been amended as hereinbefore indicated and in the light of those constitutional provisions, and was cited by Mr. Justice Riddle, who wrote the opinion of this court in support of the conclusion, reached in that case, that a provision in the charter of the city of Guthrie for the recall of city officials was [541] valid and was not in conflict with the Constitution and laws of this state.

The holding in *Lackey v. State*, *supra*, that the election of municipal officers was a matter of merely municipal concern, means that the

state has delegated to the local municipality regulations of the method of selecting its local officers, but does not intimate that the state may not impose upon police officers such duties as it has in reference to the enforcement of its police regulations prescribed for the protection and maintenance of the public peace and safety, and for a failure to perform such duties may not provide for their removal from office.

The contention is further made that the statutes under which the accusation was presented are void for uncertainty, in that it appears that no specific duties are imposed upon the plaintiff. This contention we think it without merit.

Counsel urge upon us the importance of a correct decision in this case, and view with alarm the far-reaching consequences which they fear will follow a denial of the writ. We are not unmindful of the fact that the question is an important one, and yet it is not new in this state, for in the various decisions of this court heretofore rendered the rule is well established that the provisions of a city charter adopted under the constitutional and statutory authority do not suspend or supersede the general laws of the state relating to matters of general state concern or involving the exercise of the state's sovereignty, and it was specifically decided in *Thurston v. Caldwell*, supra, that the state has a sovereign interest in local police regulation, and certainly the enforcement of [542] the laws relating to liquor, gambling, and prostitution are matters within the sovereign power of the state, which it has not seen fit, either by the Constitution or the statutes, to completely surrender into the hands of city officials, and the power to enforce obedience to its statutes is necessarily an inherent attribute in the power to enact them, for if it be once conceded that the state may not by proper measures enforce its regulations, the regulations themselves become futile and ineffective, except so far as the sentiment of any particular community may demand that the same be enforced, or so far as the officers thereof may see fit so to do, according to their particular personal views upon the matter. We do not apprehend that any dire consequences will follow a pronouncement upon our part that the state still has the right to compel an enforcement of its wholesome police regulations in each and every part of the state, and that officers may not with impunity neglect the duties imposed upon them by law, at their pleasure.

The demurrer is sustained, the writ is denied, and the petition dismissed.

All the Justices concur.

NOTE.

It is held in the reported case that the failure of a municipal chief of police to enforce the laws with reference to the sale of intoxicants and the keeping of disorderly houses is a sufficient ground for his removal in a proceeding by the state. Despite a home rule charter the state retains, it is held, its inherent sovereign interest in the enforcement of the laws of the state within the limits of a municipality, and the municipal officers are for the purpose of such enforcement agents of the state and amenable to removal by it. Failure to enforce the law as a ground for the removal of a public officer is discussed in the note to *State v. Donahue*, Ann. Cas. 1913D 18. See also the recent case of *State v. Howse*, Ann. Cas. 1917C 1125.

FIRST NATIONAL BANK OF ALBUQUERQUE

v.

STOVER.

New Mexico Supreme Court—March 30, 1915.

21 N. Mex. 453; 155 Pac. 905.

Bills and Notes — Agreement to Extend — Construction — Necessity of Consent of Holder.

A promissory note, containing the provision that "all parties hereto, . . . agree that this note may be extended from time to time by any one or more of us without the knowledge or consent of any of the others of us, and after such extension, the liability of all parties shall remain as if no such extension had been made," grants no power to the maker or other parties to the note to extend the time of payment without the consent of the payee or holder.

[See note at end of this case.]

Effect on Negotiability.

A provision in a note in the foregoing form does not render the note non-negotiable under the law merchant or the provisions of the Negotiable Instruments Law (Law 1907, c. 83).

[See 17 Ann. Cas. 52; Ann. Cas. 1914B 210; 125 Am. St. Rep. 185.]

Bona Fide Purchasers — Circumstances Putting One on Inquiry.

The general principles, running throughout the whole law, that notice of facts which should put one upon inquiry and which, if followed up with diligence and understanding, would lead to the truth, have no application to the question of good faith in the taking of negotiable instruments. The ques-

tion in such cases is, Did the holder have actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith? Suspicious circumstances, negligence, or wilful ignorance may be evidence of bad faith from which the jury may find the fact. The holder, however, will be protected unless, at the time he took the paper, he had reason to believe, and did believe, there was some defect or infirmity in the paper. The facts in this case examined and held not to authorize a finding that the appellant bank did not take the note in good faith; there being no substantial evidence to support any such finding.

Proof of Bona Fides — Sufficiency.

Sections 646, 649, 653, Code 1915, applied, and held that the plaintiff bank, under the circumstances, took the note in question charged with the burden of proof that it took the same in the course. Held further, that under the proof, that burden had been successfully met. Held further, that where the evidence was all one way, and the witness stands unimpeached in any way, his evidence is to be taken by this court as true in determining whether there is any substantial evidence to support the verdict.

(Syllabus by court.)

Appeal from District Court, Bernalillo county: MECHEM, Judge.

Action by First National Bank of Albuquerque, plaintiff, against Roderick Stover, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

A. B. McMillen for appellant.

F. E. Wood and *E. W. Dobson* for appellee.

[456] PARKER, J.—A promissory note was made and delivered in the following form:

Albuquerque, N. M., Jan. 5, 1911.

6250.00

On or before two years after date I promise to pay to the order of W. H. Gillenwater at Montezuma Trust Company six thousand two hundred fifty and no 100 dollars, with interest at the rate of six per cent per annum from April 1, 1912, until paid, payable semi-annually, with ten per cent additional on the amount unpaid as attorney's fees, if placed for collection in the hands of an attorney. All parties hereto and all indorsers hereof waive grace and protest and all appraisement laws and agree that this note may be extended from time to time by any one or more of us without the knowledge or consent of any of the others of us, and after such extension, the liability of all parties shall remain as if no such extension had been made.

Payable at the Montezuma Trust Company, Albuquerque, N. M.

[Signed] Roderick Stover.

Action was brought on the note by the plaintiff as indorsee, claiming to be a bona fide holder for value without notice and prior to maturity. The answer admitted the execution and delivery of the note, but alleged, by way of defense, that the note was given in payment for shares of stock in a bank of which the payee of the note was the head, under a proposed scheme for its reorganization and the increase of capital stock; that it was agreed between the parties that proceeds arising from the sale of said stock should be deposited with and held as a special [457] deposit by the Montezuma Trust Company until the reorganization should be completed; that if the defendant would purchase 50 shares of the new capital stock for the sum of \$6,250, his note would be accepted therefor, payable at such time as he desired, and that if for any reason it was not convenient for him to pay the note when it became due, he might extend the same from time to time until such further time as he desired; that said note would not be used, delivered, put into effect, or considered valid or in force until the entire \$200,000 of capital stock should be fully subscribed; that said note was accordingly given in payment for a subscription for 50 shares of the stock in the said corporation contemplated to be organized; that the said corporation was never organized or created, nor were any other subscriptions to the stock thereof ever secured or paid for; that thereafter, in violation of this promise and agreement with the defendant, the payee of the note fraudulently and without authority indorsed the said note to the plaintiff in this case for the sole personal use and credit of the said payee; that the plaintiff had full knowledge and notice of all of the facts hereinbefore stated, and took the said note charged and chargeable with full knowledge and notice thereof and of each of said facts. The plaintiff replied, denying that it took the said promissory note with knowledge of the facts and alleged that the same was delivered to the plaintiff for full value in due course of business. At the close of the trial each party moved for a directed verdict in his favor, and the court thereupon directed a verdict for the defendant. The only testimony given in the case was that of the vice-president and manager of the plaintiff bank, designed to show that the bank took the note as collateral security for a present loan made to payee of the note at the time, and in good faith without any notice of the facts alleged in the answer by way of defense. The motion of the defendant for a directed verdict was upon the ground that the note was without consideration, and that the note itself by its terms is not a negotiable promissory note, and that the plaintiff, therefore [458] took it chargeable with all the

defenses and equities which would have been good as between the original parties. The grounds of the motion in behalf of the plaintiff for a directed verdict in its favor are not stated. A verdict was rendered by the jury, in accordance with the instruction of the court, in favor of the defendant. The motion for a new trial was filed and overruled, and the plaintiff appeals.

It is apparent that the question involved is a very narrow one. The position of the defendant is clearly shown by his motion for a verdict in his favor. It is based upon the proposition that the note was without consideration, or rather that the consideration therefor failed, which facts are admitted by the pleadings. Upon the state of the pleadings it is clear that the original payee had no cause of action upon the note against the defendant. The defendant further urged upon the trial court that the form of the note is such that it is a non-negotiable instrument. Therefore, it is argued, that it was impossible for the plaintiff to become the holder in due course so as to cut off the defenses which would be available as between the original parties to the note. The argument is made by counsel for appellee that the note is non-negotiable for two reasons, viz.: (1) It contains a provision that the maker shall have the right to extend the maturity of the note from time to time at his pleasure, thus rendering the time of payment indefinite and uncertain; (2) even if the power to extend the time of payment is conferred by the terms of the note, upon the payee or holder alone, yet this renders the time of payment indefinite and uncertain and destroys the negotiability of the note. On the other hand, counsel for appellant argues that no such power is conferred upon the maker, and he denies appellee's second proposition entirely.

The language employed in the note is certainly unfortunate. It provides that:

"All parties hereby . . . agree that this note may be extended from time to time by any one or more of us without the knowledge or consent of any of the others of us."

[459] The maker of the note is certainly one of the "parties." The maker certainly has the power to extend the time of payment of the note by the express terms of the contract, in so far as the terms used give that power. But is the grant of power to the maker to extend the time of payment an absolute grant of that power regardless of the consent of the holder? It would seem that the answer is determinable by a proper definition of the words "may be extended." It is a matter of common knowledge and practice that an extension of the time of payment of a note is accomplished by the concurrence of the payee or holder, and some one or more

of the other parties to the contract. The actual extension of the time is effectuated by the agreement of the payee or holder. The maker or indorsers cannot extend the time unless the payee consents. If it is intended to give to the maker absolutely the right to extend, a provision is sometimes inserted that he may have the right to an extension for a certain specific time, or according to whatever the contract may be between the parties. The provision then in this contract that "this note may be extended from time to time by any one or more of us without the knowledge or consent of any of the others of us," in the light of commercial custom and usages, as well as common knowledge, is the equivalent of saying that "this note may be extended, with the consent of the payee or holder, from time to time," etc., because it is a contradiction in terms to say that a note may be extended without the consent of the payee or holder, unless the contract provides in terms that the maker shall have the right to an extension. The words "without the knowledge or consent of any of the others of us" can clearly have no application to the payee or holder. As before seen, there can be no such thing as an extension without his consent. The extension is effectuated by the making of a new contract between the parties, except in those cases where the right is given in terms to the maker, and a granting of the extension is, in such case, but the performance of a contract already made. That this is the sense in which the word "extended" was [460] used by the parties is made more manifest by the following clause:

"And after such extension liability of all parties shall remain as if no extension had been made."

There could be no liability on the part of the payee or holder, and the words used clearly indicate that the object of all of the provisions in regard to extensions were inserted simply to avoid the consequences, under the law merchant, of an extension without the consent of the indorsers or sureties. They do not grant the arbitrary right to the maker or other parties to the note to extend the same at their will and against the consent of the payee or holder; they simply provide that, in case of extension, they agree that their liability shall remain unchanged. It follows that the payee or holder of this note may insist upon payment of the same when due, and that there is consequently no uncertainty as to the time of payment, by reason of any right conferred upon the maker.

We are aware that this interpretation does violence to the naked letter of the contract. It provides that the note may be extended by "any one" of the parties without the "knowledge or consent" of any of the others. Then the maker may mentally resolve to ex-

tend the note indefinitely, and, without the knowledge or consent of the payee, may effectuate an indefinite extension, thereby rendering the contract an empty shell, devoid of meaning or efficiency. If such were the sense in which the word "extended" was used by the maker and payee in this case, they must be convicted of a foolish and vain act, if not an intention to carefully prepare a trap for the unwary. But no such presumption can be indulged. They are to be presumed to have intended to put out an ordinary note, expressing the ordinary binding contract of this kind.

Not much, if any, direct precedent is to be found in the cases, because no such language, probably, was ever before used in a note. Some of the cases, however, are valuable for their statements of the principles governing these matters.

[461] In *Pomeroy First Nat. Bank v. Buttery*, 17 N. D. 326, 116 N. W. 341, 16 L.R.A. (N.S.) 878, 17 Ann. Cas. 52, the note in question contained the provision that: "The makers and indorsers herein severally . . . consent that the time of payment may be extended without notice."

It was argued that under this provision the holder of the note might, without notice, extend the note indefinitely, thereby rendering the time of payment uncertain and the note consequently non-negotiable. The court said: "It is strenuously argued that the use of the word 'makers' in the waiver admits of an extension being made at any time on the part of the holder, by a mere secret mental process unknown to any other party. This may be true as a psychological fact, but we do not deem it so as a matter of practice in commerce and banking. To us it is quite clear that it has the same effect as though the note read 'on the 1st day of October, 1903, or thereafter on demand,' in which case there would be no question of its negotiability. Holders of notes do not, by a secret mental process, make an extension of the time of payment, but such extension, if made at all, is made by an agreement between the principal debtor and the holder of the paper, either with or without the consent of the indorsers."

In *National Bank of Commerce v. Kenney*, 98 Tex. 293, 83 S. W. 368, the note in question contained the provisions that: "The makers and indorsers hereof hereby severally . . . agree to all extensions and partial payments before or after maturity without prejudice to holder."

The Texas court said: "If, as argued, the effect of the stipulation is to give the right to the maker, without the consent of the holder, or to the holder without the consent of the maker, to appoint another date of payment and thereby extend the time, it may be that it would render the instrument not negotiable. But we do not think it capa-

ble of that construction. It does not say that either the holder or the maker may extend the note. It merely makes a provision in case the time of payment may be extended. How extended? It seems to us that the extension meant is that which takes place when the debtor and creditor make an agreement upon a valuable consideration for the payment of the debt on some days subsequent to that previously stipulated. The obvious purpose of the provision [462] taken as a whole was merely to relieve the holder of the paper from the burdens made necessary by the rigid requirements of the mercantile law in order to secure the continued liability of the indorsers and sureties upon the paper. Therefore what was meant by the stipulation as to extension of time was simply that in case the holder and the maker should agree upon an extension, the sureties and indorsers should not be discharged. The holder and maker of any note may, at any time, agree upon an extension; therefore the fact that they may have that right does not affect the negotiability of the paper. . . . So in that case, the time at which the maker may elect to pay is uncertain, but the time at which the holder may demand payment is certain. It follows that if the holder has the absolute right to demand payment at a certain date, the note is negotiable."

In *Longmont Nat. Bank v. Loukonen*, 53 Colo. 489, 127 Pac. 947, Ann. Cas. 1914B 208, the note in question contained a provision that: "The makers and indorsers hereof hereby . . . agree to any extensions of time of payment and partial payments before, at or after maturity."

The court said: "The provision under consideration does not mean that the holder can arbitrarily extend the time of the payment of the note as he may see fit, over objection by the maker, nor can the latter make an extension without the consent of the holder."

In *Navajo County Bank v. Dolson*, 163 Cal. 485, 126 Pac. 153, 41 L.R.A. (N.S.) 787, the note in question provided that: "We agree that after maturity this note may be extended from time to time by any one or more of us without the knowledge or consent of any of the others of us, and after such extension the liability of all parties shall remain as if no such extension had been made."

The court, in speaking of this provision, says: "There is nothing uncertain in this note about the date of maturity. The provision refers only to something that may be done by the maker, if the holder agrees thereto, 'after maturity.' Clearly the provision referred to is in no way binding upon the holder of the note. No one can reasonably claim that the effect thereof is to give the maker the right to extend the time of pay-

ment, without the consent of the holder. The note was dated April 23, 1908, and by its terms, [463] unaffected by anything in the provision referred to, was to mature 'nine months after date,' at which time the holder, so far as anything contained therein is concerned, had the absolute right to insist on payment. There was no provision under which the time so specified could be changed, or the right of the holder to insist on payment at such time he held to be affected. Where the time is thus definitely and irrevocably fixed at which the note shall mature and the holder shall be at liberty to compel payment, we are unable to see how a provision, looking to a possible agreement between the parties after maturity, for an extension, renders the executed note at all indefinite or uncertain as to the time when it is payable."

The interpretation of the language which is identical with the note here in question, in this regard, is exactly as we have interpreted this one. The fact of the slight difference in the phraseology in the other regard in no way affects the reasoning in the California case.

In *Missouri-Lincoln Trust Co. v. Long*, 31 Okla. 1, 120 Pac. 291, the note contained the provision that: "The makers . . . consent that the time for payment may be extended without notice thereof."

The court holds that the provision does not make a note non-negotiable, relying upon *Pomeroy First Nat. Bank v. Buttery*, 17 N. D. 326, 116 N. W. 341, 16 L.R.A. (N.S.) 878, 17 Ann. Cas. 52, *supra*, and other cases for authority.

In *Stitzel v. Miller*, 250 Ill. 72, 95 N. E. 53, 34 L.R.A. (N.S.) 1004, Ann. Cas. 1912B 412, the note contained the provision that: "We also agree that in case said note is not paid at maturity, it is at the option of the holder hereof to extend, as he deems proper, the payment of the above note, and that said extension shall not in any manner release one or either of us from the payment hereof."

The court says: "The contention that said quoted words gave the holder the authority to extend the note as he pleased, that it could not be known what extensions he might grant, and that therefore the time when the note became due . . . was uncertain and undeterminate, rendering the note non-negotiable, cannot be sustained. The note expressly provides that such option to extend can be exercised only upon the failure of the payors to make payment at its maturity."

[464] the decision is based upon the proposition that until the note matures no person under its terms had power to make an extension of time for payment, and contains an expression to the effect that, if there was authority to extend the note before maturity, it would render the note non-negotiable.

A much more serious question arises under appellee's second proposition. It is apparent that if a provision is inserted for extensions at or after maturity, they can have no effect upon the negotiability of the note, because at maturity the note ceases to be negotiable by operation of law. It therefore becomes immaterial that a provision is inserted that, after the maturity of the note, the sureties and indorsers shall not be discharged in case the note is extended. This is clearly pointed out in the Illinois and California cases, cited *supra*.

But where there is a provision authorizing extensions prior to maturity, then a more serious proposition is presented. If the note may be extended from time to time at will during the period prior to maturity, then the time of payment becomes uncertain and indefinite. It is upon this proposition that, in a majority of the states, we believe, a note like the one here in question is held to be non-negotiable. Thus in *Smith v. Van Blarcom* 45 Mich. 371, 8 N. W. 90, the note contained a provision that: "The makers and indorsers of this note expressly agree that the payee, or his assigns, may extend the time of payment thereof indefinitely, as he or they may see fit."

The court, per Campbell, J., said: "By the terms of this note, which must be read subject to the condition, it was not payable absolutely three months after date or at any other one time. The time of payment could be postponed not merely once, but as often as either Charles H. Van Blarcom or his assigns might think it desirable. There is nothing on the face of the note whereby any one can tell, either directly or by reference to any particular event, at what period this paper will become absolutely payable. We cannot conceive how this can be treated as not payable on a contingency."

[465] In *Richmond Second Nat. Bank v. Wheeler*, 75 Mich. 546, 42 N. W. 963, a note containing a similar provision was likewise held to be non-negotiable. In *Woodbury v. Roberts*, 59 Ia. 348, 13 N. W. 312, 44 Am. Rep. 685, the note contained a provision that: "The makers and indorsers of this obligation further expressly agree that the payee, or his assigns may extend the time of payment thereof from time to time indefinitely, as he or they may see fit."

The court said: "But the note before us may never fall due, for payment may be extended indefinitely. . . . By regarding such paper as non-negotiable no prejudice will result to the mercantile and financial business of the country, but sharpers will be defeated in their attempt to swindle the confiding and unwary, a result in accord with sound policy and good morals."

In *Farmer v. Graettinger Bank*, 130 Ia. 469, 107 N. W. 107, the note contained the provision that: "Sureties hereby consent that time of payment may be extended from time to time without notice thereof."

The distinction drawn in this case is evidently based upon the fact that in the former there was an agreement to an extension, but in the latter there was merely an agreement that the surety should not be discharged in case an extension should be granted. In *Glidden v. Henry*, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316, the provision for extensions are the same as in the Michigan case, supra, and the court said: "In the case before us, all parts of the note must be looked to in determining the quality of the paper. There is a promise to pay in 12 months, but that promise is not certain and unconditional. The other clause is that the time of payment may be extended indefinitely, as the parties may agree. From an inspection of the note, it is impossible to tell when it may mature, because it is impossible to know what extension may have been, or may hereafter, be agreed upon."

In *Coffin v. Spencer*, 39 Fed. 262, the provision in the note was practically the same as in the Michigan [466] and Indiana cases, and the Circuit Court for the District of Indiana said: "The latter I think the true reading, and it means that at any time before or after maturity of the note by its terms, or by the terms of any agreement for renewal or extension, the holder, whether the payee or any assignee, may, by agreement with the maker, or with an indorser or other party liable on the paper, renew or extend the date of payment 'from time to time,' that is to say, definitely, without prejudice ultimately to his remedies against any of the parties. Every successive taker of the paper is, of course, bound to take notice of this stipulation, and, instead of looking only to the face of the instrument for the time of its maturity, as in case of commercial paper he must, is put upon inquiry whether or not any agreement for a renewal or extension of time has been made by his proposed assignor or by any previous holder. . . . The note in suit, it seems clear enough, cannot be deemed negotiable."

In *Union Stockyards Nat. Bank v. Bolan*, 14 Idaho 87, 93 Pac. 508, 125 Am. St. Rep. 146, the provision in the note is as follows: "No extension of time of payment, with or without our knowledge, by the receipt of interest or otherwise, shall release us or either of us from the obligation of payment."

The court said: "This is an express contract to the effect that the time of payment may be extended to any one or all of the sureties, guarantors, indorsers, or makers of the note, without notice to all or any one of

them. This undoubtedly renders the note non-negotiable under all the authorities that have been brought to our attention on the subject."

In *Rossville State Bank v. Heslet*, 84 Kan. 315, 113 Pac. 1052, 33 L.R.A. (N.S.) 738, the provision of the note was that: "Each signer and indorser makes the other an agent to extend the time of this note."

The court refers to the former case in that state of *City Nat. Bank v. Gunter*, 67 Kan. 227, 72 Pac. 842, in which the provision appeared in the note that: [467] "The makers and indorsers . . . agree to all extensions and partial payments before or after maturity without prejudice to holder."

In discussing the case under consideration, and the *Gunter Case*, the court said: "Interpreting 'signer' to mean 'maker,' and the agency of each maker and indorser to act for the other, as equivalent to a consent to the action of either to an agreement for extension made by another, the only material difference discernible is that in the *Gunter Case* the note stated that the extension might be made before or after maturity, while in this case it authorizes the extension without stating when it may be made. The precise inquiry suggested is whether the authority to extend here given may be exercised only after maturity. If so, the time is fixed for payment; for the promise, apart from this clause, is to pay on January 1, 1909, and an authority to extend afterwards would only amount to a waiver of the right to be relieved from liability for an extension without such authority. If, however, the clause is to be construed as giving the parties named the right to extend the time before maturity, its effect would be precisely the same as though the words 'on or before' had been inserted, and the rule of the *Gunter Case* would apply. . . . The vice of the stipulation in question is that the day of payment cannot be determined. The signer (maker) or any indorser may, at any time he sees fit to do so, as agent one for another, extend the time for payment by agreement with the holder. The payee in transferring the note may become an indorser, and therefore an agent for the maker, and his indorsee may in turn, become an indorser with like power, so that the time of maturity must be indefinite, and not determinable from the instrument."

See further many cases collected in a note to *Pomeroy First Nat. Bank v. Buttery*, 17 Ann. Cas. 52.

It clearly appears from the reading of the foregoing cases, and many others which we have examined, that in the opinion of those courts the uncertainty as to the time of payment, which is held to render the note non-negotiable, arises out of the fact that there is an agreement in the note that the

same may be extended prior to maturity. The fact that such extension of the time of payment is contemplated and provided for is held to render the time of payment so uncertain as to destroy the negotiability of the instrument. On the other hand, there is a line of cases, mostly more modern, which takes an opposite view of provisions of this kind. They are based upon the proposition [468] that the time of payment within the meaning and requirement of the law merchant and the negotiable instrument law is certain or determinable, whenever the time at which the payee or holder may demand payment is certain or determinable. We have before seen that, under the terms of this instrument, in this case, the payee or holder is entitled to demand payment on the day specified therein, there being no right on the part of any other party to the instrument to compel him to extend the same against his consent. The Texas case, heretofore cited and quoted from, is one of the leading cases adopting the latter position. The North Dakota case is another leading case to the same effect. In Missouri-Lincoln Trust Co. v. Long, the Supreme Court of Oklahoma announces its adherence to the same doctrine that so long as the payee or holder may insist upon the payment of the note at maturity, there is no uncertainty as to the time of payment, citing the Texas case, *supra*, and Missouri cases. In Longmont National Bank v. Loukonen, *supra*, the makers and indorsers agreed to any extensions of time of payment before, at, or after maturity. The Colorado court in that case adopts the reasoning of the Texas and North Dakota courts, and says: "The time of payment of this note, by its express terms, is certain. A definite time when the holder may demand payment is stated, and the period of maturity is fixed. There is nothing in the note which gives the maker, or any one else, a right to demand an extension, or which binds the holder to give it. We are unable to perceive how the mere fact that the signers and indorsers undertake to be bound by any extension of time of payment, which may thereafter be settled upon, takes from an instrument in all other respects commercial paper, its negotiable character. Any agreement for an extension, not appearing in the instrument and unknown to a purchaser for value before maturity, would not defeat his right to demand payment of the note according to its original terms.

. . . The sole purpose of the stipulation is for the protection of the holder, by continuing the liability of both maker and indorser in case of extension. . . . A legal right exists in the maker and holder of any negotiable instrument to agree to an extension, and the fact that such legal right exists does not make the paper non-negotiable; no more

should the fact that the maker's consent to an extension, which he always has the legal right to give, is [469] expressed in the note, but which does not in fact constitute an extension, have such effect. To hold that an undisclosed agreement to extend destroys the obligation to pay a note according to its terms, thus making the time of payment uncertain, in the hands of a bona fide holder for value before maturity, would be contrary to every principle of justice and fair dealing. Such would be the effect of declaring this instrument non-negotiable."

The court cites the Missouri, North Dakota, Texas, and Oklahoma cases, before referred to.

In *City Nat. Bank v. Goodloe-McClelland Co.* 93 Mo. App. 123, the note provided that: "The makers and indorsers agree to all extensions and partial payments before or after maturity without prejudice to the holder."

The court held that this provision did not impair the negotiability of the note.

We propose to adopt what, we are free to admit, is the minority doctrine, at least so far as numbers of states are concerned, because we believe the doctrine to be founded in reason and to be the best suited to business and commercial usage. It is a matter of common knowledge that it is the general, if not the universal, custom of banks to insert provisions of a similar nature to the ones inserted in the note in question, whenever they loan money. We cannot see that harm can come to the people of the business world by holding this note to be a negotiable instrument. On the other hand, we can see that harm may come from unduly hampering business transactions of this kind. If a banker must insist upon payment of a note at maturity or otherwise lose the security of indorsers upon commercial paper, then the borrowers of money from banks will inevitably suffer great inconvenience, and often great loss. This is apparent to all who have had experience or observation in commercial transactions of this kind. Nor will this holding operate as a restraint upon the dealing in commercial paper for the reason that under sections 52 and 56 of our negotiable instruments law (chapter 83, Laws of 1907) the assignee cannot take such paper and lose the benefit of its negotiable character unless he [470] has actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounts to bad faith. A simple inquiry in good faith of the payee or holder of negotiable paper as to whether the same had been extended by the parties thereto would, we assume, be held to constitute such assignee a holder in due course. It follows that the judgment of the district court in holding that the instrument was non-negotiable was erroneous.

It is urged by counsel for appellant that this court should now enter judgment for the plaintiff upon the note in question. It appears, however, from the pleadings that the question of taking of the note by the plaintiff in good faith or bad faith was in issue, but was not decided by the court, the court having directed a verdict for the defendant upon the sole proposition that the note was non-negotiable, and that therefore there was no question as to the good faith or bad faith of the plaintiff, in taking the note, for determination by the jury. It is argued, on the other hand, by counsel for appellee, that the action of the court in directing a verdict for the defendant was a finding that the burden of proof resting upon the plaintiff in regard to good faith in the taking of the note had not been met. We think not. The district court, at the instance of counsel for the defendant, held that the note was non-negotiable, and that therefore it was subject, in the hands of plaintiff, to all of the defenses set up in the answer. The plaintiff, of course, denied the allegations in the answer that it had taken the note in bad faith, and introduced proof on the issue. But this issue has never been submitted to a jury, nor decided by the court. It is therefore apparent that the cause must be retried.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded to the district court, with instructions to award a new trial; and it is so ordered.

Roberts, C. J., and Hanna, J., concur.

ON REHEARING.

(January 11, 1916.)

[471] PARKER, J.—In the last section of the opinion we determine that the question as to whether the plaintiff took the note without notice, and in good faith had not been determined in the court below, and consequently we remanded the cause for a new trial. A later examination of the record, however, discloses that in this we were in error, and for that reason we have granted a rehearing.

At the close of the case each party moved for an instructed verdict in his favor, the defendant specially submitting the case on the "basis of all evidence." This necessarily submitted to the court the evidence on the question of notice and good or bad faith on the part of the appellant in taking the note. The appellant does not resist this proposition, but, on the contrary, insists that the evidence submitted authorizes and requires a judgment in its favor. Appellee, of course, argues that the evidence authorized the direction of a verdict in favor of appellee upon this point, and that the action of the court

cannot be disturbed here. There is a controversy between counsel as to the issue tendered by the answer. It was alleged in the answer that: "The said plaintiff had full knowledge and notice of all of the facts hereinabove stated, and took the said note charged and chargeable with full knowledge and notice thereof, and of each of said facts."

In the reply the appellant denied this allegation of the answer, and alleged that it acquired said note for full value in due course of business prior to its maturity, and without knowledge of any defect or want of consideration or other defects claimed by said defendant. Upon this state of the pleadings the appellant argues that there was tendered the sole issue of notice or want of notice to the appellant of the infirmities in the paper, and that no issue of bad faith in taking the note was tendered by the pleadings. The appellee contends that the allegations of the answer are broad enough to tender the issue both of actual notice and of knowledge of such facts that the taking of the instrument amounted to bad faith. In view of [472] the disposition which we will make of the matter, we do not deem it necessary to determine specifically whether the issue tendered was narrowed by the pleadings, as claimed by the appellant, or not, and the case will be treated as if the pleadings tendered both issues.

One M. W. Flournoy, vice-president and manager of the appellant bank, was the only witness who testified upon these subjects. He flatly denied that he or the appellant bank had any knowledge or notice of the defects or infirmities of the paper at the time the bank took the same; the business having been done entirely between the holder of the note and the witness as such vice-president and general manager. Upon cross-examination the witness was not shaken in any particular from the position which he took on direct examination in this regard. The issue then as to whether the appellant bank had notice of the infirmities of the paper at the time it acquired it may be dismissed from further consideration, there being no evidence of any kind in the record to support a finding that it did have such notice, and, on the other hand, evidence given all showing that it did not have such notice.

Upon cross-examination the witness Flournoy was pressed for facts which might show that he was aware of the financial condition of the payee, and the general condition of his business affairs, from which it was thought to be inferred that the note was taken in bad faith. He was asked whether he did not know, prior to taking the note, that the Montezuma Trust Company, of which the payee of the note was the head, was in bad financial condition, and that the payee was endeavoring to reorganize the same with addi-

tional capital. The witness admitted that he knew that the Montezuma Trust Company was doing business under unfavorable conditions; that he had declined to join in the reorganization of the same, and supposed that the plan had been abandoned. He testified that the Montezuma Trust Company appeared to be in financial difficulty. He further testified that the payee presented the note, and asked a loan of \$5,000 with the note as collateral security, which was made, and the proceeds placed [473] to the credit of the Montezuma Trust Company according to the custom of years; the payee not having a personal account with the appellant bank. The note was upon a printed blank, with the Montezuma Trust Company named as payee, and it was interlined, substituting the name of the payee for that of the Montezuma Trust Company. The note was payable on or before two years from date, and the witness testified it was not customary for the appellant bank to discount such note, but it was customary to take the same as collateral. The note provided for semi-annual interest, but the witness did not demand interest for about one year after the date of the note. He explained the failure to demand the interest by saying that, the note being held as collateral security, the bank did not attend to the collection of the interest promptly, as it would in case the bank really owned the note. The witness said he understood the maker of the note to be a man of means, and knew nothing about his business affairs, or whether he had needs to raise money on notes, and made no inquiry of the payee as to how he came to have the maker's note. This is the substance of the testimony of the witness Flournoy, on this subject on cross-examination. The most that can be said for this evidence is that the bank failed to make inquiry of the payee how or why he came to have such a note of the maker. That the bank did not take the note in bad faith in the sense that it knew of these infirmities, and attempted to defraud the maker to its advantage, or that of the payee, is apparent. The evidence points to no other conclusion. The bank simply failed to inquire of the payee how or why he had such a note, either through negligence, or carelessness, if, indeed, it was its duty to so inquire, or under suspicious circumstances.

Appellee argues that while gross negligence is not the same thing as bad faith, it may be evidence of the same and, in this case the appellant bank having been negligent, or being aware of suspicious circumstances, these facts are sufficient to support a finding of bad faith in taking the note. He relies upon *Goodman v. Harvey*, 4 Ad. & El. 870, 31 E. C. L. 212; *Ward v. City Trust Co.* 192 N. Y. [474] 61, 84 N. E. 585; *McNight v. Parsons*,

136 Ia. 390, 113 N. W. 858, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 15 Ann. Cas. 665; *In re Hopper-Morgan Co.* 156 Fed. 525; and 1 Daniel on Negotiable Instruments (6th ed.) § 776.

In *Goodman v. Harvey*, supra, the bill was given by the defendants to a shipowner for freight. It was presented for acceptance by an agent of the holder, and acceptance was refused, and the bill was protested. The bill was then returned to the payee, and was again put out by him, and was discounted by the plaintiff. When it became due, it was presented to the makers, and payment refused, and it was thereupon again protested for nonpayment. The jury, in answer to a question from the Lord Chief Justice, said that in their opinion the notarial marks on the bill were sufficient notice to an indorsee of nonacceptance. The court said: "The question I offered to submit to the jury was whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given consideration for the bill. Gross negligence may be evidence of mala fides, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title. The evidence in this case as to the notarial marks could only weigh as rendering it less likely that the bill should have been taken in perfect good faith."

In *Willis v. England Bank*, 4 Ad. & L. 32, 31 E. C. L. 19, it is said: "A doctrine has, indeed, prevailed that the person taking a negotiable instrument must show that he used such caution as a prudent man acquainted with business would exert; but this gave rise to many complicated questions, and the law has now nearly reverted to the old rule, which was that of certainty and convenience, that the bona fide holder of a negotiable instrument for value is entitled as against every one. It would probably be considered now, if the precise point arose, that the real question was bona fides. . . . It would, perhaps, be more correct to say that the same facts might raise the presumption of gross negligence or that of fraud. The facts might show a determination to wink at anything."

[475] In *Ward v. City Trust Co.* supra, the trust company had representatives on the board of directors of a corporation, and two of the officers of the corporation used the funds of the corporation for the payment to the trust company of their personal obligations to it. The transaction was on its face apparently without authority on the part of the officers of the bank. The court said: "It is not enough for the trust company to

part with value by surrendering the note and collateral, for it was bound to act in good faith in order to get good title. . . . Bad faith in taking commercial paper does not necessarily involve furtive motives; for it exists when the purchaser has notice of facts which, if unexplained, would show that he was taking the property of one who, to quote again from Paviour case, 'owed him nothing, in payment of a claim that he held against some one else. . . . Even if his actual good faith is not questioned, if the facts known to him should have led him to inquiry, and by inquiry he would have discovered the real situation, in a commercial sense he acted in bad faith, and the law will withhold from him the protection that it would otherwise extend.'"

The court said further: "The presumption was against the transaction, and, as we have seen, unless the presumption was overcome by reasonable inquiry, the transaction, unlawful in fact and unlawful on its face, is presumed to have been known to the trust company to be unlawful."

In *McNicht v. Parsons*, the note was delivered by the maker to the payee under agreement that it should not be negotiated until it was ascertained whether a certain fact came to pass, and in case it did not, the note was to be void and to be returned to the defendant. The question was whether the holder and plaintiff was a holder in good faith. It appears that the plaintiff in that case was really a dummy, and the note was indorsed to him for the express purpose of avoiding such defenses as the defendant might make against the holder of the note. The plaintiff made no attempt to assert the good faith of his purchase, or to negative the fact that he had notice of any defense thereto. The trial court directed a verdict for the plaintiff upon the ground that there was no evidence of bad [476] faith in the taking of the note. The judgment was reversed. It is said by the court: "It is equally true that, if the facts shown have any fair tendency to show bad faith, the question remains one of fact, and not of law. It is especially the case where the evidence of fraud is sufficient to put the burden of showing good faith on the holder."

In *re Hopper-Morgan Co. supra*, it appeared from an agreed statement of facts that the plaintiff purchased the note in a peculiar way, under peculiar circumstances, and with knowledge that the note had been issued for some particular purpose, not disclosed, but that Mugler, who had disposed of it to Prescott, from whom the claimant obtained it, was not the owner, and had the right to use it as collateral merely. The court said: "If the purchaser of the note has actual knowledge of the infirmity in the note, or want of title

in the one from whom he takes it, that, of course, ends the case. If he has no such actual knowledge, then bad faith or a willful disregard of known facts showing the infirmity or want of title or a willful evasion of knowledge of the facts, will be sufficient to defeat recovery. Facts sufficient to create a suspicion of the truth are not sufficient to show knowledge or bad faith, nor is mere gross negligence in making inquiry, or in failing to make inquiry, alone, sufficient. There must be either actual knowledge or bad faith. Bad faith may be shown by a willful disregard of and refusal to learn the facts when available and at hand."

It is apparent from what has been shown as to the facts in each of the foregoing cases that they have no application to a case like the one under consideration. In each of those cases, except, perhaps, the English cases, there was something about the nature of the transaction itself which excluded and prevented any dealing concerning the same in good faith. In the case at bar there was nothing whatever about the nature of the transaction which called for explanation; it bore no evidence whatever of illegality or fraud, but was the usual and ordinary commercial transaction. Mr. Daniel, in discussing this proposition, uses the following language: "It thus appears that the majority rule, referred to in the [477] foregoing discussion, that there must have been actual notice or bad faith, has been codified in those states which have enacted the statute. According to that rule, and under the statute, mere suspicion of defect of title or knowledge of circumstances which would excite suspicion in the mind of a prudent man, or even gross negligence on the part of the taker of the instrument, at the time of transfer, will not defeat his title. While neither gross negligence, nor knowledge of suspicious circumstances, of itself constitutes bad faith as matter of law, it is evidence from which bad faith may be inferred, and such facts, when proven, may be considered by a jury in arriving at the ultimate fact of good or bad faith. What constitutes this actual knowledge of bad faith, under the statute, has been the subject of judicial discussion. Bad faith in taking commercial paper, it has been said, does not necessarily involve furtive motives. It may be shown by a willful disregard and refusal to learn the facts when available and at hand, and if a purchaser of a note for value before maturity has notice of facts tending to show defenses to the same, he cannot purposely refrain from making inquiries as to the inception of the paper, and at the same time claim to be a bona fide purchaser." 1 Daniel, *Nego. Ins.* (6th ed.) § 776.

Appellant cites a multitude of cases upon the general doctrine that there must be either

actual notice, or bad faith to defeat a holder of commercial paper. A few of them only will be cited. *Murray v. Lardner*, 2 Wall. 121, 17 U. S. (L. ed.) 857; *Swift v. Tyson*, 16 Pet. 1, 10 U. S. (L. ed.) 865; *Goodman v. Simonds*, 20 How. 343, 15 U. S. (L. ed.) 934; *Pittsburgh Bank v. Neal*, 22 How. 96, 16 U. S. (L. ed.) 323; *Cromwell v. Sac County*, 96 U. S. 58, 24 U. S. (L. ed.) 681; *Shaw v. North Pennsylvania R. Co.* 101 U. S. 564, 25 U. S. (L. ed.) 892; *Swift v. Smith*, 102 U. S. 442, 26 U. S. (L. ed.) 193; *Second Nat. Bank v. Morgan*, 165 Pa. St. 199, 30 Atl. 957, 44 Am. St. Rep. 653; *Cheever v. Pittsburgh, etc. R. Co.* 150 N. Y. 65, 44 N. E. 701, 34 L.R.A. 69, 55 Am. St. Rep. 649; *Kitchen v. Loudenback*, 48 Ohio St. 177, 26 N. E. 979, 29 Am. St. Rep. 544; *Jennings v. Todd*, 118 Mo. 303, 24 S. W. 148, 40 Am. St. Rep. 377; *Wilson v. Denton* 82 Tex. 531, 18 S. W. 620, 27 Am. St. Rep. 912; *Breckenridge v. Lewis*, 84 Me. 349, 24 Atl. 864, 30 Am. St. Rep. 357; *Youle v. Fosha*, 76 Kan. 20, 90 Pac. 1091; *Eames v. Crosier*, 101 Cal. 260, 35 Pac. 873; *Matlock v. Scheuerman*, 51 Ore. 49, 93 Pac. 826, 17 L.R.A.(N.S.) 747; *McPherrin v. Tittle*, 36 Okla. 510, 129 Pac. 722, 44 L.R.A.(N.S.) 395; [478] *Scandinavian American Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102; *Reilly v. McKinnon*, 159 Fed. 78, 96 C. C. A. 268. He also cites 7 Cyc. 945, and *Crawford's Am. Neg. Ins. Law* (3d ed.) 68. These authorities all establish the uniform doctrine that a holder of commercial paper may be a holder in due course, notwithstanding that he may have knowledge of suspicious circumstances, or may be guilty of even gross negligence in taking the paper; the question always being in such cases whether he took the paper in good faith or bad faith.

It is apparent, however, from what has been heretofore seen in the original opinion and herein, that this fundamental, underlying proposition is not quite the proposition involved in this case. The question in this case is whether there was sufficient evidence before the trial court to authorize a finding that the plaintiff bank took the note in bad faith. In other words, the question is, Had the trial court or the jury made a specific finding that the plaintiff bank did not take the note in good faith, is there any substantial evidence in the record upon which such a finding could be based? We do not think that there is any such evidence. As has been before pointed out, this transaction was the ordinary business transaction dealing with commercial paper. There was nothing about the note itself to call attention of the plaintiff bank to any infirmity in the same. There was nothing about the circumstances or the relations of the parties which called for explanation on the part of the payee, or which even was calculated to arouse suspicion on the

part of the bank. The witness Flournoy testified that he treated the transaction exactly as he would treat any other of the same character, and that he knew nothing irregular or defective about the note. Owing to the condition of the record, we are put in the position of sitting as a jury or a trial court, and passing upon these facts. After careful examination of the testimony, and a thorough consideration of all legitimate inferences which could be drawn therefrom, we are compelled to say that there is no substantial evidence in the record authorizing a finding of bad faith on [479] the part of the bank. A fine discussion of this same question is to be found in 3 R. C. L. p. 1071, § 277, et seq. It is there said: "It is a general principle, running through all branches and subjects of the law, that one will be charged with notice of a fact who has information which should have put him upon inquiry, if, by following up such information with diligence and understanding, the truth could have been ascertained. . . . It is now well settled, however, that the doctrine of notice, as it affects good faith of transactions generally, does not apply to negotiable instruments."

Detroit Nat. Bank v. Union Trust Co. 145 Mich. 656, 108 N. W. 1092, 116 Am. St. Rep. 319, is cited, wherein it is said: "It is a general rule, applicable to transactions not involving commercial paper, that where one has notice of facts which would put an ordinarily prudent man upon inquiry, he cannot be considered a bona fide purchaser, if he neglect to take such care of his own interests as an ordinarily prudent man would do, but that rule has not been applied to commercial paper."

A lengthy quotation from *Jones v. Gordon*, 2 App. Cas. (Eng.) 627, is inserted in the opinion, from which we quote the following: "But if the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering or careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind, 'I suspect there is something wrong, and if I ask questions and make further inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover,' I think that is dishonesty. I think, my lords, that this is so not only by good sense and reason, but by the authority of the cases themselves."

In section 278 of 3 R. C. L. p. 1074, it is said: "He cannot be charged with notice by reason of any want of diligence on his part, even when he is in the situation where such facts could be ascertained by inquiry. . . .

Gross negligence even is not sufficient; actual knowledge of the facts which impeach the validity of the note must be [480] brought home to the holder. Knowledge, however, may be shown to have been possessed by the party either by direct proof, or by facts and circumstances that fairly lead to that conclusion, and circumstances that are not of any great probative force in themselves are admissible in connection with other proof to show guilty knowledge or want of good faith."

In section 280, p. 1075, R. C. L. it is said: "Although suspicious circumstances are not notice as a matter of law, yet the jury may find them to be so as a matter of fact, and evidence going to show the existence of such grounds for suspicion is always admissible."

See also *Harrington v. Butte, etc.* Min. Co. 33 Mont. 330, 83 Pac. 467, 114 Am. St. Rep. 821.

The only suspicious circumstances, if it may be called such, is the fact that this note was dated January 5, 1911, and was negotiated by the payee on January 6, 1912. It appears in the record that this note was made on January 5, 1912, and was accidentally misdated. However at the time the note was negotiated, the fact that the payee had apparently had possession of the note for a year was not mentioned. It might be argued that a man who had a good note like the one in question, and who needed money, would hardly refrain from using it for a year after its date, and that the bank should have taken notice of this fact, under the circumstances. On the other hand, if the matter was considered at all by the bank, which does not appear from the record, it might well have been inferred that the negotiating of the note one year after its date was in accordance with a perfectly honest and lawful arrangement with the maker. No inference of bad faith can be legitimately drawn from this circumstance. The question is, Did the witness, Flournoy, as the agent of the bank, know or believe at the time he took the note from the payee that it was being fraudulently put out by him, and did he willfully refrain from inquiry along that line? We have been unable, after a careful re-examination of the testimony, to put finger upon any fact from which a legitimate inference could be drawn to that effect.

This being the state of the record, we find that there is no substantial evidence upon which the district court [481] could have found that the appellant bank took the note in bad faith. There being no such evidence, it was error to so find, and for that reason the judgment will be reversed. As a matter of fact the record bears internal evidence, but not in direct terms, that the trial court did not so find, but, owing to the form in which the record is presented here, he is made to have so found, as already pointed out.

The judgment of the lower court will be reversed and the cause will be remanded to the district court, with directions to enter judgment in favor of the appellant bank as prayed in the complaint; and it is so ordered. Roberts, C. J., and Hanna, J., concur.

ON SECOND MOTION FOR REHEARING.

(March 4, 1916.)

PARKER, J.—A second motion for rehearing has been filed and is allowable, we assume, for the reason that the question to which it is directed was first considered upon the first motion for rehearing. The motion is directed to a supposed departure in the holding of the court from rules fixed by statute and the previous holdings of this court. The motion calls attention to sections 649 and 653, Code 1915, being a part of the Negotiable Instrument Act, and suggests that the court overlooked those provisions. Section 649 provides that the title of a person who negotiates an instrument is defective "when he negotiates it in breach of faith, or under such circumstances as amount to fraud." Section 653 provides that: "When it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course."

Section 646, Code 1915, defines a holder in due course as follows: "A holder in due course is a holder who has taken the instrument under the following conditions: . . . III. That he took it in good faith and for value; IV. That at the time [482] it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

It sufficiently appears, from what has been heretofore said in the two opinions heretofore handed down in this case, that the title of the payee of this note was defective, and that the plaintiff bank took the paper charged with the burden of establishing that it took the same in due course; that is to say, under the facts in this case, that it took it in good faith and for value, and without notice of any infirmity in the instrument or defect in the title of the person negotiating it. While neither of these sections of the statute were noticed in the opinion, none of the principles or rules therein mentioned were overlooked by the court. In the discussion of the matter, the exact situation herein outlined was assumed.

The question, then, before the court is whether that burden of proof resting upon the plaintiff bank has been successfully met by the proofs. In our former discussion of the evidence, we pointed out that there was no evidence in the case tending directly to show notice or lack of good faith on the part

of the bank when it took the paper. We further pointed out that there was no evidence in the case from which any legitimate inference of notice or lack of good faith could be drawn. The evidence was all one way, and pointed unequivocally to lack of notice and to good faith on the part of the plaintiff bank.

Counsel for appellee, however, points out the fact that one of the important considerations before the trial court was the demeanor and character of the witness Flournoy, whose conduct and honesty in taking the paper for the bank were directly involved. The verdict of the jury was in the following form: "We, the jury, by direction of the court, find the issues in this cause for the defendant."

The answer interposed by the defendant below tendered the proposition that the plaintiff bank—[483] "had full knowledge and notice of all the facts, . . . and took the said note charged and chargeable with full knowledge and notice thereof and of each of said facts."

The reply put this allegation in issue. When the jury returned the verdict, by direction of the court, finding the issues for the defendant, it consequently found this issue as to notice against the plaintiff bank. Counsel for appellee would have the court hold, if we understand the motion, that because the character and demeanor of the witness Flournoy was one of the considerations before the court and jury, therefore there is substantial evidence in the case to support the finding of the issue of notice to the bank, as found by the jury. They say in their motion that: "His testimony alone, especially under the circumstances surrounding the transaction, was insufficient to compel the court, as a matter of law, to find the fact in accordance with his evidence."

We appreciate fully the great difference in the effect of the evidence of a witness when he appears before a trial court, where he is seen and heard, where his demeanor while testifying may be observed, and the sum total of his credibility may be ascertained, and its effect when reduced to writing and submitted to an appellate court. Untruthful witnesses seldom escape discovery, especially where their evidence is submitted to a trained man for consideration. It nevertheless remains true that this personality, demeanor while testifying, and apparent carefulness and fairness on the stand is something which cannot be committed to paper, and which is not present before a reviewing court. Here we must judge of the witness' testimony by what he is reported to have said, without the aid of this personal element in his testimony. Here in the examination of the testimony of the witness, if he stands unimpeached, either by direct evidence of his lack of veracity, or of his bad moral character, or if unimpeached

by some equivocal character of his testimony or inherent improbability therein, or by some other legal method of impeachment, we must assume that his evidence is true. [484] To hold otherwise would bring us to absurd results. For example, can it be said that a finding by a trial court, or a verdict found by direction of the court against a plaintiff, where all of the evidence in the case is in his favor, and, where there is none against him, cannot be disturbed in this court because, possibly, the court did not believe the witnesses for the plaintiff, and consequently refused him the relief which he sought? Such cannot be the law. If there was a single fact in this record pointing to bad faith, or knowledge on the part of the bank, or if there were equivocation or inherent improbability in the testimony of the witness Flournoy, or if he had been impeached in some way, we might say that the court correctly found the issue as to the notice and good faith against the plaintiff bank, because he did not believe the witness Flournoy, the one witness who testified on the subject. There being no such infirmities in the testimony, there is no foundation upon which to base a finding of knowledge or bad faith on the part of the bank.

Counsel in the motion suggest that the court in its holding has departed from the established doctrine in this jurisdiction that a verdict of a jury or the finding of the trial court will not be disturbed in this court if it is supported by any substantial evidence. This has been the established doctrine of this court ever since the case of *Candelaria v. Miera*, 13 N. M. 360, 84 Pac. 1020, and we do not desire to depart from or modify the doctrine there stated. But, as we have pointed out in this case, there is no substantial evidence, and no legitimate inferences can be drawn from any of the evidence, to support the finding of the court and the jury under his direction that the bank had notice of the infirmities in this paper or took it in bad faith.

For the reasons stated, the motion for rehearing will be denied; and it is so ordered.

Roberts, C. J., and Hanna, J., concur.

NOTE.

Construction of Extension of or Agreement to Extend Time of Payment of Note.

Right to Extension:

In General, 158.

With Respect to Time of Maturity of Note, 161.

Number of Extensions, 162.

Effect on Original Terms of Note, 164.

Period of Extension, 167.

Effect on Rights of Indorser or Surety, 168.

Miscellaneous, 169.

Right to Extension.

IN GENERAL.

In construing an agreement providing that the parties to a note agree to any extensions of the time of payment of the note, the courts have generally held that such a provision does not authorize the maker of the note to extend arbitrarily the time of its payment without the consent of the holder or payee, and vice versa, but merely grants an option to extend the time of payment. *Uniontown Bank v. Mackey*, 140 U. S. 220, 11 S. Ct. 844, 35 U. S. (L. ed.) 485; *Anniston Loan, etc. Co. v. Stickney*, 108 Ala. 146, 19 So. 63, 31 L.R.A. 264; *Navajo County Bank v. Dolson*, 163 Cal. 485, 126 Pac. 153, 41 L.R.A. (N.S.) 787; *Longmont Nat. Bank v. Loukonen*, 53 Colo. 489, Ann. Cas. 1914B 208, 127 Pac. 947; *Oyler v. McMurray*, 7 Ind. App. 645, 34 N. E. 1004; *City Nat. Bank v. Goodloe-McClelland Commission Co.* 93 Mo. App. 123; *Missouri-Lincoln Trust Co. v. Long*, 31 Okla. 1, 120 Pac. 291; *DeGroat v. Focht*, 37 Okla. 267, 131 Pac. 172; *National Bank of Commerce v. Kenney*, 98 Tex. 293, 83 S. W. 368, 101 Tex. 1, 94 S. W. 328, reversing 35 Tex. Civ. 434, 80 S. W. 555. And see the reported case.

In *Longmont Nat. Bank v. Loukonen* 53 Colo. 489, Ann. Cas. 1914B 208, 127 Pac. 947, the promissory note in controversy contained a provision that "the makers and indorsers hereof hereby severally . . . agree to any extensions of time of payment and partial payments before, at or after maturity." The court held that this provision did not mean that the holder could arbitrarily extend the time of payment of the note as he might see fit, over objection by the maker, nor could the latter make an extension without the consent of the holder, saying: "The sole purpose of the stipulation is for the protection of the holder by continuing the liability of both maker and indorser in case of extension."

In *National Bank of Commerce v. Kenney*, 98 Tex. 293, 83 S. W. 368, 101 Tex. 1, 94 S. W. 328, reversing 35 Tex. Civ. 434, 80 S. W. 555, the note under consideration contained the following provision: "The makers and indorsers hereof hereby . . . agree to all extensions and partial payments before or after maturity without prejudice to holder." The court said: "If as is argued the effect of the stipulation is to give the right to the maker without the consent of the holder, or to the holder without the consent of the maker, to appoint another day of payment and thereby extend the time, it may be, that it would render the instrument not negotiable. But we do not think it capable of that construction. It does not say that either the holder or the maker may extend

the note. It merely makes a provision in case the time of payment may be extended. How extended? It seems to us the extension meant is that which takes place when the debtor and creditor make an agreement upon a valuable consideration for the payment of the debt on some day subsequent to that previously stipulated. The obvious purpose of the provision taken as a whole was merely to relieve the holder of the paper from the burdens made necessary by the rigid requirements of the mercantile law in order to secure the continued liability of the indorsers and sureties upon the paper. Therefore what was meant by the stipulation as to the extension of time was simply that in case the holder and the maker should agree upon an extension, the sureties and indorsers should not be discharged."

In *Pomeroy First Nat. Bank v. Buttery*, 17 N. D. 326, 17 Ann. Cas. 52, 116 N. W. 341, 16 L.R.A. (N.S.) 878, the note in controversy contained a provision that "the makers and indorsers herein . . . consent that the time of payment may be extended without notice." The court said: "We are of the opinion that this provision does not extend the time of payment indefinitely or render it uncertain. The time of payment is already fixed. It is strenuously argued that the use of the word 'makers' in the waiver admits of an extension being made at any time on the part of the holder, by a mere secret mental process, unknown to any other party. This may be true as a psychological fact, but we do not deem it so as a matter of practice in commerce and banking. To us it is clear that it has the same effect as though the note read 'on the 1st day of October, 1903, or thereafter on demand,' in which case there would be no question of its negotiability. Holders of notes do not by a secret mental process make an extension of the time of payment, but such extension, if made at all, is made by an agreement between the principal debtor and the holder of the paper, either with or without the consent of the indorsers. This provision seems to us to have been inserted to protect the holder against any release of indorsers or others, by an extension without their assent, and the word 'makers' is evidently included to prevent any misunderstanding or misconstruction of the contract or failure to distinguish between makers, indorsers, sureties, and any other parties who might be or become liable thereon under certain contingencies as makers. . . . This phrase does not express an agreement to extend time, but leaves the matter of extension optional with the holder, and not obligatory upon him, and the note on its face fixes the time when it becomes due." To the same effect see *Missouri-Lincoln Trust Co. v. Long*, 31 Okla. 1, 120 Pac. 291, and *De Groat v.*

Focht, 37 Okla. 267, 131 Pac. 172, wherein the foregoing opinion is quoted with approval as decisive of the questions therein involved.

In *Uniontown Bank v. Mackey*, 140 U. S. 220, 11 S. Ct. 844, 35 U. S. (L. ed.) 485, it appeared that two promissory notes were made and signed by a corporation and an individual, one as principal and the other as surety, and were indorsed by the defendant for the accommodation of the principal. The company desiring to renew the notes procured the defendant to sign and deliver to the holder of the note a written agreement, whereby he consented "that the payment thereof may be extended until he gives written notice to the contrary." The court held that the agreement evidently contemplated and authorized only an extension of time which should neither discharge nor increase the liability of any party to the note. It looked to an extension consented to by both the makers of the note and leaving them both liable to pay it at the end of the extended time; and not to an extension of time by agreement between the holder and the principal maker only, which would discharge the second maker, who was only a surety, and prevent the indorser, on paying the amount of the note, from having recourse to him, as well as to the principal.

In *Oyler v. McMurray*, 7 Ind. App. 645, 34 N. E. 1004, the court said: "The stipulation in this note is in these words: 'The drawers and indorsers severally waive presentment for payment, protest and notice of protest, and nonpayment of this note, and all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders to them or either of them.' This language evidently means that 'the holder or holders of this note may, before or after January 1, 1888, extend the time of its payment so as to make it payable at a later date, and the drawers and indorsers severally waive . . . all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders to them or either of them.' . . . The holder was not bound, by the stipulation, to extend the time of payment. The material and controlling fact is that the holder had the option, at any time before, as well as after, the time of payment stated in the note, to extend to the drawers and indorsers, or either of them, the time of payment."

In *City Nat. Bank v. Goodloe-McClelland Commission Co.* 93 Mo. App. 123, it was held that a provision in a note that "the makers and indorsers agree to all extensions and partial payments before or after maturity without prejudice to the holder," amounted to no more than an agreement that in the event of an extension of time the holder should not be prejudiced thereby. It was held that un-

der this agreement the holder was given the option to extend the time of payment without thereby creating a right to defend on that ground, and that, in the exercise of that option, the holder would still retain the right to fix a time when the note should become due.

In *Navajo County Bank v. Dolson*, 163 Cal. 485, 126 Pac. 153, 41 L.R.A.(N.S.) 787, the note under consideration provided as follows: "We agree that after maturity this note may be extended from time to time by any one or more of us without the knowledge or consent of any of the others of us, and after such extension the liability of all parties shall remain as if no such extension had been made." The court said: "There is nothing uncertain in this note about the date of maturity. The provision refers only to something that may be done by the maker, if the holder agrees thereto, 'after maturity.' Clearly the provision referred to is in no way binding upon the holder of the note. No one can reasonably claim that the effect thereof is to give the maker the right to extend the time of payment, without the consent of the holder. The note was dated April 23, 1908, and by its terms, unaffected by anything in the provision referred to, was to mature 'nine months after date,' at which time the holder, so far as anything contained therein is concerned, had the absolute right to insist on payment. There was no provision under which the time so specified could be changed, or the right of the holder to insist on payment at such time be held to be affected. Where the time is thus definitely and irrevocably fixed at which the note shall mature and the holder shall be at liberty to compel payment, we are unable to see how a provision looking to a possible agreement between the parties, after maturity, for an extension, renders the executed note at all indefinite or uncertain as to the time when it is payable."

In *Sawyers v. Campbell*, 107 Ia. 397, 78 N. W. 56, it appeared that across the face of the note in suit had been written the following: "Upon the written request of all the makers of this note, made on or before" the date of its maturity, "the payee agrees that the time of payment shall be extended six months from the maturity thereof, or note renewed for that time." The court said: "It will be observed that the provision, by its terms, was not to be effective unless 'upon the written request of all the makers' of the note, made on or before June 15, 1896. It is said that the word 'makers' did not include sureties, but the principals alone, and that the provision therefore gave to the principals the right to an extension or renewal of the note without the consent of the sureties. The argument in support of the claim that the

word 'makers' was not designed to include sureties is ingenious, but not convincing. Notes may be made by both principals and sureties, as was done in this case, and the fair and reasonable conclusion to be drawn from the words 'all the makers of this note' is that they were intended to refer to all persons who had signed the note. If the meaning could be regarded as ambiguous, undisputed evidence shows that the words were intended to include the sureties. . . . The provision in question did not purport to affect the terms of the note, nor the liabilities of its signers. It was in the nature of an offer to extend the time for the payment of the note, or to renew it, on condition, however, that all the signers should unite in a written request for the extension or renewal. Until that should be done, the provision was, as to the liability of the signers, wholly without effect, and it could not have affected them in any manner without a request in writing by them. The right of the sureties to enforce payment by the principals as the maturity of the note remained intact."

In *Anniston Loan etc. Co. v. Stickney*, 108 Ala. 146, 19 So. 63, 31 L.R.A. 264, the note in suit contained the following indorsement: "It is hereby agreed that this indebtedness is to be extended for six months from the maturity of this note, if so desired by the makers and indorsers, upon their giving a new note similar to this." It was held that it was not payment and satisfaction of the obligation resting on the makers and indorsers which the indorsement contemplated, or which, on any just construction, could be deduced from its words. But that all that was contemplated was that the maker and indorser should have the option or privilege of extending the debt, not of paying it, by giving a new note similar to the existing note. The court said: "It was not payment of the debt, the indorsement contemplates—it was but an extension of the day or time of payment. Not a vague, indefinite extension, the time of which rested in the future negotiation or agreement of the parties, but an extension the duration of which is precisely fixed and declared. If there was not renewal, the note was payable at its maturity; if there was renewal, the time of payment was fixed and certain. Renewal, or the failure to renew, was an event which must inevitably happen. There is no force in the suggestion, that whoever might acquire the note after maturity, could not know or ascertain without inquiry, whether there had or not been a renewal. It is not contemplated that negotiable paper shall pass current after maturity, and whoever might take the note after maturity, would take it at his own peril. But whoever acquires it before maturity, would read on its face in connection with

the indorsement, that there was no contingency about its payment; no uncertain event, which might or might not happen, on which duty and obligation to pay depended. That the renewal, or failure to renew, an event which must happen at the day of payment fixed by the note, and would determine no more, than whether the day of payment should be extended to a future day and time certain. . . . The time of payment is precise—the money is demandable six months after the date, or twelve months thereafter. By the terms of the note and indorsement, which are inseparable, it was to be the one or the other; and the means of ascertaining or determining whether it was to mature at the one day or the other were definitely and conclusively provided; no holder could ever be involved in doubt or uncertainty as to the happening of any contingency on which payment depended, or as to the time of payment."

But where there are no parties to the note whose consent is required before the time of payment may be extended, then a clause in the note waiving such consent as to the parties signing the note is without effect. *Smith v. Nelson Land, etc. Co.* 212 Fed. 56, 128 C. C. A. 512; *Iowa State Sav. Bank v. Wignall* (Okla.) 157 Pac. 725. Thus, in the case first cited, it appeared that the note in suit provided that "sureties consent that time of payment may be extended without notice thereof." The court said: "The time of payment of any promissory note may be extended, and no one has ever thought of urging that fact to destroy its negotiability. So the contention must come to this: That it is the extension without the consent of a party to the note which would make the time of payment as to him uncertain. If, however, there are no parties to the notes whose consent is not required before the time of payment may be extended, then the clause waiving such consent as to the parties not signing the notes cannot affect the time of payment, and we are of the opinion that the present is such a case. In other words, we are of the opinion that the language hereinbefore quoted could not, in law, have applied to any party signing the note, and that therefore it did not operate in any way to render the time of payment of the note uncertain."

In *Iowa State Sav. Bank v. Wignall* (Okla.) 157 Pac. 725, the note in suit provided as follows: "We, the makers, sureties, indorsers, guarantors of this note, hereby severally waive presentment for payment, notice of nonpayment, protest and notice of protest and diligence of bringing suit against any party thereto and consent that time of payment may be extended without notice thereof to any of the sureties of this note." The court held that the obvious purpose of

the provision concerning waiver and consent was to relieve the holder of the notes from the burden made necessary by the rigid requirements of the law merchant, in order to secure the continued liability of the indorsers, sureties, and guarantors. It also held that all of the makers being principals, primarily obligated to the payee or indorsee of the note as well as inter sese, and there being no sureties, guarantors, or indorsers, the provisions with respect to waiver and consent were intended for, and so could be construed to include, those whose relations entitled them to the rights of those secondarily, as distinguishable from those primarily, liable. And there being among the obligors none who were secondarily liable, the provisions with reference to waiver and consent were without field for operation, and without effect on the negotiability of the note.

However, in *Union Stock Yards Nat. Bank v. Bolan*, 14 Idaho 87, 93 Pac. 508, 125 Am. St. Rep. 146, the note in suit provided as follows: "The sureties, guarantors, and indorsers of this note severally waive presentation for payment, protest and notice of protest. No extension of time of payment with or without our knowledge by the receipt of interest or otherwise shall release us or either of us from the obligation of payment." It was held that this was an express contract to the effect that the time of payment might be extended to any one or all of the sureties, guarantors, indorsers, or makers of the note without notice to all or any one of them.

In *Houston v. Newsome*, 82 Tex. 75, 17 S. W. 603, the note sued on provided as follows: "At the maturity of this note, as above specified, I shall have the privilege of extending the time for its payment for the term of an additional two years, the interest to be due and payable as above specified, by giving the holder hereof written notice of my intention." The court held that the language of the agreement would not permit any other construction which would be fair and reasonable, than that the parties intended that the notice should be given at the time stated, and that this notice was vital to the existence of the agreement. The court held that it was left entirely at the option of the maker whether, at the maturity of the note, he would demand the extension or not, but that notice given by the filing of a petition in injunction to restrain a sale under a deed of trust given to secure the note, months after the maturity of the obligation and after failure to pay even the interest due, was not a sufficient compliance with his agreement to give the notice which he undertook to give.

Likewise in *Davis v. Weaver* (Tex.) 27 S. W. 902, wherein it appeared that the time of payment of a note was "one year after date, with privilege of one or two years

Ann. Cas. 1918B.—11.

longer," it was held that under the terms of the note, the money became due and payable at the termination of one year after the date thereof; and that if the makers desired to take advantage of the stipulation in the note for an extension of "one or two years longer," it devolved on them to notify the holders of that fact on or before the end of one year after its date.

The negotiability of a note containing a provision for an extension of the time of payment, is discussed in the notes to *Pomeroy First Nat. Bank v. Buttery*, 17 Ann. Cas. 52, and *Longmont Nat. Bank v. Loukonen*, Ann. Cas. 1914B 208.

WITH RESPECT TO TIME OF MATURITY OF NOTE.

In *Coffin v. Spencer*, 39 Fed. 262, the stipulation for renewal or extension of time of payment of the note in controversy was as follows: "And the payee or holder of this note may renew or extend the time of payment of the same from time to time, as often as required, without notice, and without prejudice to the rights of such payee or holder to enforce payment against the makers, sureties, and indorsers, and each of them, parties hereto, at any time, *when the same may be due and payable*." The court held that by the transposition of the last clause two interpretations, quite different in effect, were possible, as follows: (1) "And the payee or holder of this note, *when the same may be due and payable*, may renew or extend the time of payment 'from time to time,' etc.; or (2) "And the payee or holder of this note may renew or extend the time of payment, etc. without prejudice to the rights of such payee or holder, *when the same is due and payable*, to enforce judgment against the makers, sureties, and indorsers, and each of them, parties hereto." The latter reading the court held to be the true one, meaning that at any time before or after the maturity of the note by its terms or by the terms of any agreement for renewal or extension, the holder, whether the payee or any assignee, might by agreement with the maker, or with an indorser or other party liable on the paper, renew or extend the date of payment, "from time to time," that was to say, indefinitely, without any prejudice ultimately to his remedies against any of the parties. The court also held that every successive taker of the paper was bound to take notice of the stipulation, and, instead of looking only to the face of the instrument for the time of its maturity, as in the case of commercial paper he must, was put on inquiry whether or not any agreement for a renewal or extension of time had been made by his proposed assignor or by any previous holder.

In *Whitehouse Bank v. White*, 136 Tenn. 634, 191 S. W. 332, the note in suit contained a provision on the part of the obligors as follows: "We authorize the holder thereof to extend the payment of the same, or any part thereof, without impairing our joint and several liabilities, and the sureties agree to waive notice of any extension of time." The court said: "We construe the clause in the note, quoted above, to relate and give assent to extensions that may be granted at or after maturity, the date of which is set forth with certainty in the note; or to an extension which, if made prior to maturity, has operative effect as from the time the note falls due according to tenor. . . . Principle: As already observed, the note as executed is stipulated to mature on a date fixed and certain. The provision for extension does not put it in the power of the holder to extend the note without the concurrence of the maker, and the latter may not force an extension on the holder. When they concur, a new date of maturity is fixed, and one no less certain than the original date. The sureties merely assent in advance thereto and bind themselves to waive the right of defense that might otherwise accrue; or to be bound by the supplemental contract which fixes the later maturity date. There is no agreement embodied in the note operating to bind the holder to extend. There is incorporated no promise to do anything that would, of its force, affect the unconditional promise to pay on the date named in instrument. There is nothing in the note that looks towards an indefinite extension of time of payment. . . . Policy: Such a provision for extension not infrequently operates to the advantage of a surety in permitting the holder, at his option, safely to give grace to the maker, on the latter's application; when otherwise, pressure for payment might come inconveniently upon both maker and surety."

In *Rossville State Bank v. Heslet*, 84 Kan. 315, 113 Pac. 1052, 33 L.R.A. (N.S.) 738, the note in suit provided that "each signer and indorser makes the other an agent to extend the time of this note." It was held that interpreting "signer" to mean maker, and the agency of each maker and indorser to act for the other as equivalent to a consent to the action of either to an agreement for extension made by another, the precise inquiry was whether the authority to extend there might be exercised only after maturity. The court said: "If so, the time is fixed for payment, for the promise, apart from this clause, is to pay on January 1, 1909, and an authority to extend afterward would only amount to a waiver of the right to be relieved from liability for an extension without such authority. If, however, the clause is to be construed as giving the parties named the right

to extend the time before maturity, its effect would be precisely the same as though the words 'on or before' had been inserted. . . . Counsel for the bank say: 'At most the clause in question can only be construed to give authority to the parties named to "extend" the time of payment at or after maturity by an agreement to be then made. That is what the word "extend" means.' To extend is to stretch, or stretch out. (Webster's New Inter. Dict.) As here used, it means that the time of payment may be lengthened to a date beyond that stated in the instrument. Extension of time of payment rests in contract, and the contract may be made before as well as after maturity, unless some restriction is expressed or is to be implied from the terms used. Thus the parties to a lease for one year may agree before the end of the term that it shall be extended for another year, and this may be done ordinarily in any contract or transaction involving a fixed period of time. The general authority given in this instrument is to extend the time for payment, each signer and indorser being made an agent of every other to do this. It is not stated that this shall be done only at maturity or after maturity, and it is not perceived why such a restriction should be implied, and precedent is cited for such a rule. Indeed, it would seem that extensions in such cases would ordinarily be made before the note falls due, in order to prevent the impairment of credit, and to avoid inconveniences that might arise from disappointed expectations of receiving payment. . . . If, however, extensions could be made only after maturity, the objection that it might never fall due would have no foundation, for it would necessarily fall due before an extension could be made. The vice of the stipulation in question is that the day of payment cannot be determined. The signer (maker) or any indorser may, at any time he sees fit to do so, as agent one for another, extend the time for payment by agreement with the holder. The payee, in transferring the note, may become an indorser, and therefore an agent for the maker, and his indorsee may in turn become an indorser, with like power, so that the time of maturity must be indefinite, and not determinable from the instrument."

NUMBER OF EXTENSIONS.

In several cases it has been held that a provision waiving all defenses on the ground of "any extension" of the time of payment of a note should be construed as a consent to at least one extension of the time of payment. *Hodge v. Farmers' Bank*, 7 Ind. App. 94, 34 N. E. 123; *Oyler v. McMurray*, 7 Ind. App. 645, 34 N. E. 1004; *Matchett v. Anderson Foundry, etc. Works*, 29 Ind. App. 207, 64

N. E. 229, 94 Am. St. Rep. 272. Thus in the case first cited the note in suit provided as follows: "The drawers and indorsers severally waive . . . all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders to them, or either of them." The court held that the terms of the note must necessarily be construed to be a consent to at least one extension of time. Of a like provision in the note in suit in *Matchett v. Anderson Foundry, etc. Works*, 29 Ind. App. 207, 64 N. E. 229, the court said: "The indefinite extension of the time of payment, or more than one extension, and that for a definite time, is not justified by the language employed. Likewise, in *Oyler v. McMurray*, 7 Ind. App. 645, 34 N. E. 1004, the court said: "The term, 'any extension,' is used in the singular sense. It was not intended for an indefinite number of extensions of the time of payment. When the appellee, at the end of one year from the date of the note, extended the time of payment until January 1, 1889, such extension was in accordance with the agreement of the parties, as we have before stated, and all the parties, including appellant Oyler, were bound by it, and he was not thereby discharged. The agreement, however, contained in the stipulation in the note was met and satisfied by that extension. The other extensions, or any of them, if made as alleged, had the effect of discharging him."

It has also been held that the use of the word "any" before "extension," in such a provision, meant that one or more extensions of the time of payment were contemplated by the parties to the note. *Winnabago County State Bank v. Hustel*, 119 Ia. 115, 93 N. W. 70; *Bonart v. Rabito*, 141 La. 970, 76 So. 166 (set out at length *infra* in the subdivision *Effect on Rights of Indorser or Surety*); *Pioneer Constr. Co. v. Oklahoma City First State Bank* (Okla.) 158 Pac. 894. Thus, in the case first cited, the court said, with respect to a clause in the note there in suit which clause was identical with those in the foregoing cases: "There is nothing in the contention that but one extension of time was intended. The use of 'any' before 'extension' indicates that any one of an indefinite number was intended. . . . If so, then more than one extension might be allowed, and the defenses to each were waived. In the connection found the word is analogous to 'every.'"

In *Pioneer Constr. Co. v. Oklahoma City First State Bank* (Okla.) 158 Pac. 894, the note therein sued on contained the following clause: "The indorsers, guarantors, and assignors severally waive presentment for payment, protest, and notice of protest for non-payment of this note, and all defense on the ground of any extension of time of its pay-

ment that may be given by the holder or holders, them or either of them, or to the makers thereof." The court said: "Under this clause the bank made several extensions of the time of payment without the consent of N. S. Sherman, who claimed to have signed the note as surety, and the sole question presented for our consideration arises upon that issue. It is contended that the words 'any extension,' mean only one extension. In this we cannot agree. The use of the word 'any' before 'extension' indicates that one or more extensions of the time of payment was contemplated by the parties. The word 'any' was defined in *re McNeal*, 35 Okla. 17, 128 Pac. 285, wherein this court in doing so adopted the definition given by Webster's New International Dictionary, 'one indifferently out of a number,' and, as explained by that authority, 'as applied to individuals, "any" was formerly (and in dialect English is still) used pronominally for one of two, but in educated usage any and any one are now applied only to one of three or more; either and neither being used in referring to one of two.' Applying this definition to the facts in the case at bar, we find that the word 'any' preceding 'extension' would mean that N. S. Sherman waived all defenses to the note on the grounds of any number of extensions of the time of payment. . . . We therefore conclude that more than one extension might be allowed, and the defense to each extension was by the terms of the note waived."

In *Rochester Sav. Bank v. Chick*, 64 N. H. 410, 13 Atl. 872, the note therein sued on stipulated that "all the signers agree to be holden should the time of payment be extended." The court said: "That agreement could not have been intended for an indefinite extension of the time of payment, nor for a series of extensions from time to time, indefinitely, so that the creditors and principal makers could, at their pleasure, always keep the surety liable, and forever prevent his enforcing payment against the principal, or using the statute of limitations as a defense. Such a construction of the agreement in the note with such consequences cannot be adopted without a clearly expressed intention to that effect in the agreement itself. The time of payment fixed upon in the note is six months, and the agreement, 'to be holden should the time of payment be extended,' naturally and by the ordinary force of language, and taken in connection with the first part of the note, means a reasonable extension for a definite time, and not a series of extensions indefinite in number and endless in repetition. When the plaintiffs at the end of six months from the date of the note extended the time of payment for a definite period of time, the extension was in accordance with the

agreement of all parties, all parties were bound by it, and the defendant Clark was not thereby discharged. But the agreement in the note was met and satisfied by such an extension. Any further extension upon a valid consideration and binding upon the plaintiffs, made without the consent of the surety, had the effect of discharging him."

In *Smith v. Van Blarcom*, 45 Mich. 371, 8 N. W. 90, the note in suit contained the following clause: "The makers and indorsers of this note expressly agree that the payee, or his assigns, may extend the time of payment thereof indefinitely, as he or they may see fit." It was held that the note was not payable absolutely at the date of maturity specified therein, or at any other one time, but that the time of payment could be postponed not merely once but as often as either the payee or his assigns might think desirable; and that there was nothing on the face of the note whereby anyone could tell either directly or by reference to any particular court, at what period the paper would become absolutely payable.

Effect on Original Terms of Note.

The principal question arising with respect to the effect of an extension or agreement for the extension of the time of payment of a note on the original terms of the note, is the rate of interest to be borne by the principal at the expiration of the extension period where a different rate is provided for that period. It is generally held that the rate specified in the agreement for the extension of the time of payment controls merely during the existence of that agreement and that at the end of that period the principal bears interest at the rate provided for in the note. Thus in *Mutual Ben. L. Ins. Co. v. Daniels*, 67 Neb. 91, 93 N. W. 134, the note in suit bore interest from its date at six per cent, but there was an agreement in the note that the principal sum should bear interest after maturity of the note at ten per cent per annum. It appeared that an extension agreement was entered into between the makers and the holder of the note, in which the makers agreed to pay the principal sum on a date specified therein "and also the interest thereon at the rate of six per cent per annum, . . . during said period of extension." The court said: "The agreement was for 'interest thereon [the principal sum] at the rate of six per cent per annum in semiannual payments during said term of extension.' The intention of the parties to this contract is plain, namely, that during the period of extension, granted under agreement, the provision in the antecedent agreement for ten per cent upon principal after default should be

inoperative; and it must be assumed that it was intended that after default occurring upon the expiration of the extension period, the principal should draw interest at ten per cent. In other words, the extension agreement had for its sole purpose the postponement of the date of maturity of the original contract. . . . It does not appear from the agreement under consideration that the parties understood or intended that the rate of six per cent during the extension should extend beyond that period, when construed in connection with the subsisting contract when the extension was granted."

In *Mueller v. McGregor*, 28 Ohio St. 265, the following facts appeared: A mortgagor sold real estate to certain purchasers, they assuming to pay certain notes, made by the mortgagor to the mortgagee and secured by the mortgage, all of which were due, and amounted at that date with unpaid interest, to \$11,340.05. In consideration of an extension of time by the mortgagee for one year, the purchasers agreed in writing with the mortgagee and the mortgagor, by a tripartite agreement, that they would pay interest on the amount due (\$11,340.05) for that year at ten per cent, semiannually, and gave their two notes to the mortgagee for the amount of that interest, the notes being afterwards paid. It was expressly agreed that, on payment of the interest notes for that year, there would be due *on the mortgage notes*, at the end of the extended time, the said sum of \$11,340.05, "and no more." The question was, did the debt, after the expiration of the extension, bear six or ten per cent interest? In construing the tripartite agreement, it was held that, though it was a separate instrument from the notes and mortgage, it was, according to its manifest meaning, to be limited to the extended time of one year and no longer; and that, after the expiration of that year, the only stipulation as to interest was that contained in the notes themselves, and that the agreement did not change the obligation of the notes after that time from six to ten per cent. The court said: "It is claimed by defendant in error that the tripartite agreement is substantially a contract for forbearance generally. On the other hand, plaintiffs in error urge that it is a limited forbearance, for one year only. On this point our view coincides with plaintiffs in error. To give the contract, on this question, a broader meaning, would be destructive of its plainly expressed purpose. It secured forbearance on the part of Dunlop to bring suit on his claim for one year, and provided for the payment of ten per cent interest for one year on a sum of money then agreed by the parties to be due, which sum was not to be increased or diminished for one year. They,

the parties, could have extended the forbearance for a longer time at the same rate of interest, but, as they failed to do so, it is the province of the court to declare the contract as the parties made it. . . . We are of opinion the tripartite agreement under consideration was sufficient in form and substance to impart the quality of bearing interest at the rate of ten per cent to the sum of money named as due upon the promissory notes of Fortman for one year, and for no longer time."

In *North v. Walker*, 66 Mo. 453, it appeared that an agreement for the extension of the time of payment of a note bearing interest after maturity at ten per cent provided that the rate should be reduced to nine per cent during the period of extension. The court held that this agreement operated only as a temporary suspension of the rate specified in the note, and that when that time expired, the rate named in the body of the note furnished the true rule for computing the interest.

In *Sedgwick v. Sanborn*, 63 Kan. 884 mem. 65 Pac. 661, it appeared that a note bearing interest at the rate of ten per cent was extended by agreement for three years, and the interest reduced during that period to seven per cent. In an action for the amount thereof, brought after the expiration of the extension, it was held that the holder of the note was entitled to a judgment for interest at ten per cent; that the contract reduced the rate of interest from ten per cent to seven per cent for three years only.

In *Hibernia Sav. etc. Soc. v. Wackenreuder*, 111 Cal. 471, 44 Pac. 168, it appeared that the contract for a loan called for interest at the rate of eight per cent compounded monthly. The defendant applied for a renewal of the loan at six per cent, which the bank rejected, but stated that the loan would be "allowed to run at six per cent." The court said: "We think the only fair construction to be placed upon the bank's agreement, or proposition to reduce the interest to six per cent, is the one placed upon it by the trial court. Before this time the note was drawing interest at the rate of eight per cent, compounded monthly. The statement of the bank to the mortgagor only proposed to modify a single term of the note, and that was the annual rate of interest. No modification of the clause of the note pertaining to the compounding of the interest was mentioned in the bank's proposition, and we are bound to conclude that no modification as to that clause was contemplated, and that the original contract in that regard remained in statu quo."

In *Moffatt v. Blake*, 145 Fed. 40, 75 C. C. A. 263, the facts relating to the question of interest were as follows: The note called for interest at eight per cent per annum after ma-

turity. On March 27, 1902, which was after maturity, the interest to that time was paid and also part of the principal, and the parties entered into an arrangement evidenced by the following indorsement on the note: "Extended on or before October 1, 1902, at 6 per cent interest from March 27, 1902." The position of the holder of the note was that the reduced rate of interest was operative only between March 27, 1902, and October 1, 1902, and that after that date the interest was to be computed at the original rate. The circuit court of appeals overruling that contention concurred in the district judge's statement of the legal effect of the indorsement, viz.: "In effect, it took the place of a renewal note, due October 1, 1902, at six per cent interest. The extension was not at six per cent interest until October 1, 1902, but it was six per cent interest from March 27, 1902, and impliedly until paid, the presumption being, as in all such promissory contracts, that the debt would be paid at maturity, and if not paid the interest specified as a part of the extension agreement would continue until payment was made." The court further held that the case of *North v. Walker*, 66 Mo. 453 (set out supra) relied on by the holder of the note, was distinguishable in that by the terms of the extension agreement there under consideration the reduced rate of interest was to be operative only during the period of the extension.

In *Rowland v. Watson*, 4 Cal. App. 476, 88 Pac. 405, it appeared that at the time of the execution of a promissory note, drawing interest at seven per cent per annum from maturity, the maker and the payee entered into a written agreement to the effect that if the maker should desire an extension of time to pay the note, the payee would extend the time of payment for two months after the date of its maturity, and if the time of payment should be so extended, the maker should pay for that extension, "an additional bonus of \$50 per month for each month or fractional part of a month which said note shall be extended," together with interest on the principal sum and on the bonus at the rate of seven per cent per annum. The court said: "It seems to be conceded by all parties that said contract extended the time for payment of said note for at least two months and attached a penalty or charge of \$50 for each of said two months or fraction of months in addition to the regular seven per cent interest named in the note. But it is contended by appellant that a proper construction of said contract required the plaintiff to pay, in addition to the seven per cent interest, the sum of \$50 for each and every month that the note remained unpaid after it fell due according to its terms; and it seems to have been upon this theory that the payment of \$1,500 in

satisfaction of the note was compelled by him. We cannot agree with this contention. On reading the contract it will be noticed that there was no agreement on the part of Watson to extend the time of payment for any period in excess of two months after August 1, 1903. It must be understood, then, that the agreement related only to those two months, and it was for each of those two months, or for one of those months and a fraction of the other only that this \$50 monthly charge was contemplated by the parties. Immediately at the conclusion of said two months' period the defendant Watson, by the very terms of the agreement, was in a position to bring suit and enforce payment of the promissory note. The time during which he subsequently let the matter rest without beginning suit was voluntary on his part. It was not done in pursuance of the agreement and did not carry with it any right to collect any bonus of \$50 for each of the months subsequent to the two months mentioned. This, we think, is a fair construction of the contract, and is strictly in accord with the very letter of its terms."

In *Citizens' Nat. Bank v. Piollet*, 126 Pa. St. 194, 17 Atl. 603, 12 Am. St. Rep. 860, 4 L.R.A. 190, it appeared that the following words were written across the end of a note, and on the face of it in immediate proximity to the words of the note: "This note is given for advancements, and it is the understanding it will be renewed at maturity." The court said: "The statement that it is given for advancements does not affect the certainty of the note and it could easily be regarded as a mere memorandum, not changing the contract and therefore not material. But the remainder of the writing is an agreement that the note will be renewed at maturity. As the bank is the holder and discounted the note when it was given, it is undoubtedly affected by the terms of the memorandum, and must be considered as having agreed to renew the note at its maturity. This being so, the obligation of the note is not an absolute, unconditional contract to pay the money at maturity. It is a qualified obligation to pay, with a condition that, instead of paying, the holder may give another note in its place which the bank would be bound to accept instead of money. . . . It is manifest from the foregoing that the only inquiry necessary to determine the question of negotiability is the effect of the memorandum upon the terms of the note. As we have seen, it makes an important change in the note, in that, instead of the note being a distinct contract to pay a fixed sum of money at a day certain, the holder has agreed to accept, instead of payment in money, another note payable at another time which is not fixed. The obligation of the note, therefore, is uncertain, depending

on whether the maker chooses to pay it or give a new note in place of it. This uncertainty destroys its negotiability, and for that reason relieves the indorser."

In *Post v. Losey*, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677, it appeared that after the discharge in bankruptcy of the maker of a note, he and the payee without the consent or knowledge of the surety, entered into the following agreement, which they indorsed on the back of the note. "In consideration of the extension of time for three years from September 2d, 1878, and the reduction of the rate of interest from ten per cent to six per cent per annum, I hereby assume to pay promptly the interest at six per cent semiannually, and the principal of the within note on or before September 2d, 1881." The court said: "Here, Losey, the principal debtor, and the payee, not only agreed that the time of payment should be extended beyond the time as originally agreed upon and named in the note, but also agreed upon a rate of interest for the future different from that originally agreed upon and named in the note. Not only that, but they indorsed the agreement upon the note. The agreement thus indorsed upon the note operated as a modification and change of the original agreement. In other words, after the consummation of the latter agreement, indorsed upon the back of the note, Losey and the payee were no longer bound by the agreement as written upon the face of the note, but by that agreement as modified and changed by the subsequent agreement indorsed upon the back of the note. After that indorsement, their agreement was to be ascertained by an examination of the face of the note and the indorsement. The two writings are to be construed together. Together they constitute the contract between Losey and the payee. To hold otherwise, would be to hold that the latter agreement was and is of no validity whatever. The latter agreement, by its terms, is to pay the note as written, with a change in time and rate of interest. That there was a sufficient consideration for that agreement there can be no doubt. In consideration of the change of time and rate of interest, Losey exchanged a moral obligation only for a legal liability. . . . The contract between Losey and the payee, as evidenced by the face of the note and the indorsement upon the back of it, is not the contract between them as it existed at time Emma J. executed the mortgage, and to secure the performance of which on the part of Losey she mortgaged her separate property. Losey and the payee changed that contract without her consent or knowledge by agreeing upon a different rate of interest and a different time for payment. The contract to secure which she mortgaged her property can be enforced by no one, and for

the contract as changed neither she nor her property is liable. To hold her property liable upon the original contract as evidenced by the note, would be to hold it liable for the default in payment by Losey, three years before he could be in default under the contract as changed; and to hold her property liable upon the changed contract, would be to hold it liable for a contract different in time of payment and rate of interest from that which entered into and formed a part of the contract as evidenced by the mortgage. To hold her property liable upon the original contract, would be to measure the liability of the principal by one standard, and the liability of the surety by another and different standard. But it is said, that because Losey had been discharged in bankruptcy from all his debts, he became a stranger to the note, and that, therefore, the change in the contract agreed to by him cannot affect Emma J. or the mortgage given by her. . . . The only difference was, that by reason of his discharge, he was no longer legally liable upon the contract. He might, however, waive the immunity afforded by his discharge, and pay the debt according to the terms of the note. To secure the performance of the contract according to the terms of the note, and in no other way, the separate property of Emma J. was mortgaged. In order that Losey might again become liable for the payment of the principal sum, the payee consented that the contract might be changed as to the time of payment and the rate of interest. The contract, as evidenced by the face of the note and the indorsement upon the back of it, thus became the contract between Losey and the payee. By the change, the contract as originally executed ceased to exist, both as a legal and moral obligation on the part of Losey. And this is so, whether the new promise be regarded as a revival of the original contract, so far as consistent with it, or whether it be regarded as an entirely new contract." To the same effect see *Rosenthal v. Rambo*, 28 Ind. App. 265, 62 N. E. 637.

Where the parties to a promissory note agreed that the time for the payment of the note should be extended for two years, the effect of this agreement was to waive any past default in the payment of the principal, and to postpone the maturity of the note until the date to which the extension had been made. *Bell v. San Francisco Sav. Union*, 153 Cal. 64, 94 Pac. 225.

Period of Extension.

In *Minor v. Carpenter*, 28 Cal. App. 368, 152 Pac. 737, the question was whether a certain agreement in writing between the parties subsequent to the execution of the prom-

issory notes in suit and to the time they fell due, amounted to an extension of the time of payment of the notes beyond the date of the commencement of that action, so as to support the claim that the action was prematurely brought. The court said: "We have read this agreement carefully to determine whether it will bear this construction, but there is not a word or sentence in it which, either expressly or by fair-intendment, refers to any extension in the time of payment of the notes in question; and while it is true that said agreement purports to provide a way in which the defendant may be able to pay his full indebtedness to the plaintiff, amounting to a sum greatly in excess of the sum due on these notes, still the plaintiff nowhere therein stipulates to await the out-working of the plan provided for in such agreement before suing upon these over-due notes. A particular vice in the argument of the appellant as to the scope and effect of this agreement is that no time is fixed to which the payment of these notes is to be extended. The authorities seem to hold with considerable uniformity that extensions in the time of payment of promissory notes must be for a definite time in order to be valid; and such appears to be the rule in this state."

In *Glidden v. Henry*, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316, it appeared that the note under consideration contained a provision that "the payee, or his assigns, may extend the time of payment thereof from time to time indefinitely, as he or they may see fit." The court said: "From an inspection of the note, it is impossible to tell when it may mature, because it is impossible to know what extension may have been, or may hereafter be, agreed upon. No definite time is fixed, nor is the maturity of the note dependent upon an event that must inevitably happen. The condition is not that something may happen, or be done, that will mature the note before the time named, thus leaving that time as fixed and certain, if the thing do not happen, or be not done; but the condition is that the time named may be displaced by another, uncertain and indefinite time, as the parties may agree." In passing on a similar provision in the note in controversy in *Woodbury v. Roberts*, 59 Ia. 348, 13 N. W. 312, 44 Am. Rep. 685, the court said: "By the terms of the condition of the note in suit it would never fall due, but could be indefinitely extended at the will of the maker and indorser, who, it will be observed, is the same party. When the instrument was executed the time of its maturity was contingent upon the option of the maker of the note. It was impossible to determine when it would become due by the assent of the maker. The time of payment was uncertain and was not capable of being

made certain: Nothing happened after its execution to remove this uncertainty. Notes, which by their terms are payable on or before a fixed time or a specified event, are, it is true, uncertain as to the time at which they are payable. But there is no uncertainty as to the time when they become absolutely due. Paper of this character is regarded by the courts as negotiable. But the note before us may never fall due, for payment may be extended indefinitely."

In *Lanum v. Harrington*, 267 Ill. 57, 107 N. E. 826, it was held that an agreement that the time of payment of certain promissory notes should be extended until the makers were able to pay, or until they were able to make it out of their stock and crops, or until the death of the payee when the same could be paid out of the share of the wife, one of the makers, in the estate of the payee in case he should leave any estate and she should be entitled to any share therein, did not constitute a valid and binding extension of the time of payment. It was also held that an indefinite promise that the payee would not crowd the makers for the principal and interest, did not constitute a valid extension of time, being at most but a promise to extend the time of payment without defining the period to which it would be extended.

An agreement for the extension of a note for three years from the date when it matured, signed by the makers of the note, but not by the then holder or the subsequent holder of the note, is not complete and being invalid does not have any effect. *Hass v. Lobstein*, 108 Ill. App. 217. But when accepted and acted on by the holder, it becomes valid. *Abraham Lincoln Building, etc. Assoc. v. Zuelk*, 124 Ill. App. 109.

In *Workman v. Ray* (Tex.) 180 S. W. 291, it appeared that the holder of certain notes and one who had assumed the payment thereof as part consideration for the conveyance of certain land agreed to "extend the notes a reasonable length of time" and to give a reasonable length of time to sell the land if the debtor would pay all interest up to a certain specified date and the debtor "agreed not to have said notes paid off and taken up." It was held that this agreement was not binding, being an extension for an indefinite time, if the agreement was that the interest was to be paid at the expiration of a reasonable length of time.

The words "this note to be extended if desired by makers," as indorsed on a note, have been held to contain no definite agreement and to be without significance. *Krouskop v. Shontz*, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817.

An indefinite extension of the time of the payment of a note does not render it void as between the parties thereto, though it may be invalid as far as it affects the rights of

third persons. *Drake v. Pueblo Nat. Bank*, 44 Colo. 49, 96 Pac. 999.

Where it appeared that the holder of a note due December first agreed to extend the time of payment until the fall of the year, it was held that this extension was sufficiently definite as an extension to at least the first of September following. *Robson v. Brown* (Tex.) 57 S. W. 83, rehearing denied 57 S. W. 686.

In *Maupin v. McCormick*, 2 Bush (Ky.) 206, it appeared that as part of the consideration for the purchase of certain lands, the purchaser executed a note containing the following covenant: "I am to have the privilege of extending the time of payment as long as I choose by paying interest thereon annually at the rate of six per cent." The court said: "It is a stipulation that Maupin shall, on certain conditions, run the notes at his own option. Of course this could extend no longer than Maupin himself shall be capable of exercising his own volition; therefore, when by disease or death, he shall no longer be capable of 'choosing,' the notes must be paid, even if all the other conditions be strictly complied with. The notes were made payable November 17, 1857, with the privilege, at Maupin's choosing, to extend the time by the annual payment of interest. This, at most, could only be a privilege to extend the time during his life, and is not a perpetuity. It may, so far as the interest is concerned, be called an annuity to be paid by Maupin during his life."

Effect on Rights of Indorser or Surety.

In *Bonart v. Rabito*, 141 La. 970, 76 So. 166, the note in suit provided that "the makers, indorsers, guarantors, and sureties of this note hereby severally . . . consent that time of payment may be extended without notice thereof." The court said: "We cannot conceive of any reasonable theory on which to hold that the indorser's consent, as expressed in the note sued on, authorized the payee to grant the maker only one extension of the time of payment, however long, and did not authorize two extensions, however short. To maintain such a doctrine would lead to the anomalous conclusion that the indorser would not have been released if the payee had granted to the maker of the note, without notice to the indorser, one extension of the time of payment for one year, but that she would have been released by the granting of two extensions, for one month, or one week, or one day each. Our interpretation of the indorser's consent that time of payment might be extended without notice thereof is that the payee and the maker of the note could agree to extend the payment from time to time without notice to the indorser and without releasing her from liability, unless

and until at any time after maturity she saw fit to pay the note and become immediately subrogated to a right of action against the maker."

In *School Trustees v. King*, 85 Ill. App. 220, it appeared that each of certain notes contained the following clause: "And we further agree . . . that no extension of the time of payment, with or without knowledge, by the receipt of interest or otherwise, shall release us, or either of us, from the obligation of payment." The court held that it was clear that when the maker and sureties executed these notes, they contracted to be bound by an extension of the time of payment, though made with the principal debtor without their knowledge.

Miscellaneous.

In *Sykes v. Citizens' Nat. Bank*, 78 Kan. 688, 98 Pac. 206, 19 L.R.A. (N.S.) 665, it was held that the language of the note in that case, viz., "the makers and indorsers hereof hereby severally . . . agree to all extensions and partial payments before or after maturity, without prejudice to the holder," would not bear an interpretation making it, in effect, a demand note.

In *Corbett v. Clough*, 8 S. D. 176, 65 N. W. 1074, it was held that the words, "Extended to December 1st, 1891," written on the face of a note by the payees thereof at the request of the maker, pursuant to an agreement between them, was a written extension of time.

In *Niblack v. Champeny*, 10 S. D. 165, 72 N. W. 402, the following indorsement on the back of a note by the maker after an agreement with the payee for the extension of the note, was held to be a written extension of the time of payment: "4-24. Int. paid and extended 60 days,—consent of both parties."

But in *Brenneke v. Smallman*, 2 Cal. App. 306, 83 Pac. 302, it appeared that on the fifth day of January the payee of a note indorsed on the back thereof the words, "Renewed July 6," followed by her signature. It was held that while the word "renewed" might properly be used to express an agreement on the part of the maker of a note, it could not express an agreement on the part of the payee extending the time of payment. The court said: "'July 6' does not indicate with any certainty the period to which the note was 'renewed,' or to which payment was extended, if we should construe 'renewed' as meaning 'extended.' We may conjecture that it was intended by the words written to extend the time for payment of the note to July 6, 1901, but it would be but a conjecture, which is not sufficient upon which to base judicial action. The original agreement was to pay at a certain time. . . . We do not think that the words 'Renewed

July 6' can be construed as expressing an agreement to extend the time of payment of a note upon which they are written to July 6, 1901."

In *Wellington Nat. Bank v. Thomson*, 9 Kan. App. 667, 59 Pac. 178, the note in suit contained the following provision: "We, the makers, sureties, guarantors, and indorsers hereon, agree to extensions of this note without notice, hereby ratifying such extensions, and binding ourselves for payment hereof as if no extension of time for or forbearance of payment has been granted or made." The court held that the word "extension," as used therein, must be understood as meaning an actual extension of the time of payment, resting on a definite basis; that is, on a contract to that effect, supported by a sufficient consideration; and that without such a contract, an extension of time of payment or a forbearance to sue would not bind the holder of the note. The court said that the construction contended for, that by reason of the payments of interest on the note the operation of the statute of limitations was suspended, and that under the terms of the note the defendant was bound by those payments, would make the words of the note an agreement to waive the defense of the statute of limitations, and therefore void.

In *Miller v. Poage*, 56 Ia. 96, 8 N. W. 799, 41 Am. Rep. 82, the promissory note in suit, while in the ordinary form, contained the following provision: "If this agent does not sell enough in one year, one more is granted." The court said: "We think the true construction is that the maker was the agent of the payee for the sale of something, and if he realized sufficient funds from such sales, the amount specified was to be paid within one year. Payment during such time was to be made only on condition that the necessary funds were realized. This clearly implies the instrument was to be paid out of a particular fund."

In *Jewett Lumber Co. v. Martin Conroy*, 171 Ia. 513, 152 N. W. 493, the note in litigation provided as follows: "This note is given for lumber used in the improvements and if the case of *Lair v. Martin Conroy* Co. now pending in the district court of Polk county, Ia., is not settled or tried in said court by the time this note becomes due, we Jewett Lumber Co. agree to extend the time until said suit is determined, said extension in no event to exceed one year. Recovery on this note is not dependent upon the outcome of said suit." The court held that the only condition attached to the note and the giving thereof was the one mentioned in the note itself, and that the plaintiffs' right to recover did not depend on the outcome of the suit therein named.

In *Wilcox v. McCain Land, etc. Co.* (S. D.) 159 N. W. 49, it appeared that the receipt for the delivery of a certain promissory note given by the holder of the note, provided as follows: "The note given may be renewed, providing the interest is paid in full and the McCain Land and Live Stock Company are solvent at time of renewal." It was contended that the receipt constituted an agreement for an extension which released the sureties from liability. The court said: "A renewal of a note is the giving of a new note in the place of the former one, and a contract for renewal contemplates a new note, to which the parties are the same. Plaintiff could not, under his receipt, have been required to have accepted a note as a renewal note, except under the conditions named in such receipt, and then only in case such note, offered as a renewal, was executed by all those who executed the first note. An agreement for a renewal is not an agreement for an extension."

In *Stitzel v. Miller*, 250 Ill. 72, Ann. Cas. 1912B 412, 95 N. E. 53, 34 L.R.A. (N.S.) 1004, the note in controversy contained the following provision: "We also agree that in case said note is not paid at maturity, that it is at the option of the holder hereof to extend, as he deems proper, the payment of the above note, and that said extension shall not in any manner release one or either of us from the payment hereof." The court said: "The quoted words do not affect the character of the note, before or up to its maturity, either in its certainty, amount to be paid, the date of payment, or the person to whom the payment is to be made." To the same effect see *Farmer v. Graettinger Bank*, 130 Ia. 469, 107 N. W. 170, wherein the note provided that "sureties hereby consent that time of payment may be extended from time to time without notice hereof."

PEOPLE

v.

DETROIT, BELLE ISLE AND WINDSOR FERRY COMPANY.

Michigan Supreme Court—July 23, 1915.

187 Mich. 177; 153 N. W. 799.

Municipal Corporations — Smoke Ordinance — Reasonableness.

Where the evidence of expert marine engineers showed that there was no known

appliance which could be used upon marine boilers to prevent the emission of smoke, an ordinance, declaring that the emission of dense, black or gray smoke from any smoke-stack used in connection with any steam boiler in any boat, etc., within the city limits should be a public nuisance *per se*, and that the owners of any steamboat and the general manager, fireman or other employee having charge of any steamboat within the city permitting it to emit such smoke should be guilty of creating a public nuisance and of a violation of the ordinance, is unreasonable and invalid; though its invalidity is not a bar to a future prosecution thereunder if practical and efficient appliances may be had, or to liability for a common-law nuisance.

[See note at end of this case.]

Res Judicata — Finding of Facts — Effect of Future Developments.

An opinion of the recorder's court, in a prosecution for a ferry company's violation of the smoke ordinance, that there is then no known appliance which can be used upon marine boilers to prevent the emission of dense smoke, is not *res judicata* as to whether subsequently known appliances to prevent such smoke are practical.

Certiorari to Recorder's Court of Detroit: CONNOLLY, Judge.

Proceeding against Detroit, Belle Isle and Windsor Ferry Company for violation of ordinance of city of Detroit. Defendant convicted and brings certiorari. The facts are stated in the opinion. REVERSED.

Thomas P. Penniman and *Richard I. Lawson* for People.

Gray & Gray and *A. W. Sempliner* for respondent.

[178] STEERE, J.—This case involves the validity of an ordinance of the city of Detroit relative to the so-called smoke nuisance as applied to marine practice. Section 1 of the ordinance provides:

"That the emission of dense black or gray smoke from any smokestack or chimney used in connection with any steam boiler, locomotive or furnace of any description, in any apartment house, building, boat or any other structure, or in any building used as a factory, or for any purpose of trade, or for any other purpose whatever, within the corporate limits of the city of Detroit shall be a public nuisance *per se*."

Section 6 of said ordinance is as follows:

"The owner or owners of any locomotive, engine, steamboat, tug, dredge, or pile driver, and the general manager, superintendent, yardmaster, engineer, fireman or other officer or employee having in charge or control the operation of any locomotive, engine, steamboat, tug, dredge, or pile driver, within the

corporate limits of the city of Detroit, who shall cause, [179] permit or allow such dense black or gray smoke to be emitted therefrom within said corporate limits, shall be deemed guilty of creating a public nuisance and of violating the provisions of this ordinance."

Under this ordinance complaint was filed against defendant and appellant in the recorder's court on the 18th day of August, 1908. A motion to quash and dismiss the complaint was made by the defendant on several grounds:

(1) That in a former case in the same court the ordinance was held to be impossible of observance in marine practice and therefore invalid, and that decision was a bar to this prosecution. (2) That the ordinance was unreasonable and invalid because there was no known appliance which could be used upon marine boilers to prevent the issuance of smoke.

(3) Because it would destroy the value of defendant's property, it being a practical impossibility to rearrange the equipment of the boats so as to prevent the issuance of smoke.

(4) Because the ordinance destroys the value of defendant's property without making adequate compensation therefor, and deprives the defendant of its property without due process of law.

(5) That the Federal courts had exclusive jurisdiction to regulate the navigation of these vessels.

(6) That the ordinance and complaint declare smoke a nuisance *per se*, and there is no charge that defendant created or maintained a common-law nuisance.

The motion to quash being denied, proofs were taken at intervals from November 27, 1908, until February 16, 1911. This testimony related to the reasonableness or unreasonableness of the ordinance as applied to marine practice; as to what devices to prevent the issuance of smoke had been able to accomplish on boats; and the experiments of this defendant and others with devices to prevent smoke emission and their impracticability in the operation of boats. On February 16, 1911, at the close of the case, the motion [180] to quash was again renewed for the same reasons, and for the further reasons:

(1) That the ordinance was invalid and unreasonable, because it made no allowance for smoke that must be emitted when fires were being started, cleaned, or pricked; (2) because it appeared from the testimony that there were no devices known in marine practice that would successfully prevent the emission of smoke.

This motion was denied, the defendant found guilty, and a fine was imposed.

The case is reviewed in this court by writ of error. It appears from the record that in October, 1906, a similar complaint had been

lodged against the same defendant, and that on May 27, 1907, the same judge who heard the case at bar delivered an opinion, in part, as follows:

"I find, as charged in respondent's fourth objection, that this ordinance is impossible of observance in marine practice. The overwhelming preponderance of evidence in this case compels me to this conclusion. Indeed, after the fiasco in the Lansdowne case, the people seem unable to suggest any device which has even a fair record for preventing smoke in marine practice. I do not believe it would be just or reasonable to compel marine interests to experiment with every quack nostrum for smoke prevention which is exploited by promoters. In land practice, approved and successful devices are known to the engineering profession; I am convinced that none such is known in marine practice. If there was, I am confident that Frank E. Kirby would know, and tell, about it."

Nevertheless the court on the second hearing reached a contrary conclusion. A portion of the opinion follows:

"The whole subject of the unreasonableness of this ordinance and of the possibility of complying with its mandate in the present state of the marine engineering art has been exhaustively investigated and studied for a long period of time. Witnesses of noted scientific attainment have been produced, and their testimony is in the record. In addition to the taking of testimony, [181] the court and counsel went to the city of Chicago in June, 1910, and personally investigated the operation of the marine plant in the dredge 'Francis J. Simmons,' operating off Lincoln Park in Chicago, and of the tug 'Keystone,' operating in conjunction with the dredge 'Simmons.' These marine plants were equipped with what is known as the Jones underfeed stoker. The 'Simmons' is engaged in sucking dirt from the bottom of Lake Michigan and pumping it through possibly a mile of pipe to the shore, where an addition is being built to Lincoln Park. The work is irregular; frequent stops being necessary.

"The personal inspection of the court was conclusive, beyond all cavil or question, that the marine plant of the 'Francis J. Simmons' did not emit any objectionable smoke when the underfeed stoker system was in operation; but that, when the underfeed stoker system was shut off, dense black or gray smoke was forthwith emitted from the stack, and almost immediately ceased when the underfeed stoker system was put back in operation.

"The personal observation of the court as to the tug 'Keystone' was to the effect that, although the Jones underfeed stoker was installed in cramped quarters, it rendered satis-

factory service in preventing the emission of smoke.

"In June, 1911, counsel for the city invited the court and counsel for the defendant to inspect a similar equipment on an excursion steamer known as the 'City of Benton Harbor,' plying between Chicago, Ill., and Benton Harbor, Mich. Through some misunderstanding, counsel for the defendant did not participate in this inspection, but counsel for the city and the court journeyed from Chicago to Benton Harbor on the 'City of Benton Harbor,' and personally observed the effect of the operation of the Jones underfeed stoker in that marine plant. For several miles of the journey another ship, called the 'City of South Haven,' which was not equipped with the Jones underfeed stoker, journeyed on a parallel course to that of the 'City of Benton Harbor,' and the contrast in the smoke emitted was most marked. The 'City of South Haven' left an enormous trail of black smoke in its wake across the lake; the 'Benton Harbor,' maintaining as good a rate [182] of speed as the 'South Haven,' left practically no trail of smoke in its wake.

"A review of the whole record in this case, including the testimony taken in court, the depositions taken in Chicago with reference to the dredge 'Simmons,' and the personal observations of the court as to the operation of marine plants equipped with Jones underfeed stokers convinces the court that the present state of marine engineering art is not such as to render impossible the prevention of objectionable smoke in marine practice.

"A similar complaint to the one now under consideration was made against this defendant some years ago, when I first came upon the bench of this court. At that time, there was no smoke-preventing equipment in marine practice that had a demonstrated efficiency, and I dismissed the complaint, believing that the ordinance was unreasonable and void at that time, in that it required an impossibility of the defendant. But I am satisfied that the development of the art since that time has been such as to make it possible so to equip a marine boiler as to prevent the emission of objectionable smoke.

"The objection that there is not sufficient room on these ferryboats to equip them with smoke-preventing devices, in my judgment, falls to the ground upon an inspection of the equipment in the cramped quarters of the tug 'Keystone.'

"The claim that the Houden hot-air draft prevents smoke is confuted by the fact that these ferryboats, although so equipped, have flagrantly offended against the smoke ordinance in this case.

"These objections could have no weight at all in the case of *People v. White Star Line*

Company, because their steamer 'The Tashmoo' is overboilered, and has plenty of room in which to make the proper equipment.

"The court has been at great pains, with the aid of counsel, to consider exhaustively this whole subject so that no hardship might be inflicted upon the defendants by requiring them to expend large sums of money in uncertain or experimental devices. The net result of this investigation, as I said before, is to the effect and purport that smoke prevention in marine practice has passed the experimental stage, and is now [183] such a reasonable certainty, both as to smoke prevention and increase of plant efficiency, that this ordinance cannot fairly be considered to be unreasonable in its mandate.

"I do not consider it necessary to discuss the other objections raised by counsel as to the enforcement of this ordinance in this case, being content to rule, generally, that they are not, in my judgment, well founded. The principal objection is to the reasonableness of the ordinance, and I am constrained to hold that it is reasonable and practicable and therefore valid, and that it is the defendant's duty to comply with it."

Recognizing the importance of this case not alone to the owners of vessels plying upon the Detroit river within the corporate limits of the city of Detroit, but to the city of Detroit itself, we have given careful attention to the testimony introduced relative to the practicability and efficiency of the appliances used for the prevention of smoke in marine equipment in the present state of the art. We think it fair to assume that the conclusion reached by the learned judge who tried the case below was based upon his belief that the Jones underfeed stoker had reached such a state of perfection as to make its installation in marine practice feasible and reasonable, and the results to be obtained therefrom satisfactory. That testimony related to five boats, only, where such installation had been made. It would be of no avail to set out the voluminous testimony upon this question. It is sufficient to say that to our minds it is far from convincing. In some instances it is clear that the appliance, after its installation, has been removed, and in all instances the results obtained are not left entirely free from doubt.

The expert testimony introduced upon the question, while not conclusive, strongly persuades us to the view that up to the present time no device has been invented which within the confined space available for installation in marine practice is adequate for the [184] elimination of smoke so long as the consumption of bituminous coal is permitted. Mr. Frank E. Kirby, whose opinion seemed to have controlled—or at least largely influenced—the judgment of the court below

upon the former trial, testified in the case at bar as follows:

"There is no efficient device that is known to me for the prevention of smoke in marine practice."

Mr. Kirby is known as perhaps the most experienced designer of vessels for use on inland waters in the State of Michigan.

Prof. Frederick C. Sadler of the University of Michigan, an expert of distinction, testified as follows:

"I do not know of any device with which a marine plant can be equipped at the present time that would operate successfully under marine conditions and eliminate the emission of smoke in the operation of the vessels on the Detroit river here and the ferry service. . . .

"Q. Will you state whether in your judgment, from the investigation and studies you have made, it is possible to construct a steamer for passenger service on the Detroit river and equip it with any device—the Jones underfeed or any other—that when so equipped will be efficient for operation and service and comply with all the government requirements for operation?

"A. I do not know of any such device."

Testimony to the same effect was given by the following persons: Peter McLaren, chief engineer for 20 years of the Walkerville ferry line; Frank W. Stogell, superintendent of Hiram Walker & Sons, Ltd., an engineer for 15 years; Edward A. Dustin, manager of the Ashley & Dustin Steamer Line; Arthur J. Fox, of the same line, a master and pilot since 1874; J. P. Wells, of the Detroit & Cleveland Navigation Company, a marine engineer for 25 years; Winfield Dubois, a marine engineer for 35 years, with the White Star Line; James D. Stewart, a marine engineer [185] for 20 years, and for 3 years operating a Jones underfeed stoker; Minton Sickstele, a marine engineer for 10 years with the Detroit & Cleveland Navigation Company; George F. Moore, an employee of the city of Detroit, and marine engineer for 15 years and engineer of the fire tug James F. Battle; and A. G. Mattason, chief engineer of the Great Lakes Engineering Works.

It is perhaps worthy of note that the fire tugs James F. Battle and James R. Elliott, belonging to the city of Detroit, and operating upon the Detroit river, are not equipped with either the Jones underfeed or any other smoke consuming device.

Taken in its entirety, we are convinced that the testimony as to the impracticability of the Jones underfeed in marine practice fairly sustained the position of defendant.

We do not think it can be said that the earlier opinion of the recorder's court is *res judicata* of the question; nor should the con-

clusion reached in the case at bar be regarded as a bar to a future action under the ordinance, if, in the advance of the art, appliances are invented which in marine practice are efficient and practical. Nor is it to be deduced from this opinion that the defendant or other offenders may not be held liable as for the creation of a common-law nuisance if their acts warrant prosecution therefor.

Having reached this conclusion upon a point controlling of the issue, it is unnecessary to consider the other questions raised by the appellant.

The judgment is reversed.

Brooke, C. J., and Kuhn, Stone, Ostrander, Bird, and Moore, JJ., concurred.

The late Justice McAlvay took no part in this decision.

NOTE.

Validity of Smoke Ordinance or Statute.

Introductory, 173.

Regulations Held to Be Valid, 173.

Regulations Held to Be Invalid, 175.

Introductory.

The purpose of this note is to discuss the recent cases passing on the validity of a smoke ordinance or statute. The earlier decisions on the subject are considered in the notes to *St. Paul v. Haugbro*, as reported in 2 Ann. Cas. 580, and 106 Am. St. Rep. 427, and *Bowers v. Indianapolis*, 13 Ann. Cas. 1198.

Regulations Held to Be Valid.

A state, or, under a proper delegation of power, a municipality, has the power to make reasonable regulations to prevent the emission of dense or excessive smoke from chimneys. Thus where the legislature expressly conferred on a city the power to pass a smoke ordinance, the following provision in a city ordinance was sustained: "The emission of dense smoke within the city from the smokestack of any locomotive, steam boat, steam tug, . . . excepting for a period of six minutes in any one hour, during which the fire box is being cleaned out or a new fire being built therein, is hereby declared to be a nuisance and may be summarily abated. . . . Any person . . . deemed guilty of a violation of this ordinance, and upon conviction thereof shall be fined not less than ten dollars nor more than one hundred dollars for each offense." Chi-

cago v. Dunham Towing, etc. Co. 161 Ill. App. 307, affirmed in 175 Ill. App. 549.

An ordinance prohibiting the emission by yard and switch engines of dense smoke caused by the use of soft coal has been held to be a valid exercise of the power to abate nuisances in populous cities, as the emission of such smoke interferes with the comfort of the people, is destructive of property, and under some conditions is injurious to health. *State v. Chicago, etc. R. Co.* 114 Minn. 122, Ann. Cas. 1912B 1030, 130 N. W. 545, 33 L.R.A.(N.S.) 494, wherein the court said: "The ordinance is not an interference with the property rights of the defendant, or an abridgment of its privileges protected by the federal and state constitutions. If the use of soft coal tends directly to cause a nuisance, a prohibition of such use by the legislature is not forbidden by the constitutional provisions referred to. Such being the case, the ordinance is a legitimate exercise of the police power of the state for the promotion of the comfort and welfare of the people, and the defendant cannot complain of the resulting restrictions in the use of its property. Property rights and privileges are subject to reasonable regulations to promote the general welfare, and the defendant holds its property under the implied obligation that its use of it shall not be injurious to the community. The regulation and abatement of nuisances is one of the ordinary functions of the police power of the state."

In *Buffalo v. George P. Ray Mfg. Co.* 124 N. Y. S. 913, it was held that in an action for a penalty for the violation of an ordinance making the emission of smoke unlawful it was not necessary to establish that the emission of smoke in fact constituted a nuisance. Referring to the constitutional right to adopt such an ordinance the court said: "The right to pass ordinances in reference to matters of police presupposes that there may be conditions which would not constitute a common-law nuisance, but which are, nevertheless, inconsistent with the rights of individuals and the public, and the test of an ordinance is not whether there is, in fact, a nuisance, but whether the ordinance is reasonable. If it were necessary to establish the fact of a nuisance to convict one of a violation of an ordinance, then there would be no need of the ordinance, for the maintenance of a nuisance is unlawful at all times, and may be reached without the aid of municipal ordinances. The right to adopt ordinances is limited only by the constitution and the statutes, and the reasonableness of the same, and if an ordinance regulating a matter of this kind is reasonable, then it does not matter whether it deals with a condition constituting a common-law nuisance or not, and no citation of authority is necessary upon the point."

Under the general welfare clause in a charter it was held in *Rochester v. Macauley-Fien Milling Co.* 199 N. Y. 207, 92 N. E. 641, 32 L.R.A.(N.S.) 554, that a city had the power to prohibit the emission of dark smoke from chimneys during certain hours of the day and to provide a penalty for the violation thereof. Quoting from *Moses v. U. S.* 16 App. Cas. (D. C.) 428, the court said: "Now, whilst the emission of the ordinary smoke from the chimneys of houses does not amount to a nuisance per se, it is nevertheless a matter of common knowledge, not to be ignored by the courts, that the emission of a volume of dense, black smoke from a single smokestack or chimney of a large furnace, may, under some circumstances, work physical discomfort to the general public coming within its circle of distribution upon public thoroughfares, and may possibly also work injury to public interests in other respects. Whenever it may become a special source of legal injury to an individual he will have an action of damages therefor, and, in cases of continuation, equity will afford complete relief by process of injunction."

It has been held that it is within the police power of the state to declare that the burning of soft coal within certain prescribed limits of a city is detrimental to the public welfare, a statute prohibiting the burning of soft coal in the city of Brooklyn being sustained. *Brooklyn v. Nassau Electric R. Co.* 44 App. Div. 462, 61 N. Y. S. 33.

It has been held that where the regulation of smoke is within the police power of a city and very broad authority is given to the local officials to legislate on subjects relating to the public health, convenience, and comfort, an ordinance regulating the discharge of smoke will be upheld, unless by the evidence it becomes clear beyond any reasonable doubt that it is not authorized by the legislature or that it unnecessarily and unreasonably interferes with private property rights, and imposes an unreasonable burden, considered in the light of the benefit to the public. *People v. New York Edison Co.* 159 App. Div. 786, 144 N. Y. S. 707.

It was held in *Cincinnati v. Burkhardt*, 30 Ohio Cir. Ct. Rep. 350, that an ordinance prescribing a certain scale for measuring the density of smoke and declaring anything in excess of that scale to be a public nuisance was not an unreasonable measure to prevent an annoyance or injury to the public. The court said: "We are of the opinion that the ordinary mind would be in doubt whether the prohibition is unreasonable, the difficulty lying in the manner of fixing and declaring the density of the smoke prohibited; but it will be presumed, in the absence of proof to the contrary, that council duly investigated the subject and adopted this particular scale upon the ground of accuracy and precision;

and unless it is clearly unreasonable or in restraint of trade the ordinance should not be declared void."

Where a state constitution authorized any city to make and enforce within its limits all such local, police, sanitary, and other regulations as were not in conflict with general laws, the following ordinance was sustained: "It shall be unlawful for any person, firm or corporation to permit any soot to escape from the smokestack or from the chimney of any furnace within the city of Sacramento in which distillate or crude oil is consumed as fuel." In *re Junqua*, 10 Cal. App. 602, 103 Pac. 159, wherein the court said: "But, as has been said, the subject-matter of the ordinance before us is within the jurisdiction of the legislative authority of the city of Sacramento to regulate, in the exercise of its police power, by direct grant from the constitution as well as by express authority from the legislature expressed in the charter of said city, and, as the ordinance, upon its face is, apparently, unobjectionable for any reason here urged against its validity, and there being nothing presented here de hors the measure to disclose that the enforcement of its provisions in the case of the petitioner involves an invasion of his constitutional or fundamental rights, it follows that the judgment imposed against and upon the petitioner was within the jurisdiction of the court imposing it, and that, therefore, his restraint by the chief of police of the city of Sacramento is not unlawful."

Where a city was given authority to regulate and control the construction of buildings and chimneys, and to prevent nuisances, an ordinance forbidding the construction of smokestacks less than fifty feet high was held to be valid. *State v. Shannon*, 130 Mo. App. 90, 108 S. W. 1097.

Regulations Held to Be Invalid.

The regulation of the emission of smoke being an exercise of the police power, a regulation which is under all the circumstances unreasonable is invalid. Thus it was held in *Cleveland v. Malm*, 7 Ohio Dec. 124, that an ordinance making the emission of dense smoke from any chimney, stack, etc., within the city limits, a public nuisance was unconstitutional and void. Following the ruling in *Sigler v. Cleveland*, 4 Ohio Dec. 166, the court said: "The emission of smoke at common law was not in and of itself a nuisance, neither has any statute of this state made the emission of smoke per se a nuisance. The emission of smoke becomes only then a nuisance when it is a nuisance in fact and to be a nuisance in fact would depend entirely upon whether it was injurious to health, damaging to property or annoying to the

inhabitants of a locality, and that in turn would depend upon the character of the smoke, the quantity of smoke, the locality in which the same is emitted and the surrounding circumstances. . . . The legislature gave the council the power to regulate the consumption of smoke, but did not give them the power to prohibit the same under any and under all circumstances and at any and all times. Thus then the council has again exceeded its powers and thereby rendered the ordinance void and invalid. The city of Cleveland is now the metropolis of Ohio, having a population of nearly 400,000 inhabitants. It has become so prosperous and so populous by reason of its diversified manufacturing interests, and no doubt in the districts containing most of our manufacturing establishments there is a vast emission of smoke emitted by the burning of the vast quantities of coal consumed in the furnaces of the various manufactories. And the court has no doubt in the least that the emission of this smoke is injurious and annoying to the health and comfort of the people living in those districts and elsewhere. I have furthermore no doubt that it is damaging to the property both real and personal, of the same individuals and to the goods, wares and merchandise of a great many merchants; but in order that those individuals may be free, to a certain extent, from this injury, annoyance or damage, the council must pass an ordinance which will stand the test and not be open to the objections cited. The ordinance must therefore be held void and invalid in view of these defects, to wit: First: That the ordinance is indefinite, uncertain and vague. Secondly: That the city council transcended its power, granted to it by the legislature, in declaring the emission of smoke per se a nuisance. Thirdly: That the city council exceeded its grant of power in that it prohibits the emission of smoke under any and all circumstances and at any time instead of regulating the same."

In *Erie R. Co. v. Jersey City*, 83 N. J. L. 92, 84 Atl. 697, the court held to be unreasonable the following ordinance: "It shall be unlawful to permit the emission of dense smoke from any stack connected with any engine or locomotive within the limits of Jersey City, which smoke contains soot or other substance in sufficient quantity to cause injury to health or damage to property within the corporate limits of said city." In that case it was said: "The question is whether the present ordinance will be sustained, so as to support these convictions of a railroad company by reason of discharge of smoke from its locomotive engines. Counsel for the city do not seem to justify it as an exercise of police power in protection of the public health, but concede that this jurisdiction,

under later legislation, has been transferred from the board of aldermen to the board of health. Consequently the clause 'injury to health' must be treated as surplusage, and the ordinance be read as aimed solely at damage to property. And it may be noted that, while the complaints are in the alternative, the convictions are all based on the 'damage to property' clause. It is doubtful if the distinction is material; for whether the protection be to health or property, or both, we are met with the fundamental proposition that the chartered right of a railroad to operate its line includes the right to make such noise, smoke, and smells as are reasonably unavoidable in the careful and proper conduct of its business, even if some injury to health or some damage to property be caused thereby. . . . Whatever might be said of an ordinance forbidding smoke from railroad engines needlessly and negligently emitted, we think it plain that the breadth of scope of that under consideration, in prohibiting all smoke containing soot, etc., sufficient to cause injury to property, is in derogation of the charter rights of the railroad, and as to it unreasonable." In *Pennsylvania R. Co. v. Jersey City*, 84 N. J. L. 716, 87 Atl. 465, 49 L.R.A.(N.S.) 715, the court passing on the validity of the same ordinance held that unless a municipality has express power delegated to it by the state it cannot prohibit the emission of dense smoke from the smokestacks of a railroad company where the legislature has conferred the right on the railroad company to consume fuel and emit the smoke arising therefrom in order to operate its road, unless it can be shown that the escape of the smoke results from the negligence on the part of the railroad company. The court said: "The proposition presented is, Has the city the power to enforce this ordinance against this defendant when the emission of dense smoke from its engines is caused by the consumption of fuel necessary in the exercising of its legislative grant to operate a railroad? All negligence or want of care on the part of the railroad company in the conduct of its authorized business is eliminated, for the ordinance applies to the emission of dense smoke from defendant's engines, whether it be the result of negligence or not. The defendant is authorized by the legislature to use engines in carrying on its business, and that cannot be done without the consumption of fuel and the consequent emission of smoke, which at times must fall within the description of dense, and so long as the conduct of defend-

ant is not negligent, it has the right to allow smoke to escape from its engines. To sustain the contention of the city we should have to assume that, notwithstanding its grant to the defendant, the legislature has delegated to the city a power, which practically amounts to a repeal of its former grant, for no railroad can be operated without creating smoke, and if the city can forbid the escape of dense smoke, it can also prevent the emission of all smoke, and thus deprive the railroad company of the right to burn fuel in the prosecution of its business, because the burning of fuel is not only necessary to operate a railroad, but must produce smoke. We are of opinion that no such power is vested in the city, and therefore the ordinance, so far as it attempts to make unlawful the emission of smoke from defendant's engines affords no lawful basis for the conviction of the defendant under the proofs in this case, and that as to it the ordinance is void and the convictions must be set aside."

The reported case holds that an ordinance making the emission of dense black smoke from the smokestack or chimney used in connection with any steam boiler, locomotive or furnace, building, boat, or any other structure within the city limits a "public nuisance *per se*" is unreasonable and invalid, as against the owners of a steamboat where the evidence shows that the latest mechanical appliances are inefficient to comply with the requirements of the ordinance. The court says however that the decision is not to be regarded as a bar to a future action under the ordinance, if in the advance of the art, appliances are invented which in maritime practice are efficient and practical.

In *Rex v. Canadian Pac. R. Co.* 33 Ont. L. Rep. 248, 8 Ont. W. N. 60, it was held that a municipal by-law relating to the emission of smoke does not apply to a railway company which is subject to the regulations of the dominion railway board. The court said: "The Dominion authorities having undertaken to pass regulations dealing with this question, the jurisdiction of the municipality, if it ever had any, is, I think, ousted. So long as the railway company complies with the direction of the board, the municipality cannot interfere. For a violation of the board's directions, the appropriate prosecution must follow. This is, I think, something incident to the operation of the railway, and forms part of the railway legislation over which the Dominion alone has control, and it cannot be regarded as mere municipal legislation, within the jurisdiction of the Province."

LITTLEFIELD

v.

BOWEN ET AL.

Washington Supreme Court—March 15, 1916.

90 Wash. 286; 155 Pac. 1053.

Actions — Joinder of Causes — Rights Arising from Same Transactions.

Under Rem. & Bal. Code, § 296, subd. 8, permitting plaintiff to unite several causes of action in the same complaint when they arise out of the same transaction, a complaint alleging a cause of action upon a breach of contract and upon defendants' wrong in rendering performance by another party impossible, so as to prevent the earning of a commission, from that party, is not demurrable on the ground that two causes of action are improperly joined.

Brokers — Contract for Commissions from Both Parties — Sale Prevented by One Party.

A complaint, in a broker's action for commission, alleging that defendants and certain other owners entered into a written contract to exchange certain properties at stipulated values and that each of the parties was to pay plaintiff a commission upon the execution of the instrument effecting the exchange, that the other contracting parties had been ready, able, and willing to execute their instruments of conveyance, but that defendants refused to perform their contract, and rendered performance by the other parties impossible, states a cause of action against the defendants for the agreed compensation to be paid by both parties.

[See note at end of this case.]

Recording of Contract by Broker — Liability to Principal.

The fact that plaintiff, a real estate broker, who had caused defendants to enter into a written contract to exchange certain properties with other parties, recorded such contract, which record did not colorably establish any right, claim, or lien in the broker, does not render him liable to damages for the recording of the contract.

Performance by Broker — Refusal of Principal to Accept Trade — Necessity of Tender.

In a broker's action for commission under a contract for the exchange of properties, the fact that the transfer by the other parties to the plaintiff was refused made it immaterial whether such other parties made any tender of a deed or not.

Evidence — Proof of Title — Best and Secondary Evidence.

When the title to real estate is directly in issue, the best evidence of title consists in the muniments of title such as deeds, mortgages, patents, wills, etc.

Same.

In a broker's action against defendants for a commission due under their contract

Ann. Cas. 1918B.—12.

with plaintiff and with other parties for an exchange of properties, where it is only incumbent upon plaintiff to make a prima facie case, showing that the other parties were willing and able to comply with the contract, and that defendants refused to perform, the other party's ownership is provable by parol.

Brokers — Contract for Commission from Both Parties — Sale Prevented by One Party.

A real estate broker, who, as agent for all of the parties, procured a contract between himself, defendants, and other parties for an exchange of their properties, entitling him to a commission from each, payable on the execution of the instruments effecting the exchange, may, upon defendants' failure to carry out their contract, maintain an action against them for the loss of the commissions agreed to be paid by the other party.

[See note at end of this case.]

Exchange of Property — Contract — Termination — Lapse of Reasonable Time for Completion.

Where a contract for an exchange of properties does not, in itself, provide a time for its termination, a reasonable time is implied.

Brokers — Right to Commission — Refusal by Principal to Convey — Sufficiency of Evidence.

The evidence, in an action for a commission, payable under a contract for the exchange of properties whereby each of the exchanging parties was to pay plaintiff a commission, to recover a commission directly payable by defendants, and the commission due from the other party lost by defendants' breach, is held to support a finding that defendants refused to perform the contract, and rendered it impossible for the other party to perform, though ready and able to do so.

Appeal from Superior Court, King county: MACKINTOSH, Judge.

Action by E. E. Littlefield, plaintiff, against F. A. Bowen et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

Byers & Byers for appellants.

Edgar S. Hadley for respondent.

[287] HOLCOMB, J.—Respondent, a real estate broker, as first party, one Thorniley and wife as second parties, and appellants as third parties, on September 23, 1914, entered into a written contract whereby the Thornileys and Bowens agreed to exchange certain properties at certain stipulated valuations, and each of the exchanging parties pay to respondent a certain stipulated commission, the same "being payable upon the execution of the instruments effecting the exchange." The "instruments effecting the exchange" were never executed by both parties to the exchange. The Thornileys claim to have been "ready, able and willing to perform and to

have tendered performance to the Bowens, but that performance by them was refused by the Bowens, who also refused performance themselves."

Respondent brought his suit against appellants in two separate causes of action, upon the theory that they breached [288] the contract and rendered performance impossible by the Thornileys, and that appellants were therefore liable to him, both for the commission earned by him from appellants directly upon the agreed promise to pay, and for the commission earned from the Thornileys under the contract, because of appellants' breach of the contract. The contest is chiefly over the questions of whether in fact the Thornileys were ready, able and willing to perform their contract so as to bind appellants, and whether in fact the Thornileys, rather than appellants, breached the contract. Incidentally, the rulings of the court upon appellants' demurrer to the complaint and upon respondent's demurrer to the affirmative answer of appellants are urged as erroneous.

The tripartite contract, among other things, provided that each of the parties of the second part and of the third part were to furnish to the other an abstract of title covering their respective properties described in the contract, certified to date, allow five days for examination thereof, and to convey, each to the other, the properties so contracted, by good and sufficient warranty deed free and clear of incumbrances of every nature, except certain incumbrances against each which it was agreed the other would assume.

I. Appellants complain of the overruling of their demurrer to the complaint on the ground that two causes of action were improperly joined, one upon contract, and one upon tort; and that the complaint did not state facts sufficient to constitute a cause of action.

"The plaintiff may unite several causes of action in the same complaint, when they all arise out of . . . the same transaction." Rem. & Bal. Code, § 296, subd. 8 (P. C. 81, § 281).

See also *Harding v. Ostrander Ry. etc. Co.* 64 Wash. 224, 116 Pac. 635. The first ground of demurrer was not good.

It is further urged that, because the contract stipulated that "such amounts being payable upon the execution of the [289] instruments effecting the exchange" and the instruments of exchange were not alleged to have been executed, the respondent could not recover, and that therefore the complaint was insufficient.

Respondent could not compel appellants to execute the instruments, but alleged that the other contracting parties, the Thornileys, had been, and then stood, ready, able, and willing to execute their instruments of conveyance,

and stood ready to complete the transfer of their properties in accordance with the contract, but that appellants refused such performance and refused to perform their (appellants') contract. In such posture of affairs, under such a contract, the respondent was entitled to recover his agreed compensation, to be paid by both parties, from whichever party refused to perform and rendered performance by the other party to the exchange impossible. The complaint, therefore, was sufficient and the demurrer was properly overruled.

II. Appellants attempted, by affirmative answer and cross-complaint, to claim damages against respondent for the recording of the contract involved herein, alleging that such recording cast a cloud upon their title, to their damage in the sum of \$500. Demurrer thereto was sustained, and this is alleged as error. There could be no such recovery. No right, claim, lien, or estate in the real estate of appellants described in the recorded contract became actually or colorably established in respondent thereby. That one of the parties to a written contract voluntarily made by another party to it sees fit for some reason to procure its recordation in the public records violates no legal rights of the other party. There was no fraud, overreaching, or undue influence alleged or existing to avoid the contract. The demurrer to the affirmative answer and cross-complaint was properly sustained.

III. A deed was offered in evidence, executed by Thorniley and wife to appellant, of the real estate to be transferred [290] by the Thornileys as a tender under the contract. It appears that this deed had no revenue stamps as provided by the emergency revenue act of Congress of October 29, 1914. Objection was made to the introduction thereof for the reason that it was not competent evidence. We cannot find that the revenue act of Congress cited contains any provision that a deed or other such instrument not bearing the revenue stamp is inadmissible as evidence. The act provides only for a penalty for failure to attach such stamps. In any event, the evidence tends to show that the transfer by the Thornileys had been theretofore refused, and it was immaterial whether the Thornileys made any tender of a deed or not under such evidence.

Thorniley, a witness for respondent, while on the witness stand, after reciting a description of the property to be conveyed by him, was asked by counsel for respondent: "Was that your property?" To this appellants objected and the court sustained their objection, saying: "It is incumbent on you, Mr. Hadley, to prove your contention that you were able to convey it. If you had no title, and were not able to convey, you could not re-

cover, so you will have to prove it." The witness was then withdrawn from the stand, and it is contended that there was no other evidence or offer of evidence tending to prove that Thorniley had title to the property in question. It is contended, also, that a witness cannot be permitted to prove ownership by simply stating the fact that he owns property, over the objection of the opposite party.

The first contention does not seem to be sustained by the record. While there were some complications concerning the title of Thorniley, there is evidence to the effect that these matters were all matters of adjustment, and that there had been transactions looking to the adjustment of all the matters which had been objected to by counsel for appellants, whereby it was testified by Thorniley and other witnesses that the title was rendered good. A peculiarity of the contract was [291] that, while the contract provided that abstracts should be delivered to and examined by each party, there was no provision in the contract that the property conveyed should be of perfect title or good and marketable title. The only provision relating thereto was that each party should give a good and sufficient warranty deed free and clear of incumbrances of every nature except those specified. There is evidence, however, although disputed, to the effect that the title was passed upon favorably by Mr. Byers, acting as attorney for Mr. Bowen, and that the defects pointed out were in the process of adjustment and curing; that, upon the curing of such objections, the title would be satisfactory. There is further evidence that these objections were met and the defects cured. There is further evidence that everything was satisfactory.

As to the other ground of the objection, it is, of course, a general rule that, when the title to real estate is directly in issue, the best evidence of title consists in the muniments of title such as deeds, mortgages, patents, wills, etc.; but when the title to real property is not directly in issue, or where only a *prima facie* showing of title is necessary, the rule as to best evidence does not apply and ownership may be proven by parol. 12 Ency. Evidence, 544. This action was not a suit to try the title of the property, and it was at best only incumbent upon respondent to make a *prima facie* case showing that Thorniley was willing and also able to comply with the contract entered into, and that appellants refused to comply therewith.

IV. What we have said applies also largely to appellants' fifth assignment of error, that the court erred in denying their motion for a nonsuit. As to that, it is argued that one of two things must be true: either the respondent did all the acts necessary to bring the parties together and was, therefore, en-

titled to a commission from each of them, or he failed to do the acts called for by the contract and was not entitled to a commission from either of them; that, in the [292] latter case, the motion for a nonsuit should have been sustained as to both causes of action, and in the former case, it should have been sustained as to the second cause of action. Authorities are cited to the effect that the duty of a broker employed to sell property is to bring the buyer and seller to an agreement. While it is not essential that he should be present and an active participant in the agreement or sale when it is actually concluded to entitle him to his commission, he must produce a purchaser ready and willing to enter into a contract on his employer's terms. He is not entitled to a commission for unsuccessful efforts to effect a sale, unless the failure is caused by fault of the principal. And further, that the burden was on the broker, in order to establish a *prima facie* case, to prove not only that the purchaser found was willing, but able to consummate the sale; citing: Colburn v. Seymour, 32 Colo. 430, 2 Ann. Cas. 182, 76 Pac. 1058; Chaffee v. Widman, 48 Colo. 34, 108 Pac. 995, 139 Am. St. Rep. 220; Sibbald v. Bethlehem Iron Co. 83 N. Y. 378, 38 Am. Rep. 441; Gilliland v. Jaynes, 36 Okla. 563, 129 Pac. 8, 46 L.R.A.(N.S.) 129; Reynolds v. Anderson, 37 Okla. 368, 132 Pac. 322, 46 L.R.A.(N.S.) 144; Carter v. Owens, 58 Fla. 204, 50 So. 641, 25 L.R.A.(N.S.) 736; Riggs v. Turnbull, 105 Md. 135, 11 Ann. Cas. 783, 66 Atl. 13, 8 L.R.A.(N.S.) 824.

There is no doubt these cases in general correctly state the law. But, on the other hand, these purchasers had already agreed upon their sale or exchange. They had entered into a written contract agreeing to make the exchange. The respondent was employed by, and was the agent for, both of them. His compensation had been adjusted. All that was required of him to do he had done. He could not compel either of the parties to make their title perfect or to convey when perfect. It has been held by this court that:

"A real estate broker who has procured a contract of sale to be entered into between the owner of land and a prospective purchaser may maintain an action for damages for the loss of his commissions against the purchaser for failure to [293] carry out such contract, although the broker had agreed to look to the vendor for his commissions." [Syllabus.] Livermore v. Crane, 26 Wash. 529, 67 Pac. 221, 57 L.R.A. 401.

This, then, supports respondent's action against appellants for their failure to carry out their contract, although, as to the commissions of the other party to the contract, he had agreed to look to the other party.

The commissions payable by appellants were due under the terms of the contract directly if respondent had done all that was required by him, and without his fault the contract fell through. If the preponderance of evidence was with respondent on those questions, he was entitled to recover. The court so found, and we cannot say that the preponderance is the other way.

V. It is further urged that appellants took the initiative and, on November 10, 1914, fixed a time for the termination of the contract, to wit, November 16, 1914. The contract did not itself provide a time for its termination. In such case a reasonable time was implied. Appellants wrote a letter on November 10, 1914, notifying the Thornileys and respondent that, unless the contract of September 23, 1914, was fulfilled on or before November 16, they would consider it terminated. The evidence shows, however, notwithstanding that fact, that many negotiations were had between the Thornileys and appellants and respondent after November 16. If it had been abandoned, these subsequent transactions were inconsistent. They resumed or continued negotiations with the other parties, thereby leading them into the belief that the contract had not been abandoned and that it would probably be performed. On November 24, there was some negotiation between the parties looking toward the preparation of papers to be deposited in escrow until all the matters should be concluded. On December 12, a conference was had in which a modification of the exchange agreement was considered.

The testimony of Mr. Bowen himself tended very strongly to contradict the abandonment of the contract by their letter [294] of November 10. He testified that, two or three days after the expiration of the time specified in his letter, he talked with Mr. Thorniley again about it; that they were then and there arranging for the necessary papers to be placed in escrow, if such was thought advisable by Mr. Fullen (Thorniley's attorney) and Mr. Byers; that he knew then that there had been an arrangement for a loan whereby everything against the Thornileys' property would be cleaned up; that he objected to the form of a mortgage and note that had been prepared for him to sign; that he was advised not to give that mortgage; that he then decided he would not go through with the deal; that he saw Mr. Thorniley and told him he would not give that mortgage, and that they agreed if they could get the money somewhere else, giving a different form of mortgage, he would complete the deal; that Mr. Thorniley informed him about that time of an arrangement with a Mr. Keating whereby Keating would finance the matters against the Thorniley property, and that Thorniley was in

position to convey the property with only the \$12,000 incumbrance against it, according to the original agreement, but that he then told Thorniley that he considered the trade was all off; that his ground of objection was the form of the mortgage proposed for him and his wife to execute.

This and other evidence tends very strongly to support the finding of the trial court that appellants refused to perform the contract entered into, thereby rendering it impossible for the other parties to the contract to perform it, although ready and able. Other matters are argued incidentally by the briefs of counsel, but we think this is sufficient to justify the affirmance of the judgment.

Affirmed.

Morris, C. J., Bausman, Main, and Parker, JJ., concur.

NOTE.

Liability on Contract of Buyer and Seller to Pay Broker's Commission Jointly.

Introductory, 180.

Broker Negotiating Contract:

Majority Rule:

Rule Stated, 181.

Knowledge of Dual Agency, 183.

Sale Prevented by One Party, 184.

Minority Rule, 185.

Broker Bringing Parties Together:

General Rule, 185.

Modification of Rule, 188.

Introductory.

The basis of the distinctions made by the courts with respect to the right of a broker to recover on a contract of the buyer and the seller to pay commissions jointly is the rule of public policy which forbids secret dual agencies whereby the agent is placed in the position of endeavoring to serve inconsistent interests. It is well settled that a broker employed by one party to bring about a sale may not contract secretly for compensation from the other party. See the notes to *Howard v. Murphy*, 1 Ann. Cas. 571; *Leno v. Stewart*, Ann. Cas. 1917A 509, and *Chaffee v. Widman*, 139 Am. St. Rep. 257. Looking to the reason of that rule, the cases discussed in the present note differentiate sharply between brokers charged with the duty of negotiating the terms of sale and middlemen whose duty is performed when the parties are brought together to conduct their own negotiations, and it is with respect to brokers of the former class that the right to rely on a contract to pay joint commissions is limited. But with respect to brokers

of that class it is recognized that the rule against dual agency is designed for the protection of the principal and is accordingly subject to waiver by him. Therefore, the majority of the cases reviewed in this note hold that if a broker with the knowledge of his principal contracts for additional compensation from the other party, there is in effect an agreement of the parties to pay commissions jointly, and the broker is entitled to recover. A few jurisdictions, however, maintain that only by an express agreement may the rule forbidding dual agency be waived.

Broker Negotiating Contract.

MAJORITY RULE.

Rule Stated.

By the weight of authority, where a broker is empowered to negotiate with respect to the term of sale, if both the parties have knowledge that he is acting for them both, they thereby assent to his acting in a double capacity and are each liable to pay the broker's commission which they have respectively agreed to pay.

England.—See *Baring v. Stanton*, 3 Ch. D. 502.

Canada.—*Culverwell v. Campton*, 31 U. C. 343; *Culverwell v. Birney*, 11 Ont. 265, *appeal allowed* 14 Ont. App. 266.

California.—*Jauman v. McCusick*, 166 Cal. 517, 137 Pac. 254; *Shepherd-Teague Co. v. Hermann*, 12 Cal. App. 394, 107 Pac. 622.

Colorado.—*Finnerty v. Fritz*, 5 Colo. 174; *Scott v. Lloyd*, 19 Colo. 401, 35 Pac. 733.

Connecticut.—*Zimmerman v. Garvey*, 81 Conn. 570, 71 Atl. 780.

Georgia.—*Hanesley v. Monroe*, 103 Ga. 279, 29 S. E. 928; *Ballew v. Ware*, 16 Ga. App. 149, 84 S. E. 597.

Illinois.—*Keach v. Bunn*, 116 Ill. App. 397, *affirmed* 214 Ill. 259, 73 N. E. 419; *Johnson v. Kurzenknabe*, 182 Ill. App. 459; *Madden v. Davis*, 192 Ill. App. 575.

Indiana.—*Alexander v. Northwestern Christian University*, 57 Ind. 466.

Iowa.—*Leekins v. Nordyke, etc. Co.* 66 Ia. 471, 24 N. W. 1; *Lindt v. Schlitz Brewing Co.* 113 Ia. 200, 84 N. W. 1059; *Redmond v. Henke*, 137 Ia. 228, 114 N. W. 885.

Kansas.—*Beeson v. Trainer*, 97 Kan. 523, 155 Pac. 939.

Michigan.—*Kirby-Sorge-Felske Co. v. Doty*, 190 Mich. 553, 157 N. W. 273. See also *Adams Min. Co. v. Senter*, 26 Mich. 73.

Minnesota.—*Wasser v. Western Land Securities Co.* 97 Minn. 460, 107 N. W. 160; *American Security, etc. Co. v. Penney*, 129 Minn. 369, 152 N. W. 771.

Missouri.—*De Steiger v. Hollington*, 17 Mo. App. 382; *Stripling v. Maguire*, 108 Mo. App. 594, 84 S. W. 164; *Cook v. Piatt*, 126 Mo. App. 553, 104 S. W. 1131; *Lipscomb v. Mastin*, 142 Mo. App. 228, 125 S. W. 1177; *Goldberry v. Thomas*, 178 Mo. App. 334, 165 S. W. 1179.

Nebraska.—*Maddox v. Harding*, 91 Neb. 292, 135 N. W. 1019.

New York.—*Platt v. Baldwin*, 2 City Ct. Rep. 281; *Dearing v. Sears*, 50 Hun 604 mem. 3 N. Y. S. 31, 19 N. Y. St. Rep. 325; *Lansing v. Bliss*, 86 Hun 205, 33 N. Y. S. 310; *Rowe v. Stevens*, 53 N. Y. 621, 35 Super. Ct. 189; *Jarvis v. Schaefer*, 105 N. Y. 289, 11 N. E. 634; *Haviland v. Price*, 6 Misc. 372, 26 N. Y. S. 757; *Bonwell v. Auld*, 7 Misc. 447, 27 N. Y. S. 936, *affirmed* 9 Misc. 65, 29 N. Y. S. 15; *Whiting v. Saunders*, 22 Misc. 539, 49 N. Y. S. 1016; *Minster v. Benoliel* 32 Misc. 630, 66 N. Y. S. 493, *reversed* 33 Misc. 588, 67 N. Y. S. 1044, 9 N. Y. Ann. Cas. 190; *Swee v. Neumann*, 67 Misc. 605, 123 N. Y. S. 776; *Abel v. Disbrow*, 15 App. Div. 536, 44 N. Y. S. 573; *Geery v. Pollock*, 16 App. Div. 321, 44 N. Y. S. 673; *Felbel v. Kahn*, 29 App. Div. 270, 51 N. Y. S. 435; *Willner v. Seale*, 127 App. Div. 180, 111 N. Y. S. 699; *Bonwell v. Howes*, 1 N. Y. S. 435; *Bellin v. Wein*, 104 N. Y. S. 360.

North Carolina.—*Lamb v. Baxter*, 130 N. C. 67, 40 S. E. 850; *Kinsland v. Grimshawe*, 146 N. C. 397, 59 S. E. 1000.

Ohio.—*Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528.

Oregon.—*Jameson v. Coldwell*, 23 Ore. 144, 31 Pac. 279; *Franck v. Blazier*, 66 Ore. 377, 133 Pac. 800.

Texas.—*Chase v. Veal*, 83 Tex. 333, 18 S. W. 597; *Shropshire v. Adams*, 40 Tex. Civ. App. 339, 80 S. W. 448; *Bass v. Tolbert*, 51 Tex. Civ. App. 437, 112 S. W. 1077; *Hunter v. Lyons*, 144 S. W. 353; *Hill v. Patton*, 160 S. W. 1155; *Fraser v. McCarty*, 168 S. W. 44.

Washington.—*Darrow Invest. Co. v. Breyman*, 32 Wash. 234, 73 Pac. 363; *Philips v. Langlow*, 55 Wash. 385, 104 Pac. 610; *Price v. Partridge*, 78 Wash. 362, 139 Pac. 34.

In *Leekins v. Mordyke, etc. Co.* 66 Ia. 471, 24 N. W. 1, it was said: "When defendant entered into the contract it had full knowledge of the relation which existed between plaintiff and the Grundy County Company. It knew that he was acting as the agent of that company in making the purchase of the machinery, yet it contracted to pay him a commission for effecting the sale. The jury have found, at least, that it made such contract. The evidence shows without any conflict that plaintiff's principal is not only satisfied with the contract, but that it authorized him in advance to contract, in the purchase of the machinery, for the payment by the seller of such a commission on the

sale as would compensate him for his services in transacting the business. As the contract was entered into by plaintiff by the authority of his principal, and as defendant contracted with him with knowledge of his relation to his principal, it is very clear, we think, that it cannot now avoid its undertaking. Plaintiff in the transaction acted to some extent as the agent of both defendant and the Grundy County Company, but each consented that he might act in that capacity for the other, and what was done in the transaction was done with the consent of both principals."

In *Lindt v. Schlitz Brewing Co.* 113 Ia. 200, 84 N. W. 1059, the court said: "It is against public policy for an agent to represent both buyer and seller. Each has the right to rely on his skill, knowledge, and influence, and, as the interests of buyer and seller usually conflict, the law does not ordinarily allow one to assume this double relation. If, however, the buyer has full knowledge that the agent is acting for the seller, he may still employ him to purchase; and, if he does so, the agent is entitled to compensation for his services. There need not be an express agreement to pay in such a case, but there must be full knowledge of the prior relation, and such facts and circumstances shown as will raise an implied contract to pay for the services."

In *Minster v. Benoliel*, 32 Misc. 630, 66 N. Y. S. 493, it appeared that the defendant engaged the plaintiff, a real estate broker, to procure a tenant for his vacant premises. The plaintiff introduced a tenant to the defendant and the premises were finally rented. In an action for the commissions the defendant contended that the plaintiff could not recover because he agreed to accept a commission from the tenant. The tenant never paid the plaintiff and could not be made to pay. It was held under these circumstances that the defendant was liable to the broker according to the original agreement.

In *Franck v. Blazier*, 66 Ore. 377, 133 Pac. 800, it was held that a broker has a right to act for both parties in the deal, provided the business is open, fair and honest, and each party is aware of the employment by the other. If a party is fully informed in regard to the facts and consents to the termination of the deal with an understanding of the true conditions, he is liable for the broker's commission.

The broker is not bound to give express notice to his principal that he is acting for the other side. It is sufficient if from the nature of the circumstances the principal must be aware of the fact, and if no active objection is made at the time of the employment of the broker, the objection cannot be raised after the negotiation is completed.

Culverwell v. Birney, 11 Ont. 265, *appeal allowed* 14 Ont. App. 286.

In *Shropshire v. Adams*, 40 Tex. Civ. App. 339, 89 S. W. 448, it appeared that the plaintiff and the defendant entered into a contract whereby the defendant agreed to buy a herd of cattle to be taken care of by the plaintiff, the defendant to furnish the pasture; the profits of the increase to be divided at the end of five years, one-fourth to the plaintiff. In consideration of this promise the plaintiff agreed to bring about a sale of a tract of land owned by the defendant. The plaintiff procured a purchaser for the land who promised to pay the plaintiff \$5,000 in cash in case he should bring about the purchase. This fact the plaintiff reported to the defendant who assented to the joint employment by the plaintiff and said he would be glad to see him make that sum. It was held that there was no inconsistent employment and that the plaintiff could recover in an action for damages for a breach of contract for a failure to buy the stock as agreed.

It has been held that knowledge of the dual agency on the part of the defendant may be inferred from the circumstances of the case. Thus in *Goldsberry v. Thomas*, 178 Mo. App. 334, 165 S. W. 1179, it was held that where the defendant refused to admit that he had knowledge of the double employment but admitted that he surmised it, it was a question for the jury whether there was a consent.

In *Kinsland v. Grimshawe*, 146 N. C. 397, 59 S. E. 1000, it appeared that the defendant employed the plaintiff to find a purchaser for his land at a fixed price per acre. The plaintiff introduced a purchaser to the defendant, and after some negotiation the defendant gave the purchaser an option on the land for thirty days. The purchaser was a dealer in real estate and employed the plaintiff to procure a person to take the lands out of his hands at a profit for which services the plaintiff was to receive a commission. It was held that the broker under those circumstances did not represent adverse interests and could recover a commission from both the buyer and seller.

Where one has an option on a parcel of land and puts it in the hands of a broker to trade and he trades with one who agrees to pay him a commission, the parties both knowing that the broker is to receive a commission from both, the fact that the owner of the record title does not know of the agreements as to the commission is no bar to a recovery of the commission as agreed. *Cook v. Piatt*, 126 Mo. App. 553, 104 S. W. 1131.

If the agent procures a buyer who pays a price which is satisfactory to the seller and after the transaction is completed the buyer pays the agent \$100 for his services though he did not employ the broker previous to

the transaction, the seller is liable to the broker for a reasonable compensation as commission, there being no charge of bad faith. *Campbell v. Yager*, 32 Neb. 266, 49 N. W. 181.

A provision in a contract of sale that "this to be in full settlement of my part of the commission on the deal or trade between myself and C. T. Gregory" has been held to be sufficient to indicate that the principal knew that the broker was acting for both parties in the deal. *Fraser v. McCarty* (Tex.) 168 S. W. 44, wherein the court said: "Who was to pay the other half of the commission? It could not have been any other person than Gregory; for he alone, besides appellant, was interested in the trade. It is inconceivable that appellant did not know the exchange, and he must have known that if \$125 was 'my part of the commission on the deal or trade, between myself and C. T. Gregory,' that Gregory was to pay the other part. No other reasonable inference can be drawn from the facts."

Knowledge of Dual Agency.

Many authorities hold that in order that the broker may recover a commission from both buyer and seller, he must prove not only that the seller was aware of the double agency, but that the purchaser of the property also had knowledge of the double employment.

Alabama.—*Green v. Southern States Lumber Co.* 141 Ala. 686, 37 So. 670.

California.—*Glenn v. Rice*, 162 Pac. 1020.

Colorado.—*Finnerty v. Fritz*, 5 Colo. 175.

Connecticut.—*Bollman v. Loomis*, 41 Conn. 582.

Illinois.—*Byrd v. Hughes*, 84 Ill. 174, 25 Am. Rep. 442; *Young v. Trainor*, 158 Ill. 428, 42 N. E. 139.

Iowa.—*Stapp v. Godfrey*, 158 Ia. 376, 139 N. W. 893.

Kansas.—*Crawford v. Surety Invest. Co.* 91 Kan. 748, 139 Pac. 481; *Hoffhines v. Thorson*, 92 Kan. 605, 141 Pac. 253.

Massachusetts.—*Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Sullivan v. Tufts*, 203 Mass. 157, 89 N. E. 239.

Michigan.—*Friar v. Smith*, 120 Mich. 411, 79 N. W. 633, 46 L.R.A. 229.

Minnesota.—*Hobart v. Sherburne*, 66 Minn. 171, 68 N. W. 841.

Missouri.—*Chapman v. Currie*, 51 Mo. App. 40; *Dennison v. Gault*, 132 Mo. App. 301, 111 S. W. 844.

Nebraska.—*Campbell v. Baxter*, 41 Neb. 729, 60 N. W. 90.

New York.—*Pugsley v. Murray*, 4 E. D. Smith 245; *Carman v. Beach*, 63 N. Y. 100.

Ohio.—*Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Capener v. Hogan*, 40 Ohio St. 203.

Oklahoma.—*Skirvin v. Gardner*, 36 Okla. 615, 129 Pac. 729; *Levy v. Gross*, 46 Okla. 626, 149 Pac. 237.

Rhode Island.—*Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458.

Texas.—*Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268.

The court in *Glenn v. Rice* (Cal.) 162 Pac. 1020, said: "The authorities with practical unanimity declare that, if an agent is engaged by both parties to effect a sale of property from one to the other, or an exchange between them, not as a mere middleman to bring them together, but actively in inducing each to make the trade, he cannot recover compensation from either party, unless both parties knew of the double agency at the time of the transaction. The reason for the rule is that he thereby puts himself in a position where his duty to one conflicts with his duty to the other, where his own interests tempt him to be unfaithful to both principals, a position which is against sound public policy and good morals. His contract for compensation being thus tainted, the law will not permit him to enforce it against either party. It is no answer to this objection to say that he did, in the particular case, act fairly and honorably to both. The infirmity of his contract does not arise from his actual conduct in the given case, but from the policy of the law, which will not allow a man to gain anything from a relation so conducive to bad faith and double dealing. And the fact that the party whom he sues was aware of the double agency and of the payment, or agreement to pay, compensation by the other party, and consented thereto, does not entitle him to recover. He must show knowledge by both parties. One party might willingly consent, believing that the advantage would accrue to him, to the detriment of the other. The law will not tolerate such an arrangement, except with the knowledge and consent of both, and will enter into no inquiry to determine whether or not the particular negotiation was fairly conducted by the agent. It leaves him as it finds him, affording him no relief."

In *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268, the court said: "It is well settled that a person cannot act in the capacity of agent for both the buyer and seller, and receive commissions from both; and from principles of public policy such an agent would not be allowed to recover compensation from either party, unless he should so act with the full knowledge and consent of both principals; and about this exception there is a conflict of authority. It makes no difference that the principal was not in fact injured, or that the agent intended no wrong, or that the other party acted in good faith."

When the duality of the agency is relied on as a defense to an action for commissions it is necessary for the defendant to prove not only the fact of such agency but also, that the same was not known to both parties. *Red Cypress Lumber Co. v. Perry*, 118 Ga. 876, 45 S. E. 674; *Ballew v. Ware*, 16 Ga. App. 149, 84 S. E. 597. The court in *Red Cypress Lumber Co. v. Perry*, supra, said: "Dual agency was not absolutely contrary to public policy, but only so if the principals did not know thereof. And as it required two elements to defeat the agent's right to recover, both should have been proved by the party asserting the invalidity of the contract. 'When a contract is valid in the absence or existence of certain facts, but otherwise void, it is, in the absence of evidence, presumed to be valid; and the burden of proving the absence or existence of such facts lies upon him who asserts its invalidity.' *Greenhood on Pub. Pol.* 118, Rule cxxx."

Where a double employment exists but it is not known to one of the parties no recovery can be had against the party kept in ignorance; and it does not matter that there is no fraud meditated on the part of the broker. *Kronenberger v. Fricke*, 22 Ill. App. 550; *Jones v. Veeck*, 197 Ill. App. 119; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *De Steiger v. Hollington*, 17 Mo. App. 382; *Frankel v. Wathen*, 58 Hun 543, 12 N. Y. S. 591; *Norman v. Reuther*, 25 Misc. 161, 54 N. Y. S. 152; *Bellin v. Wein*, 104 N. Y. S. 360; *Jensen v. Bowen* (N. D.) 164 N. W. 4; *Meyer v. Hanchett*, 43 Wis. 246.

In *Frankel v. Wathen*, supra, it appeared that the plaintiff was the general agent of the defendants in the sale of whisky and that while so employed he was requested by others to negotiate an exchange of their farm for whisky. An exchange was effected with the defendants through the plaintiff on which exchange the plaintiff received a commission from the owners of the farm. The defendants were not aware that the plaintiff represented the other parties to the transaction, beyond a mere suggestion that they relied on the plaintiff's judgment as to the selection of whisky to be given for the farm. It was held that the plaintiff could not recover a commission on the whisky given in exchange for the farm, the court saying: "The rule governing the subject suggested is therefore so strict and so vigorous, so sensible and so just, that when the person is acting in the double capacity of representing two persons, for each of whom he is expected to do his best, a knowledge of the duplicate character should be established, not upon mere inference, but upon a full disclosure or positive proof of knowledge, so that the seller or the buyer, as the case may be, may be advised of the exact relation of the agent to the parties

conducting the negotiation. There is no such evidence in this case."

Where a broker was allowed to show that a principal was aware of the double agency it was held to be error to exclude testimony offered by the principal to prove that he was ignorant of the double employment. *Condit v. Sill*, 18 N. Y. S. 97, 44 N. Y. St. Rep. 284.

Sale Prevented by One Party.

Where a broker has lawfully contracted for commissions from both parties, of course a party who wrongfully prevents the consummation of the sale is liable for the commission which he agreed to pay. *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447.

And where a binding and enforceable contract has been entered into, the fact that one party refuses to perform does not relieve the other party from his agreement to pay a commission. *Hutton v. Stewart*, 90 Kan. 602, 135 Pac. 681; *Tieck v. McKenna*, 115 App. Div. 701, 101 N. Y. S. 317. And see *Collins v. Fowler*, 8 Mo. App. 588.

If a broker has a valid contract for commissions from both parties, and has fully performed on his part, a party who wrongfully prevents a sale before a binding contract has been entered into is liable not only for the commission which he agreed to pay, but for that which would have been payable by the other party had a contract been entered into. *James v. Home of Sons, etc. of Israel*, 153 N. Y. S. 169; *Hunter v. Lyons* (Tex.) 144 S. W. 353. In the case last cited the court said: "We are of opinion, also, that in this instance, if the jury believed that both principals knew that a commission was to be paid to Hunter by each of them, and assented thereto, and if, in fact, he was the efficient cause of an agreed trade, and if, in fact, Lyons, without legal excuse, failed to carry out such trade, he could, in law, be liable, not only for the commission which he had contracted to pay Hunter, but also for the commission which Hunter thereby lost and which he would otherwise have received from Westbrook." In *James v. Home of Sons, etc. of Israel*, 153 N. Y. S. 169, it was said: "The learned judge below seems to have decided this case on a question of law of which I think that he has taken an erroneous view. The defendant agreed with plaintiff that, if plaintiff would procure the sale to it of the property named at an agreed price, it would purchase the same, and it was aware that plaintiff would receive a commission from the owner. When it broke this contract with plaintiff by refusing to complete the transaction without valid reason, plaintiff was entitled to his damage, and the measure thereof was the amount of the commission which he would have received. This

follows from the nature of a contract and the result of its breach." See also the reported case.

MINORITY RULE.

In at least two jurisdictions it is held that in order to entitle a broker to commissions from both the buyer and the seller there must be an express contract by which the buyer and seller bind themselves to pay and that knowledge of the double employment is not in itself sufficient to create a contract. *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Rice v. Davis*, 136 Pa. St. 441, 20 Atl. 513, 20 Am. St. Rep. 931; *Addison v. Wanamaker*, 185 Pa. St. 536, 39 Atl. 1111; *Maxwell v. West*, 23 Pa. Co. Ct. 302; *Moore v. Grow*, 1 Pa. Super. Ct. 125; *Evans v. Rockett*, 32 Pa. Super. Ct. 365; *Mitchell v. Schreiner*, 43 Pa. Super. Ct. 633. See also *Fulton v. Walters*, 28 Pa. Super. Ct. 269.

The court in *Mitchell v. Schreiner*, supra, said: "It is a rule of public policy, subject to such exception as we are about to notice, that an agent for the sale of property cannot at the same time act as agent for the purchaser thereof and become entitled to compensation from both vendor and purchaser or from either: *Everhart v. Searle*, 71 Pa. St. 256. Whilst this rule may be waived by an express agreement between the parties, yet it is well settled that such agreement cannot be inferred either from knowledge of the fact that the rule has been violated or from mere silence or failure to dissent at the time, or from all these combined. Nothing short of 'clear and satisfactory proof of an agreement' to waive the rule can be regarded as sufficient for this purpose."

Broker Bringing Parties Together.

GENERAL RULE.

It is held generally that if the extent of a broker's agency is to bring the contracting parties together and does not involve the duty of negotiating for either, the agent is termed a middleman and may contract for and recover commissions from both buyer and seller. In such a case knowledge by either party of the dual agency is not necessary.

United States.—*McLure v. Luke*, 154 Fed. 647, 630, 84 C. C. A. 1, 24 L.R.A. (N.S.) 659.

California.—*Green v. Robertson*, 64 Cal. 75, 28 Pac. 446; *Clark v. Allen*, 125 Cal. 276, 57 Pac. 985; *King v. Reed*, 24 Cal. App. 229, 141 Pac. 41.

Colorado.—*Finnerty v. Fritz*, 5 Colo. 174; *Staats v. Weaver*, 53 Colo. 25, 123 Pac. 666; *Manders v. Craft*, 3 Colo. App. 236, 32 Pac. 836.

Georgia.—*Red Cypress Lumber Co. v. Perry*, 118 Ga. 876, 45 S. E. 674.

Idaho.—*Clopton v. Meeres*, 24 Idaho 293, 133 Pac. 907.

Illinois.—*Law v. Ware*, 238 Ill. 360, 87 N. E. 308; *O'Neill v. Sinclair*, 54 Ill. App. 298; *Jones v. Missouri Lumber, etc. Co.* 166 Ill. App. 266. See also *Sisson v. Whiting*, 192 Ill. App. 605.

Indiana.—*Cox v. Haun*, 127 Ind. 325, 26 N. E. 822.

Iowa.—*Stapp v. Godfrey*, 158 Ia. 376, 139 N. W. 893.

Kansas.—*Hutton v. Stewart*, 90 Kan. 602, 135 Pac. 681.

Kentucky.—*Delph v. Wainscott*, 14 Ky. L. Rep. 304.

Massachusetts.—*Rupp v. Sampson*, 16 Gray 398, 77 Am. Dec. 416.

Michigan.—*Ranney v. Donovan*, 78 Mich. 318, 44 N. W. 276; *Montross v. Eddy*, 94 Mich. 100, 53 N. W. 916, 34 Am. St. Rep. 323; *Friar v. Smith*, 120 Mich. 411, 79 N. W. 933, 4 Detroit Leg. N. 194, 46 L.R.A. 229; *Flattery v. Cunningham*, 125 Mich. 467, 84 N. W. 625; *Hogle v. Meyering*, 161 Mich. 472, 126 N. W. 1063.

Minnesota.—*Wasser v. Western Land Securities Co.* 97 Minn. 460, 107 N. W. 160; *American Security, etc. Co. v. Penney*, 129 Minn. 369, 152 N. W. 771.

Missouri.—*Collins v. Fowler*, 8 Mo. App. 588.

Montana.—*Childs v. Ptomey*, 17 Mont. 502, 43 Pac. 714.

Nebraska.—*Compare Strawbridge v. Swan*, 43 Neb. 781, 62 N. W. 189.

New Jersey.—*Sternberger v. Young*, 73 N. J. Eq. 586, 75 Atl. 807.

New Mexico.—*Ross v. Carr*, 15 N. M. 17, 103 Pac. 307.

New York.—*Platt v. Baldwin*, 2 City Ct. Rep. 281; *Balheimer v. Reichardt*, 55 How. Pr. 414; *Wyckoff v. Bliss*, 12 Daly 324; *Siegel v. Gould*, 7 Lans. 177; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Knauss v. Gottfried Krueger Brewing Co.* 142 N. Y. 70, 36 N. E. 867, reversing 62 Hun 46, 16 N. Y. S. 357; *Gracie v. Stevens*, 171 N. Y. 658, 63 N. E. 1117, affirming 56 App. Div. 203, 67 N. Y. S. 688; *Haviland v. Price*, 6 Misc. 372, 26 N. Y. S. 757; *Jones v. Henry*, 15 Misc. 151, 36 N. Y. S. 483; *Pollatschek v. Goodwin*, 17 Misc. 587, 40 N. Y. S. 682; *Marks v. O'Donnell*, 66 Misc. 147, 121 N. Y. S. 214; *Swee v. Neumann*, 67 Misc. 605, 123 N. Y. S. 776; *Felbel v. Kahn*, 29 App. Div. 270, 51 N. Y. S. 435; *Norton v. Genesee Nat. Sav. etc. Assoc.* 57 App. Div. 520, 68 N. Y. S. 32; *Clapp v. Schaus*, 156 App. Div. 681, 141 N. Y. S. 451; *Silberkraus v. Winnie*, 158 App. Div. 50, 142 N. Y. S. 887; *Connor v. Munsees*, 145 N. Y. S. 891; *Erland v. Gibbons*, 159 N. Y. S. 875.

North Carolina.—*Lamb v. Baxter*, 130 N. C. 67, 40 S. E. 850. See also *Atkinson v. Pack*, 114 N. C. 597, 19 S. E. 628.

North Dakota.—Jensen v. Bowen, 164 N. W. 4.

South Dakota.—Grasinger v. Lucas, 24 S. D. 42, 123 N. W. 77; Langford v. Issenhuth, 28 S. D. 451, 134 N. W. 889; Jordan v. Anderson, 36 S. D. 508, 155 N. W. 769.

Texas.—Bass v. Tolbert, 51 Tex. Civ. App. 437, 112 S. W. 1077; Leake v. Scaief, 140 S. W. 814; Inman v. Brown, 147 S. W. 652; Hill v. Patton, 160 S. W. 1155.

West Virginia.—Runnion v. Morrison, 71 W. Va. 254, 76 S. E. 457; Peters v. Riley, 73 W. Va. 785, 81 S. E. 530.

Wisconsin.—Herman v. Martineau, 1 Wis. 151, 60 Am. Dec. 368; Stewart v. Mather, 32 Wis. 344; Meyer v. Hanchett, 43 Wis. 246; Barry v. Schmidt, 57 Wis. 172, 15 N. W. 24, 46 Am. Rep. 35; Orton v. Scofield, 61 Wis. 382, 21 N. W. 261; Donohue v. Padden, 93 Wis. 20, 66 N. W. 804; McKenzie v. Lego, 98 Wis. 364, 74 N. W. 249; Kilpinski v. Bishop, 143 Wis. 390, 127 N. W. 974; Tasse v. Kindt, 145 Wis. 115, 128 N. W. 972, 31 L.R.A.(N.S.) 1222; Litts v. Morse, 145 Wis. 472, 130 N. W. 460.

In *Friar v. Smith*, 120 Mich. 411, 79 N. W. 633, 46 L.R.A. 229, the court stated the rule and gave the reason for it as follows: "The rules of law applicable to this class of cases are briefly stated: An agent to sell may not become the agent of the purchaser, nor may an agent to buy become the agent of the seller, unless the principals are duly acquainted with the fact that the agent is acting in such dual capacity. *Mechem*, Ag. § 943; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541; *Leathers v. Canfield*, 117 Mich. 277. If, however, both principals, with full knowledge, consent that the agent act on behalf of both, the agreement for compensation is binding. See cases cited above. Defendant, who knows that his agent expects a commission, may defeat recovery by showing that the other principal of the agent is unaware of the fact of such double agency, and this on the ground that the parties have engaged in a transaction against public policy. The law will not enforce their contracts, but will leave them where it finds them. *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Rice v. Davis*, 136 Pa. St. 439, 20 Am. St. Rep. 931; *Everhart v. Searle*, 71 Pa. St. 256. But there is another class of cases, in which the broker is not employed to negotiate a sale or purchase, but simply to bring two parties together, and permit them to make their own bargain. In such case he is a mere middleman, and may recover an agreed compensation from either or both, though neither may know that compensation from the other is expected. This is on the ground that such an employment does not place the broker in a position where he can sacrifice the interests of his principal, and because he is not, as

agent of the owner, bound to secure the best price obtainable, or, as agent of the buyer, to purchase at the least price at which the property can be bought, as in such case he has nothing to do with fixing the price. Neither party has contracted for his skill, knowledge, or influence, and he stands entirely indifferent between them."

The court in *Siegel v. Gould*, 7 Lans. (N. Y.) 177, said: "According to the finding of the referee, the nature of the defendant's employment of the plaintiffs was that of mere brokers, in the strict signification of that term, and not that of agents to make a sale on his behalf. The evidence sustains this view of the relations between the parties. The defendant agreed to pay the plaintiffs for that service. The service having been rendered pursuant to the agreement, we are unable to perceive any legal objection to a recovery by the plaintiffs. The fact that Martin, the purchaser of the defendant's property, also agreed to pay the plaintiffs for their services to him, creates no such obstacle. Both contracts being founded on a legal consideration, each is valid. The case would have been quite different if the plaintiffs had been employed as agents of the defendant to buy or sell. They would then have been incapacitated from acting for Martin in the transaction without the assent of the defendant. Such conflicting relations are repugnant to the fundamental principle on which the law of agency rests, and are forbidden by law. But the plaintiffs were not such agents. They were employed as middlemen only, to bring the parties together to enable them to make their own contracts. They so acted with the knowledge of both parties. In such a case a broker is not an agent for either party to buy or sell, but stands indifferent between them. There is no conflict of duty in the case. He does not make himself an adverse party to either principal, nor does either of them repose any special trust or confidence in him."

In *Rupp v. Sampson*, 16 Gray (Mass.) 398, 77 Am. Dec. 416, it was said: "We can see nothing in the conduct of the plaintiff which was fraudulent, or which operated to deceive the defendants in making the agreement to pay him for his services. He made no false representations to them. They knew the nature and value of his services, and the extent to which they were beneficial to them. It was wholly immaterial that he was also to receive compensation from the other party. It might well be that the services of the plaintiff were of value to both parties, and that each might be willing to pay according to the benefit received by each. We know of no principle of law, on which an agreement to pay for services rendered, honestly entered into, can be avoided on the ground that an-

other person, having interests wholly distinct and independent, has stipulated by a separate contract to pay for the same services. Both contracts are valid; they are made upon good consideration; and each agrees to make compensation for a benefit which he expects to receive from the bargain."

The court in *Langford v. Issenhuth*, 28 S. D. 451, 134 N. W. 889, defined the term "middleman" and pointed out when the term "broker" may be used instead, saying: "In the application of this rule appellant attempts to draw a distinction between the duties and obligations of one who acts as a broker, and one who acts as a 'middleman.' The contention is that plaintiff in the complaint alleges himself to be, and brings this action as, a broker, and for that reason the court erred in submitting to the jury any question as to his right to recover as a 'middleman.' The contention is that plaintiff in the complaint alleges himself to be, and brings this action as, a broker, and for that reason the court erred in submitting to the jury any question as to his right to recover as a 'middleman.' In 19 Cyc. 116 (4) it is said: 'The broker is, strictly speaking, a middleman or intermediate negotiator between the parties, and is not in the fiduciary relation of an agent to his principal, but must favor neither the one nor the other of the parties between whom he effects a transaction.' Hence there was no inconsistency between plaintiff's allegation that he was engaged in business as a broker and proof of his right to recover commissions as a middleman. A middleman is defined to be 'a person employed to bring two or more parties together, the parties when they meet to do their own negotiating and make their own bargain; an agent who merely brings the parties to the sale together, and upon whom does not devolve the duty of negotiating for either, and who may contract for and receive commissions from both.' 27 Cyc. 487. A middleman, therefore, is a broker whose duties are limited by his contract to finding and producing a purchaser able, ready, and willing to accept his client's terms, or to effect a transaction with his client upon any terms satisfactory to both. The term 'middleman' is merely descriptive of the nature of the contract of employment."

If nothing is left to the broker's discretion but to find a willing purchaser at a price fixed by the seller, it is of no importance to the seller whether the purchaser also pays the broker for any services he may render. *Montross v. Eddy*, 94 Mich. 100, 53 N. W. 916, 34 Am. St. Rep. 323.

Where a broker was employed by a prospective purchaser to see if he could not obtain some persons who would sell their breweries on terms to be agreed on by the

principals themselves, and he was also employed by a corporation to introduce its president to some one who wished to purchase, but the terms and all else regarding the contract were to be agreed on between the buyer and the seller, it was held that the broker was a mere middleman and might recover from both parties the commissions agreed on if the transaction was concluded wholly by negotiations between the parties after he had brought them together. *Knauss v. Gottfried Krueger Brewing Co.* 142 N. Y. 70, 38 N. E. 867, reversing 62 Hun 46, 16 N. Y. S. 357.

A broker who is given an option to buy land at a fixed price and on stated terms may, on assigning his option to a third person, receive a commission from both the buyer and the seller since his relation to the parties is that of a middleman, and no more. *Runnion v. Morrison*, 71 W. Va. 254, 76 S. E. 457.

If the language of the contract creating the agency calls on the broker to bring about a condition which will enable the principal to make a deal satisfactory to himself, the broker is a mere middleman and it is of no consequence to the seller that the agent is at the same time the agent for the person with whom he deals. *Kilpinski v. Bishop*, 143 Wis. 390, 127 N. W. 974.

In *Tasse v. Kindt*, 145 Wis. 115, 128 N. W. 972, 31 L.R.A.(N.S.) 1222, it appeared that the defendant agreed to pay the plaintiff a commission if the plaintiff would procure a purchaser for the defendant's land who would pay the highest price obtainable. The contract was later modified, the defendant fixing the price at which the property should be offered. Prior to the modification the plaintiff had a contract with prospective purchasers whereby he was to be paid a commission by them. It was held that the plaintiff could recover from the seller notwithstanding this arrangement.

Where an agent brings about an exchange of parcels of real estate, having nothing to do with the prices and details, his functions terminating with the bringing of the parties together, he may recover a commission from both parties if both have agreed to pay. *Manders v. Craft*, 3 Colo. App. 236, 32 Pac. 836.

It has been held that where one is employed merely to secure the acceptance of a proposition and is paid therefor by the principal, he cannot be required to account for money received by him from the broker for the other party who divided his commission with him. *Law v. Ware*, 238 Ill. 360, 87 N. E. 308, wherein the court said: "In this case, however, the complainant, who was a real estate dealer, fixed his own price on the property, and did not employ the defendant to secure the best price he could obtain but

only to secure the acceptance of his proposition. Ordinarily an owner who lists property for sale with a real estate broker and who fixes a minimum price understands, and has a right to expect, that the broker will obtain as large a price as possible, and the broker expects and is entitled to commissions on the price that he may obtain. But here the complainant fixed his own price, and, assuming that his version of the agreement was the correct one, the amount was much less than the usual commission, with no increase or further compensation in any event. We do not see how it can be said that the defendant placed himself in the transaction in a position where he owed a duty to the church board inconsistent with his duty to the complainant."

It has been held that the evidence must clearly show that the broker acted only as a middleman in bringing the parties together. If the broker actively participated in the negotiations he cannot recover commissions as a middleman unless he disclosed to the seller that he expected a commission from the buyer. *Leathers v. Canfield*, 117 Mich. 277, 75 N. W. 612, 45 L.R.A. 33; *Pinch v. Morford*, 142 Mich. 63, 105 N. W. 22.

When a double agency is shown the burden of proving that he acted as a middleman merely is on the broker. *Jensen v. Bowen* (N. D.) 164 N. W. 4, wherein the court said: "Unless, indeed, he was a mere middleman, each party who employed him was entitled to the exercise of his discretion, skill, and judgment, and the mere fact that the price was fixed by one would not absolve him from the use of such skill and discretion in regard to the interest of the other. But was he employed to act and to negotiate, or did he negotiate, for both parties? The question being one of burden of proof, when the double agency was shown, did he overcome the presumption of bad faith occasioned thereby by proof that he was merely a middleman, and this not merely at the inception, but throughout the whole transaction? We believe he did not, and we believe that it was incumbent upon him to do so."

Where an agent acts merely as a middleman he can claim commission from both parties even though he has kept each party in ignorance of his employment by the other, and the question whether the employment involves discretion or is purely ministerial is one of fact. *Siegel v. Gould*, 7 Lans. (N. Y.) 177; *Knauss v. Gottfried Krueger Brewing Co.* 142 N. Y. 70, 36 N. E. 867; *Norton v. Genesee Nat. Sav. etc. Assoc.* 57 App. Div. 520, 68 N. Y. S. 32; *Siegel v. Rosenzweig*, 129 App. Div. 547, 114 N. Y. S. 179.

It has been held that where a local custom obtains to the effect that a broker in bringing the parties together for the exchange of land

may recover a commission from both parties, the law will presume that the parties are aware of the custom and will allow the agent to recover for the customary commission. *Ramey v. Sturgeon*, 17 Ga. App. 292, 86 S. E. 660; *Mullen v. Keetzieb*, 7 Bush (Ky.) 253; *Haviland v. Price*, 6 Misc. 372, 26 N. Y. S. 757.

But it has been held that in order for such a custom to have effect with respect to the matter of compensation it is necessary that the broker should act as a middleman in negotiating the exchange in the mutual interest of both parties and without his being the particular agent of either. The principle underlying this is, that a custom will not be allowed to subvert a rule of law. *Inman v. Brown* (Tex.) 147 S. W. 652.

Proof of a custom to charge both parties will not be admitted where the broker acts for both parties without informing either that he was acting for the other. *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756.

MODIFICATION OF RULE.

If it can be shown that a broker without the knowledge of his principal was at the same time working for the other party in an attempt to secure the property for the lowest possible price, he cannot recover commissions from the seller as a middleman, although the seller and purchaser finally agreed on the price without the assistance of the broker. *Southack v. Lane*, 23 Misc. 515, 52 N. Y. S. 687, *reversed* 32 Misc. 141, 66 N. Y. S. 629.

If a broker effects a sale of property by first taking a contract to himself, refusing to tell the principal who the purchaser is until he secures a written contract, he cannot recover a commission from the seller after assigning his contract to the real purchaser from whom he receives a commission. Having negotiated the trade himself, the broker does not act as a middleman merely. *Horwitz v. Pepper*, 128 Mich. 688, 87 N. W. 1034, 8 Detroit Leg. N. 834.

If a broker exerts himself to the utmost to bring about a sale, advising each party that the trade is a desirable one to make, he is more than a middleman, since he attempts to aid each in effecting the exchange for which he is instrumental in bringing them together. No compensation can therefore be had under such circumstances without the consent of both to the dual agency. *Casady v. Carraher*, 119 Ia. 500, 93 N. W. 386.

Where a broker is employed to bring about an exchange of real property and is to get all the property he can for his principal in exchange he cannot recover compensation from either party without the knowledge and

consent of the other. *Robinson v. Clock*, 38 App. Div. 67, 55 N. Y. S. 976. Under such an employment the employer has a right to assume that the agent is acting solely in his interest unless he is apprised to the contrary. *Hannan v. Prentiss*, 124 Mich. 417, 83 N. W. 102.

Where the seller of property placed it with an agent for sale or exchange for farm property at the broker's option, agreeing to render all the assistance he could in making the sale or exchange, it was held that the contract conferred authority to negotiate, and did not constitute the broker a mere middleman to bring the parties together. *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541, wherein the court said: "The writing placed the property for sale or exchange in plaintiffs' hands and then reserved an option as to whether the final disposition should be a sale or an exchange and expressly required defendant to afford the plaintiffs all the assistance he could in making such sale or exchange. The contract had large scope and went much further than to constitute the plaintiffs mere middlemen to bring some particular third person, or even any one in general, into a position to negotiate with the defendant. It conferred authority to negotiate and reposed trust and confidence and contemplated that the plaintiffs should act in defendant's interest and should exert their judgment and their influence in his behalf."

Where a broker actually participates in the negotiations leading up to the transaction he cannot be considered a middleman merely, although he is employed by both parties. *Stapp v. Godfrey*, 158 Ia. 376, 139 N. W. 893, wherein the court said: "No definite value was put on their property by either defendant or Coombs in listing with plaintiff, and he was not authorized by either to negotiate the trade. But his compensation, as he claims, was dependent on any exchange, and he admits having exerted himself to the utmost to bring about the deal; advising each, apart from the other, that the trade was a desirable one to make. Under these circumstances, he was more than a middleman, for he attempted to aid each in effecting the exchange for which he was instrumental in bringing them together. Loyalty to either principal required him to disclose his relations to the other. The agent cannot serve two principals without the intelligent consent of both, and, if he undertakes to do so, compensation cannot be recovered for services rendered."

FIELDS

v.

ALTMAN ET AL.

Alabama Supreme Court—May 20, 1915.

193 Ala. 160; 69 So. 543.

Public Officers — Liability — Tax Sale under Void Statute.

An officer, who sells property for taxes acting under a void statute, is not liable to the purchaser of such property at the tax sale, since the rule of caveat emptor applies.

[See note at end of this case.]

Appeal from Birmingham City Court:
PUGH, Judge.

Action by A. E. Fields, plaintiff, against J. W. Altman et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

Harsh & Fitts for appellant.

Stallings, Nesmith & Judge for appellees.

[160] MAYFIELD, J.—The question in this case, upon which all others depend, is this: Is an officer who sells property for taxes, acting under a void statute, liable to a purchaser of the property sold at the tax sale? We are of the opinion that this question should be answered in the negative. The trial court so answered it, to which ruling we agree.

There are several valid reasons why the purchaser cannot recover in such case. One is that the rule of caveat emptor applies with all its vigor in such cases. Where two persons are equally at fault, the law will leave them as it finds them. The officer did not sell the property as his own, or by virtue of individual right or will. He sold it, as he and the purchaser thought, [161] by virtue of law and for a public purpose, but by a mistake of law only he had no right or authority to sell, and by virtue of the same mistake the plaintiff purchased. The latter could not take his chances of getting a title to the property purchased, and, if he failed in that, recover back his money paid from the officer making the sale. Ignorance or mistake of the law will not excuse a man, nor relieve from the consequences of crime, or from liability for torts or on contracts, much less confer a right of action upon him which he would not have had but for the ignorance or mistake. There are exceptions to, limitations upon, and qualifications of, the above rule; but this case does not fall within any of the exceptions, limitations, or qualifications.

What was said in the case of *Southern R. Co. v. Florence*, 141 Ala. 495, 37 So. 844, 3 Ann. Cas. 106, is applicable here, and that decision supports the ruling of the lower court in this case. It is there said: "This action was brought to recover back money paid by plaintiff to defendant for a license to operate a toll bridge as required by an ordinance, because illegally collected. Plaintiff bases its right of recovery upon the proposition that the ordinance under which the exaction was made and the money paid was and is void, and upon the further proposition that, because only a portion of the bridge operated by it was within the city limits, therefore the action was illegal. It is clear from this statement that plaintiff predicates his right of recovery upon a mistake of law. It is not insisted that there was any fraud or imposition, or that plaintiff did not have full knowledge of all the facts."

It is needless to say that this action is not brought under any of our statutes providing that a taxpayer may [162] recover back money which he paid under void statutes, void assessments, etc. No such contention is made by appellant, who is not a taxpayer, but a purchaser at tax sale. Careful research by us fails to disclose a single case in which a purchaser at a tax sale was allowed to recover back his money, the purchase price, because either the statute or the sale was void—not even to the extent of the taxes legally due, unless such action was expressly provided for by the statute. There are in some of the other states statutes which authorize a recovery by the purchaser to the extent of the taxes due, but we have no such statute in Alabama.

There is a radical difference between the right of a person to recover back money which he was required to pay by the taxing power under a void law or assessment and the claim of one who purchase property at a tax sale which is void. The latter is a mere volunteer in making the payment; he has the same means of knowing whether or not the sale is authorized, valid, or void, that the officer making the sale has. He buys a title without warranty. His speculation may prove profitable or unprofitable; and no one has, in either case, taken his money without his consent, or with any contract, express or implied, to reimburse him if his bargain proves a bad one for him. *Lynde v. Melrose*, 10 Allen (Mass.) 49. The above has been well stated by the Texas court as follows: "In *McCormick v. Edwards*, 69 Tex. 108, 6 S. W. 33, it was said: 'After a careful research we have found no case in which a purchaser at a void tax sale has, without the aid of a statute, been permitted to recover even the taxes lawfully assessed upon the land and paid by his purchase. It would

seem equitable that he should at least recover the taxes which the landowner ought to have paid, and which he failed [163] to pay. Many states have, accordingly, passed statutes in regulation of this subject, and giving the relief indicated; and, so far as we have been able to discover, whenever this relief has been given or sanctioned by a court of last resort, it has been by virtue of statutory law.'"

In the case of *Lisso v. Police Jury*, 127 La. 283, 53 So. 566, 31 L.R.A. (N.S.) 1141, and notes thereto, the authorities are all reviewed, and the law seems to be as we have decided it above.

The purchaser at a tax sale is provided for in certain cases mentioned in section 2304 et seq. of the Code, but no claim is made that this case is brought within these statutes. In no event, and under no phase of the pleadings or the evidence, was the plaintiff entitled to recover in this action. No possible injury could or did result by any adverse ruling complained of.

Affirmed.

Anderson, C. J., and Somerville and Thomas, JJ., concur.

Rehearing denied June 30, 1915.

NOTE.

Personal Liability of Officer for Sale of Property for Taxes under Void Statute.

There appear to be no decisions other than the reported case dealing with the personal liability of an officer for the sale of property for taxes under a void statute; and it would seem from the authorities cited in the notes to *Foster v. Malberg*, Ann. Cas. 1914A 1116, and *Pennock v. Douglas County*, 42 Am. St. Rep. 579, which treat of analogous propositions, that there is a general acquiescence in the rule laid down in the reported case, that an officer who sells property for taxes under a void statute is not personally liable to a purchaser of the property. The basis of the rule is that the purchaser has the same means of knowing whether the sale is authorized, valid or void, that the officer making the sale has, and that the purchaser at a tax sale comes strictly and rigidly within the rule of caveat emptor. Thus it is said in *Desty on Taxation* p. 850 that "except as limited and qualified by express statutory provisions, the rule (caveat emptor) applies to all purchasers at tax sales; and, if the public has nothing to sell, the purchaser gets nothing." So in the case of *Hamilton v. Valiant*, 30 Md. 139, wherein the purchaser at a tax sale which was invalid for want of proper notice brought an action for damages against the officer whose omission invalidated the sale,

it was held that no liability existed. The court said: "The purchaser's title mainly depends upon the regularity of the proceedings of the officer who makes the sale, he is however bound to inquire whether he has acted in conformity with the law from which his power is derived; and if he acted without proper inquiry and care, it was his own fault, and buying upon the faith of his own judgment he must abide the consequences."

STATE EX REL. GASS

v.

GORDON.

Missouri Supreme Court—December 22, 1915.

266 Mo. 394; 181 S. W. 1016.

"Revenue" — Meaning of Term.

In view of Const. art. 11, §§ 6, 7, providing that the school fund shall consist of certain funds together with so much of the ordinary revenue of the state as may be by law set apart for that purpose, and that, in case the public school fund shall be insufficient to sustain a free school four months in each year, the general assembly may provide for such deficiency, but in no case shall there be set apart less than twenty-five per cent of the state revenue, the word "revenue" used in Laws 1915, p. 89, § 1, appropriating one-third of the ordinary revenue paid into the state treasury for school purposes, means the annual and current income of the state, however derived, which is subject to appropriation for general public uses in contradistinction to sums which are required to be paid into the state fund; the word "revenue" in its ordinary sense meaning the annual yield of taxes, etc., collected by the state.

[See note at end of this case.]

Same.

In such case, the word "ordinary" is to be given its usual meaning as "according to settled order," and the school fund is entitled to one-third of the regular and usual annual income of the state subject to appropriation for public uses.

[See note at end of this case.]

Statutes — Construction — Effectuating Legislative Intent.

Statutes should be construed so as to give effect to legislative intent and avoid meaningless and absurd results.

Words Given Ordinary Meaning.

In construing a statute, words should be given their ordinary meaning.

Practical Construction.

The construction of executive officers entrusted with the duty of carrying out statutes is entitled to great weight.

"Revenue" — Meaning of Term — Particular Items Included.

Under Laws 1915, p. 89, § 1, appropriating for schools one-third of the ordinary revenue of the state, gross earnings of and fees collected by various state departments are revenue only when paid directly into the state treasury without deduction for the expenses of the departments and salaries of the officers thereof, but when such deduction is made only the surplus is revenue.

[See note at end of this case.]

Same.

In such case, as Laws 1913, p. 367, providing for inspections of hay and grain by warehouse commissioners, provides, in section 41, that fees shall be regulated so as to produce only sufficient funds to defray the expenses of the department, and Rev. St. 1909, § 10955, provides for payments to local commissioners out of the textbook filing fund, only the surplus remaining after payment of such charges is revenue.

[See note at end of this case.]

Same.

Interest on ordinary state deposits, other than special funds, governed by Laws 1911, p. 114, § 10, requiring expenditure of the interest for the purpose of the fund, is "ordinary revenue" within Laws 1915, p. 89, § 1, appropriating one-third thereof for schools.

[See note at end of this case.]

Same.

Fines assessed against lumber companies are not "ordinary revenue," within Laws 1915, p. 89, § 1, appropriating one-third of annual revenue for schools, as such fines are wholly adventitious and are in no way annual.

[See note at end of this case.]

Same.

Moneys intermittently transferred from the insurance department fund to the general revenue fund are not ordinary annual revenue within Laws 1915, p. 89, § 1, appropriating one-third thereof for schools, particularly as Rev. St. 1909, § 6884, requires payment into the special fund, and as transfers are not binding on the legislature and are made biennially.

[See note at end of this case.]

Same.

Under Laws 1915, p. 89, § 1, appropriating one-third of annual ordinary revenue for schools, neither the gross nor net income from the factory inspection fund is ordinary revenue, for such income goes into a special fund for expenses of inspection which cannot be made up from the general revenue, and the transfer to the general revenue fund is made biennially by Rev. St. 1909, § 7826.

[See note at end of this case.]

Same.

Only the net earnings of examiners appointed by the state auditor is "ordinary revenue" within Laws 1915, p. 89, § 1, appropriating one-third for schools, for Laws 1913, p. 767, § 5, provides for payment of salaries of examiners out of the per diem received from counties and payment of surplus into the treasury.

[See note at end of this case.]

Original application for mandamus. Howard A. Gass, relator, and John P. Gordon, respondent. The facts are stated in the opinion. Warrt ISSUED.

A. T. Dumm for relator.

Robert Burkham for Board of Education of City of St. Louis.

Gage, Ladd & Small for School District of Kansas City.

H. K. White for School District of St. Joseph.

Ed. D. Merritt for School District of Springfield.

Kelsey & Cameron for School District of Joplin.

Mahan, Smith & Mahan for School District of Hannibal.

Charles E. Yeates for School District of Sedalia.

A. G. Young for School District of Webb City.

Arthur B. Chamier for School District of Chamier.

[399] *FARIS, J.*—This is an original proceeding by mandamus, brought by relator as State Superintendent of Public Schools, to compel respondent, as State Auditor, to set apart and certify for payment to the relator for the use of the public schools of the State, the sum of \$496,587.34, under the Act of February 12, 1915 (Laws 1915, p. 89), which required the State Auditor to ascertain and set apart one-third of the ordinary revenue for the support of the public schools.

The case is here upon the pleadings and an agreed statement of facts. The pleadings are conventional, and since no point is made touching them, we need not cumber the books with them. The agreed statement of facts, which we apprehend will be found sufficient to convey an understanding of the conditions and issues, runs thus:

"It is agreed that during the fiscal year ending June 30, 1915, there were paid into the State Treasury to the credit of the General Revenue Fund, the following sums from the different sources mentioned:

1. From county collectors (tax on real and personal property)	\$3,851,174 61
2. County foreign insurance tax	365,449 17
3. Private car tax	9,870 90
4. Express companies' tax	44,737 68
5. Notaries' commissions	12,336 00
6. Land Department fees	556 23
7. Fees earned in office of State Auditor	8,380 88
8. Fees earned by office of Secretary of State	9,719 30
[400] 9. Incorporation tax (fees paid by corporations upon their incorporation and upon their increase of capital stock)	87,017 50

10. Fees from Excise Commissioner of city of St. Louis	42,462 00
11. Proceeds of sale of beer stamps ..	460,858 27
12. Interest received from State depositaries	147,223 35
13. Sale of oil stamps (being fees from oil inspections)	150,466 80
14. Interest on deposit of fees by St. Louis Excise Commissioner	47 17
15. Interest on deposit of Fish Commission	18 74
16. Excess fees from clerk of Supreme Court, clerk of St. Louis Court of Appeals, clerk of Springfield Court of Appeals, clerk of Kansas City Court of Appeals	3,573 62
17. Fees collected by Excise Commissioners of St. Louis county	3,713 02
18. Receipts from sale of laws	2,018 50
19. Receipts from old bond and coupon account	15,270 43
20. Receipts from amounts refunded ..	36,032 06
21. Receipts from fines assessed against lumber companies for violation of Anti-Trust Act	252,728 65
22. Receipts from fees of Poultry Experiment Station	5,280 96
23. Receipts from fees of Warehouse and Grain Department	127,123 37
24. Moneys earned by State Auditors' Examiners	6,702 08
25. Receipts from insurance on Federal Soldiers' Home	2,308 92
26. Receipts from sale of old furniture ..	165 00
27. Receipts for Itinerant Vendors Licenses	25 00
28. Receipts from fees of Bureau of Labor	2 07
29. Receipts from fees of Board of Agriculture	25 00
30. Receipts from fees of Fruit Experiment Station	298 72
31. Receipts from Fish Commissioner's refund	301 05
32. Transferred from Insurance Department Fund	125,000 00
33. Transferred from Factory Inspection Fund	6,271 93
34. Transferred from Text-Book Fund ..	990 00
35. Receipts from fees of Public Service Commission	36,946 87

"The aggregate of the items enumerated above, numbered 1, 2, 3 and 4, is \$4,271,232.36. The respondent, State Auditor, did on July 3, 1915, set apart and certify to the relator one-third of said sums, that is to say, \$1,423,744.12, as the total amount to be apportioned [401] by relator for the benefit of the public schools of the State.

"The respondent, as State Auditor, and his predecessors in said office, have continuously annually for many years prior to the present year, set apart and certified to the relator and the predecessors of the relator in the office of State Superintendent of Public Schools, in addition to one-third of the moneys derived from our first four sources above mentioned, one-third also of the moneys derived from the following sources, to wit:

5. Notaries commissions.
6. Land Department fees.
7. Fees earned in office of State Auditor.
8. Fees earned by office of Secretary of State.
9. Incorporation tax.
10. Fees from Excise Commissioner of city of St. Louis.
11. Proceeds of sale of beer stamps.
12. Interest received from State depositaries.
13. Sale of oil stamps.
14. Interest on deposit of fees by St. Louis Excise Commissioner.
15. Interest on deposit of Fish Commission.
16. Excess fees from clerk of Supreme Court, clerk of St. Louis Court of Appeals, clerk of Springfield Court of Appeals, clerk of Kansas City Court of Appeals.
17. Fees collected by Excise Commissioners of St. Louis county.

"That the moneys derived from said sources, numbered 5 to 17, both inclusive, and paid into the State Treasury to the credit of the General Revenue Fund during the year ending June 30, 1915, amounted in the aggregate to \$926,372.87, no portion of which has been set apart and certified by respondent as State Auditor to the relator, for the year ending June 30, 1915.

"Neither the respondent, as State Auditor, nor any of his predecessors in said office, have heretofore set apart or certified to the relator or his predecessors in the office of Superintendent of Public Schools, any portion of the moneys derived and paid into the State Treasury to the credit of the General Revenue Fund from the following sources:

- [402] 18. Receipts from sale of laws.
19. Receipts from old bond and coupon account.
 20. Receipts from amounts refunded.
 21. Receipts from fines assessed against lumber companies for violations of Anti-Trust Act.
 22. Receipts from fees of Poultry Experiment Station.
 23. Receipts from fees of Warehouse and Grain Department.
 24. Moneys earned by State Auditors' Examiners.
 25. Receipts from insurance on Federal Soldiers' Home.
 26. Receipts from sale of old furniture.
 27. Receipts from Itinerant Vendors' Licenses.
 28. Receipts from fees of Bureau of Labor.
 29. Receipts from fees of Board of Agriculture.
 30. Receipts from fees of Fruit Experiment Station.
 31. Receipts from Fish Commissioner's refund.
 32. Transferred from Insurance Department Fund.
 33. Transferred from Factory Inspection Fund.
 34. Transferred from Text-Book Fund.
 35. Receipts from fees of Public Service Commission.

"Some of the laws from which these moneys were derived and paid into the State Treasury are of comparatively recent enactment, as will be pointed out in the briefs to be filed.

"The relator here expressly waives and abandon any claim to a setting apart or a certificate to him by respondent of any part
Ann. Cas. 1918B.—13.

of the moneys derived from the sources now to be mentioned and already referred to in this statement by numbers, as follows:

19. Receipts from old bond and coupon account.
20. Receipts from amounts refunded.
26. Receipts from insurance on Federal Soldiers' Home.
26. Receipts from sale of old furniture.
27. Receipts from Itinerant Vendors' Licenses.
31. Receipts from Fish Commissioner's refund.

And it is agreed that the relator's petition be taken and regarded as amended by striking out any claim to a setting apart of moneys derived from any of the sources last mentioned.

"After excluding from consideration the moneys derived from the six sources last mentioned (claim to which is now abandoned), the moneys derived from the other sources mentioned (no part of which has ever [403] been set apart and certified by State Auditors for the benefit of the public schools), and paid into the State Treasury to the credit of the General Revenue Fund, amount to the sum of \$563,389.15.

"The moneys paid out for salaries and expenses of the Warehouse and Grain Department during the period mentioned, were \$96,491.42. The receipts of said department were \$127,123.37.

"The sum paid out of the State Treasury for the support (salaries and expenses) of the Public Service Commission during the year mentioned were largely in excess of the fees paid into the State Treasury and earned by said commission.

"The same is true as to the proceeds of the sale of laws; the expense of publishing the laws being greater than the amount received from the sale.

"The expense of maintaining the Poultry Experiment Station, which is paid out of the State Treasury, is largely in excess of the fees received on that account.

"The same is true of salaries and expenses connected with the Department of Labor; the Board of Agriculture and the Fruit Experiment Station; in each case the expense of maintaining each one of these departments, which is paid out of the State Treasury, is in excess of the fees received from them respectively.

"The amount of the salaries, wages and expenses of the State Auditors' Examiners, which were paid by the State, was substantially the same as the moneys paid into the State Treasury on account of the services of said examiners.

"The one hundred and twenty-five thousand dollar (\$125,000) item, numbered 32 in this statement, 'Transferred from Insurance Department Fund,' was so transferred by virtue of section 55a, an act with the heading:

'Appropriations; contingent and incidental [404] expenses for the years 1915 and 1916,' approved April 2, 1915, Laws 1915, p. 20.

"The Attorney-General wrote to the respondent, the State Auditor, the opinions set out in the return of the respondent.

"It is agreed that, prior to the filing of the petition for an alternative writ of mandamus, demand was made by relator upon respondent for the relief herein sought, and the same was refused; and that the petition shall be considered and taken as amended so as to show such demand and refusal.

"In the cases in which the figures shown in the petition as to the amount of moneys received from any source do not correspond with the figures contained in this agreed statement of facts, the petition is to be considered as amended to correspond to the agreed statement of facts.

"If the court shall be of the opinion that as to moneys derived from some of the sources mentioned in the relator's petition and claimed by him therein (and not herein waived and abandoned by him), the relator's claim as made in his petition to a setting apart and certification to him of a part thereof cannot be maintained, and shall be of the opinion that as to some of said moneys no part thereof should be set apart or certified by respondent to relator, it is agreed that as to such moneys and the claim thereof the petition of the relator shall be taken and considered as amended by striking out all claim on account of any said moneys, and the relator hereby asks that his petition be considered and regarded as amended in that respect; so that if the court shall be of the opinion that the relator is entitled to any part of the relief which he asks, he shall not be denied all relief for the reason that he has asked for more than he is entitled to."

[405] OPINION.

I. While we have not had the benefit of respondent's views, since regrettably and to the great increase of our labors, he has not seen fit to furnish us with a brief it is apodeictic that the controversy turns upon the construction to be placed upon section 1 of the Act of February 12, 1915, appropriating money out of the State Revenue Fund for the support of the public schools. [Laws 1915, sec. 1, p. 89.] This section reads thus:

"There is hereby appropriated out of the State Revenue Fund, to be applied to the support of the public schools of the State, one-third of the ordinary revenue paid into the State Treasury for the fiscal years from July 1, 1914, to June 30, 1916, which amount of said fiscal year apportionment shall be ascertained and set apart to said school mon-

eys by the State Auditor, as is or may hereafter be provided by law."

It is likewise apparent that the controversy in its last analysis resolves itself into the single question: What is the meaning of the two words "ordinary revenue," as these words are used in the Legislative act, *supra*?

It is fairly clear, we think, that the word "revenue" is modified or limited by the use of the word "ordinary." The effect of this limitation we will discuss hereafter. Turning to the lexicons of the language we find that the word "revenue" means: "The annual yield of taxes, excise, customs, duties, rents, etc., which a Nation, State, or municipality collects and receives into the treasury for public use." [Webster's Int. Dict.] "The total current income of a government, *however derived*, subject to appropriation for public uses." [Standard Dict.] "The annual income of a State derived from the taxation, customs, excise, or other sources and appropriated to the payment of the national expenses." [Century Dict.]

[406] These definitions have met the approval of the courts, as will be noted by an examination of the below cases: *Fletcher v. Oliver*, 25 Ark. 289; *Bates v. Porter*, 74 Cal. 224, 15 Pac. 732; *U. S. v. Norton*, 91 U. S. 566, 23 U. S. (L. ed.) 454; *State v. School Fund Com'rs*, 4 Kan. 261; *Vansant v. Harlem Stage Co.* 59 Md. 330; *State v. Ewing*, 22 Kan. 708; *U. S. v. Bromley*, 12 How. 88, 13 U. S. (L. ed.) 905; *People's U. S. Bank v. Goodwin*, 162 Fed. 937; *In re Magnes*, 32 Colo 527, 77 Pac. 853.

In the case of *State v. Ewing*, *supra*, at page 712, the Supreme Court of Kansas, in an opinion by Judge Brewer, sometime judge of the Supreme Court of the United States, said:

"The Act of 1879 is entitled, 'An act to provide revenue,' etc. Now how broad is the term 'revenue,' and what may be included in such a title? Does it mean simply funds raised by taxation, and is the levying of taxes all that may be included? Such would seem to be the views of the counsel for the State, but we cannot think them correct. One of the definitions given by Webster of the term is, 'the annual produce of taxes, excise, customs, duties, rents, etc., which a Nation or State collects and receives into the treasury for public use.' The word is broad and general, and includes all public moneys which the State collects and receives, from whatever source and in whatever manner. The general funds in this State are collected from taxes, but the Legislature might, in an act with such a title—at least, so far as any question of the form of the legislation is concerned—enact that they be collected from licenses, or from the sale of lottery tickets, or it might unite and enact that part might be collected

from one source and in one manner, and the rest from another source and in a different manner."

In the case of *U. S. v. Bromley*, supra, at page 96, the Supreme Court of the United States said:

[407] "That the act which prescribes the offense charged is a revenue law, there would seem to be no doubt. In its title, it is declared to be an act to reduce the rates of postage, and for the 'prevention of frauds on the revenue of the Post-Office Department.' In its character and object it is a revenue law, as it acts upon the rates of postage and increases the revenue by prohibiting and punishing fraudulent acts which lessen it. Under the Act of 1836, the revenue of the Post-Office Department is paid into the Treasury. Revenue is the income of a State, and the revenue of the Post-Office Department, being raised by a tax on mailable matter conveyed in the mail, and which is disbursed in the public service, is as much a part of the income of the government as moneys collected for duties on imports."

The various definitions of this word as collated and summarized by Cyc. are as follows:

"The annual product of taxes, excise customs, duties, rents, etc., which a Nation or State collects and receives into the Treasury for public use; the yearly income of a government or a person natural or artificial, from the property belonging to such government or person; the income of the State; the income which a State collects and receives into its Treasury and has appropriated for the payment of its expenses; the product or fruit of taxation; the income of the government arising from taxation, duties and the like; the annual profits of taxes, excise, customs, duties, rents, etc., which a Nation or State collects and receives into the Treasury for public use; the income of the State or Nation derived from the duties and taxes and other sources for the payment of the national expenses." [34 Cyc. 1691.]

Clearly the word "revenue" is broader than and includes taxation, as well as all other sources of municipal income. Revenue may be said to be the genus, while taxation is but a species. We are convinced [408] therefore that the word "revenue," as used in the appropriation act under discussion, when standing alone, and when not modified by the word "ordinary" (which we shall later discuss, when we come to sum up our conclusions), means: *The annual and current income of the State, however derived, which is subject to appropriation for general public uses.* This excludes such income as the Constitution, or any permanent existing law, may specifically devote to a special purpose, in contradistinction to a general public use,

or which is not required to be paid into the State Revenue Fund, but into a special fund, e. g., the collateral inheritance tax, specifically collected for the support of the State University and its departments (Sec. 312, R. S. 1909); the money derived from license fees on motor vehicles (Laws 1911, p. 331, sec. 13); fees paid into the State Treasury to the credit of the "Insurance Department Fund" (Sec. 6884, R. S. 1909); and others of similar sort. Color is lent to this view not alone by the lexical meaning of the word revenue and by its construction by respectable and high courts, but by the very language of our Constitution, which enjoins upon the Legislature the making of this appropriation for the support of the public schools, and which reads thus:

"In case the public school fund now provided and set apart by law, for the support of free public schools, shall be insufficient to sustain a free school at least four months in every year in each school district in this State, the General Assembly may provide for such deficiency in accordance with section eleven of the article on revenue and taxation; but in no case shall there be set apart less than twenty-five per cent of the State revenue, exclusive of the interest and sinking fund, to be applied annually to the support of the public schools."

Further light is cast upon this view by the provisions of section 6 of article 11 of the Constitution, [409] which, after naming divers sources from which funds for the support of the public schools of the State should be derived, couples itself by language in *pari materia* with section 7, supra, by providing, among other things, that certain named funds from the several sources in the section designated, "*together with so much of the ordinary revenue of the State as may be by law set apart for that purpose*," shall be faithfully appropriated for establishing and maintaining the free public schools," etc. [Italics ours.] Confessedly, however, when we concede that the expressions used are in *pari materia* and therefore in a way synonymous, we are met by the doubt whether they each mean "State revenue," or each mean "ordinary revenue of the State." The latter expression is first used in the article; the former merely refers back to the latter logically we may say, for the definition of the words "State revenue" as latterly used. So, no comfortable short-cut can with logical consistency, be found in the Constitution. For the Legislature, in nineteen appropriation acts, out of a total of twenty, has used the words "ordinary State revenue," or "ordinary revenue," as used in said section 6, instead of the language in section 7 of the Constitution; notwithstanding the last-named section is the one which specifically enjoins upon the Legis-

lature the duty of appropriating as much as one-fourth of the State revenue for the support of the public schools.

II. From 1877, when for the first time it became the Legislature's Constitution-enjoined duty to appropriate "at least twenty-five per cent of the State revenue, exclusive of the interest and sinking fund," to the support of the public schools, till 1887, the Legislature of this State biennially set apart "*one-fourth of the ordinary State revenue paid into the treasury*" for the support of the public schools; using in making such appropriation [410] the language we italicise above. [Laws 1877, p. 12; Laws 1879, p. 3; Laws 1881, p. 3; Laws 1883, p. 4; Laws 1885, p. 4.] In 1887 "*one-third of the ordinary State revenue*" was for the first time appropriated for the support of the public schools of this State. Biennially since, one-third, instead of one-fourth, of the ordinary revenue has been by the Legislatures of this State so set apart. Likewise in the years 1887, 1889 and 1891, the language of the Appropriation Act was "*ordinary State revenue.*" [Laws 1887, p. 4; Laws 1889, p. 12; Laws 1891, p. 24.] For the first time in 1893, and ever since, *barring one exception, that of the Act of 1895*, below discussed, the words used in making this appropriation have been simply "*ordinary revenue.*" [Laws 1893, p. 19; Laws 1897, p. 21; Laws 1899, p. 24; Laws 1901, p. 19; Laws 1903, p. 22; Laws 1905, p. 26; Laws 1907, p. 38; Laws 1909, p. 50; Laws 1911, p. 72; Laws 1913, p. 82; Laws 1915, p. 89, already set out *verbatim*, supra.] In 1895 the Legislature in making this appropriation used the words "*one-third of all moneys paid into the State Treasury for the years 1895 and 1896 to the credit of the State Revenue Fund.*" [Laws 1895, p. 18.] It is urged that the expression used, to wit, "*one-third of all the moneys paid . . . to the credit of the State Revenue Fund,*" is highly significant. We do not so regard it. For the "*one-third of all the moneys*" is limited by the requirement that such moneys shall be from the "*State revenue;*" and the question here largely vexing us is, What moneys of the State are included in the expression "*State revenue,*" and what is meant thereby? We would grant the contention if the language of the act had been simply "*one-third of all the moneys paid into the State Treasury,*" and had, as it did not, stopped there. But this is not important. At most it is but a straw in the wind, only infinitesimally meet in determining direction.

[411] III. We conclude then that both lexically and historically the definition given above of the word "*revenue*" as used in the statute under discussion, is reasonably correct. But as this word appears both in the appropriation act here confronting us and in

the Constitution (Sec. 6, art. 11, Constitution 1875), it is clearly limited by the word "*ordinary.*" We are not warranted in casting this word out, but must use it and give a meaning to it, if to do so will not defeat the legislative intent, or render the statute and organic law absurd or meaningless. [Strotzman v. St. Louis, etc. R. Co. 211 Mo. 227, 109 S. W. 769; State v. Harter, 188 Mo. 516, 87 S. W. 941.]

As words when used by the people in their Constitution, and by the Legislatures in their statutes, are ordinarily to be construed to be used in their ordinary sense (Sec. 8057, R. S. 1909), again recourse must be had to the dictionaries. From these we find the word "*ordinary*" means in its adjectival use as it occurs in the act before us: "*According to established order; settled, regular.*" It is a synonym of "*normal, common, customary, usual.*" Its antonyms are: "*Extraordinary, unusual, uncommon.*" Taking the two words together, then, as they occur both in our Constitution and in the appropriation act before us, and being guided by both their lexical and legal meanings, as well as the construction urged on us by the necessity for formulating a fixed and general rule, we conclude that the words "*ordinary revenue,*" as used in said section 6, article 11, of the Constitution and in the act under discussion (Sec. 1. p. 89, Laws 1915), mean: *The regular and usual annual income of the State, however derived, which is subject to appropriation for general public uses.*

IV. Keeping this construction of the meaning of "*ordinary revenue*" before us, there is no mountainous [412] difficulty in deciding the concrete facts here vexing us. The controversy for the most part, we think, becomes fairly plain. The trouble lies in steering a legal, logical and sensible course through the bewildering maze of diverse statutes which created departments of the State government, the operating of some of which is carried on at a total or partial loss and others of which produce either gross or net incomes to the State, and of formulating a fixed rule of construction, applicable to all these diverse conditions, which will serve to obviate the thick and excusable uncertainty heretofore and now prevailing.

If we should grant that *as a matter of law*, the words "*ordinary revenue*" are ambiguous—a thing we cannot bring ourselves to concede—we could, if the above conditions presented all of the facts and showed all of the difficulties, very readily (if there were not other and additional items in dispute) and speedily settle this case by invoking the well-recognized rule of statutory construction, that the meaning put upon the words of these many similar appropriation acts by the executive officers of the State upon whom the

duty of interpretation falls, is of great weight, and absent other qualifying considerations, decisive (*Schawacker v. McLaughlin*, 139 Mo. 333, 40 S. W. 935; *Darling v. Potts*, 118 Mo. 506, 24 S. W. 461; *Ross v. Kansas City, etc. R. Co.* 111 Mo. 18, 19 S. W. 541; *Barber Asphalt Paving Co. v. Meservey*, 103 Mo. App. 186, 77 S. W. 137); especially when coupled with the passive acquiescence of the Legislature for almost forty years. But other items, to wit, those numbered 18, 21, 22, 23, 24, 28, 29, 30, 32, 33, 34 and 35, are likewise in dispute here. As to these items we gather from the record and judicially notice from the public biennial reports of the State Auditor there has been no uniform practice in the office of the State Auditor. Some years some of these items last above were included, and in other years they, or some of them formerly taken into account, were omitted, and others of them used. So great was [413] the doubt and uncertainty in this behalf existing that it caused the discrepancy to be pointed out by a special legislative committee having in charge the examination of the various State offices.

In the light of this latter condition we cannot say that executive interpretation, long acquiesced in by the Legislature, aid us; for the very simple reason that *there has been no uniformity in interpretation by such executive officers*, and conduct seeming to be legislative acquiescence is found to be passive noninterference with changing methods wholly lacking uniformity. It is plain then that we are not aided and cannot be aided by invoking any rule of construction made for us by executive interpretation through a long course of years.

V. It appears from the record that moneys accruing from items numbered 1, 2, 3 and 4, to wit:

1. From county collectors (tax on real and personal property);
2. County foreign insurance tax;
3. Private car tax;
4. Express companies' tax;

aggregating \$4,271,232.36, are not in dispute; that in pursuance of a uniform custom, the respondent, as both he and his predecessors in office have always done, set apart and certified on July 3, 1915, for the use of the public schools, the sum of \$1,423,744.12. So with these items, since there is no dispute here about them or about this sum, and since we think the course taken as to them is undoubtedly correct, we need not concern ourselves further.

Items numbered 19, 20, 25, 26, 27 and 31, to wit:

19. Receipts from old bond and coupon account;
20. Receipts from amounts refunded;

25. Receipts from insurance on Federal Soldiers' Home;
26. Receipts from sale of old furniture;
27. Receipts from itinerant vendors' licenses;
31. Receipts from Fish Commissioner's Refund;

[414] are abandoned by relator. He concedes that the public schools are not, under the terms of the act under discussion, entitled to one-third of any of the items last above. Therefore we dismiss them from our discussion.

Items numbered 5 to 17, both inclusive, to wit:

5. Notaries' commissions.
6. Land Department fees.
7. Fees earned in office of State Auditor.
8. Fees earned by office of Secretary of State.
9. Incorporation tax.
10. Fees from Excise Commissioner of city of St. Louis.
11. Proceeds of sale of beer stamps.
12. Interest received from State depositaries.
13. Sale of oil stamps.
14. Interest on deposit of fees by St. Louis Excise Commissioner.
15. Interest on deposit of Fish Commission.
16. Excess fees from clerk of Supreme Court, clerk of St. Louis Court of Appeals, clerk of Springfield Court of Appeals, clerk of Kansas City Court of Appeals.
17. Fees collected by Excise Commissioners of St. Louis county.

are, however, in dispute here. The agreed case as to them shows that both respondent and his predecessors in the office of State Auditor have for many years uniformly, until this year, set apart one-third of all State income arising from each of the last above several items, under authority conferred by appropriation acts couched in precisely similar verbiage to that here under discussion.

Items numbered 18, 21, 22, 23, 24, 28, 29, 30, 32, 33, 34 and 35, to wit:

18. Receipts from sale of laws.
21. Receipts from fines assessed against lumber companies for violations of Anti-Trust Act.
22. Receipts from fees of Poultry Experiment Station.
23. Receipts from fees of Warehouse and Grain Department.
24. Moneys earned by State Auditors' Examiners.
28. Receipts from fees of Bureau of Labor.
29. Receipts from fees of Board of Agriculture.
30. Receipts from fees of Fruit Experiment Station.
32. Transferred from Insurance Department fund.
33. Transferred from Factory Inspection fund.
34. Transferred from Text-Book Fund.
35. Receipts from fees of Public Service Commission.

[415] are likewise in dispute. None of said items last above has been uniformly taken into account in setting apart moneys from general revenue for the support of public schools by either respondent or any of his

predecessors. Thus stands the controversy, and so we come to consider specific matters and funds in dispute.

VI. The question whether "ordinary revenue" includes the whole of the \$127,123.37 of gross earnings of the office of Warehouse Commissioners, or whether it includes only the net earnings (the sum of \$30,631.95) of such office after deducting aggregate sums paid out of the State Treasury for salaries and contingent expenses for upkeep, presents much difficulty. No consistent course has been pursued by the Legislature in dealing with this department. This makes it well nigh impossible for us to deduce a consistent rule touching the fees of this department. In 1913 the whole of article 2 of chapter 60, Revised Statutes 1909, which provided theretofore for the inspection of hay and grain, was repealed and a new act *in toto* was passed (Laws 1913, pp. 354-373), which of course, is now the law. That this department was not intended to be an earner of profits, but merely to pay its own way, appears conclusively from the terms of the act itself, which provides that the charges fixed by the Warehouse Commissioner for services rendered "shall be regulated in such manner as will, in the judgment of the commissioner, produce sufficient revenue to meet the necessary expenses of the service of inspection and no more." [Sec. 41, p. 367, Laws 1913.] This view is accentuated by the language of the section of the act appropriating money for the support of this department for the years 1913 and 1914 (the earning for six months of which latter year are here in controversy). After setting out the amounts appropriated, it is further provided in the act "that no more [money] [416] shall be drawn against the appropriation than has been paid into the treasury by said department, the intention being that the above-named department shall support itself out of its fees made and turned into the treasury." [Laws 1913, p. 9, sec. 12b.] While there is no such condition specifically attached to the appropriation for this department for the years 1915 and 1916, so far as we have been able to find, yet the condition set out in the Act of 1913, in intent, only follows the terms of the act creating the department. [Sec. 41, Laws 1913, p. 367, *supra*.] Therefore, while conceding that by reason of the inconsistency of treatment of this department by the Legislature, we are unable to bring it strictly within the definition we formulate, we conclude that only the net sum, after deducting operating expenses, should be here taken into account. So much only can we gather of the intent of the Legislature from its acts. If the intent be otherwise, the language next used by the Legislature can clarify the point beyond dispute. Indeed,

here for a period of six months, the case falls exactly within our rule. We are unable from the facts before us to segregate the earnings of this period from those of the other six months in controversy. For these reasons we take into account from this item, the sum of \$30,631.95 only, same being net revenue left after the payment of all operating expenses.

The general rule by which departments like the above are to be measured, would seem to be that: Whenever a statute creating a department of government of this State provides (or whenever an appropriation for the support of a department of government contains such a proviso) that the cost of operation shall be defrayed wholly from fees earned by such department and not otherwise, then clearly the State is, as to an amount equal to the cost of upkeep, a trustee merely of the moneys paid in, and the State's general [417] revenue fund is entitled only to the surplus paid in to the State Treasury after deducting expenses of the operation of such department. For strictly speaking, in such case the appropriation is not made out of the general revenue of the State, but out of the earnings of the department. By the very terms of the attached condition, the officers would not be paid in full, or at all if no fees were earned. (e. g., Hay and Grain Inspection Department, Laws 1913, p. 367, sec. 41, Laws 1913, p. 9, sec. 12b; Text-Book Filing Fund, sec. 10955, R. S. 1909). So to all such the term "revenue" means net revenue. This in fact is the present rule by statute as to the fees of the clerk of this court and likewise as to the fees of the clerks of the several Courts of Appeals.

As to other departments and the earnings thereof, when payment of operating expenses is in no wise conditioned upon earnings, and which earnings go directly by express statute into the State Treasury, the gross sum of earnings is to be considered ordinary revenue, e. g., earnings of the Public Service Commission; earnings of the Secretary of State (sec. 10718, R. S. 1909); earnings of the State Auditor (sec. 1276, R. S. 1909), etc. This for the reason that the statutes provide for the payment of the expenses of all of these departments whether they earn fees or not, and because all of such fees earned by the former (Laws 1913, p. 567, sec. 21) as well as those earned by the two latter, are by statutes required to be paid into the State Treasury (secs. 10716, 10717, 10718, R. S. 1909) to the credit of the revenue fund.

VII. It is patent that interest accruing to the State from moneys deposited in banks, or other State depositaries, is to be considered as "ordinary revenue" within the purview of the appropriation act under discussion, and in the light [418] of our construc-

tion of the words "ordinary revenue," supra, save and except in such cases (if such there be) wherein the interest accrues from a special fund, and by express provision of law is required to be expended for the identical purpose of the special fund, from which it accrued. [Cf. Act of March 24, 1911, sec. 10, p. 114, Laws 1911.]

VIII. From the rules which we are impelled to formulate from our view of the law, we are of opinion that the fines assessed against the Arkansas Lumber Co. and others in the suit of State v. Arkansas Lumber Co. 260 Mo. 212, 169 S. W. 145, are not to be taken into account but wholly excluded. (Such fines have never been taken into account heretofore in this behalf by any State Auditor.) This, for the reason that while it is undoubtedly revenue, it is not ordinary revenue, because it is not annual or current, but wholly adventitious and in the nature of a "windfall," if we may use an horticultural expression.

Likewise item 32, the same being the moneys which have been intermittently, for some years prior, and which were, by act of the last Legislature, transferred from the "Insurance Department Fund" to the general revenue fund, is not to be taken into account. This for the reasons that these moneys are not annual, or current revenue; and because they are required to be paid into a special fund (Sec. 6884, R. S. 1909) and because only the "overflow" from this fund reaches the State revenue fund, and then only pursuant to an express and special act passed, ordinarily, biennially, transferring a portion of such fund to State revenue. [Laws 1915, sec. 55a, p. 20; Laws 1913, sec. 79, p. 30.] We say "ordinarily biennially," for the reason that we have been unable to find any general statute making such transfer mandatory upon each or any Legislature, [419] and note that no such transfer was made in 1905, or in 1895. This item has never been included heretofore.

IX. Neither the gross income, nor the net income, from the Factory Inspection Fund should be taken into account, for the reasons: (a) such income, or fees, go into a special fund, viz.: "the Factory Inspection Fund," and are not annually paid into general revenue; (b) this fund is primarily to be devoted to the payment of the expenses of the Factory Inspection Department, and no excess of expense over income of the department can be made up from general state revenue, and (c) the income to the general revenue fund of the State, if any, is not paid in regular and usual annual payments, but biennially only. [Sec. 7826, R. S. 1909.]

X. The question of whether the earnings of the examiners appointed by the State Auditor and whose duty it is to examine and audit the

books of the several counties and of divers state institutions, in the act more specifically set out (Laws 1913, pp. 765 et seq.), presents much of difficulty. Clearly this branch of the Treasury Department is not designed to be an earner of revenue; neither has it earned any, for the agreed facts show that the income therefrom in the biennial period here under discussion was substantially equal to the expense thereof. Pertinent parts of the statute creating this department provide thus:

"The examiner making such examination shall make out his account under oath and forward same in duplicate to the State Auditor, one copy of which shall be filed in the office of the State Auditor and the other forwarded by the State Auditor to the county court of said county or the proper officers of the city of St. Louis, who shall draw a warrant at their first meeting in payment of same and remit said amount to the examiner making the examination, addressed [420] to Jefferson City, Mo., in care of the State Auditor: Provided, that any of the regularly appointed examiners whose time is spent in the auditing of accounts of any county and receives a *per diem* of \$7.50 for same, the amount so received from the county shall be deducted from the \$2,000 authorized by this act to be paid to him from the public treasury, in order that in no case shall an examiner's salary be in excess of \$2000; and provided further, that whenever the *per diem* of any regular examiner exceeds the amount of \$2000, the salary allowed him by this act, the excess, if there be any, shall be paid into the State Treasury to the credit of the State Revenue Fund." [Laws 1913, p. 767, sec. 5.]

In substantial accordance with the rules of construction which we have reached and laid down, we hold that this item should not be taken into account in this action, but net income therefrom, if any such there may hereafter be, should be included.

XI. It follows, then, that all of the items 5 to 17, to wit:

5. Notaries' commissions;
6. Land department fees;
7. Fees earned in office of State Auditor;
8. Fees earned by office of Secretary of State;
9. Incorporation tax;
10. Fees from Excise Commissioner of city of St. Louis;
11. Proceeds of sale of beer stamps;
12. Interest received from State depositaries;
13. Sale of oil stamps;
14. Interest on deposit of fees by St. Louis Excise Commissioner;
15. Interest on deposit of Fish Commission;
16. Excess fees from clerk of Supreme Court, clerk of St. Louis Court of Appeals, clerk of Springfield Court of Appeals, clerk of Kansas City Court of Appeals;
17. Fees collected by Excise Commissioners of St. Louis county;

both inclusive, are to be taken into account and included in "ordinary revenue" within the purview of the statute in dispute; for the reasons that said [421] items 5, 6, 7, 8, 9, 10, 11, 13, 16 and 17 are clearly "regular and usual annual income of the State . . . which is subject to appropriation for general public purposes." Moneys are derived from these several items every year. These several sums are paid into the general treasury of the State for the revenue fund, pursuant to general laws, and subject to no restrictions limiting their application; items 12, 14 and 15, *supra*, because they each represent interest paid upon deposits of State moneys, absent a statute requiring such interest to follow in use a specifically restricted principal.

That items 18, 22, 28, 29, 30 and 35, to wit:

- 18. Receipts from sale of laws;
- 22. Receipts from fees of Poultry Experiment Station;
- 28. Receipts from fees of Bureau of Labor;
- 29. Receipts from fees of Board of Agriculture;
- 30. Receipts from fees of Fruit Experiment Station;
- 35. Receipts from fees of Public Service Commission;

and the *net income* of fees from items 23 and 34, to wit, the Warehouse and Grain Inspection Department, and the Text-Book Filing Fund, are likewise to be so included. What we say last above forms, we think, a sufficient reason for so including items 18, 22, 28, 29, 30 and 35. Our views and reason for excluding the gross income, but for including the net income, of the last above several items numbered 23 and 34 have been herein before set out at length.

All other items in dispute, since they do not fall within the purview of the definitions and conclusions reached by us and discussed either specifically or generally hereinabove, are to be excluded. While on first blush an apparently though not really arbitrary rule may seem to be invoked as to such items as come into the general revenue fund of the State biennially only (e. g., Factory Inspection Fund), or biennially, but intermittently, and by virtue of an express special act (e. g., transfer from Insurance Department Fund), [422] or occasionally and adventitiously (e. g., fines accruing from prosecutions of lumber companies, *State v. Arkansas Lumber Co.* 260 Mo. 212, 169 S. W. 145), yet upon more careful thought and consideration it will be seen that a crying necessity exists for a general rule to use in setting apart this fund, which will forever dissipate the dark obscurity which has heretofore befogged it, and that no such rule can be logically formulated, which will serve to measure all cases, if these items are to be included. This is the administrative difficulty; if it be wrongly resolved a word from the Legislature can correct it. Besides, it

may well be that these rules which we have formulated as the only consistent interpretation of the legislative intent derivable from the language of the appropriation act under discussion, will serve to obviate fat and lean years in public school revenues, and that it was so intended. That those in charge of such schools may confidently rely upon a fairly fixed and stable income, and that they may not be induced to lavish and waste funds this year and be forced to a too lean and scrimping economy next year, is a *desideratum* to be wished for. The conclusions here reached bring this to pass and are yet, we think, in line with the law both here and elsewhere. The rule allows full latitude for a growth of the State, a condition fully demonstrated by the fact that the amount below set apart from State revenues for the support of the public school system exceeds by many thousands of dollars an appropriation for any one year ever before so devoted, from this source.

Amending the petition (which by stipulation stands as and for the alternative writ, issuance of which was waived), as provided by the agreed facts, we eliminate all items except as last above enumerated and found to be within the purview of the appropriation act and award the writ as to such items.

It is therefore our order that our peremptory writ go for the sum of \$334,189.31, being the aggregate of [423] the one-third part of the items aforesaid, and making, with the sum already set apart and certified by respondent for the use of the public schools for the fiscal year 1915, a grand total of \$1,757,933.43. Let our peremptory writ so issue. All concur.

NOTE.

Legal Meaning of "Revenue."

"Revenue" Generally:

General Definition, 201.

Definition with Respect to Particular Context, 202.

"All Revenue," 206.

"Estimated Revenue," 206.

"General Revenue," 207.

"Ordinary Revenue," 208.

"Bills for Raising Revenue," 209.

"Revenue Laws:"

In General, 213.

Statute Relating to Appellate Jurisdiction, 214.

Statute Relating to Limitation of Actions, 216.

Statute Relating to Removal of Causes, 217.

"Revenue Measure," 218.

"Revenue Debts or Charges," 219.

"Revenue Tax," 219.

"Board of Revenue," 220.

"Officer of the Revenue," 220.

"Revenue" Generally.**GENERAL DEFINITION.**

The definitions of the word "revenue," as found in the various lexicons, though expressed in diverse language, have practically a synonymous meaning. Revenue is defined as "the income of the government arising from taxation, duties, and the like." Bouvier, *Law Dictionary*, quoted in *The Nashville*, 4 Biss. 188, 17 Fed. Cas. No. 10,023; *State v. School Fund Com'rs*, 4 Kan. 261.

"The annual income of a state derived from the taxation, customs, excise, or other sources and appropriated to the payment of the national expenses." *Century Dict.* quoted in the reported case.

"The total current income of a government, however derived, subject to appropriation for public uses." *Standard Dict.* quoted in the reported case.

"The annual produce of taxes, excise, customs, duties, rents, etc., which a nation or state collects and receives into the treasury for public use." *Webster's Dict.* quoted in *Fletcher v. Oliver*, 25 Ark. 289; *Bates v. Porter*, 74 Cal. 224, 15 Pac. 732; *Yancey v. New Manchester Mfg. Co.* 35 Ga. 622; *State v. Ewing*, 22 Kan. 708; *Pottsville v. Pottsville Gas Co.* 15 Pa. Dist. 979, 32 Pa. Co. Ct. 7.

"The annual yield of taxes, excise, customs, duties, rents, etc., which a nation, state or municipality collects and receives into the treasury for public use." *Webster's Int. Dict.* quoted in the reported case.

"The annual or periodical yield of taxes, excise, customs, duties, rents, etc., which a nation, state, or municipality collects and receives into the treasury for public use; public income of whatever kind." *Webster's New Int. Dict.* quoted in *State v. Stanton County*, 100 Neb. 747, 161 N. W. 264.

"1. Income or annual profit received from lands or other property." *Worcester's Dict.* quoted in *Bates v. Porter*, 74 Cal. 224, 15 Pac. 732; *Curvie v. Trustees of Wabash, etc. Canal*, 71 Ind. 208.

"2. The income of a nation or state derived from the duties, taxes, and other sources for the payment of the national expenses." *Worcester's Dict.* quoted in *Bates v. Porter*, 74 Cal. 224, 15 Pac. 732.

The foregoing definitions are reviewed in the reported case, wherein the word "revenue" as used in an act appropriating money out of the state revenue fund for the support of the public schools (*Laws Mo. 1915*, § 1, p. 89) is construed. The court says that the word "revenue" is broader than and includes taxation as well as other sources of municipal income; that revenue may be said to be the genus, while taxation is but a species. So the

court holds that the word "revenue," as used in the foregoing statute, when standing alone, and when not modified by the word "ordinary," means the annual and current income of the state, however derived, which is subject to appropriation for general public uses. In this sense the court holds that it excludes such income as the constitution or any permanent existing law may specifically devote to a special purpose, in contradistinction to a general public use, or which is not required to be paid into the state revenue fund, but into a special fund, e. g., the collateral inheritance tax, specifically collected for the support of the state university; and its dependent (*R. S. 1909*, § 312); the money derived from license fees in motor vehicles (*Laws 1911*, § 13, p. 331); fees paid into the state treasury to the credit of the "insurance department fund" (*R. S. 1909*, § 6884); and others of similar sort. For a construction of the word "revenue" as modified by the word "ordinary," see *infra* the subdivision *Ordinary Revenue*.

The term "revenue," when used with reference to funds derived from taxation, is best interpreted, in the absence of qualifying words or circumstances implying a different signification, as confined to the usual public income taxation. *Laughlin v. Santa Fé County*, 3 N. M. 420, 5 Pac. 817.

The ordinary meaning of the word "revenue" is the total income of the government, derived from all sources, subject to be applied to public purposes. *Fergus v. Brady*, 277 Ill. 272, 115 N. E. 393.

Revenue, when used as meaning that of individuals, is equivalent to income, which is the true sense generally used to designate the annual receipts, and includes receipts from all sources—at least, all permanent sources of profits or rent. Revenue is more generally used to designate the income of the government, arising from taxation, duties and the like. *People v. New York Cent. R. Co.* 24 N. Y. 485, *affirming* 34 Barb. 123. To the same effect see *People v. Niagara County*, 4 Hill (N. Y.) 20, *affirmed* 7 Hill 504.

"Revenue" is a return for capital invested or labor bestowed. In a general sense, it is the annual rents, profits, interests or issues of any species of property, real or personal, belonging to an individual or the public. *People v. New York Cent. R. Co.* 24 N. Y. 485, *affirming* 34 Barb. 123.

Revenue is the income of a state, and the revenue of the post-office department, being raised by a tax on mailable matter conveyed in the mail, and which is disbursed in the public service, is as much a part of the income of the government as moneys collected for duties on imports. *U. S. v. Bromley*, 12 How. 88, 13 U. S. (L. ed.) 905.

The "revenue" or "income" of a farm is the sum total which its owner receives from it. It is not the money borrowed by the owner, or an annuity which he may own and may have pledged to pay for it, or the money invested in stock, farming utensils, or fertilizers put upon it. *People v. New York Cent. R. Co.* 24 N. Y. 485, *affirming* 34 Barb. 123.

Moneys raised by a law authorizing the levy of a tax to build bridges and roads, is not revenue, in the sense in which the word revenue is used in the constitution, the revenue there referred to being such as may be used for the support of the state government, and the payment of its ordinary expenses. *Fletcher v. Oliver*, 25 Ark. 289.

DEFINITION WITH RESPECT TO PARTICULAR CONTEXT.

"The word 'revenue' is used in many senses. It is, like thousands of words in our language, ambiguous in meaning, the significance of which can only properly be determined by the words with which it is connected. Let it be conceded that the usual and ordinary meaning of the word, when used alone, is 'net income'—that which remains of the annual income of property after deducting from gross receipts the expenses incurred in producing the gross income—still we must resort to the context to find the sense in which it is used in the writing presented for interpretation. If the context indicates a meaning different from its ordinary and popular signification, we must adopt the meaning so indicated; that is, indicated by the words of the statute or instrument in which it is used." *Bates v. Porter*, 74 Cal. 224, 15 Pac. 732.

The word "revenue," as used in the Illinois constitution (art. 4, sec. 18), is not limited to moneys raised by direct taxation, but includes moneys derived from all sources required by law to be paid into the state treasury within a specified time. *Fergus v. Brady*, reported in full, post, this volume, at page 220.

In construing a Kansas statute (Laws 1879, p. 270, c. 149, § 4) entitled "An act to provide revenue," etc., it was held in *State v. Ewing*, 22 Kan. 708, that the word "revenue" therein was broad and general, and included all public moneys which were collected and received by the state from whatever source and in whatever manner and did not mean simply funds raised by taxation. The court said: "Now, how broad is the term 'revenue,' and what may be included in such a title? Does it mean simply funds raised by taxation, and is the levying of taxes all that may be included? Such would seem to be the views of the counsel for the state; but we cannot think them correct. One of the

definitions given by Webster of the term is 'the annual produce of taxes, excise, customs, duties, rents, etc., which a nation or state collects and receives into the treasury for public use.' The word is broad and general, and includes all public moneys which the state collects and receives, from whatever source and in whatever manner. The general funds of this state are collected from taxes, but the legislature might, in an act with such a title—at least, so far as any question of the form of the legislation is concerned—enact that they be collected from licenses, or from the sale of lottery tickets, or it might unite and enact that part might be collected from one source and in one manner, and the rest from another source and in a different manner. Now, section 4 simply enacts what revenues shall be provided for the annual school fund, which is a public fund as much as any. Provision for it is a matter of legislative care and duty. It is true the section does not in form enact that moneys be collected; but would there be any doubt of the validity of a section which declared that a tax of one mill on the dollar be levied for the annual school fund? Would it not be conceded that this was simply providing revenue? The form of this section grows out of the constitutional provision concerning the fund and prior legislation. The constitution declares that certain lands, and the proceeds thereof, shall constitute a perpetual school fund, not to be diminished, and that the rents and interest therefrom, 'and such other means as the legislature may provide, by tax or otherwise, shall be inviolably appropriated to the support of common schools.' Prior legislation had been in the form heretofore quoted. Such section, though appearing several times in the statutes of the state, has not been re-enacted each year. The understanding has been that it continued a tax from year to year; and the state must concede this, for otherwise, as there is no express levy of the one-mill tax this year, there would be no pretense of right to enforce its collection. And this section, following the earlier statute, makes provision for the revenue of that fund, simply omitting one source. It may be said that the section is unnecessary, because the constitution already makes the same provision for that fund. Conceding that, yet it would not follow that it might not be re-enacted in a statute, or, if so re-enacted, that it was outside the scope of the title of the act. It may still be a mere provision for revenue; but it is not simply a restatement of the constitution. The constitution may grant that revenue to the annual fund; but this prescribes the limits of that fund. The constitution leaves the matter of other revenues with the legislature, and this section defines what the fund shall

consist of. It is thus making provision for the revenues to be paid into the fund."

A Tennessee statute (Code, § 730) provides that "any officer concerned in the collection of revenue who has failed to collect, make returns or settlement, or pay over moneys of the state by him received, at the time and in the manner required by law, may be proceeded against summarily by motion in the circuit court by the proper law officer of the state, pursuant to the instructions of the comptroller." In *Donelson v. State*, 3 Lea (Tenn.) 692, in holding that this section was broad enough to give jurisdiction to the circuit court, if the money sought to be recovered was "revenue," the court said: "This, however, is denied as to a large part of the recovery. It appears that the larger part of the sum recovered is claimed to be due the state in this way. In a number of prosecutions for felony in the criminal court of Davidson county, where the defendants were in jail, the jail fees were collected from the state monthly in advance, in accordance with section 5435b. c., T. & S. Code. Upon final trial and conviction, these fees were taxed in the bill of costs, which the defendant was sentenced to work out in the workhouse, and was thereupon paid to the clerk by the county. It is argued that if the state is entitled to this money at all, it is not revenue, and the motion given by sec. 730 does not lie; and besides, as the state in its motion specially moves for 'revenue unaccounted for,' proof of the facts indicated does not sustain the motion. It is true this is not one of the sources of revenue defined by the statute. Code, sec. 533. Perhaps in its exact definition it may be confined to money raised by some of the modes of taxation, but in one sense all money belonging to the state is revenue. It is claimed that this should be more properly described as 'costs.' But strictly speaking the state does not render service for which it is entitled to costs. These costs are paid by the state out of its revenues, and the motion is to collect the money for reimbursement. It is a civil proceeding, properly cognizable in a civil court, the circuit court being one of general jurisdiction. We hold, therefore, that the circuit court had jurisdiction."

The word "revenue" is sufficiently broad to include all provisions having that general object in view, not only provisions for securing revenue as the result of a direct tax on property, but revenue derived from the imposition of licenses, duties, excises, and a tax on occupations or on successions. So, in the case of *In re Magnes*, 32 Colo. 527, 77 Pac. 853, it was held that the word "revenue" included an act imposing a duty on privileges or successions, the direct and avowed object of which was to provide for securing public revenues for governmental purposes.

Likewise, in *Parsons v. People*, 32 Colo. 221, 76 Pac. 666, it was held that a section of an act passed solely for the purpose of securing revenue for state purposes, and not designed as a regulation of a business, imposing a license fee on persons engaged in the business of selling liquor, was clearly within the title, which was "An act in relation to revenue," etc.

In *Omaha v. Hodgskins*, 70 Neb. 229, 97 N. W. 346, the court held that the word "revenue" as used in an act entitled "An act to provide a system of revenue," should be construed in its generic sense, to include all the money raised by any form of taxation, and hence to include special assessment, and not in its restricted sense, to apply only to taxes levied for general purposes.

In *Com. v. Brown*, 91 Va. 762, 21 S. E. 357, 28 L.R.A. 110, in passing on the constitutionality of an act entitled "An act for the preservation of oysters and to obtain revenue for the privilege of taking them within the waters of the commonwealth" (Act of Feb. 25, 1892), the court said: "The object of the tax is concisely but expressly stated. It is 'to obtain revenue.' What is 'revenue?' It is the income which a state collects and receives into its treasury, and is appropriated for the payment of its expenses. The object of the act, then, was to raise money for the support of the government of the state. It is concisely defined by the words to 'obtain revenue,' but by that phrase the object of the tax is as popularly understood as if it had been declared in the title or body of the act that the object was to raise money for the current expenses of the government."

In *Bates v. Porter*, 74 Cal. 224, 15 Pac. 732, there was involved an act incorporating a city and repealing certain prior acts, providing inter alia that all moneys collected by any officer who had the control, collection, or custody of any money collected for taxes, licenses, water rents, fees of office, or any other account not otherwise provided in the act, were required to be paid into the treasury on the Saturday of each week. (Sec. 28.) It also provided that "the revenue derived from and within the city limits for municipal purposes, viz., taxes, licenses, harbor dues, water rents, and fines collected in the mayor's court, or otherwise, when paid into the treasury shall be set apart and appropriated as follows: Fifty-five per cent to an interest and sinking fund," etc.; "fifteen per cent to a salary fund," etc.; "eight per cent to a school fund," etc.; "twenty-two per cent to a . . . 'contingent fund.'" (Sec. 35.) The court held that the word "revenue" as used therein with respect to the water rents, extended to and embraced within its terms the gross receipts from water rents, and did

not only include the net receipts after deducting salaries, expenses, etc.

Under a Louisiana statute (Art. 350, C. C.) providing that under no circumstances may the expenses of a minor for board, clothing, tuition, etc., exceed his revenues, and contemplating that expenses of this character shall be met as they arise either from the minor's revenues or from his capital by authorization of a family meeting, the minor's "revenues" must be taken to be what remains each year, after the payment of the taxes for that year. *Sims v. Billington*, 50 La. Ann. 968, 24 So. 637.

The Montana constitution (Art. XIII, sec. 6) limits the indebtedness which a city may contract to three per cent of the value of the taxable property therein, but provides that the legislature may authorize an increase over that limit "when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt." In *Public Service Commission v. Helena*, 52 Mont. 527, 159 Pac. 24, it was held that where the legislature had authorized the increase and a city already indebted to the full extent of the three per cent limit had purchased its own water system, the "revenues" from the water plant referred to in the above section, which were to be held inviolate, dedicated to the discharge of the extraordinary indebtedness, were the net revenues or the gross receipts less necessary operating expenses. The court held that if a regulation of the public service commission was a reasonable one, the extra expense involved in carrying it into effect was a proper and necessary charge against the gross revenues derived from the water system, and not an obligation imposed on the city.

A California statute (Pol. Code, § 4070) provides as follows: "The Board [of Supervisors] must not for any purpose contract debts or liabilities, except in pursuance of law, or under ordinances of their own, adopted in accordance with the powers herein conferred; and whenever debts and liabilities have been created, which, added to the salaries of county officers and other estimated liabilities fixed by law for the remainder of the year, equal in the aggregate the revenue of the county for current expenses, no further allowance of any accounts must be made."

In *Babcock v. Goodrich*, 47 Cal. 488, the court held that the word "revenue" as used in that section did not mean the actual money which should be received in the county treasury, since to give the word this interpretation would render it impossible for the board to comply with the direction of the statute, because the amount could never be ascertained until all the assessments had been collected

and paid into the treasury. So, it was held that, in view of the context, it was no forced interpretation to say that it was the estimated revenue which the lawmakers had in mind.

In *State v. New Orleans*, 40 La. Ann. 299, 3 So. 584, the court held that the term "revenues" as used in the statute (Act 109 of 1886, § 66) providing that "the council shall not, under any pretext whatever, appropriate any funds for the government of the corporation to the full extent of the revenues, but shall reserve twenty per cent of said revenues, which reserve, and all sums, rights, interests and credits received from miscellaneous or contingent sources shall be appropriated by the council for the purpose of permanent public improvement, as herein provided for," meant the revenue fixed in the budget, or the budget estimates of revenues. The court said: "All three sections refer exclusively to the formation of the budget, which is the fixing in advance the modus vivendi of the city for the ensuing year, by a careful estimate of the expenditures and revenues. The council is first required to make an estimate of expenditures, and, but for Sec. 66, it would not be allowed to levy a greater rate of taxation than would be necessary, with other revenues, to provide for said estimated expenditures. But Sec. 66 authorizes the raising of a revenue twenty per cent beyond the estimated expenses, and devotes the surplus as a reserve fund to be appropriated to public works and improvements. Hence, the city is authorized and is bound to estimate and to provide a revenue, eighty per cent of which, no more or no less, is equal to her estimated expenditures, and this eighty per cent is irrevocably appropriated to these expenses. How would the city comply with these mathematical requirements if, as relator contends, she is authorized and required to appropriate eighty per cent, not of her estimated revenues, but of the revenues which shall be thereafter actually collected? How can she tell in advance what deficiency may result in the collection of her revenues? How is she to adjust her estimate of expenses and her corresponding provision of revenue in exact proportion or equality to an unknown quantity? The law did not contemplate or require any such impossibilities. It is plain the city must place on her budget, in exact figures, the liabilities and expenditures, and these must be just eighty per cent of the sum designated in amended Sec. 66 as 'revenues.' Unless some mathematical process can be invented whereby to calculate a percentage of an unascertained sum, relator's construction is impracticable, and we must treat the elision of the word 'estimated' before 'revenues,' as used in previous statutes, as the simple correction of an useless tautology."

In *State v. School Fund Com'rs*, 4 Kan. 261, it was said that the section of the Kansas constitution (Art. 11, § 3) declaring it the duty of the legislature to provide revenue for the current expenses of the state each year, would be popularly taken to mean that taxes should be levied each year to meet the current expenses; and this is precisely its technical construction, as the word "revenue," in this connection, means the income of the government arising from taxation, excise and the like. And so it was held that an act directing the issue and sale of \$30,000 of the bonds of the state, and directing "that the commissioners for the management and investment of the school funds are authorized and directed to invest an amount of the permanent school funds in said bonds, sufficient to satisfy the requirements of this act," the object of which is stated in the title to be for the purpose of paying the officers and members of the state legislature, and current expenses of the state, is unconstitutional.

The word "revenue" as used in the Nebraska constitution (Art. VI., § 2) giving the supreme court original jurisdiction of "cases relating to the revenue, civil cases in which the state shall be a party, mandamus, quo warranto, habeas corpus," etc., has no reference to the revenues of municipal corporations, but to those only which are required for the purpose of general state administration. *Aachen, etc. F. Ins. Co. v. Omaha*, 72 Neb. 112, 100 N. W. 137.

Under the Illinois Practice act (§ 88) as amended by Act of 1879 (Sess. Laws, p. 222) providing for appeals to the supreme instead of the appellate courts, "in all cases of revenue," it was held that the term "revenue" was not used in its most extended meaning, but embraced public revenue, whether state or municipal, including special assessments for almost every municipal purpose, as well as general taxes, but that it did not embrace fines and forfeitures or sums due on contracts. *Webster v. People*, 98 Ill. 343; *Phoenix Grain, etc. Exch. v. Gleason*, 22 Ill. App. 373; *Gunning v. People*, 76 Ill. App. 574; *Claypool Drainage, etc. Dist. v. Chicago, etc. R. Co.* 81 Ill. App. 433. So, an assessment for street improvements which was a municipal tax, levied for a special purpose by public authority, clearly falls within the term "revenue" in this statute. *Potwin v. Johnson*, 106 Ill. 532; *Herhold v. Chicago*, 106 Ill. 547. See also *Schlierbach v. Panna*, 13 Ill. App. 382. Likewise, an assessment for public park improvements is embraced within the term "revenue" as used in the statute, being taxes and assessments imposed by public authority. *People v. Springer*, 106 Ill. 542.

In *Louisiana* "the tutor may retain as a commission for his care and labor ten per

cent on the annual amount of the revenues of the property committed to his charge." (Art. 349, C. C. La. 1898.) In the case of *In re Hollingsworth*, 45 La. Ann. 134, 12 So. 12, the court said with reference to that statute: "Revenue is an amount accruing to the minor through the care and labor of the tutor. In order that he may secure that commission it must be derived from crops, rent, interest. Certainly not amounts derived from sales or cash inherited." In the case of *In re Ratcliffe Minors*, 139 La. 996, 72 So. 713, L.R.A. 1917C 188, the court said: "Revenue or income is what is produced by capital without impairing the capital. What is taken from the capital cannot be considered revenue or income." However, the court held that a distinction must be made between revenues earned by the property belonging to the minors and revenues earned by the property of their father and transmitted to them, as stock dividends earned or produced before the minors inherited the property, the tutor being entitled to a commission under the statute cited on the first class of revenues, and not on the second class. In the case of the *Succession of Hargrove*, 9 La. Ann. 505, it was held that the net amount, and not the gross amount, of the proceeds of the sales of crops made on the minor's plantation, was to be considered as the revenues meant under the provisions of the foregoing article. See also *Grover's Succession*, 12 La. Ann. 335. In *Turnbull v. Towles*, 10 La. 254, it was held that the revenue must be considered as composed of the interest of five per cent on the moneys in hands of the tutor and of the annual hire or value of the services of the minor's slaves.

In *People v. New York Cent. R. Co.* 24 N. Y. 485, affirming 34 Barb. 123, it was held that the toll or tax imposed by the laws in force at the time of the adoption of the New York constitution of 1846 on merchandise carried by railroad companies, was not included within the "canal revenues," appropriated by the seventh article of that instrument; that the "revenues" of the canals included tolls, penalties and rent of surplus water, and any other return which the state might receive from the capital invested in the canals, and so meant the income or receipts from the canals.

In *Cromie v. Wabash, etc. Canal*, 71 Ind. 208, it was held that the word "revenue" in a contract granting a canal company for its own use the proceeds of all the tolls and revenues which might accrue from a specified portion of the canal, during the time provided for by the contract, after paying the expenses of keeping the canal in repair and certain other expenses stipulated for, the residue to go to the company, was broad enough to cover income derived from the sale of ice in

the canal, as the ice was a source of revenue, as much as water rents or anything else pertaining to the canal.

In *Hurlbut v. Gainor*, 45 Tex. Civ. App. 588, 103 S. W. 409, it appeared that the ground on which a writ of sequestration of property was asked, as stated in the affidavit, was that the "plaintiff fears that the defendant will make use of his possession to convert to his own use the fruits or revenues, produced by the property." The court held that the words "fruits" and "revenues" were used in the sequestration statute (Rev. Stats., art. 4864) as synonymous, and that the use of the word "or" between these words did not present in the alternative separate grounds for the writ, nor render the affidavit indefinite or uncertain.

The word "revenue" in a statute (Art. 341, C. C. La. 1825; Art. 347, C. C. La. 1898) directing a tutor to invest in the name of his minor the revenues which exceed the expenses of his ward whenever they amount to the sum of five hundred dollars, on penalty of being charged with interest thereon, is to be taken as synonymous with the word "funds," and as meaning all moneys belonging to the minor that come into the hands of the tutor in the course of administration. *Fuselier v. Babineau*, 14 La. Ann. 764, quoted with approval in the Tutorship of Watson, 51 La. Ann. 1641, 26 So. 409.

In *Cataract Power, etc. Co. v. Buffalo*, 131 App. Div. 485, 115 N. Y. S. 1045, there was involved a municipal ordinance granting a franchise to a private company to introduce electrical energy into the city for the purposes of light, heat and power, and providing that the structures for its lines should be sufficient to afford facilities for at least one other company which additional space should not be used by the company receiving the grant for ten years after the acceptance of the grant, and that at any time during the ten years the city might use such additional space for any public purpose from which it should not derive a revenue without compensation. It was held that the water rates paid by persons and corporations for their private use was "revenue" under the ordinance, and that the city had no right to use the additional space for the purpose of transmitting electricity to use in pumping water for private use. The court said: "It seems to me clear that water rates paid by private parties to the city constitute 'revenue' within the meaning of that word as used in the ordinance, and the city has no right to use the additional space for the purpose of pumping water for such private use without compensation. Much of the water used is for public purposes, and for this no water rates are paid, but a large amount is received as water rates for merely private purposes and from

private persons, and this certainly is 'revenue,' and for it compensation should be paid."

A Maryland statute passed in 1880 conferred on a city the power to license and regulate certain vehicles owned and used in the city, and also to license and regulate certain occupations carried on therein; "provided, however, that all the revenue arising from said licenses shall be applied to the paving or repaving of the public highways of the city." In *Vansant v. Harlem Stage Co.* 59 Md. 330, the court held that the primary object of the law was not to authorize the city to levy and collect a tax for the purpose of raising revenue, and that the term "revenue" used in the proviso, was used in the same sense as "the money received" from the license, and in fact only made a particular appropriation of the license money, where without such proviso, it would have gone for general municipal uses.

The Nebraska statute of limitations (Rev. St. 1913, § 7581) provides in part that "every claim and demand in behalf of the state, except for revenue [etc.] shall be barred by the same lapse of time as is provided by the law in case of like demands between private parties." In *State v. Stanton County*, 100 Neb. 747, 161 N. W. 264, it was held that a demand by the state for the taxes levied and collected by a county under the statutes providing for the board and care of patients committed to the state hospital for the insane (Ann. St. 1911, §§ 10094, 10095) and transferred from the county insane fund to the county general fund, was a demand for "revenue" of the state within the exception in the statute.

"All Revenue."

In *Humphrey v. Lang*, 169 N. C. 601, 86 S. E. 526, L.R.A.1916B 626, it appeared that a testator devised to his wife "all revenue" from certain named banks, properties and companies. The court affirmed the holding of the lower court that a dividend declared by one of the banks named, paid to the estate in a time certificate of deposit, but which the stockholders had the privilege of taking in cash or in stock, at their option, was revenue or income, and not principal, and that the widow was entitled to it under the will.

"Estimated Revenue."

In *Callaway v. Baltimore*, 99 Md. 315, 57 Atl. 661, there was involved the following provision of a city charter: "In case of any surplus arising in any fiscal year by reason of an excess of income received from the estimated revenue over the expenditures for such year, the said surplus shall be passed to the commissioners of finance to be credited to the general sinking fund." The court held

that the proceeds of a loan dedicated by the statute authorizing the same to a particular municipal use, to wit, for the purpose of extending the city's water service and constructing an additional reservoir, did not come within the description of "estimated revenue," as used in the section quoted. Much less, the court declared, could it be said that the future proceeds of stock of that character, which had not yet been issued or sold, fell within the description of "estimated revenue."

"General Revenue."

In *Whitehead v. Gibbons*, 10 N. J. Eq. 230, it appeared that a will contained the following provisions: By the "second item" of his will, the testator declared, "I do order and direct that all my just debts be paid and freely discharged, for which purpose I bind my whole, entire and undivided estate; and I direct that my estate shall not be divided, and no devise or bequest take effect, until all my just debts are paid and fully discharged from the general revenues of my estate, together with such appropriations as are hereinafter mentioned and provided." By the "third item" of his will, the testator ordered that his whole and entire stock of blood horses be sold at public auction, and the proceeds of the sale appropriated to the payment of his debts, and the surplus, after that, be divided equally among his four children. By the "fifth item," he ordered all bonds secured by mortgages, promissory notes, and other obligations and contracts for the payment of money, except Ashbel Bruen's bond of \$12,000, secured by mortgage, and four bonds of the city of Savannah, to be collected with all possible despatch, and the proceeds applied to the payment of his debts, and any surplus, over and above what is sufficient for that purpose, to be equally divided among his four children. By the "twelfth item," he directed that all money on hand in any bank with which he kept an account, and at his dwelling house, or elsewhere, also all and every balance of account for money or funds due him in the hands of all and any of his agents or attorneys, or persons with whom he might have had dealings, should first be applied to the payment of his funeral expenses, then to the payment of his debts, then to the current temporary expenses of his children, at home or abroad, at school or otherwise, until the adjustment of his affairs in ascertaining the condition of the estate and their respective rights, and any balance remaining should go into his general estate, and be divided equally between his four children. The exceptants to the executor's settlement insisted that the testator intended the "general revenues" of the estate as the primary fund to pay his debts, that he charged the "general revenues" of

his estate, together with the appropriations made in the third, fifth, and twelfth items of his will, with the payment of his debts. The court said: "What constitutes the general revenues of this estate? I think it is plain the testator meant the rents and profits of his real estate, and the interest or profits arising out of the personal estate. He had made specific devises of all his real estate to his children. He had charged it with the payment of his debts. He had declared the devises should not take effect until all his debts were paid. As to his personal property he makes a specific appropriation of the whole of it. He appropriates a part of it to secure a trust fund; another portion of it he directs his executors to convert into money to pay his debts; another part to convert into money to pay his funeral expenses; then his debts; then the temporary expenses of his children until his estate should be settled; and he then specifically bequeaths all the personal property he could enumerate, not before appropriated to his four children, making provision for residue, if any. He does not mean the personal property in the third, fifth, and twelfth items to constitute a part of the general revenue. He had directed that to be converted into money. Nor did he mean the proceeds or interest arising out of that fund to make any part of that revenue; for, in the second item of the will, he distinguishes it from the general revenue, as the appropriations provided with the 'general revenues' to pay his debts. We then have two distinct funds, the general revenue of the testator's estate, chargeable with his debts, and a fund which has been raised out of specific personal property, converted into money by the express orders of the testator. Which fund is to be the first appropriated for the purpose? It appears to me to have been the intention of the testator, and that he meant the phraseology he used as an expression of such intention, that the appropriations made in the second, fifth, and twelfth items of the will should constitute the primary fund for the payment of his debts. And again, if there is an absence of an intention as to which fund shall be primarily liable, upon general principles, the debts are first to be paid out of the property mentioned in the items enumerated. The testator first charges all his estate, both real and personal, with the payment of his debts; but knowing it would not be necessary to sell his real estate for that purpose, nor to break in upon the specific legacies which he had made to his children, he declares that the revenues shall be used for that purpose, together with such other appropriations as he makes. The word 'appropriations' is significant. It evinces the intention of the testator to designate and set it apart from his

other property for a specific object. The word means a designation to a particular exclusive use. He orders his blood horses to be sold, and certain obligations to be collected with all possible despatch, to constitute a fund in the hands of his executors to pay his debts. It cannot be that he meant the 'revenues of his estate as the primary fund,' and this fund, thus 'earmarked,' as it were, and 'appropriated' to the very object, to be a secondary or auxiliary fund. The revenues of the estate are sufficient to pay the debts without the aid of the appropriations in the second, fifth, and twelfth items of the will. Did the testator ever contemplate such a result as that these appropriations should never be used for this object? It is quite as clear he could not have meant the two funds as a common fund to pay the debts. What proportion of the burden was each fund to bear, and at what period was the account to be taken? I, think, too, the intention of the testator is clear from another circumstance. He manifested a great anxiety to have his debts paid speedily. The fund created by the third, fifth, and twelfth items of his will was a certain fund in the hands of his executors immediately upon their assuming the duties of their office. It was a fund which appropriately belonged to the executors, in their character as personal representatives of the testator. Not so with the rents and profits of the realty, which constituted the bulk of the 'revenue' of the estate. They did not pass into the hands of the executors *ratione officii*. They had no authority to collect them, except by the express or implied authority conferred upon them by the will. The will gives no express authority. It is only by implication that the executors possess it. The testator having authorized the rents to be appropriated, under certain circumstances, to pay his debts, and the duty of paying his debts devolving upon his executors, by implication, they are clothed with power to collect the rents. . . . The fact that the testator expressed a great anxiety to have his debts speedily paid; that of the two funds charged with this burden, one was a certain fund in the hands of his executors available at once, the other not belonging to them appropriately as executors, and the testator conferring upon them no express authority to obtain possession of it, all these considerations are of importance, as showing that the testator's mind was not upon the revenue of his estate as the primary fund for the payment of his debts. To determine that such was his intention would mar the prominent feature in his will, his determination to have his debts speedily paid; it would embarrass the very object which seemed to swallow up all others in contemplation of the testator. To my mind, the intention of the testator is clearly expressed upon the face

of the will, that the property enumerated in the third, fifth, and twelfth items should constitute the primary fund to pay his debts. But if there is an absence of intention as to what part of his estate shall constitute the primary fund, upon well settled principles of law, the property named in these several items is the appropriate and primary fund for that object. . . . But it is said that the 'general revenues' derived from his estate, mentioned in the second item of the will, constituted the testator's 'general estate,' and although it was proceeds and interest of real and personal estate specifically devised and bequeathed, the testator did not intend it should go to the devisees and legatees, from the fact that he devised to them the realty and personalty out of which it was derived, because he declared that no devise or bequest should take effect until all his debts were paid; that his revenue had accumulated in the hands of the executors before the debts were paid, and consequently before any devise or bequest took effect. This brings us back to the first question we considered, whether the testator meant anything more than to charge the devises and legacies with the payment of his debts, and to make the revenues derived from them an auxiliary fund to the specific personal property appropriated for his debts. I have before stated it as my opinion, that it was the intention of the testator that the devisees and legatees should take their estates and legacies without diminution, except so far as it was necessary to appropriate these proceeds to the payment of his debts in aid of other funds provided for the purpose."

In *Stevens v. Miller*, 3 Kan. App. 192, 43 Pac. 439, it was said that the words "general revenue purposes" in the Kansas statute authorizing a municipality to "levy and collect taxes for general revenue purposes not to exceed ten mills on the dollar in any one year, on all the real, mixed and personal property within the limits of said cities, taxable according to the laws of this state," (Gen. St. 1889, par. 788), mean the same as "ordinary purposes." Accordingly it was held that in the absence of a showing that the council had already levied the full amount permitted by law for "general revenue purposes," a levy might be made thereunder for the purpose of paying a judgment against the city.

"Ordinary Revenue."

After stating the various lexical and other definitions of the word "revenue," the court in the reported case holds that it is broader than and includes receipts from taxation, as well as municipal income; that revenue may be said to be the genus, while taxation is but a species. The court concludes that the word

"revenue," as used in an act appropriating one-third of the money out of the state revenue fund for the support of the public schools (Laws Mo. 1915, § 1, p. 89), when standing alone, and when not modified by the word ordinary, means the annual and current income of the state, however derived, which is subject to appropriation for general public uses. This, the court holds, excludes such income as the constitution, or any permanent existing law, may specifically devote to a special purpose, in contradistinction to a public use, or which is not required to be paid into the state revenue fund but into a special fund, e. g., the collateral inheritance tax, specifically collected for the support of the state university and its departments (R. S. 1909, § 312); the money derived from license fees on motor vehicles (Laws 1911, § 13, p. 331); fees paid into the state treasury to the credit of the "insurance department fund" (R. S. 1909, § 6884); and others of similar sort. However, taking the two words, "ordinary" and "revenue," together, as they occur in the appropriation act under consideration, the court holds that they mean the regular and usual annual income of the state, however derived, which is subject to appropriation for general public uses. The court thereupon proceeds to the determination of the question whether the several sums mentioned in the agreed statement of facts are included in the terms "ordinary revenue."

"Bills for Raising Revenue."

"What bills are properly 'bills for raising revenue,' in the sense of the Constitution, has been matter of some discussion. A learned commentator supposes that every bill which indirectly or consequentially may raise revenue, is, within the sense of the Constitution, a revenue bill. He therefore thinks, that the bills for establishing the post office, and the mint, and regulating the value of foreign coin, belong to this class, and ought not to have originated (as in fact they did), in the senate. But the practical construction of the Constitution has been against this opinion. And, indeed, the history of the origin of the power, already suggested, abundantly proves, that it has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue. No one supposes that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue, in the sense of the Constitution. Much less would a bill be so deemed which merely regulated the value of foreign or domestic coin, or authorized the discharge of insolvent debtors upon assignment of their estates to the United States, giving a priority of payment to the United States in case of insolvency, Ann. Cas. 1918B.—14.

although all of them might incidentally bring revenue into the treasury. Story, Const. § 880." The Nashville, 4 Biss. 188, 17 Fed. Cas. No. 10,023.

This practical construction of the provision of the federal (Art. 1, § 7, 8 Fed. St. Ann. 337) and the state constitutions that "all bills for raising revenue shall originate in the house of representatives," contended for by Judge Story, viz., that the phrase "bills for raising revenues" is confined to bills the direct and principal object of which is to raise revenue, has been followed in practically all the decisions arising under those provisions. The Nashville, 4 Biss. 188, 17 Fed. Cas. No. 10,023; Twin City Bank v. Nebeker, 167 U. S. 196, 17 S. Ct. 766, 42 U. S. (L. ed.) 134, *affirming* 3 App. Cas. (D. C.) 190; Dundee Mortg. Trust Invest. Co. v. Parrish, 11 Sawy. (U. S.) 92; Geer v. Ouray County, 97 Fed. 435, 38 C. C. A. 250; Twin Falls Canal Co. v. Foote, 192 Fed. 583; Stanfield v. Umatilla River Water Users' Assoc. 192 Fed. 596; Harper v. Elberton, 23 Ga. 566; Com. v. Bailey, 81 Ky. 395, *reversing* 3 Ky. L. Rep. 110; State v. Bernheim, 19 Mont. 512, 49 Pac. 441; Anderson v. Rittenbush, 22 Okla. 761, 98 Pac. 1002; Cornelius v. State, 40 Okla. 733, 140 Pac. 1187; Johnson v. Grady County (Okla.) 150 Pac. 497; Trustees', etc. Ins. Co. v. Hooton (Okla.) 157 Pac. 293, L.R.A.1916E 602; In re Ambler, 11 Okla. Crim. 449, 148 Pac. 1061. See also Millard v. Roberts, 202 U. S. 429, 26 S. Ct. 674, 50 U. S. (L. ed.) 1090.

"A bill for raising revenue,' as we understand it from the debates on the Federal Constitution, authorities, and textwriters, embraces all appropriations of money for the public treasury where the bill either provides for the levy of duties or taxes, capitulation or ad valorem, upon the people, or is a part of a system of laws or another bill which does so provide." Com. v. Bailey, 81 Ky. 395, *reversing* 3 Ky. L. Rep. 110.

"It is, of course, possible to differentiate between a law 'for raising revenue' and a 'revenue law,' but the distinction is not entirely obvious, and the two phrases might very properly be used to convey the same meaning. Lexically and grammatically, the strain comes, not in assimilating but in distinguishing them. As language is commonly and ordinarily understood, it would seem that, where a bill 'for raising revenue' is enacted into law, it becomes 'a revenue law,' and a 'revenue law' originates in a bill 'for raising revenue.'" Twin Falls Canal Co. v. Foote, 192 Fed. 583, wherein it was held that the Reclamation Act (Act of June 17, 1902, c. 1093; 32 Stat. 388; 7 Fed. St. Ann. 1098) was not a bill "for raising revenue" in the constitutional sense. To the same effect see Stanfield v. Umatilla River Water Users' Assoc. 192 Fed. 596.

Any law which provides for the assessment and collection of a tax to defray the expenses of the government, is a revenue law. Such legislation is commonly referred to under the general term, "revenue measures," and those measures include all the laws by which the government provides means for meeting its expenditures. *Peyton v. Bliss*, *Woolw.* 170, 19 Fed. Cas. No. 11,055.

"Bills for raising revenue" are, when passed, "revenue laws" within the meaning of the statute (Act of July 18, 1866, § 8; 14 Stat. 180, now Rev. Stat. § 3088; 2 Fed. St. Ann. (2d ed.) 1173) authorizing an action in rem, where a vessel or the master or owner of a vessel is subject to a penalty for a violation of the revenue laws of the United States. *The Nashville*, 4 Biss. 188, 17 Fed. Cas. No. 10,023.

The post-office laws are not laws or bills for raising revenue within the constitutional provision, *U. S. v. James*, 13 Blatchf. 207, 26 Fed. Cas. No. 15,464; though they are revenue laws within the meaning of certain statutes, *U. S. v. Bromley*, 12 How. 88, 13 U. S. (L. ed.) 905; *Warner v. Fowler*, 4 Blatchf. 311, 29 Fed. Cas. No. 17,182. So, a bill establishing or increasing rates of postage is not a bill for raising revenue, within the meaning of the Constitution. *U. S. v. James*, 13 Blatchf. 207, 26 Fed. Cas. No. 15,464, wherein the court said: "Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, either directly or indirectly, or lay duties, imposts or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens of the benefit of good government. It is this feature which characterizes bills for raising revenue. They draw money from the citizen; they give no direct equivalent in return. In respect to such bills it was reasonable that the immediate representatives of the taxpayers should alone have the power to originate them. Their immediate responsibility to their constituents, and their jealous regard for the pecuniary interests of the people, it was supposed, would render them especially watchful in the protection of those whom they represented. But the reason fails in respect to bills of a different class. A bill regulating postal rates for postal service, provides an equivalent for the money which the citizen may choose voluntarily to pay. He gets the fixed service for the fixed rate, or he lets it alone, as he pleases and as his own interests dictate. Revenue, beyond its cost, may or may not be derived from the service and the pay received for it, but it is only a very strained construction which would regard a bill establishing rates of postage as a bill for raising revenue, within the meaning of

the Constitution. This broad distinction existing in fact between the two kinds of bills, it is obviously a just construction to confine the terms of the Constitution to the case which they plainly designate. To strain those terms beyond their primary and obvious meaning, and thus to introduce a precedent for that sort of construction, would work a great public mischief."

The act (Act of June 3, 1864; 13 Stat. 99, c. 106) providing for a national currency secured by a pledge of United States bonds and for the circulation and redemption thereof, so far as it imposed a tax on the average amount of the notes of a national banking association, was not a revenue bill within the constitutional clause. *Twin City Bank v. Nebeker*, 167 U. S. 196, 17 S. Ct. 766. 42 U. S. (L. ed.) 134, *affirming* 3 App. Cas. (D. C.) 190, wherein Mr. Justice Harlan said: "What bills belong to that class is a question of such magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject. It is sufficient in the present case to say that an act of Congress providing a national currency secured by a pledge of bonds of the United States, and which, in the furtherance of that object, and also to meet the expenses attending the execution of the act, imposed a tax on the notes in circulation of the banking associations organized under the statute, is clearly not a revenue bill which the Constitution declares must originate in the House of Representatives. Mr. Justice Story has well said that the practical construction of the Constitution and the history of the origin of the constitutional provision in question proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue. 1 Story on Const. § 880. The main purpose that Congress had in view was to provide a national currency based upon United States bonds, and to that end it was deemed wise to impose the tax in question. The tax was a means for effectually accomplishing the great object of giving to the people a currency that would rest, primarily, upon the honor of the United States, and be available in every part of the country. There was no purpose by the act or by any of its provisions to raise revenue to be applied in meeting the expenses or obligations of the government."

An act incorporating a town is not an act "for raising revenue," although the act among the many powers conferred on the town the power to tax. In such a case taxation is not the end; it is a mere incident. *Harper v. Elberton*, 23 Ga. 506.

An act entitled "An act to provide uniform and cheap textbooks for the public schools of Minnesota (Laws 1877, c. 76; Gen. St.

1878, c. 36, §§ 156-167)" was held not to be a revenue act in *Curryer v. Merrill*, 25 Minn. 1, 33 Am. Rep. 450, wherein the court said: "A bill for raising a revenue is one whose main purpose is to raise money by taxation. A mere appropriation of public money, though it may lead to the necessity of taxation, is insufficient to characterize a measure as one for revenue, such as must originate in the house, and not in the senate."

In *Geer v. Ouray County*, 97 Fed. 435, 38 C. C. A. 250, it was held that an act (Act of April 17, 1889; 1 Mill Ann. St. Colo. 1891, §§ 945-948) entitled "An act to enable the several counties of the state to refund their bonded debt which has matured, or may hereafter mature, and to issue bonds in satisfaction of judgments and matured bonds," was not a bill for raising revenue. The court said: "A bill for raising revenue, within the meaning of this provision of the Constitution, is one which provides for the levy and collection of taxes for the purpose of paying the officers and of defraying the expenses of the government. This act was not of that character. Its main purpose was to authorize certain quasi municipal corporations to refund their debts. The provisions for the levy and collection of taxes which it contained were mere incidents to the general refunding legislation which it carried. The probability is that they did not even increase the taxes which the counties were required to levy, for they were bound to lay taxes to pay their debts and the interest upon them before as well as after they were refunded. These provisions raise no revenue for the government, but, on the other hand, the act expressly provided that the moneys derived from the levies made under it should not be appropriated to pay the officers of the state or of the county, or to defray the expenses of governing the people, but should be set apart and applied exclusively to pay the bonds and coupons issued under it for the purpose of refunding the debts of the counties."

In *Anderson v. Rittenbusch*, 22 Okla. 761, 98 Pac. 1002, it was held that a statute (Sess. Laws 1907-08, p. 729, c. 81, art. 9) entitled "An act for the discovery of property not listed for taxation, providing for its assessment and the collection of taxes thereon," was not a bill for raising revenue. The court said: "We have a complete revenue law for the purpose of raising money to defray the expenses of state, county, and municipal government, and one that would apportion the burdens of government justly and equally among the taxpayers if all property owners complied with its provisions. Unfortunately this is not the case, and the legislature found it necessary to provide a means for reaching property which, through fraud or other means, was omitted from taxation,

whereby such property and the owners thereof would be required to pay their just share of the burdens of government. To our minds such a law is in no sense a bill for raising revenue, although it may incidentally have that effect. It does not belong to that class of revenue bills mentioned by Judge Story as those that levy taxes in the strict sense of the word."

In holding that a Kentucky statute (Act of April 9, 1880) for the regulation of the fees and salaries of the public officers enumerated in the first section was not a "bill for raising revenue," the court in *Com. v. Bailey*, 81 Ky. 395, reversing 3 Ky. L. Rep. 110, said: "'A bill for raising revenue,' as we understand it from the debates on the Federal Constitution, authorities, and textwriters, embraces all appropriations of money for the public treasury where the bill either provides for the levy of duties or taxes, capitation or ad valorem, upon the people, or is a part of a system of laws or another bill which does so provide. A bill may originate in the senate for the appropriation of money for or from the treasury, unless it necessitates the levy of taxes or duties to meet its requirements. The principle underlying this provision of the Constitution is founded on the ground that the people are bound to pay the taxes to support the government in consideration of protection to their lives, liberty, and property; hence, the power of taxation was placed in the hands of the popular branch of the legislature as a means of security to the people, from whom its members are selected, against exactions by taxation for other than strictly governmental purposes. This view excludes from the comprehension of this constitutional clause such bills as appropriate money to or from the treasury, raised from the people in consideration of other benefits and services than protection in their lives, liberty, and property. . . . It is clear from every source that the terms 'bills for raising revenue' are confined to bills to levy taxes in the strict sense of the word, and do not embrace bills for other purposes which incidentally create revenue, unless so framed as to draw money from the people, with no other advantage or benefit to them except the general protection which belongs to the citizen under our form of government as a matter of common right. The act before us incidentally turns money into the treasury. The reduction of the fees and salaries of the officers named necessarily results in increasing the sums in the treasury to the extent of the amount these officers may collect for their services beyond \$3,000, deputy hire and necessary expenses. But the sums collected by them from the litigant or persons for whom the services may be rendered are in consideration of such services, and those

sums are not, in the strict sense, taxes levied on the citizen any more than increased postage is a tax levied on the sender of mail matter. Both have a consideration to support them, and that consideration is exceptional, and does not belong to the people in common, but it is rendered for the identical persons who are bound to pay therefor. The act neither increases nor diminishes the burdens of the people or litigants who pay the fees of these officers for their services. The rate of fees remains the same, the effect and purpose of the act being to so regulate the compensation of these officers as to reduce the sum retained by them for their services to \$3,000. We do not think the bill was, in any particular, a bill 'for raising revenue' in the constitutional sense of those terms."

An act creating the office of county assessor, and for other purposes relative thereto (Sess. Laws Okla. 1910-11, c. 152), has been held not to be a bill for raising revenue, since "revenue bills" are those that levy taxes in the strict sense of the word. *Johnson v. Grady County* (Okla.) 150 Pac. 497.

In *Colorado Nat. L. Assur. Co. v. Clayton*, 54 Colo. 256, 130 Pac. 330, it was held that a bill regulating the insurance business and insurance companies doing business within the state, and requiring the payment of certain enumerated fees and a two per cent tax annually on gross premiums, was not a bill for raising revenue. The court said: "Plaintiff contends the tax is a revenue measure, and unconstitutional because the act originated in the senate instead of the house. This contention does not meet with our approval. A bill designed to accomplish some well defined purpose other than raising revenue, is not a revenue measure. Merely because, as an incident to its main purpose, it may contain provisions, the enforcement of which produces a revenue, does not make it a revenue measure. Revenue bills are those which have for their object the levying of taxes in the strict sense of the words. If the principal object is another purpose, the incidental production of revenue growing out of the enforcement of the act will not make it a bill for raising revenue. The primary object and purpose of this bill was to regulate insurance companies and the insurance business in the state. It is a regulation or supervision tax, and the method of arriving at the amount, or because of its operation the act produces an excess which is required to be turned into the general fund, does not affect its validity or render it an act for revenue."

In *State v. Bernheim*, 19 Mont. 512, 49 Pac. 441, it appeared that a statute (Sess. Laws 1893, p. 150; Civ. Code §§ 978-984) providing that the owner of a railroad or steamboat should provide each agent who was authorized to sell tickets with a certifi-

cate of authority, which the agent must exhibit to the secretary of state, who, on payment of a license fee of one dollar, should issue a license authorizing him to engage in the business of selling tickets of the common carrier from whom he held his appointment, originated in the senate. It was held that the fact that a license fee of one dollar must be paid to the secretary of state for the license, did not make the law a bill for raising revenue, and so unconstitutional.

A statute requiring the payment of certain fees by parties litigant to officers named in the act, who were paid by salary and not out of such fees (Laws Ore. 1893, p. 163), has been held not to be a bill for raising revenue. *Northern Counties Invest. Trust v. Sears*, 30 Ore. 388, 41 Pac. 931, 35 L.R.A. 188, wherein the court said: "A law which requires a fee to be paid to an officer, and finally covered into the treasury of a county, for which the party paying the fee receives some equivalent in return, other than the benefit of good government, which is enjoyed by the whole community, and which the party may pay and obtain the benefits under the law, or let it alone, as he chooses, does not come within the category of an act for raising revenue."

The Oklahoma Medical Practices Act (Comp. Laws 1909, §§ 4242-4264) imposing a fee on peddlers of medicine and medical appliances is not a revenue measure, since revenue laws in the contemplation of the constitution are those only whose principal purpose is the raising of revenue, and not those under which revenue may incidentally arise. In *re Ambler*, 11 Okla. Crim. 449, 148 Pac. 1061.

The Oregon statute (Act of Nov. 25, 1885, Laws Spec. Sess. 38) amending an act entitled "An act to regulate the sale of spirituous, malt, and vinous liquors," and fixing, different amounts for the license to sell such liquors than were provided for in the act amended, has been held not to be a bill to raise revenue. *State v. Wright*, 14 Ore. 365, 12 Pac. 708.

A law authorizing the levy of taxes to build bridges and roads has been held not to be a "revenue bill." *Fletcher v. Oliver*, 25 Ark. 289, wherein the court said: "Labor produces money; the timber, stone and gravel used in the construction of the road may be converted into money. It requires money to produce the labor, timber, stone and gravel that may be used in the construction of the roads. If one should contract with another for the building of a public road or highway from here to Hot Springs, over which the public could travel by the ordinary means of conveyance, we should expect the ravines and streams between here and that point to be placed in such condition, by bridging or other-

wise, as would render the crossing as free from all danger as any other portion of the road. Money, in this instance, is placed in the same class of adjuncts for building roads and highways that timber, stone, gravel or labor may be, and, as such, is not revenue, in the sense in which the word is used in the constitution. The revenue there referred to was such as might be imposed for the support of the state government, and the payment of its ordinary expenses. There are many laws that provide for raising money by taxation that are not revenue laws. The law under which the city derives the power to tax the property within its limits, originated in the senate. The law organizing schools, and permitting the levy of a tax for that specific purpose, originated in the senate, and no one ever dreamed of calling them revenue laws."

An act (Sess. Laws Okla. 1913, c. 246) entitled "An act providing for exemption from ad valorem tax on mortgages of real estate and the indebtedness thereby secured, the payment of the registration tax when filing mortgages for record," etc., has been held not to be a revenue bill. *Cornelius v. State*, 40 Okla. 733, 140 Pac. 1187; *Trustees', etc. Ins. Co. v. Hooten* (Okla.) 157 Pac. 203, L.R.A. 1916E 602.

In *Mumford v. Sewell*, 11 Ore. 67, 4 Pac. 585, 5 Am. Rep. 462, in construing a law (Act of Oct. 26, 1882) taxing mortgages, the court said: "Some of us have considerable doubt whether the bill is not properly a bill for raising revenue, and therefore in violation of sec. 18 of art. 4 of the state constitution, because it originated in the senate. But it is not sufficiently clear that a law which merely declares that certain property therefore exempt from taxation shall thereafter be subject to taxation, is strictly a law for raising revenue. We do not feel warranted, therefore, as at present advised, in declaring the law unconstitutional on this ground." In *Dundee Mortg. Trust. Invest. Co. v. Parrish*, 11 Sawy. (U. S.) 92, however, in construing the same act, the court said: "But I am clear that this is not a bill for raising revenue. True, it provides that when revenue is to be raised mortgages shall contribute thereto as land. But it does not authorize or provide for levying any tax or raising a cent of revenue. A bill for raising revenue or a 'money bill,' as it was technically called at common law, is a bill levying a tax on all or some of the persons, property, or business of the country for a public purpose; and the assessment or listing and valuation of the polls or property preliminary thereto, and all laws regulating the same, are merely measures to secure what may be deemed a just or expedient basis for the levying of a tax or raising a revenue thereon."

A Kentucky statute (Act of March 4, 1904), "relating to revenue and taxation, pro-

viding for license taxes on compounded, rectified, adulterated or blended distilled spirits, known and designated as single stamped spirits, and providing penalties for violations of its provisions," has been held to be a bill for raising revenue, and not a bill to regulate the manufacture and use of rectified spirits with revenue as a mere incident. Hence, having originated in the senate, it was held void. *H. A. Thierman Co. v. Com.* 123 Ky. 740, 97 S. W. 366, 30 Ky. L. Rep. 72.

In *Perry County v. Selma*, etc. R. Co. 58 Ala. 546, it was held that an Alabama statute (Act of Feb. 9, 1870, Pamph. Acts 87) entitled an act "To amend an act entitled an act to establish revenue laws for the state of Alabama," though in a sense reducing the taxes in that it assumed to relieve certain railroad property, was nevertheless a bill for raising revenue, and unconstitutional by reason of having originated in the senate.

"Revenue Laws."

IN GENERAL.

Any law which provides for the assessment and collection of a tax to defray the expenses of the government is a revenue law. Such legislation is commonly referred to under the general term, "revenue measures," and those measures include all the laws by which the government provides means for meeting its expenditures. *Peyton v. Bliss*, Woolw. 170, 19 Fed. Cas. No. 11,055.

The lexical definition of the term *revenue* is very comprehensive; and is thus given by Webster: "The income of a nation, derived from its taxes, duties, or other sources, for the payment of the national expenses." The phrase *other sources* would include the proceeds of public lands, those arising from the sale of public securities, the receipts of the patent office in excess of its expenditures, and those of the post-office department when there should be such excess. Indeed, the phrase would apply in all cases of such excess. But it is a matter of common knowledge that the appellative "revenue laws" is never applied to the statutes involved in these classes of cases. *U. S. v. Norton*, 91 U. S. 566, 23 U. S. (L. ed.) 454; 2 Cow. Crim. (N. Y.) 358.

"Bills for raising revenue" are, when passed, "revenue laws" within the meaning of the statute (Act of July 18, 1866, § 8; 14 Stat. 180, now Rev. Stat. § 3068; 2 Fed. St. Ann. (2d ed.) 173) authorizing an action in rem, where a vessel or the owner or master of a vessel is subject to a penalty for a violation of the revenue laws of the United States. "Revenue laws," within this statute, then, means laws relating to the income of the government, arising from taxation, duties and the like, and which on their face were plain-

ly designed to raise revenue. The Nashville, 4 Biss. 188, 17 Fed. Cas. No. 10,023.

While the post-office laws are revenue laws, within the meaning of certain statutes, U. S. v. Bromley, 12 How. 88, 13 U. S. (L. ed.) 905; Warner v. Fowler, 4 Blatchf. 34, 29 Fed. Cas. No. 17,182; they are not laws or bills for raising money within the Constitution, U. S. v. James, 13 Blatchf. 207, 26 Fed. Cas. No. 15,464.

That the general term "revenue laws" includes internal revenue acts, has been both held, U. S. v. Wright, 11 Int. Rev. Rec. 22, 35, 17 Pittsb. Leg. J. 20, 3 Pittsb. 192, 28 Fed. Cas. No. 16,770, and denied, Stevens v. Mack, 5 Blatchf. 514, 6 Int. Rev. Rec. 181, 23 Fed. Cas. No. 13,404.

The Act of July 4, 1864 (13 Stat. 390), entitled "An act further to regulate the carriage of passengers in steamships and other vessels," consisting of ten sections, containing no provision of any kind concerning revenue, and amending various sections of prior acts, all of which concern the protection of the lives of passengers on steamers, is not a revenue law, though it may incidentally touch the interests of the United States treasury. The Nashville, 4 Biss. 188, 17 Fed. Cas. No. 10,023.

Under the Act of Congress of June 30, 1870 (16 Stat. L. 176, now Rev. Stat. § 949; 6 Fed. St. Ann. 594), making it the duty of the court to give to causes wherein a state is a party or where the execution of the "revenue laws of a state" has been enjoined or suspended by judicial order, preference and priority over all other civil causes; and giving to the state, or the party claiming under the laws of the state, the execution of whose revenue laws has been enjoined or suspended, the right to have such cause heard at any time after docketing in preference to any other civil cause between private parties, the ordinances of municipal corporations levying taxes cannot be classed as revenue laws of a state. Davenport City v. Dows, 15 Wall. 390, 21 U. S. (L. ed.) 96, wherein the court said: "Congress seems to have intended to give to the state the right to preference in hearing when itself a party to a cause pending in this court, and a like preference when the execution of the revenue laws of a state is enjoined or suspended, to any party claiming under such laws. This preference is given, plainly enough, because of the presumed importance of such cases to the administration and internal welfare of the states, and because of their dignity as equal members of the Union. The reasons for preference do not apply to municipal corporations, more than to railroad and many other corporations."

It has been held that the Collection Act of March 2, 1799 (Brown & D. Laws,

c. 128; 1 Stat. 678, c. 22), was a revenue act within the meaning of the clause in the Act of April 18, 1818 (Story's Laws, c. 65; 3 Stat. 433, c. 70, § 4), providing "that all penalties and forfeitures incurred by force of this act shall be sued for, recovered, distributed, and accounted for, and may be mitigated or remitted, in the manner and according to the provisions of the revenue laws of the United States." The Abigail, 3 Mason 331, 1 Fed. Cas. No. 18.

A section of the New York General Corporation Law (§ 16a; Laws of 1895, c. 240; also known as section 181 of the Tax Law), provides that every foreign corporation, except certain specified kinds of corporations, shall pay to the state treasurer for the use of the state, a license fee of one-eighth of one per cent for the privilege of doing business within the state, to be computed on the basis of the capital stock employed by it within the state during the first year of carrying on its business within the state. It also provides, inter alia, that no action may be maintained or recovery had by such a foreign corporation without its having obtained a receipt for the license fee thereby imposed within thirteen months after beginning business in the state. Section 15 of the General Corporation Law (Laws 1892, c. 687, as amended by Laws of 1901, c. 538, and Laws of 1904, c. 490) provides that "a foreign stock corporation whose business 'to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business' is entitled to a certificate of authority to do business in this state on compliance with the requirements of section 16 of the General Corporation Law by filing with the secretary of state a sworn copy in the English language of its charter, a statement under its corporate seal particularly setting forth the business or objects of the corporation which it is engaged in carrying on or which it proposes to carry on within the state, and a place within the state which is to be its principal place of business, and designating in the manner prescribed in the Code of Civil Procedure a person upon whom process against the corporation may be served within the state." The court held in *F. J. Emmerich Co. v. Sloane*, 108 App. Div. 330, 95 N. Y. S. 39, 1129, that the phrase "revenue law" meant "a law providing in terms for revenue," and that this definition would fit the provisions of section 181 of the Tax Law, but not those of sections 15 and 16 of the General Corporation Law.

STATUTE RELATING TO APPELLATE JURISDICTION.

The Act of Congress of May 31, 1844 (5 Stat. L. 658), giving a writ of error in any

civil action brought by the United States for the enforcement of its revenue laws was held to embrace within its meaning the Act of March 3, 1845 (5 Stat. L. 736), designed to reduce rates of postage and to prevent frauds in the revenue of the post-office department, since the latter act was, within the meaning of the former, a revenue law. *U. S. v. Bromley*, 12 How. 88, 13 U. S. (L. ed.) 905, wherein the court said: "That the act which prescribes the offense charged is a revenue law, there would seem to be no doubt. In its title, it is declared to be an act to reduce the rates of postage, and for the 'prevention of frauds on the revenue of the post-office department.' In its character and object it is a revenue law, as it acts upon the rates of postage and increases the revenue by prohibiting and punishing fraudulent acts which lessen it. Under the Act of 1836, the revenue of the post-office department is paid into the treasury. Revenue is the income of a state, and the revenue of the post-office department, being raised by a tax on mailable matter conveyed in the mail, and which is disbursed in the public service, is as much a part of the income of the government as moneys collected for duties on imports."

Under the same statute as re-enacted (Rev. Stat. § 643; 4 Fed. St. Ann. 260, repealed by Judicial Code, Act of March 3, 1911; 36 Stat. 1087; 5 Fed. St. Ann. (2d ed.) 1087) it was held that another statute (Rev. Stat. § 844; 4 Fed. St. Ann. (2d ed.) 707) providing for the payment by the clerk of a court into the treasury of the surplus money received by him as the fees and emoluments of his office, was not a revenue law. *U. S. v. Hill*, 123 U. S. 681, 8 S. Ct. 308, 31 U. S. (L. ed.) 275, wherein the court said: "As the provision relates to the jurisdiction of this court for the review of the judgments of the circuit courts, it is proper to refer to the statutes giving jurisdiction to those courts to see if there is anything there to show what the term 'revenue law,' as here used, means. Looking, then, to § 629 of the Revised Statutes, we find that by the fourth subdivision the circuit courts have been granted original jurisdiction 'of all suits at law or in equity arising under any act providing for revenue from imports or tonnage,' and 'of all causes arising under any law providing internal revenue.' And again, by the twelfth subdivision, 'of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him under any law of the United States for the protection or collection of any of the revenues thereof.' This clearly implies that the term 'revenue law,' when used in connection with the jurisdiction of the courts of the United States, means a law imposing duties on imports or tonnage, or a law provid-

ing in terms for revenue; that is to say, a law which is directly traceable to the power granted to Congress by § 8, art. I, of the Constitution, 'to lay and collect taxes, duties, imposts, and excises.' This view is strengthened by the third subdivision of § 699, which gives this court jurisdiction, without reference to the value in dispute, of 'any final judgment of a circuit court . . . in any civil action against an officer of the revenue, for any act done by him in the performance of his official duty.' Certainly it will not be claimed that the clerk of a district court of the United States is an 'officer of the revenue,' but there is nothing to indicate that the term revenue has any different signification in this subdivision of the section from that which it has in the other. The clerk of a court of the United States collects his taxable 'compensation,' not as the revenue of the United States, but as the fees and emoluments of his office, with an obligation on his part to account to the United States for all he gets over a certain sum which is fixed by law. This obligation does not grow out of any 'revenue law,' properly so called, but out of a statute governing an officer of a court of the United States." The foregoing was quoted in part in *U. S. v. Mason*, 218 U. S. 517, 31 S. Ct. 28, 54 U. S. (L. ed.) 1133.

The phrase "revenue laws of this state" in the provision of the Missouri constitution (Art. 6, § 12) giving the supreme court appellate jurisdiction in cases involving the construction of the "revenue laws of this state," does not relate alone to the assessment of property, the levy or collection of taxes, licenses, etc., but may well include statutes concerning the disbursement of the revenue as well as the gathering of it into the county or state chest. *State v. Adkins*, 221 Mo. 112, 119 S. W. 1091, wherein the court said: "We conclude: (1) that when our jurisdiction is put upon the ground that the construction of the revenue laws of the state is involved, the law up for construction must be a state law as contradistinguished from the provisions of special city charter; (2) that it makes no difference where the law is to be found, whether under the title of 'revenue' or any other title, so long as it relates to the subject-matter of revenue; (3) that the revenue must be directly and primarily concerned, not merely indirectly or as an incident; (4) that the term 'revenue law' covers and includes laws relating to the disbursement of the revenue and its preservation as well as provisions relating to the assessment, levy and collection of it; and (5) finally, that where the question in the case is merely one relating to the general practice in circuit courts or before justices of the peace, although the case may pertain to the

collection of taxes, yet the revenue laws are not involved in a constitutional sense."

The foregoing decision was followed in *State v. Reynolds*, 243 Mo. 715, 148 S. W. 623, and in *State v. Shuck*, 184 Mo. App. 511, 170 S. W. 431. Thus in *State v. Reynolds*, supra, in holding that the portions of a city charter relating to the assessment of benefits to property for public improvements were not "revenue laws of this state" within the constitutional phrase, the court quoted the foregoing extract from *State v. Adkins*, supra, and added: "With these conclusions we are fully satisfied. We would emphasize but one point. Our brother uses the phrase 'revenue laws of the state' whilst the constitution uses the phrase 'the revenue laws of this state.' We are not prepared to say that the word 'this' is more pointed as to the laws referred to than is the word 'the,' but it occurs to us that its use more strongly tends to show that the legislative mind was dealing with state laws as contradistinguished from city charters. . . . We do not think that the constitution makers when they used the phrase 'the revenue laws of this state' had any reference to special city charter provisions going solely to local assessments."

The purpose of the provision in the Texas statute (Rev. Stat. art. 996) permitting a writ of error to the supreme court from the decision of the court of appeals in case the revenue laws of the state were involved, when in other cases such a writ is not allowed, was to give the supreme court power in all such cases to construe the laws which were primarily intended to produce the revenues from which the government was to be supported. *Johnson v. Hanscom*, 90 Tex. 321, 37 S. W. 601, 38 S. W. 761, wherein, in construing the meaning of the words "the revenue laws of the state" the court held that while in a general sense these terms might embrace all laws, the operation of which brought an income to the state or to its counties, however trivial might be the sum yielded, an action by an officer to compel the payment by the county to him of costs and fees earned by him as recorder and ex-officio justice of the peace in criminal actions, did not come within the exception as being a case involving the revenue laws of the state.

STATUTE RELATING TO LIMITATION OF ACTIONS.

The Act of Congress of March 26, 1804 (c. 40, § 3; 2 Story's Laws 941; 2 Stat. 290, re-enacted in Rev. Stat. § 1047; 3 Fed. St. Ann. (2d ed.) 330), provides that any person or persons guilty of any crime arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of the said laws, may be prosecuted, etc., at any

time within five years after committing the offense or incurring the fine or forfeiture. The true meaning of "revenue laws" in that clause is such laws as are made for the direct and avowed purpose of creating and securing revenue or public funds for the service of the government. No laws, whose collateral and indirect operation may possibly conduce to the public or fiscal wealth, are within the scope of the provision. *U. S. v. Norton*, 91 U. S. 566, 23 U. S. (L. ed.) 454; 2 Cow. Crim. Rep. (N. Y.) 358; *U. S. v. Mayo*, 1 Gall. 396, 26 Fed. Cas. No. 15,755. In *U. S. v. Wright*, 11 Int. Rev. Rec. 22, 35, 17 Pittsb. Leg. J. 20, 3 Pittsb. 192, 28 Fed. Cas. No. 16,770, the court said: "The general terms of this section would seem to embrace offenses created by the act upon which this indictment is founded, but an elaborate argument has been made by the defendants' counsel to show that it is to be restricted in its application to offenses defined, or penalties imposed by laws relating to the importation of goods, etc.; and this for the reason that only such laws are to be regarded as revenue laws within the meaning of the Act of March 26, 1804. The argument has failed to convince us of the soundness of such interpretation. Its fundamental infirmity is in confounding the instrumentality with the result. Taxation is the means by which revenue is raised, and revenue is, therefore, the product or fruit of taxation. It matters not in what form the power of taxation may be exercised, or to what subjects it may be applied, its exercise is intended to provide means for the support of the government, and the means so provided are necessarily to be regarded as the national revenue. Duties upon imports are imposed for the same general object, and because they are so imposed the money thus produced is considered revenue, not because it is derived from that particular source. So also with regard to the act upon which the indictment in this case is founded; its object is to furnish financial sustenance to the government; its title expressly declares it to be 'An act to provide internal revenue,' etc. The taxes imposed by it when paid are to be applied to vital national objects, and constitute part of the revenue of the government. It is therefore manifestly a revenue law, and as such comes within the purview of the Act of 1804. . . . We must hold that the act upon which this indictment is founded is a revenue law, within the meaning of the Act of 1804, and that the limitation for the prosecution, trial and punishment of persons guilty of offenses within it, is extended to five years."

So, a suit for a penalty brought under an act which is not a "revenue law," and which therefore is not a case arising under the "revenue laws of the United States," is not

within the limitation of five years prescribed by the foregoing statute, but is governed by the statutes with reference to the time limited for suing on penal statutes. *U. S. v. Norton*, 91 U. S. 566, 23 U. S. (L. ed.) 454; 2 Cow. Crim. (N. Y.) 358 (holding that an "Act to establish a postal money-order system," Act of May 17, 1864, 13 Stat. 76, could not be deemed a revenue law); *Parsons v. Hunter*, 2 Sumn. 419, 18 Fed. Cas. No. 10,778 (holding that the Consular Act of Feb. 28, 1803, c. 62, § 2; 2 Story's Laws 884; 2 Stat. 203, c. 9, providing a penalty for not depositing a ship's register and certain other papers with the consul on arrival in a foreign port, was in no just sense a revenue law); *U. S. v. Mayo*, 1 Gall. 396, 26 Fed. Cas. No. 15,755 (holding that an action to recover a penalty under the Embargo Act of Jan. 9, 1808, c. 8; 2 Stat. 450, was not a case arising under the revenue laws of the United States).

STATUTE RELATING TO REMOVAL OF CAUSES.

While the general terms, "revenue laws of the United States," used in the Act of March 2, 1833 (4 Stat. 632), providing for the removal of suits brought in state courts, under the revenue laws, to the federal courts, undoubtedly might, if standing alone, include all revenue laws of every description, yet, where they are used in an act entitled "An act further to provide for the collection of duties on imports," they must be considered as not intended to include laws for the collection of internal duties, and hence the statute does not apply in cases arising under the internal revenue laws. *Stevens v. Mack*, 5 Blatchf. 514, 6 Int. Rev. Rec. 181, 23 Fed. Cas. No. 13,404.

And it has been held that officers under the post-office department, such as an inspector and an assistant attorney-general of that department, are not officers acting under "the revenue laws," within the meaning of that phrase as used in the statute as re-enacted (Rev. Stat. § 643; 4 Fed. St. Ann. 260, repealed by Judicial Code, Act of March 3, 1911, c. 231; 36 Stat. 1087; 5 Fed. St. Ann. (2d ed.) 1085); *People's United States Bank v. Goodwin*, 162 Fed. 937, wherein the court said: "It is the treasury department which, by law, is charged with the administration of all revenue laws, customs and internal. If the fact that some acts of the officers of a department performed in pursuance of an act of Congress result in the collection or receipt of moneys which must necessarily be paid into the treasury of the United States, and thereby become available for the payment of the governmental expenses, makes that department and all the officials under it persons acting under 'the revenue laws' of the United States within the meaning of section 643,

it is hard to imagine a case against any officer of the United States which would not be removable under that section. Officers of the judicial department, clerks and marshals, collect all fines and penalties imposed under the criminal laws of the United States; the marshals of the United States collect fees for their services from litigants—and all these moneys, whether collected for fines and penalties or fees for services performed by these officers, are required to be paid into the national treasury, and are, of course, available and used for defraying the expenses of the government under the appropriation acts of Congress. The department of the interior is charged with the sale of the public lands and the collection of all revenues arising from the public domain; the war and navy departments are authorized to sell many articles when they cease to be of further use for the purposes of these departments; the department of commerce and labor collects certain fees in naturalization cases—and all these moneys are required by law to be paid into the treasury to be used in the same manner as moneys collected under the revenue laws. Do these facts make all the officials and employees of those departments officers acting under 'the revenue laws' of the United States within the meaning of section 643? The mere statement of these facts is a conclusive answer to the defendants' contention. In my opinion, to permit the removal of a cause under this section of the law, the acts which constitute the cause of action must have some rational connection with official duties under 'a revenue law,' and in some way affect the revenue of the government. It could hardly be claimed that even a revenue collector, if sued for some act claimed to have been committed in the performance of his official duties, would have the right to remove the cause under section 643, if neither the declaration nor petition for certiorari showed that the act for which he was sued was in fact in the performance of an official duty imposed on him by law, having some relation to the collection of revenue for the government. These facts must appear on the face of the complaint in the action or in the petition for the writ of certiorari; otherwise a national court is without jurisdiction."

Nor is the Reclamation Act (Act of June 17, 1902, c. 1093; 32 Stat. 388; 7 Fed. St. Ann. 1098) a "revenue law," under the foregoing removal statute. *Twin Falls Canal Co. v. Foote*, 192 Fed. 583, wherein the court said: "Obviously, as indicated in its title, the reclamation of the arid lands of the United States by rendering to settlers temporary assistance in procuring water for the irrigation thereof was the controlling motive for its passage. It was recognized that

in executing plans for the irrigation of much of the public arid land individual effort would be inadequate, and that the government with its unlimited credit could undertake and successfully carry to completion projects, which, because of their magnitude and difficulties, private enterprise would hesitate to undertake. The government was neither to gain nor to lose by the enterprise, for in theory the entire cost of any given project is to be reimbursed by those who enter irrigable lands thereunder. It is clear that, in so far as it is a feature at all, revenue is an incident only, and not the primary purpose of the act.

Without further elaboration, my conclusions may be briefly summarized as follows: (1) Unquestionably, the reclamation act is not a measure 'for raising revenue' in the constitutional sense. (2) It is not clear, and there is no decisive ruling to the effect, that the phrase 'revenue laws,' as used in section 643, is more comprehensive than the constitutional clause, 'bills for raising revenue.' (3) However that may be, 'revenue law,' as the phrase is ordinarily understood, does not aptly describe the reclamation act. Construction is required. (4) There is nothing either in the history of section 643 or in the conditions conducing to its enactment from which it is to be inferred that Congress intended to attach to the phrase, 'revenue laws,' any unusual significance or give to it a meaning beyond that which it is ordinarily understood to convey. (5) The reported cases are wholly indecisive of the question. (6) There is nothing in the reclamation act from which it can be inferred that Congress intended it as a revenue measure or from which the presumption arises that Congress purposed that controversies like the one here involved should be brought within the exclusive cognizance of federal courts. (7) In view of these several considerations, it is concluded generally that the reclamation act cannot properly be held to be a 'revenue law' within the meaning of section 643." To the same effect see *Stanfield v. Umatilla River Water Users' Assoc.* 192 Fed. 596.

However, a direct tax law (Act of 1861, 12 Stat. 294) in which a direct tax was imposed by a statute which revised and increased the duties on import, and for the first time taxed incomes, thus embracing in one revenue law, customs, duties, direct taxes and internal revenue, and entitled "An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes," has been held to be a revenue law and not an internal revenue act within the terms of the foregoing statute providing for the removal of suits. *Peyton v. Bliss*, Woolw. 170, 19 Fed. Cas. No. 11,055.

The post-office laws were held to be "revenue laws" within the meaning of the removal

statute. *Warner v. Fowler*, 4 Blatchf. 311, 29 Fed. Cas. No. 17,182, wherein the court said: "The revenue of the state is the produce of taxes, excise, customs, and duties, which it collects and receives into the treasury for public use. It is the income which it receives to enable it to perform its proper functions. And laws relating to the revenue, or revenue laws, are such laws as are enacted in reference to such income, such as give rules as to the mode of its collection, and as to the manner in which the officials employed in such collections shall conduct. All taxes which are imposed by the state, whether such taxes be direct or indirect, are, when collected, the revenue of the state. They are its income. As they are the revenue of the state, all laws regulating such taxes and giving such rules for their collection are taxes relating to the revenue. The duty paid for the carriage of letters by the agency of government is at times a most important branch of the public revenue, and the laws relating to the same are of the greatest importance to the revenue. From this duty the government, in time of war, or at any time when, from any cause, the income from customs is materially impaired and cannot be increased, derives an essential part of its revenue. Duties or taxes collected under the tariff laws of the United States, upon the importation of foreign goods into the country, are the revenue of the state; and the laws regulating the collection of such duties or taxes, and prescribing rules to officials employed in such collection, are laws relating to the revenue. This is conceded. But such duties or taxes are no more the revenue of the state than are the duties or taxes collected under the post-office laws of the United States, for the carriage of letters in the public mails, the revenue of the state. And the laws regulating the collection of duties or taxes upon the importation of foreign goods into the country, and prescribing rules for the governments or officials in the collection of such duties or taxes, are no more laws relating to the revenue than are the laws which regulate the mode of collecting duties or taxes for the carriage of letters in the public mails, or which prescribe rules for the conduct of officials in the collection of such duties or taxes for such carriage."

"Revenue Measure."

The power to license and regulate, granted by statute, and conferred on municipal corporations solely for police purposes, cannot be used by them as a means of increasing their revenues. So in *Ft. Smith v. Gunter*, 106 Ark. 371, 154 S. W. 181, it was held that an ordinance passed by the city under the authority of a statute which attempted to define those things which a city council

should have power to license, regulate, or prohibit, and in which in the very nature of things only general terms were employed, imposing a license on restaurants at the rate of \$25 per annum, \$15 for six months, and \$3 per month, was the regulation of restaurants by the city and was not a revenue measure.

In *Pottsville v. Pottsville Gas Co.* 15 Pa. Dist. 979, 32 Pa. Co. Ct. 7, it was held that an ordinance of a borough requiring the obtaining of a permit before making excavations in the streets and fixing the fee therefor according to the size of the excavation to be made and the nature of the paving of the street, was not a measure for revenue. The court said: "What is 'revenue?' Webster defines it to be 'The annual produce of taxes, excise, customs, duties, rents, etc., which a nation or state collects and receives into the treasury for public use.' It is an annual tax. Surely this is not an annual tax. The defendant company may not dig up the streets again in a single place for five years. And if they do not dig there will be no charge. It is not for general use, but to pay for the very expenses incurred by the acts of this company, necessitated by their failure to restore the streets to their former condition and for which the borough is not responsible. The borough is bound to keep its streets in a reasonably safe condition and are responsible in damages for neglect. Why then should they be forced to a suit at law, in case the company would, not pay for these repairs? Why can they not demand payment in advance? We think they can. In the cases cited it is an annual charge which the municipalities have sought to enforce. Here, if it exceeds what is reasonable for the necessary supervision, it becomes revenue. In this case it is not an annual tax. It is dependent entirely upon the action of the company. During the period covered by the evidence they must have had an unusual amount of work, for the price paid for labor leads to that conclusion, and they may not be called upon to pay such an amount for permits in years."

However, in *Parsons v. People*, 32 Colo. 221, 76 Pac. 666, it was held that the section of an act regulating the sale of liquor and requiring a license fee from those engaged in selling liquor was a revenue measure, having been enacted, and the fee imposed, solely for the purpose of securing revenue for state purposes, and there being no element of regulation in the statute.

"Revenue Debts or Charges."

As used in an act (42 & 43 Vict. c. 187, § 12) empowering one railway company to purchase the undertaking of another at a price to be fixed by arbitration and providing

that the purchase money should be used in part in paying off any revenue debts or charges of the company purchased, so far as the same had not already been paid out of revenue, it has been held that the words "revenue debts or charges," included such current expenses as might be incurred after the time of transfer and during the limited operations of the company purchased while winding itself up and directing the apportionment of the purchase money, as well as the revenue debts and charges which existed at the time of the transfer. *Hutton v. West Cork R. Co.* 23 Ch. D. (Eng.) 654, 52 L. J. Ch. 689, 49 L. T. N. S. 420, 31 W. R. 827.

In *Midland Great Western Ry. Co. v. Dublin, etc. R. Co.* 4 R. & Can. T. Cas. 145, it was held that under a working agreement between the two railway companies providing for the submission to arbitration of all questions arising between the two companies as to its construction, certain new works, as boilers at certain of the stations for heating water to supply passengers with foot warmers, and the replacing of a wooden engine shed with a larger one built of stone, were revenue charges and not capital charges and were to be borne by the plaintiff company under the agreement.

"Revenue Tax."

In holding that the fee required to be paid for a building license under an ordinance providing that no person should build or enlarge any building, or remove any building from place to place in the city, or put any new roof or covering on any building within the fire district, etc., without a license or permit first issued therefor to the owner or person in charge of such building, was a revenue tax, the court in *Welch v. Hotchkiss*, 39 Conn. 140, 12 Am. Rep. 383, said: "The objection is that the fee to be paid for a building license is a tax for revenue purposes; that the charter confers no power upon the city to levy such a tax; that it is a sum paid for which no consideration or equivalent is given in return; that it is unequal in its operation, the same fee being required for all classes of buildings without regard to size or expense; and that the power thus to tax implies and carries with it the power to require such a fee as would prevent owners from building at all, and thus comes in conflict with the fundamental rules of law, and operates as a restraint of trade. If it is to be regarded as a revenue tax, it might be liable to some or all of these objections. But we are of the opinion that it is not a tax, in any proper sense. It is rather a reasonable sum collected of the party, intended for the purpose of defraying, in part, the necessary expense attending the issuing and recording

the license. As such it is open to none of these objections."

In *Yancey v. New Manchester Mfg. Co.* 33 Ga. 622, it was held that the act providing for an income tax for the support of the indigent widows and orphans of deceased soldiers (Act of April 18, 1863; Pamphlet Acts 177, 178) was a revenue tax.

"Board of Revenue."

"The term 'board of revenue' has a distinct meaning in our legislative history, from the fact that for many years there have existed in various counties of the state such boards as a substitute for courts of county commissioners, with like powers and duties." *State v. Bracken*, 154 Ala. 151, 45 So. 841, wherein the title of an act using that term was held to express clearly the purpose of the act.

"Officer of the Revenue."

A postmaster is not an "officer of the revenue" within the federal statute (Rev. Stat. § 989, 3 Fed. St. Ann. (2d ed.) 232, reenacting Act of March 3, 1863, 12 Stat. 741) providing that "when a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him, and by him paid into the treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the direction of the secretary of the treasury or other proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the treasury." *Campbell v. Jomas*, 3 Fed. 513, wherein the court said: "The section is taken from section 12 of the Act of March 3, 1863 (12 U. S. Stat. L. 741). . . . The Act of March 3, 1863, is entitled 'An act to prevent and punish frauds upon the revenue, to provide for the more speedy and certain collection of claims in favor of the United States, and for other purposes.' In section 2 are found the words 'frauds upon the revenue;' in sections 3, 4 and 6 the words 'any officer of the revenue;' in section 5 the words 'the revenue laws;' in section 7 the words 'any fraud on the revenue;' in section 11 the words 'the revenue laws;' and in sections 12 and 13 the words 'collectors or other officers of the revenue.' It is clear that the word 'revenue' in all these forms of expression, means only the revenue from customs. The act does not relate to revenue from any other source. So far as it relates to revenue from any source

it relates only to revenue from customs. The words 'officers of the revenue,' in section 12, mean officers of the revenue from customs. The words 'officers of the revenue' in section 989 of the Revised Statutes, which is a mere revision or reprint of section 12 of the Act of 1863, can have no different meaning from what it would have had if there had been no revision or reprint. Under said section '12 the words 'other officers of the revenue' would never have been construed to mean a postmaster. Therefore, they cannot be so construed in section 989 of the Revised Statutes. The revision cannot change the meaning of the same words by displacing the enactment from the connection in which Congress originally placed it."

FERGUS

v.

BRADY ET AL.

Illinois Supreme Court—February 21, 1917.

277 Ill. 272; 115 N. E. 393.

"Revenue" — Meaning of Term.

The constitution, in limiting appropriations which may lawfully be made by each general assembly for the ordinary and contingent expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session to the amount of revenue authorized by law to be raised in such time, does not regard the amount of the state's total revenue as merely the amount of its moneys raised by direct taxation.

[See note at end of this case.]

Public Officers — Liability — Payment under Invalid Law.

The state auditor of public accounts and the state treasurer cannot be compelled to account for and restore moneys paid out, before the institution of a taxpayer's suit, pursuant to appropriations made by the general assembly, since their duties in issuing and paying warrants are purely ministerial, and neither is required to decide the validity of a law apparently enacted for a governmental purpose.

Payment for Purpose Not Governmental.

A public officer having only ministerial duties may be held personally liable for the payment of an appropriation for a purpose which is not governmental in its nature.

States — Exceeding Current Revenue — Validity of Contract.

Const. art. 4, § 18, prohibits appropriations in excess of the revenue authorized by law

to be raised in the period for which appropriations are made, but provides that in case of failure of revenue the general assembly may borrow moneys to be applied to the purpose for which they were obtained, or to pay the debt so created, and to no other purpose. Section 19 prohibits the general assembly from authorizing the payment of any claim or part created against the state under any contract made without express authority of law, with the exception that it may make appropriations for expenditures incurred in repelling invasion or suppressing insurrection. Cr. Code (Hurd's Rev. St. 1915-16, c. 38) § 208, provides that making a contract in excess of the amount of an appropriation subjects the public officer to a fine and removal from his office, trust, or employment. It is held that every claim or contract created or made by an officer of the state is utterly void if not within the amount of appropriations already made, unless there is express authority of law for the creation of the debt or claim or the making of the contract, that authority being "express" which confers power to do a particular identical thing set forth and declared exactly, plainly, and directly with well-defined limits, an authority given in direct terms, definitely and explicitly, and not left to inference or implication, as distinguished from authority which is general, implied, or not directly stated or given.

Constitutional Law — Construction of Constitution — Contemporaneous Construction.

Where the language of the constitution and the intent of the people in adopting it are clear and free from doubt or uncertainty, the practice of the general assembly and officers of the government in making appropriations has no influence in determining their legality, since contemporaneous construction is of value only where there is doubt and uncertainty.

Taxpayer's Action — Restraining Unauthorized Payments.

A taxpayer has the right to maintain a suit to restrain the state auditor of public accounts and the state treasurer from paying out sums illegally appropriated by the general assembly, in violation of Const. art. 4, §§ 18, 19, in excess of revenue.

[See Ann. Cas. 1913C 884.]

Appeal from Circuit Court, Sangamon county: CREIGHTON, Judge.

Action by J. B. Fergus, plaintiff, against James J. Brady et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. MODIFIED.

P. J. Lucey, Lester H. Strawn, A. R. Roy and Logan Hay for appellants.

F. S. Munro, John A. Watson and Stevens & Herndon for appellee.

[274] CARTWRIGHT, J.—By his second amended bill filed in this case in the circuit court of Sangamon county, the appellee, J. B.

Fergus, prayed for an injunction against the appellants, James J. Brady, Auditor of Public Accounts, and Andrew Russel, Treasurer of the State of Illinois, to prevent the payment of various sums appropriated by the General Assembly to boards and individuals and to require an accounting and restitution for sums that had been paid out of the State treasury on warrants drawn by the Auditor and paid by the Treasurer. The defendants demurred generally and specially, and the chancellor sustained two of the special causes of demurrer. The bill alleged that appropriations amounting in the aggregate to more than \$400,000 were illegal because in excess of the revenue authorized to be raised by taxation. The chancellor held that the word "revenue," as used in section 18 of article 4 of the constitution, is not limited to moneys raised by taxation but includes moneys derived from all sources required by law to be paid into the State treasury within a specified time, and also held that the bill of complaint did not state a case against the defendants warranting an accounting and restitution of moneys paid out of the State treasury. An interlocutory decree was entered accordingly, and the defendants answered, alleging the validity of the appropriations and setting forth the payment of the greater part of them before the suit was instituted. Charles E. Pope, to whom an appropriation had been made, intervened by petition and the cause was heard mainly on a stipulation of facts. The chancellor found that a considerable number of unpaid appropriations were unlawful and enjoined their payment but included by inadvertence [275] four claims that had been paid. An appeal was prosecuted from the decree, and appellants have assigned error on the ruling of the chancellor on each of the items held illegal, and the appellee has assigned cross-errors on the ruling of the chancellor in sustaining the special causes of demurrer and the failure to require an accounting and restitution by the defendants of claims paid out before the bill was filed and to decide the same to be illegal.

The decision of the controversy will be better understood by first considering the cross-errors assigned on the ruling of the chancellor sustaining two special causes of demurrer.

The constitution limits appropriations which may lawfully be made by each General Assembly for the ordinary and contingent expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session to the amount of revenue authorized by law to be raised in such time, and the first question is whether the amount of revenue is limited to moneys raised by taxation. There is a very large amount of money paid into the State treasury from other sources than direct taxa-

tion, and the ordinary meaning of the word is the total income of the government, derived from all sources, subject to be applied to public purposes. It would not be reasonable to say that appropriations which are not to exceed income should be limited to moneys raised by direct taxation while there are other large sums of money which may be applied to the purposes of the government not taken into account.

The chancellor also held on the special demurrers that the complainant could not compel an accounting and restitution of moneys paid out before the institution of the suit in pursuance of appropriations made by the General Assembly. The duties of the Auditor and Treasurer in issuing and paying warrants are purely ministerial, and neither is required to decide upon the validity of a law which is [276] apparently enacted for a governmental purpose. A public official having only ministerial duties may be held personally liable for the payment of an appropriation for a purpose which is not governmental in its nature, as in the case of *Jackson v. Norris*, 72 Ill. 364, where the treasurer of the city of Salem paid \$1,000 to the Salem Manufacturing Company to enable that company to discharge its debts, but it would be a perilous doctrine to hold that an official having ministerial duties in the machinery of the State government is authorized to determine whether an act of the General Assembly is in violation of the constitution where he has no notice that the appropriation is unlawful, as in this case. If an appropriation were entirely outside of the functions of a State government the question would be different. The chancellor was right in eliminating from the controversy between the complainant and the State Auditor and Treasurer all the appropriations which had been paid.

The errors assigned by the appellants against the decision of the chancellor concern the unpaid appropriations found to be illegal, and whether they were or not depends upon provisions of the constitution. Sections 18 and 19 of article 4 of the constitution are as follows:

"Sec. 18. Each General Assembly shall provide for all the appropriations necessary for the ordinary and contingent expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, the aggregate amount of which shall not be increased without a vote of two-thirds of the members elected to each house, nor exceed the amount of revenue authorized by law to be raised in such time; and all appropriations, general or special, requiring money to be paid out of the State treasury, from funds belonging to the State, shall end with such fiscal quarter: *Provided*, the State may, to meet casual deficits or fail-

ures in revenues, contract debts, never to exceed in the aggregate \$250,000; and moneys thus borrowed shall be applied to the purpose for which they were [277] obtained, or to pay the debt thus created, and to no other purpose; and no other debt, except for the purpose of repelling invasion, suppressing insurrection, or defending the State in war (for payment of which the faith of the State shall be pledged), shall be contracted, unless the law authorizing the same shall, at a general election, have been submitted to the people, and have received a majority of the votes cast for members of the General Assembly at such election. The General Assembly shall provide for the publication of said law for three months at least before the vote of the people shall be taken upon the same; and provision shall be made, at the time, for the payment of the interest annually, as it shall accrue, by a tax levied for the purpose or from other sources of revenue; which law, providing for the payment of such interest by such tax, shall be irrevocable until such debt be paid: *And, provided, further*, that the law levying the tax shall be submitted to the people with the law authorizing the debt to be contracted.

"Sec. 19. The General Assembly shall never grant or authorize extra compensation, fee or allowance to any public officer, agent, servant or contractor, after service has been rendered or a contract made, nor authorize the payment of any claim, or part thereof, hereafter created against the State under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void: *Provided*, the General Assembly may make appropriations for expenditures incurred in suppressing insurrection or repelling invasion."

Section 208 of division 1 of the Criminal Code makes it a crime for anyone holding any public office, trust or employment to contract, directly or indirectly, for an expenditure beyond the amount appropriated to be contracted for or expended upon the subject-matter of the contract, in the following language: "Every person holding any public office (whether State, county or municipal), trust or employment, [278] . . . who shall be guilty of contracting directly or indirectly, for the expenditure of a greater sum or amount of money than may have been, at the time of making the contracts, appropriated or set apart by law or authorized by law to be contracted for or expended upon the subject-matter of the contracts, . . . shall be fined not exceeding \$10,000, and may be removed from his office, trust or employment."

These provisions of the constitution and statute are clear and unambiguous in terms and their purpose and object cannot be mis-

understood. Section 18 prohibits appropriations in excess of the revenue authorized by law to be raised in the period for which appropriations are made, but necessarily revenue, whether derived from one source or another in the future, must always be estimated and never can be a fixed and certain sum. Circumstances may occur that will cause the reasonable expectations of the General Assembly as to the amount of revenue to miscarry or not to be fulfilled, so that there may be a temporary deficiency. To meet that condition which may arise from failure in making collections of taxes or result from decreased revenue from other sources, the section provides that in case of failure of revenue the General Assembly may contract debts, never to exceed \$250,000. This debt is only to be created by borrowing money,—not by incurring debts or making contracts,—since the section requires that the moneys thus borrowed shall be applied to the purpose for which they were obtained or to pay the debt thus created, and to no other purpose. No other debt can be contracted, except for the purpose of repelling invasion, suppressing insurrection or defending the State in war, except upon a vote of the people at a general election. By section 19 the General Assembly is prohibited from authorizing the payment of any claim, or part thereof, created against the State under any agreement or contract made without express authority of law, and all such unauthorized agreements or contracts [279] are null and void, with the exception that the General Assembly may make appropriations for expenditures incurred in repelling invasion or suppressing insurrection. By the Criminal Code the making of a contract in excess of the amount of an appropriation subjects the offender to a fine not exceeding \$10,000 and removal from his office, trust or employment. No right whatever can grow out of the commission of a crime, and by the plain language of the constitution every claim or contract is utterly void if not within the amount of appropriations already made, unless there is express authority of law for the creation of the debt or claim or the making of the contract. In section 19 claims under any agreement or contract made by express authority of law are excepted, and if there is some particular and specific thing which an officer, board or agency of the State is required to do, the performance of the duty is expressly authorized by law. That authority is express which confers power to do a particular, identical thing set forth and declared exactly, plainly and directly, with well defined limits, and the only exception under which a contract exceeding the amount appropriated for the purpose may be valid is where it is so expressly authorized by law. An express authority is one given in direct

terms, definitely and explicitly, and not left to inference or to implication, as distinguished from authority which is general, implied or not directly stated or given. An example of such express authority is found in one of the deficiency appropriations to the Southern Illinois penitentiary which had been paid, and serves only as an illustration. The authorities in control of the penitentiary are required by law to receive, feed, clothe and guard prisoners convicted of crime and placed in their care, involving the expenditure of money, which may vary on account of the cost of clothing, food and labor beyond the control of the authorities, and which could not be accurately estimated in advance for that reason or by determining the exact number of inmates. To [280] extend the meaning of the constitutional requirement that there shall be express authority of law for the creation of a debt or the making of an agreement or contract in excess of an appropriation for the purpose beyond the meaning we have given to it would destroy and nullify the provisions of the constitution. The power of the General Assembly to make appropriations for any purpose is not exhausted by one appropriation but additional appropriations may be made before an indebtedness is incurred, as occasion may require.

The language of the constitution and intent of the people in adopting it being clear and free from doubt or uncertainty, the practice of the General Assembly and officers of the government in making appropriations has no influence in determining their legality. Contemporaneous construction is of value only where there is doubt and uncertainty, and there is none in this instance. All that has been done is that the General Assembly and public officials have disregarded constitutional requirements adopted by the people for their protection. It cannot be said that the people, who constitute the other party in interest, have acquiesced in the construction adopted by the General Assembly, since the money interest of an individual taxpayer would not justify the necessary expense of an appeal to the courts to prevent such unlawful action.

It would not be practicable to enumerate the appropriations held void by the chancellor and to explain in detail their nature. Each one was for the payment of a claim created without express authority of law and either without a previous appropriation or in excess of the appropriation.

It is argued that the complainant, as a taxpayer, had no right to maintain the bill, but on the principle declared in *Jones v. O'Connell*, 266 Ill. 443, 107 N. E. 731, and *Fergus v. Russell*, 270 Ill. 304, Ann. Cas. 1916B 1120, 110 N. E. 130, he had a right to maintain the suit.

The four appropriations which had been paid and were included in the decree by mistake are, \$280.15 to A. DeElton [281] Peterson, \$200 to T. E. Wayne, \$200 to J. McGreal and \$137 to W. P. McGuire. The decree will be modified by striking out these four items and as so modified will be affirmed.

Decree modified and affirmed.

NOTE.

The reported case holds that, as used in a constitutional provision that annual appropriations shall not exceed the revenue authorized to be raised by taxation, the term "revenue" is not limited to the proceeds of direct taxation but includes "the total income of the government derived from all sources subject to be applied to public purposes." The cases discussing the definition of the term "revenue" are collated in the note to *State v. Gordon*, reported ante, this volume, at page 191.

NEWELL

v.

REID ET AL.

Michigan Supreme Court—December 21, 1915.

189 Mich. 174; 155 N. W. 352.

Food and Drugs — Foreign Substance in Animal Food — Liability of Seller.

In an action for the death of two cows alleged to have been caused by eating bran purchased from defendants and containing arsenic, the evidence is held to be sufficient to support findings that the cows died from arsenic poisoning.

[See note at end of this case.]

Error to Circuit Court, St. Clair county: TAPPAN, Judge.

Action by John Newell, plaintiff, against James Reid et al., defendants. Judgment for plaintiff. Defendants bring error. The facts are stated in the opinion. **AFFIRMED.**

Clair R. Black and *John B. Mellwain* for plaintiffs in error.

Walsh & Walsh and *C. L. Benedict* for defendant in error.

[175] *OSTRANDER, J.*—It is alleged in the plaintiff's declaration that he purchased from defendants bran to feed to cattle, that defendants sold him the bran for such use, that the

bran was not fit and proper for such use—"and was mixed with and contained poisonous substances and unwholesome and deleterious material, and was entirely worthless and of no value and unfit for such use and of a poisonous and unwholesome nature; and the said plaintiff, . . . relying upon said promises and warranties, fed such bran and materials to certain live stock, to wit, two cows then and there the property of said plaintiff of the value of, to wit, \$300, which thereupon, by reason of its unwholesome and poisonous nature, immediately became sick and soon thereafter died as a result of eating said bran and materials aforesaid."

The court refused a peremptory instruction favorable to defendants. Defendants then presented, and the court submitted to the jury, two special questions, namely:

"Do you find from the preponderance of the evidence in this case that the two cows of the plaintiff died from arsenic poison, and not from other causes?"

"Do you find from a preponderance of the evidence [176] in this case that at the time of the sale of the bran to plaintiff there was arsenic in the small sack sufficient to kill the two cows?"

To each question the jury returned an affirmative answer, with a general verdict for plaintiff of \$140.

It is certified that the bill of exceptions "has been made sufficiently full and complete so that the Supreme Court on writ of error may by going over the same be able to make an examination of the entire case."

It is the contention, and only contention, of defendants, appellants, that the answers to the special questions and the general verdict are not supported by testimony. In considering this contention, it is assumed that the record contains substantially all of the testimony given at the trial. Otherwise, it would be presumed that testimony had been given which supported the findings of the jury. *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205. The assumption is based upon what seems to be the fair meaning of the certificate above referred to.

The contents of the stomachs of the two cows which died, and which the plaintiff claims were poisoned, were not analyzed. However, the testimony for the plaintiff tended to prove that both cows were fed bran from a package purchased from defendants, both died, exhibiting symptoms of arsenical poisoning, the remainder of the contents of the package was screened, a portion of the material was submitted to a chemist, and he found upon an analysis that it contained arsenic. Further, the testimony tended to prove that when it was sold to plaintiff the bran was not in the packages purchased by defendants from the manufacturer of the bran, but,

had been resacked by defendants after having been turned out upon the floor of their barn, or storehouse. The smaller package, claimed to have contained the noxious substance, or substances, had in it, besides bran, pieces of bread and meat. The [177] chemist tested a portion of a sample of 1½ ounces of this material, consisting of a mixture of bread, bran, meat, dirt, and hairs, and found arsenic, and estimated that in the 1½ ounces there was probably a grain of arsenic. Defendants used rat poison about their premises on several occasions, putting it upon bread and meat. A box of the material screened from the smaller sack of bran, and like that sent to the chemist, was exhibited to the jury. It is not mere conjecture, but an inference, based upon testimony, that the smaller sack of bran contained sweepings from the storehouse floor and included portions of bread and meat and rat poison, which ought not to have been sold for food for cattle. There was testimony tending to prove that the rat poison used by defendants contained no arsenic, and different persons might have reached different conclusions concerning the preponderance of the evidence. That there was testimony supporting the finding is, I think, clear.

The judgment is affirmed.

Brooke, C. J., and Person, Kuhn, Stone, Bird, Moore, and Steere, JJ., concurred.

NOTE.

Liability for Injury Resulting from Foreign Substance in Food.

It appears to be the general rule that on a sale of food there is an implied warranty of fitness for human consumption (see the notes to *National Cotton Oil Co. v. Young*, 4 Ann. Cas. 1123, and *Farrell v. Manhattan Market Co.* 15 Ann. Cas. 1076) and that a manufacturer or vendor is liable for consequential damages resulting from the breach of that warranty. See the notes to *Jackson v. Watson*, 16 Ann. Cas. 492; *Doyle v. Fuerst*, Ann. Cas. 1913B 1110; *Mazetti v. Armour*, Ann. Cas. 1915C 140; and *Woodward v. Miller*, 100 Am. St. Rep. 188. As to the liability as for negligence of a restaurant proprietor for serving unfit food, see the notes to *Crocker v. Baltimore Dairy Lunch Co.* Ann. Cas. 1914B 884, and *Merrill v. Hodson*, Ann. Cas. 1916D 917. A question closely related to that discussed in the present note, namely, the liability for an injury resulting from a foreign substance in a beverage, is considered in the note to *Crigger v. Coca-Cola Bottling Co.* Ann. Cas. 1917B 572.

The few cases which have passed on the liability arising from the sale of food containing a foreign substance seem to have been
Ann. Cas. 1918B.—15.

based on negligence, and to turn on the question whether the presence of such a substance in an article of food is *prima facie* evidence of negligence. In *Chaproniere v. Mason*, 21 Times L. Rep. (Eng.) 633, it was held that a *prima facie* showing of negligence was made by proof of the presence of a stone in a bun.

So in *Ternay v. Ward Baking Co.* 167 N. Y. S. 562, reversing a dismissal of the action, the court stated the facts and its conclusion thereon as follows: "Plaintiff sued for injuries received through having partaken of a loaf of bread, baked by the defendant, because of the presence of many particles of glass imbedded in the crust on the lower side of the loaf. It appears from the evidence that the defendant's driver delivered this bread, with other loaves, to a storekeeper, who placed them in a case reserved for the bread which stood on a counter in the dealer's store. The dealer testified that this case was always in a state of perfect repair, and that there was no glass or other foreign substance in it; that, however, his customers were in the habit of helping themselves to the bread which they purchased by themselves taking it out of the showcase. I understand respondent to urge in support of the judgment that the line of cases beginning with *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, and ending with *MacPherson v. Buick Motor Co.* 217 N. Y. 382, Ann. Cas. 1916C 440, 111 N. E. 1050, L.R.A.1916F 696, does not apply, because in those cases the defects considered were defects of manufacture, whereas in the instant case the evidence is not sufficient to charge the defendant, as manufacturer, with responsibility for the presence of the glass. This claim is based upon a two-fold argument: First, to the effect that manifestly glass is not an ingredient of bread; and, second, that the proof is not sufficient to exclude the possibility or probability of outside interference with the bread during the interval between its delivery and the purchase by the infant plaintiff. Of course, it need hardly be said that there was no direct proof that the glass had been inserted by the manufacturer. There is, therefore, I take it, no dispute between the parties as to the correct principle of law defining the responsibility of the defendant in the premises. Defendant, it may be assumed, would be liable, were the proofs sufficient to raise a question for the jury whether the glass was in the bread before its delivery to the dealer, and if the jury should so determine. It is superfluous to repeat that there can be no set formula to determine the quantum of evidence required to prove an ultimate fact. Each case must depend upon its own intrinsic circumstances. The particles of glass shown on the exhibit, which by consent of both parties has been submitted to the

court, are embedded in the lower crust of the loaf, and, so far as can be judged from the part submitted, were distributed over its entire surface. They have the appearance of having been baked into the crust, or, at all events, of having been impressed thereon at a time when the crust was soft, and therefore probably still warm from the baking. The testimony of the dealer is sufficient to permit a finding that no opportunity was ever presented during his possession of the loaf to so interfere with it as to produce the result which the exhibit discloses. I think, therefore, that on his evidence and the mute testimony of the exhibit an issue was presented for submission to the jury whether the dangerous condition of the bread was not produced by the defendant through its agents."

In *Freeman v. Schultz Bread Co.* 100 Misc. 528, 163 N. Y. S. 396, wherein it appeared that a nail was embedded in a loaf of bread, the court said: "The manufacturer of bread, it may be assumed, knows and recognizes that, when he puts his finished product upon the market, it is intended for sale to and use by the public as bread is ordinarily used, by biting off a piece to masticate, without first examining or testing it in the search for foreign substances which might injure the teeth or mouth while biting into a slice, or become dangerous to life if swallowed. A loaf of bread of itself is not dangerous, but it may be assumed that a manufacturer knows it may become a source of danger to the consumer if care is not used in its manufacture, and that unless he uses ordinary care and skill with regard to the manner of manufacturing it, and to keep it clear from dangerous foreign substances with which it is likely to come into contact in the factory, there will be injury to the person for whom the bread is intended, and therefore a duty arises on his part to the consumer to use that ordinary care and skill in its manufacture, for a neglect to perform which duty causing an injury an action for negligence can be maintained."

But in *Jacobs v. Childs Co.* 166 N. Y. S. 798, a restaurant keeper was held not to be charged with negligence by proof of the presence of a nail in a cake prepared and served by him, the court saying: "The plaintiff, while a guest in one of the eating places maintained by the defendant, ordered a piece of cake which was served wrapped in wax paper. The plaintiff removed the cover, and while in the process of eating bit upon a metallic nail which was concealed in the cake. For the injuries resulting therefrom she seeks to hold the defendant liable. The cake was baked and prepared by the defendant. The learned counsel for the plaintiff at first proceeded upon the theory of the defendant's implied warranty of the fitness of the food

for consumption; but subsequently moved to change the cause of action to one in tort predicated upon the negligence of the defendant in permitting the nail to get into the cake. The court having allowed the amendment, the question for consideration is whether the fact of the presence of the nail is sufficient to charge the defendant with negligence. The extent of the duty of restaurant keepers to furnish wholesome food and the resultant liability upon their failure so to do is foreign to the decision of this case. The cake which was served to the plaintiff was not bad for consumption or unwholesome. The various ingredients which made up the cake were not deleterious to health, and the cake itself was fit for consumption. The gravamen in this case is that a foreign substance in no wise connected with the preparation of the cake caused injury to the plaintiff. Likewise the consideration of those authorities must be eliminated which deal with the responsibility of manufacturers engaged in making commodities which were inherently dangerous. The plaintiff failed to show any negligence on the part of the defendant beyond the fact of the presence of the nail in the cake. She relies upon the doctrine of *res ipsa loquitur*. Without entering into a discussion of the vexed question of the application of that doctrine, I am of the opinion that it has no application to this case. It is obvious that the nail was not used in the mixing of the dough, nor in connection with the other ingredients of the cake. It apparently was dropped into the dough carelessly or wilfully by one of the defendant's servants or an outsider."

In *Akers v. Overbeck*, 18 Misc. 198, 41 N. Y. S. 382, it was held that negligence was not shown by the fact that a sack of coffee contained a stone, whereby the coffee mill of a purchaser was broken.

In *Liggett, etc. Tobacco Co. v. Cannon*, 132 Tenn. 419, Ann. Cas. 1917A 179, 178 S. W. 1009, L.R.A.1916A 940, it was held that chewing tobacco is not a "food" within the rule allowing a recovery by a person not in privity with the manufacturer for an injury from the presence of a foreign substance therein.

In *Hunt v. Rhodes Bros. Co.* 207 Mass. 30, 92 N. E. 1001, it appeared that a married woman was injured while preparing for cooking a leg of lamb purchased by her husband, in which was embedded a carpet tack. The court held that the evidence warranted a finding that the husband acted as her agent so as to create a privity of contract between her and the seller, and added: "We cannot help feeling that a more satisfactory ground on which to rest the case would have been the duty which the defendant owed to any one preparing it to be served as food to see

174 Cal. 417.

that there was not suffered to remain embedded in the lamb anything that was liable to cause injury to any one in preparing it while in the exercise of due care."

In some cases involving the presence of a foreign substance in food sold for the use of animals it has been held that there could be a recovery for breach of an implied warranty. *Wilson v. Dunville*, 6 L. R. Ir. (Eng.) 210 (small particles of lead in grain); *Coyle v. Raum*, 3 Okla. 695, 41 Pac. 389 (castor beans in oats). And see the reported case.

In other cases the doctrine of implied warranty has been held not to apply to a sale of animal food, and the presence of a foreign substance has been deemed not to show negligence. *National Cotton Oil Co. v. Young*, 74 Ark. 144, 4 Ann. Cas. 1123, 85 S. W. 92, 109 Am. St. Rep. 71 (pieces of wire in cotton seed meal); *Lukens v. Freund*, 27 Kan. 664, 41 Am. Rep. 429 (metal clasps in bran).

Where the seller was charged with notice of the presence of the foreign substance a recovery on the ground of negligence has been sustained. *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440 (hay on which seller knew white lead had been spilled); *Provost v. Cook*, 184 Mass. 315, 68 N. E. 336 (oats known to seller to have been in place involving danger of mixture with paris green).

ESTATE OF MANCHESTER.

California Supreme Court—February 15, 1917.

174 Cal. 417; 163 Pac. 353.

Signature — Definition of Term "Sign."

To "sign" a document is to affix a signature thereto, to ratify by hand or seal, or to subscribe in one's own handwriting. Citing Words and Phrases, Sign.

Wills — Execution — Necessity of Signature at End — Olographic Will.

An olographic will containing testatrix's name at beginning of document, and closing with, "whereunto I hereby set my hand, etc.," but not subscribed, is not "signed," as required by Civ. Code, § 1277, in view of section 13, which provides that words are to be construed as ordinarily used and according to context.

[See note at end of this case.]

Same.

Where an olographic will was not signed as required by Civ. Code, § 1277, indorsement "my will," with decedent's signature, on the envelope containing it, does not cure the defect, merely showing her belief that it was

a valid will, and the envelope not being a part of the will.

[See note at end of this case.]

Manner of Execution — Intent of Testator.

The power and method of testamentary disposition is within legislative control, and, in determining whether a will is properly executed, testator's intention cannot be considered.

Signature — Definition of Term "Sign."

To "sign" a document is to make any mark upon it in token of knowledge, approval, acceptance, or obligation, and the "signature" is the sign thus made, and, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the document's face.

Wills — Place of Signature — Intent.

Where a signature is at the end of a will, universal custom creates the conclusion that it was appended as an execution; if elsewhere, it is for the court to say from inspection of the whole document, as to language as well as form and relative position of parts, whether that was the intention.

Appeal from Superior Court, Alameda county: WASTE, Judge.

Petition by Henry R. Woltman for probate of will of Ida Matilda Manchester, deceased. From order admitting will to probate, Walter Manchester appeals. The facts are stated in the opinion. REVERSED.

L. P. Forestell for appellant.

Wm. A. Powell, Earl H. Webb and George W. Chamberlain for respondent.

[413] SHAW, J.—The court below, upon the petition of Woltman, duly made an order admitting a certain document to probate as the last will of the decedent. From this order Walter Manchester, a brother and heir of the decedent, appeals.

The document referred to was wholly in the handwriting of the decedent. The only objection presented upon this appeal is that it was not signed by the decedent.

The document began as follows:

"January 14th, 1914.

"I, Matilda Manchester, leave and bequeath all my estate & effects, after payment of legal, funeral & certain foreign shipment expenses (as directed) to the following legatees, viz.:"

Then followed a statement of devises and bequests to divers persons. It ended as follows:

"Whereunto I hereby set my hand this fourteenth day of January, 1914."

The name of the decedent does not appear in or on the paper anywhere, except in the opening clause as above shown. This document was folded by the decedent and placed

in an envelope, which was then sealed and indorsed by the decedent, in her own handwriting, with the words, "My Will, Ida Matilda Manchester." In that condition it was, by her direction, placed in her safe deposit box, where it was found after her death. These are all the facts bearing upon the question of its execution as a will.

"An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject [419] to no other form, and may be made in or out of this state, and need not be witnessed." (Civ. Code, sec. 1277.)

The will in question fits this description in all respects except the signing thereof. It was not "signed" according to the meaning of that word in ordinary usage. To sign, as applied to a document, is defined as follows: "To affix a signature thereto; to ratify by hand or seal; to subscribe in one's own handwriting." (Webster's Dictionary.) Unquestionably, as used in the above-quoted section, it means the signature of the testator in his own handwriting written somewhere in or upon the document, with the intention by so writing it to authenticate the document. The name written at another place than the end of the document, and not for the purpose of authenticating it and indicating its completion, but merely to identify the person who is making the will, cannot be deemed to be a name "signed" to the document, unless that word is given a meaning entirely different from that which it is generally understood to have. (7 Words & Phrases, p. 6508.) The Civil Code itself provides that words "are construed according to the context and the approved usage of the language." (Civ. Code, sec. 13.) If this be done, a document in which the name of the person making it appears only in the beginning thereof, and by way of recital to designate that person as the maker, in the manner above shown, cannot be said to have been signed by the maker. (In re Walker, 110 Cal. 393, 52 Am. St. Rep. 104, 30 L.R.A. 460, 42 Pac. 815.) We have here the additional indication of lack of that completion essential to a will in the closing words, "whereunto I hereby set my hand this," etc. These are apt words to precede a signature in attestation of a will or deed, and they tend to show that the decedent intended to sign immediately below, but failed to carry out that intention.

The defect is not cured by the words "My Will" indorsed on the envelope and signed by the decedent. The manifest purpose of that indorsement was to state that the paper within the sealed envelope was the will of Ida Matilda Manchester. It shows that the decedent believed that the inclosed document was her will, and indicates that she believed that it was lawfully executed and valid. But her belief that it was a valid will, properly

executed, does not make it so. The power [420] to dispose of one's property by will and the mode by which it may be exercised are matters under legislative control, and the mode prescribed by the statute must be followed, or there is no will. "For the purpose of determining whether a will had been properly executed, the intention of the testator in executing it is entitled to no consideration. For that purpose the court can consider only the intention of the legislature as expressed in the language of the statute, and whether the will as presented shows a compliance with the statute." (In re Seaman, 146 Cal. 460, 106 Am. St. Rep. 53, 2 Ann. Cas. 726, 80 Pac. 701; In re Walker, 110 Cal. 391, 52 Am. St. Rep. 104, 30 L.R.A. 460, 42 Pac. 815.) If the decedent had used a printed form of will, filled the blank spaces as she desired, and had duly signed it, without attesting witnesses, the document would show her testamentary intentions as satisfactorily as the document she here prepared, but it would not have been a valid will. (Billings's Estate, 64 Cal. 427, 1 Pac. 701.) The act of signing is essential. An intention proven by other means will not serve the purpose.

There is no force in the argument that the indorsement on the envelope can be treated as a part of the document inclosed, as if it were an additional page attached thereto to give room for the signature. The circumstances are utterly inconsistent with the idea that the indorsement was made for any such purpose. They show that it constituted no part of the paper designated as "My Will" within the sealed envelope. (Warwick v. Warwick, 86 Va. 596, 6 L.R.A. 775, 10 S. E. 843.)

It is claimed that the decisions in Stratton's Estate, 112 Cal. 513, 44 Pac. 1028, and In re Camp, 184 Cal. 233, 66 Pac. 227, are opposed to the foregoing conclusions. In Estate of Stratton the olographic will was duly signed at the end, but below the signature were the words, "My husband Thomas Stratton." Discussing the effect of these words as part of the document, the court held that they were intended to name the husband as a legatee; that they were merely displaced by the testator, and should be read as though written at the beginning or end of the last clause, in which the legatee was designated only by the pronoun "he." In this discussion the court said: "The statute does not require that an olographic will shall be 'subscribed by the testator at the end thereof.' It is sufficient that it be 'signed' by him and this signing may be at the beginning or in any part of the document," [421] citing In re Walker, 110 Cal. 391, 52 Am. St. Rep. 104, 30 L.R.A. 460, 42 Pac. 815.

In the case of In re Camp, proof that the final clause of an olographic will, including the signature of the testator at the end

thereof, had been torn off and destroyed after the testator's death was duly made by two credible witnesses, as required by section 1339 of the Code of Civil Procedure, and this was held to be sufficient proof of the authenticity of the will. The initial clause also contained the name of the testator. The court said that this also established the fact that the document was intended by him to be his last will, and that "the writing by him of his name in that clause was itself a sufficient signature."

The declarations in these cases are entirely consistent with the rule stated in *In re Walker*, that "To sign an instrument or document is to make any mark upon it in token of knowledge, approval, acceptance, or obligation. The signature is the sign thus made." In neither of them was there any discussion, or need of discussion, as to the kind of proof permissible to establish the fact that the signature appearing in an olographic will, though not at the usual place at the end of the document, was nevertheless intended as a signature in execution thereof. They do not in the least control our decision of this question. The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears. If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference from the document itself that the signature was so placed with the intent that it should there serve as a token of execution. If such inference thus appears, the execution may be considered as proven by such signature.

This rule has the support of the better reasoned decisions of other jurisdictions. Thus, in *Waller v. Waller*, 1 Grat. (Va.) 454, 42 Am. Dec. 564, where the subject is elaborately discussed, the court says that the signing of the will is required as proof "that the act is a complete, concluded act," [422] and that "the signing must be such as upon the face and from the frame of the instrument appears to have been intended to give it authenticity. It must appear that the name so written was regarded as a signature, that the instrument was regarded as complete without further signature and the paper itself must show this." In *Warwick v. Warwick*, 86 Va. 596, 6 L.R.A. 775, 10 S. E. 843, the will began as follows: "I, Abraham Warwick, declare this to be my last

will and testament," but the testator's name did not occur elsewhere in the will, and there was no declaration in the document that the signature at the beginning was written for the purpose of authentication or execution. The court held that the signature was not "affixed in such a manner as to make it manifest that the name was intended as a signature." To the same effect are *Catlett v. Catlett*, 55 Mo. 339; *Crutcher v. Crutcher*, 11 Humph. (Tenn.) 384; *Armant's Succession*, 43 La. Ann. 310, 26 Am. St. Rep. 183, 9 So. 50; *In re Tyrrel*, 17 Ariz. 418, 153 Pac. 767; *French v. French*, 14 W. Va. 479. And in the recent decision in *In re Dombrowski*, 163 Cal. 295, 125 Pac. 235, we said: "No doubt a subscription or signing of any kind will not constitute a valid execution of a will unless made with the intention, on the part of the testator, of finally and completely authenticating the will." This was said of an attested will, but that it was not supposed to state a rule confined to attested wills is shown by the fact that *Waller v. Waller*, 1 Grat. (Va.) 454, 42 Am. Dec. 564, is cited as an application of it.

The few decisions to the effect that where the name of the testator appears only in the initial clause of an olographic will, the will may be considered as "signed" within the meaning of statutes similar to ours, are all based on the supposed authority of the English case of *Lemayne v. Stanley*, 3 Lev. 1, 83 Eng. Rep. (Reprint) 545, decided in 1681. The will there considered was an attested will. The subsequent cases following it take it as absolute authority, and do not properly distinguish or limit the scope of its language. The case has been criticised in England and limited strictly to cases where witnesses saw the will written or where it was subsequently acknowledged before them. (*Morison v. Turnour*, 18 Ves. Jr. 175, 34 Eng. Rep. (Reprint) 284; *Coles v. Trecothick*, 9 Ves. Jr. 234, 32 Eng. Rep. (Reprint) 598.) To overcome its effect in [423] England the statutes of 1 Vict. 15 Vict. and 16 Vict. were enacted, changing the law so as to require that "all wills be signed at the end thereof." In view of this consequence of that decision, it is obvious that its authority should not be considered as controlling. The rule we have stated is, in our judgment, supported by sounder reasons and is less likely to produce evil results.

Our conclusion is that the document in question was not signed by the testator, as required by section 1277, and that it is not entitled to probate.

The order is reversed.

Henshaw, Lorigan, Melvin, Sloss, Lawlor, JJ., and Angellotti, C. J., concurred.

NOTE.

The reported case holds that an instrument in testamentary form in which the name of the maker appears only in the body is not "signed" within the meaning of a statute relating to holographic wills unless it appears that the name was so inserted for the purpose and with the intent of authenticating the instrument. Applying that rule, it is held that the inference of the requisite intent is prevented by the fact that the instrument concludes "whereunto I hereby set my hand," etc., no signature following those words. It is well established that in the absence of a statute requiring a signature at the end, the name of the testator written by him in the body of the will is sufficient if the intent thereby to authenticate the will appears. See the note to *Armstrong v. Walton*, Ann. Cas. 1916E 137. That the court did not intend in the reported case to depart from that doctrine is shown by a decision rendered on the following day (*In re Estate of McMahon*, 174 Cal. 423, 163 Pac. 669, L.R.A.1917D 778) sustaining as a holographic will an instrument not subscribed at the end but introduced by the words "This is the last will and testament of Elizabeth R. McMahon." The decision in the reported case apparently rests, therefore, on the view that the final clause of the instrument there under consideration indicated an intent that it should be further signed. The further holding in the reported case that the signing was not aided by the inclosure of the instrument in an envelope indorsed "My will" with the signature of the alleged testatrix is apparently opposed to the cases of *Alexander v. Johnston*, 171 N. C. 468, 88 S. E. 785, and *Warwick v. Warwick*, 86 Va. 596, 10 S. E. 843, 6 L.R.A. 775, cited in the note heretofore referred to.

DAWSON

v.

NATIONAL LIFE INSURANCE COMPANY ET AL.

Iowa Supreme Court—May 15, 1916.

176 Iowa 362; 157 N. W. 929.

Corporations — Directors — Relation to Stockholders.

The officers and directors of a corporation are trustees of the stockholders in many re-

spects, as in the transaction of the business and care of the property of the corporation.

Fraud — What Constitutes Fiduciary Relation.

Wherever special confidence is reposed by reason of blood, business, friendship or association, by one person in another who is in a position to have and exercise or does exercise and have influence over each other, a fiduciary relation may exist.

Effect of Fiduciary Relation — Burden of Proof as to Transaction.

Whenever the relations between the contracting parties are such as to render it certain that they do not deal on terms of equality, but that either, on the one side, from superior knowledge of the matter derived from a fiduciary relation or from overmastering influence, or, on the other, from dependence, or a trust justifiably reposed, unfair advantage in a transaction is rendered probable, the transaction is presumed void, and the burden shifts to the stronger party to show affirmatively that no deception was practiced and no undue influence used.

Corporations — Relation of Stockholders to Corporation.

The stockholders of a corporation have no legal title to property, which is owned by the entity known as the corporation, but their shares represent integral parts of the whole, and proportional shares of the dividends declared or to be declared, and of net assets upon dissolution.

[See 7 R. C. L. tit. *Corporations*, p. 25.]**Same.**

A corporation itself is a legal personality holding the full title, legal and equitable, to all corporate property.

Fiduciary Relation of Director and Stockholder — Purchase of Stock by Director.

Any contract whereby corporate directors acquire profit to the shareholder's detriment, casts upon them the burden of affirmatively showing that the contract was fairly procured for value, or, if for less than value, upon full disclosure of all facts known to the director and unknown to the shareholder.

[See note at end of this case.]

Same.

Plaintiff, the holder of shares of stock in a life insurance company having a book value of about \$130 each, but which had sold as high as \$150, and who sold them for around \$200 a share to the vice-president and secretary of the company, acting with the president and others, owning a majority of its stock, in transferring or reinsuring its risks at a value giving them about \$1,000 a share, and certain payments and preferences for such service, and who had not been informed as to the true condition of the company or the value of its assets, may maintain an action against such officers for fraud, and recover the full value of his stock, without reference to the price agreed upon at the time of the sale.

[See note at end of this case.]

Appeal from District Court, Polk county:
AYRES, Judge.

Action by E. J. Dawson, plaintiff, against National Life Insurance Company et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

Casper Schenk for appellant.

Maurice E. Locke, Cummins, Hume & Bradshaw and *J. B. Weaver, Jr.*, for appellees.

[363] LADD, J.—The Des Moines Life Insurance Company was organized on the mutual plan about 1885, and so continued under various forms of organization until about January 1, 1908, when it was incorporated under the laws of Iowa as a legal reserve life insurance company, with a capital stock of \$100,000 divided into 1,000 shares of the par value of \$100 each. Its business expanded so that, in the fall of 1911, nearly \$30,000,000 of insurance [364] was in force. The health of its president, C. E. Rawson, failed, and the burden of managing the company devolved largely on his wife, L. C. Rawson, and son-in-law, Wilmot A. Harbach, who had been vice-president and secretary respectively since the reorganization. Rawson owned 251 shares of stock; Mrs. Rawson, 250 shares; their son Homer, 1 share; and Harbach, 50 shares. The remaining 448 shares were widely distributed; for in reorganizing, any policyholder was permitted to subscribe for a limited number, and in that way, plaintiff, who was the company's chief bookkeeper, acquired 3 shares. The book value of these shares was about \$130 each at the time in question, but shares had been sold for as much as \$150 each. A surplus of \$350,000 not assigned to policyholders had accumulated, and, according to the evidence, the value of the insurance outstanding for the purpose of transferring to another company was about \$15 per \$1,000 of stipulated indemnities, or altogether, about \$450,000. This, of course, included the transfer of agencies, in so far as possible, and other incidental advantages. Manifestly, the management had been efficient, and there was room for a finding that the actual value of the stock was much more than either the book value or prices at which previously sold, or \$200 per share paid plaintiff by defendant Harbach on December 8, 1911, especially if disposed of for the purpose of effecting reinsurance. During the time in question, the National Life Insurance Company of the United States was a corporation organized under the laws of Illinois, with a capital of \$500,000, divided into shares of \$100 each, of which Albert M. Johnson owned 3,420; his wife, 1,050; Robert D. Lay, 500; and Robert E. Sackett, 30. Johnson was

president, and Lay, secretary, both being directors. Since January 23, 1912, W. A. Harbach has been in the employ of that company in the agency department, at a salary of \$12,000 per annum. For more than a year, Johnson had been negotiating in behalf of his company, either directly with Mrs. Rawson or, through Harbach, with Mr. and Mrs. Rawson, for the purchase of the stock of [365] the Des Moines company, with the well-understood purpose of reinsuring its risks in the National Life Insurance Company and taking over its assets. These negotiations culminated in an option, November 29, 1911, in the words following:

"For and in consideration of one dollar and other good and valuable considerations in hand paid to C. E. Rawson and L. C. Rawson by A. M. Johnson, receipt of which is hereby acknowledged, the said C. E. Rawson and L. C. Rawson hereby agree to sell and the said A. M. Johnson hereby agrees to buy on or before February 28, 1912, 502 shares of the capital stock of the Des Moines Life Insurance Company for the sum of \$500,000, to be paid as mutually agreed to.

"If either party fails to perform their part to this agreement they shall pay to the other the sum of \$5,000 as liquidated damages.

"In witness whereof the parties hereto have set their hands and seals this 29th day of November, A. D. 1911.

"C. E. Rawson (Seal)

"L. C. Rawson (Seal)

"A. M. Johnson (Seal)"

At the time this was signed, the parties thereto, with Harbach, arranged that Johnson should acquire the remainder of the stock, or substantially all of it, at not to exceed \$200 per share, and that Harbach should purchase the stock for Johnson. On December 1st following, the latter addressed a letter to Harbach, saying that his 50 shares of stock would be purchased for the sum of \$10,000, to be paid when the shares of Mr. and Mrs. Rawson were finally acquired, and on the following day placed in Harbach hands \$80,000 out of which to obtain the remaining 448 shares of stock. Harbach acknowledged this and outlined a plan under which the name of the purchaser would be concealed. On December 16th, Harbach was paid for his stock, and on the 23d, Johnson advised Harbach:

[366] "That, upon the consolidation or reinsurance of the Des Moines Life Insurance Company by the National Life Insurance Company of the United States of America, you will be placed upon the pay roll of the National Life Insurance Company of the United States of America for a term of three years, at a salary of \$12,000 per year, payable monthly.

"For your services in assisting me in purchasing the capital stock of the Des Moines Life Insurance Company, and for other services in connection with the possible consolidation or reinsurance of the Des Moines Life Insurance Company by the National Life Insurance Company of the United States of America, you are to receive the sum of \$40,000, upon terms of payment to be agreed upon between us, at the same time the stock of C. E. and L. C. Rawson is purchased and paid for."

This latter would make the price of Harbach's stock a little higher than that to be paid the Rawsons. The plan doubtless was adopted because of Harbach's agency in buying the minority of shares. He had bought for Johnson all but 14 of these shares at an average price of something less than \$200 per share. On January 23, 1912, the Des Moines Life Insurance Company and the National Life Insurance Company entered into a contract, by the terms of which the former undertook to transfer to the latter all of its assets and business; and the National Life Insurance Company, in consideration thereof, agreed to save the Des Moines Life Insurance Company harmless, to assume all its obligations on outstanding policies, to maintain the necessary legal reserves, make necessary reports, and to enter into direct individual supplementary contracts to this effect with the policy holders of the Des Moines Life Insurance Company, and further, to "pay the Des Moines Life Insurance Company \$700,000—\$300,000 on the taking effect of the agreement, and \$400,000 in five annual instalments of \$80,000 each." This plan was approved by the state reinsurance commission, consisting of the governor, auditor of state and attorney general. The contract was performed, and thereafter the Rawsons were [367] paid \$500,000 in money or legal obligations to pay for their 502 shares of stock, or nearly \$1,000 per share, and Harbach, \$40,000 for his services rendered Johnson in consummating the deal; and also he was taken into the employment of the National Life Insurance Company at the salary agreed upon, more than double that paid him by the Des Moines Life Insurance Company. The evidence was such that the jury might have found that, though the president of the Des Moines Life Insurance Company was enjoying a salary of \$10,000 per year, the vice-president, a salary of \$6,000, and the secretary, a salary of \$5,000, they had negotiated, for nearly a year, without the knowledge of other stockholders, with Johnson as president of the National Life Insurance Company with the distinct purpose of effecting, directly or indirectly, the transfer to his company of all the assets and risks of the Des Moines Life Insurance Company, and

thereby terminating its existence. Until Johnson, in pursuance of the plan agreed upon, had acquired substantially all the shares of the minority stockholders, he humored Mrs. Rawson's sentiment against participating in the actual transfer of the assets and reinsuring the risks; but thereafter he insisted that this be done as a condition precedent to buying the Rawsons' stock, and she finally acquiesced, and the deal as contemplated from the outset was consummated. According to Johnson's testimony, the completion of the deal depended upon obtaining substantially all the shares of the minority stockholders. The jury might well have found, but for the withdrawal of the issue, that the negotiations from the beginning were to acquire all the company's property; that the scheme of buying the stock was merely a means of accomplishing this; and that these directors and officers, knowing that Johnson was ready and willing to pay approximately \$700,000 therefor, secretly connived with him to so effect the transfer that the Rawsons and Harbach might receive an unfair portion of the proceeds of the sale,—that is, \$550,000 for their 552 shares of stock, or nearly \$1,000 per share,—while those owning the 448 shares should have less [368] than \$100,000, leaving the balance for the added expenses of perpetrating the deal in this fashion.

Appellant requested the court to instruct the jury in the language following:

"You are instructed that a director and managing officer of a corporation doing business as a life insurance company stands in a relation of a fiduciary to all the stockholders who are not themselves engaged in the active management of the company, and before any such director and officer of the company, who is acquainted with its conditions and affairs, can rightfully purchase the stock of such company from stockholders who are not actively engaged in the management and operation of the corporation, such managing officer and director must inform such stockholders of the true condition of the company and its affairs and assets, and must give to such stockholders all the information affecting the value of the stock which such officer himself possesses; and a purchase from a stockholder who is not acquainted with the condition and affairs of the company of his stock in such company, by one of the directors and managing officers, without first having informed such stockholder of the true condition of the company, and value of its assets, is a fraud on the part of such officer and director, and renders him or her liable to pay the stockholders the full value of the stock without reference to the price agreed on at the time of the sale, provided the stockholder does not himself know the value of the stock."

This was refused and the jury told that:

"Neither the defendant W. A. Harbach nor the defendant L. C. Rawson were bound, because of their official position with the Des Moines Life Insurance Company, . . . to make any disclosures as to the reinsurance or merger of said company."

And to this plaintiff excepted. That both had knowledge of facts materially affecting the value of the shares of its capital stock not possessed by other shareholders is not questioned, and whether the instruction was correct necessarily [369] depends on the nature of the relation sustained by the defendants named as directors and secretary and vice-president, to the shareholders as such. If the relation was fiduciary in character with respect to the interests of the shareholders represented by their shares of stock in the company, then they owed the duty, before assisting Johnson in purchasing, to disclose everything bearing on their value coming to their knowledge as officers of the company. If no such relation existed, then they might deal with them severally, precisely as a stranger to the organization might, even to the extent of intentionally helping others to buy their stock at a mere fraction of its actual value. The authorities are agreed that the officers and directors of a company are trustees of the stockholders in many respects, as in the transaction of the business and care of property of the corporation, but there is a conflict as to whether any fiduciary relation exists between them concerning the shares of capital stock. One line of cases, while recognizing that the directors and managing officers are trustees for the shareholders in some respects, limit these strictly to matters appertaining to the management of corporate affairs, and say that dealing with the individual shareholder concerning his shares of capital stock is not within the scope of the trust relation, and that, as director or officer, he is charged with no duty to the stockholder with reference to his shares; in other words, the matter of buying from or selling to the stockholder capital stock in the corporation is wholly without the scope of his agency as director or managing officer thereof. *Tippecanoe County v. Reynolds*, 44 Ind. 509, 15 Am. Rep. 245; *Carpenter v. Danforth*, 52 Barb. (N. Y.) 581; *Deaderick v. Wilson*, 8 Baxt. (Tenn.) 108. Other decisions merely restate this conclusion and cite the above cases, especially the first two, as establishing it, and many textbooks do likewise. See *O'Neile v. Ternes*, 32 Wash. 528, 73 Pac. 692; *Haarstick v. Fox*, 9 Utah 110, 33 Pac. 251; *Crowell v. Jackson*, 53 N. J. L. 656, 23 Atl. [370] 426; *Walsh v. Goulden*, 130 Mich. 531, 90 N. W. 406; *Hooker v. Midland Steel Co.* 215 Ill. 444, 74 N. E. 445, 106 Am. St. Rep. 170; *Bawden v. Taylor*, 254 Ill.

464, 98 N. E. 941; *Grant v. Attrill*, 11 Fed. 469; *Gillett v. Bowen*, 23 Fed. 625; *Haverland v. Lane*, 89 Wash. 557, 154 Pac. 1118; 1 Cook on Corp. (7th ed.) § 320; 2 Machem on Corp. § 1637; *Bower on Actionable Non-Disclosure*, §§ 138, 308; *Cooley on Torts* (3d ed.) p. 991. In *Smith v. Hurd*, 12 Metc. (Mass.) 371, 46 Am. Dec. 690, Chief Justice Shaw, in holding that an individual stockholder might not maintain an action against the directors of a corporation for damages consequent upon negligence and malfeasance in what they did as such, resulting in loss and waste of its capital, observed:

"There is no legal privity, relation or immediate connection between the holders of shares in a bank in their individual capacity, on the one side, and the directors of the bank on the other. The directors are not the bailees, the factors, agents or trustees of such individual stockholders."

And it was decided that such an action might be maintained by the corporation only. On the principle thus stated, the above decisions seem to be founded, as will best appear from excerpts from the leading cases. In *Carpenter v. Danforth*, supra, *Sutherland, J.*, in the course of the opinion, said:

"There was certainly a trust relation between the plaintiff as the holder of, or as the person having the legal title to, the shares of stock, and the defendant, Danforth, as a trustee or director. A corporation aggregate can only act by agents. Its trustees or directors are its agents for managing its affairs. They are such agents, viewing the corporation either in the abstract, as an immaterial thing, of legislative creation, with a name and certain powers and rights given by law, or as composed of its corporators, or shareholders, having the right to share pro rata in its dividends. There is, therefore, a certain trust relation between the shareholders and the directors of a corporation; but the trust put in the directors usually extends, and I must assume that in this case it extended only to the [371] management of the general affairs of the corporation, with a view to dividends of profits; and, therefore, that the trust relation between the plaintiff and the defendant Danforth extended no farther. The title to the property of a corporation is in neither the directors nor shareholders. It is in the corporation as an abstract, immaterial thing of legal creation. The directors are not trustees for the sale of the stock of the corporation. They have no power, as directors, to sell stock; they have no power to sell any stock but their own. The defendant Danforth was not a trustee for the sale of the plaintiff's stock. The plaintiff's stock was not the subject of trust between them, nor had the trust relation between them any connection with the plaintiff's stock, except

so far as the good or bad management of the general affairs of a corporation by its directors, indirectly affects the value of its stock. In *Knight v. Marjoribanks*, 2 Macn. & G. (Eng.) 10, it was held, 'that the circumstance, that two parties stand towards each other in the relation of trustee and *cestui que trust*, does not affect any dealings between them, unconnected with the subject of the trust.' I think it will be found, in most of the cases referred to by the counsel, that it appeared, or that it was assumed, that the trust, or trust relation, extended to the subject of the dealing, or contract in question. . . . The counsel does not say, and he could not say, that the strict or technical relation of trustee and *cestui que trust* exists between the director and shareholder, for the legal title to the corporate property is not in the directors; but he insists that the trust relation which does exist between them, as to the management of the affairs of the corporation, compels the director, on a purchase of stock, to disclose all the facts within his knowledge, material on the question of value, not known to the seller—that this disclosure is a duty arising from the trust relation, independent of the question of positive or actual fraud; in other words, that the trust or trust relation, for or as to the management, subjects the director to the rule or principle of equity which has been so often referred to. I [372] think that the sale or transaction, or its subject, is not so far connected with, or the subject of the trust, or trust relation which is admitted to exist, as to subject the director to, or give the seller the benefit of, the principle of equity, or to make the principle reasonably applicable to the transaction. It will not do to make the principle generally applicable to purchases by directors of the stock of their corporations. As to stocks which have a regularly quoted price or market value, parties generally sell and buy them, with reference to *this* price or value, rather than with reference to their real value, or any opinion of their real value, founded on a knowledge or supposed knowledge of the condition of the corporations or of their affairs. As to such stock, would it do to make the purchase of it by a director, though it happened to be the stock of his own corporation, an exception, and to say that the parties dealt with reference to the real condition of the corporation and the supposed real value of the stock, founded on a knowledge or supposed knowledge of its affairs? Plainly it would not; and plainly in such case, the application of the principle of equity would be unreasonable. But the duty arising from the mere trust relation must be the same, in all cases where the same trust relation exists; for courts of equity, though they deal with special cases, apply general

principles. My conclusion is, then, that this case is not a case of constructive fraud—that there was not any such trust or confidential relation between the plaintiff and Danforth as to make the principle of equity, which has been referred to, reasonably applicable to the case."

In *Tippecanoe County v. Reynolds*, supra, the court, after the statement of facts, proceeded:

"Was the defendant, in consequence of being a director and the president of the company, a trustee of the plaintiff as a stockholder, whereby it became his duty, as a purchaser of the stock, to pay a fair and adequate price for it, to take no advantage of the relation which he bore to the company or the knowledge acquired thereby, and to disclose to the plaintiff [373] all the material facts within his knowledge? . . . We are of opinion, upon an examination of such authorities as have been brought to our notice, upon the point, that the relation of trustee and *cestui que trust* does not exist in such case. It is said very frequently in the books that the directors of a corporation are trustees of the stockholders, and that the relation of trustee and *cestui que trust*, with its consequences, exists between them. But these expressions must always be understood to have relation to the cases to which they are applied, and not to be of universal application. It may be conceded that, in respect to the property of the corporation, whether it be land, money, securities, capital stock, or other property held by the corporation, and the management of its business, the directors are trustees for the stockholders. The action of the directors in respect to the property of the corporation must affect, to a greater or less degree, the stockholders generally. It has been generally in such cases, or where the action of the directors has affected the whole body of stockholders, that the relation of trustee and *cestui que trust* has been held to exist. . . . It seems to us, however, keeping in view the current of authorities, that notwithstanding the general language employed in the above cases, for some purposes, the directors of a corporation stand in a relation similar to that of trustees for the shareholders. This seems to be the case in reference to the management, by the directors, of the property and general affairs of the corporation. These are matters usually entrusted to the directors, and in respect to which they are empowered to act; and their action affects the whole body of shareholders, beneficially or injuriously, in respect to dividends upon, or the value of, their stock. But stock in a corporation held by an individual is his own private property, which he may sell or dispose of as he sees proper, and over which neither the corporation nor

its officers have any control. It is the subject of daily commerce, and is bought and sold in market like any other marketable commodity. The directors have no control or dominion over it whatever, or [374] duty to discharge in reference to its sale and transfer, unless it be to see that proper books and facilities are furnished for that purpose. As the property of the individual holder, he holds it as free from the dominion and control of the directors as he does his lands or other property. . . . Such being the nature of the interest of the stockholder in his stock, and the directors having no control, power, or dominion over it, or duty to discharge in reference to it, beyond the duty devolving upon them to prudently manage the affairs and property of the corporation itself, it seems to us to be very clear, that, in the purchase of stock by a director from the holder, the relation of trustee and *cestui que trust* does not exist between them."

In several of the cases cited, the decision may be put on other grounds, but in each is to be found the approval of the ruling in cases from which we have quoted. The consequences were such that their correctness was immediately challenged. In *Tipppecanoe County v. Reynolds*, supra, Downey, C.J., in dissenting denounced the contract upheld by the majority "as hard, unconscionable and fraudulent" and was of opinion that an actual fraud had been perpetrated and that the president of the corporation "occupied a relation of trust and confidence toward the county (owner of shares bought) which, under the circumstances disclosed, made him guilty of constructive fraud." As often declared, law is not alone the product of abstract reasoning, but of experience as well. It is the outcome of logic of the mind confirmed by the logic of events. The consequences of the application of a rule often furnish the most potent argument in its support or are most persuasive in its condemnation. Some of the cases disclose unconscionable advantages as the reward for the suppression of truth. Thus, in *Tipppecanoe County v. Reynolds*, supra, the president of a railroad company bought 570 shares of its stock through agents for \$25,650, when these were actually worth \$342,000. In *Carpenter v. Danforth*, supra, a director of a company, under the guise of friendship [375] for the family, bought of the executor of a deceased stockholder shares at \$60 each, on which a dividend of 310 per cent was declared within five months, and another of 200 per cent, eight months later. In other words, with the information which he had acquired as officer of the corporation, and which he knew the executor did not possess, he pocketed \$195 a share, or \$26,520, which in all fairness belonged to the estate of his deceased friend. The possibility of so

dealing with corporate stock has proven a strong temptation to dishonest management of the business of corporations, and in instances without number has enabled the managing officers to reap the profits legitimately belonging to the shareholders. The rule has operated as a shield for those who obtain control of corporate affairs, not to carry out the purposes of the organization, but to profit from the manipulation of its affairs, enabling them, by artificially increasing or depressing the market value of its stock, to take advantage of the confidence of their unsuspecting associates. There is something wrong in any rule which will enable a director legally by his position to obtain for himself alone profits all have won.

No stockholder would urge his choice as director that he might have such an opportunity. That a director or managing officer might thus serve his selfish purposes to the detriment of stockholders would tend strongly to discourage stock investments and be a menace to the efficient management of the business of corporations. The debate as to whether technically a fiduciary relation exists may and doubtless will go on, but a knowledge of the law is not required to enable one to appreciate the moral wrong perpetrated by a corporate officer in profiting by the ignorance of a stockholder by means of knowledge acquired by virtue of his position. That stockholders look to the managing officers for results, no one questions, and the natural tendency of stockholders is to rely on being fairly and openly dealt with by such officers. It is often difficult to draw precisely the line separating intimate from hostile relations. Surely the test is not alone whether one is [376] trustee for the other. The attorney is not ordinarily a trustee for his client, nor the priest for his parishioner, nor the agent for his principal, and yet the several relations are of the highest confidence, and impose the obligation of open dealing. The very selection for service is an expression of confidence, and the employment, the bestowal of power. The shareholder selects the director to serve him in caring for the corporate property. Upon his efficiency largely depends the value of the investment in its capital stock. Is he not thereby expressing his confidence? Is his faith in the man chosen to manage its affairs any less because of the corporation's being a separate and independent entity? The ordinary stockholder gives little or no attention to the details or control of corporate affairs. He trusts all with the managing officers, and naturally relies on them in all matters touching his interest in its business and property. Stockholders, other than directors and officers, stand on an equal footing and deal with each other at arm's length. No power with respect to the corporate property has been conferred

on one not possessed by the other. But power akin to that of an attorney, priest, agent or copartner is conferred on the directors and officers by those selecting them to manage corporate affairs. Not that they have control of the shares of the stockholders, but for that they do control nearly everything affecting their value. The fiduciary obligation is to the stockholders in a body. Why not to the component parts represented by the shares? The relative position is such as to inspire confidence, and experience has frequently demonstrated that it actually exists. Why should the law say, then, that it does not, for that one is not the trustee for the other, when this is not a requisite in other relations?

The fiduciary relation may exist wherever special confidence is reposed, whether the relationship be that of blood, business, friendship or association, by one person in another when they are in a position to have and exercise or do have and exercise influence over each other. *Curtis v. Armagast*, [377] 158 Ia. 507, 138 N. W. 873. The rule is well stated in *Cowee v. Cornell*, 75 N. Y. 91, 99, 31 Am. Rep. 428:

"Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that, either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or, on the other, from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary, and well understood."

The officers of a corporation, by virtue of their position as trustees of the entire body of shareholders, acquire superior knowledge of the company's affairs bearing on the values of the shares of stock, and as a consequence thereof deal with a mere stockholder on unequal terms, in reference to said shares, and, owing to their superior knowledge and the natural reliance of the shareholders on their officers, are in a situation to exercise an influence that they could not otherwise exert. Though the stockholders have no legal title to the property, it being owned by the invisible intangible entity known as the corporation, their shares represent integral parts of the whole, the proportional shares of the dividend declared or to be declared, and of the net assets upon dissolution. Necessarily every detriment or disadvantage to the property or business affects proportionately the several shares of stock, for they represent

parts of the entity. To say, then, that a director, as such, owes nothing to the shareholders, as such, is in effect declaring that, though acting as trustee of the entity, he is under no obligation with respect to its component parts. In his capacity as director, he served the entire body of stockholders, and in doing so he cannot well escape serving the individual [378] stockholder as well. The stockholders elect him to represent them in managing the corporation's affairs. This is because it is impracticable for them to administer such affairs directly. As a director for all, he serves each as well. Surely, as a servant of all, he necessarily is incapacitated to oppose the stockholders severally. Undoubtedly, he is not a trustee of the stockholder in the strict sense, for he does not have title to the latter's stock. His relation is that often denominated quasi trustee. Mr. Pomeroy, in his work on *Equity Jurisprudence* (3d Ed.) Vol. 3, § 1090, clearly analyzes the relation of the directors of a corporation with it and the stockholders:

"The trust character of directors is involved in the very organization of a corporation, and is necessarily twofold—towards the corporation, and towards the stockholders. The doctrines are fundamental and familiar that the corporation itself is a legal personality, and holds the full title, legal and equitable, to all corporate property. Stockholders, individually and separately, hold the full title, legal and equitable, to their respective shares of stock. A stockholder does not, by virtue of his stock, acquire any estate, legal or equitable, in the corporate property; he obtains only a right to participate in the lawful dividends while the corporation is in being, and to his proportionate share of the net assets upon its dissolution and final settlement. Shares of stock, however, are regarded by courts of law and of equity as a species of property, as vendible in the market, as having a pecuniary value, and as clothing their owner with proprietary rights which will be protected and enforced. From this analysis it is obvious that, so far as the trust embraces or is concerned with the corporate property, the directors and managing officers occupy the position of quasi trustees towards the corporation only; there is no relation of beneficiary and trustee, having the corporate property for its subject-matter, between the stockholders and the directors. The directors are also agents for the corporation, but that fact does not prevent them from [379] being in a partial sense trustees for the corporation. The important conclusion I repeat, that this phase of their trust is concerned with and confined to the corporate property; from it arise their fiduciary duties towards the corporation in dealing with such property, and the equitable remedies of the corporation for

a violation of those duties. On the other hand, the directors and managing officers occupy the position of quasi trustees towards the stockholders alone, and not at all towards the corporation, with respect to their shares of stock. Since the stockholders own these shares, and since the value thereof and all their rights connected therewith are affected by the conduct of the directors, a trust relation plainly exists between the stockholders and the directors, which is concerned with and confined to the shares of stock held by the stockholders; from it arise the fiduciary duties of the directors towards the stockholders in dealings which may affect the equitable remedies for a violation of those duties. To sum up, directors and managing officers, in addition to their functions as mere agents, occupy a double position of partial trust: they are quasi or *sub modo* trustees for the stockholders with respect to their shares of the stock."

The subject is so fully discussed in *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232, as to leave little to be added. There the petitioners were owners of 658 shares of stock in an oil company, to purchase which at \$110 each, defendant, who was president and director, obtained an option. He was then negotiating a sale of the plant for \$304,500, which would be \$185 per share, but concealed this from the petitioners; and, as soon as the sale of the plant was agreed to, closed the option and completed the sale, realizing a profit of \$49,250. A demurrer to a complaint so alleging and praying to recover such amount because of constructive fraud in not disclosing the facts concerning the prospective sale of plaintiffs was overruled, and the court, speaking through the late Mr. Justice Lamar, said:

"The fact that he is trustee for all is not to be perverted [380] into holding that he is under no obligation to each. The fact that he must serve the company does not warrant him in becoming the active and successful opponent of an individual stockholder with reference to the latter's undivided interest in the very property committed to the director's care. That he is primarily trustee for the corporation is not intended to make the artificial entity a fetic to be worshipped in the sacrifice of those who in the last analysis are the real parties at interest. No process of reasoning and no amount of argument can destroy the fact that the director is, in a most important and legitimate sense, trustee for the stockholder. . . . Not a strict trustee, since he does not hold title to the shares, not even a strict trustee who is practically prohibited from dealing with his *cestui que trust*, but a quasi trustee as to the shareholder's interest in the shares. If the market or contract price of the stock should be different from the book value, he would be under no

legal obligation to call special attention to that fact, for the stockholder is entitled to examine the books, and this source of information, at least theoretically, is equally accessible to both. It might be that the director was in possession of information which his duty to the company required him to keep secret; and, if so, he must not disclose the fact even to the shareholder, for his obligation to the company overrides that to an individual holder of the stock. But if the fact so known to the director cannot be published, it does not follow that he may use it to his own advantage, and to the disadvantage of one whom he also represents. The very fact that he cannot disclose prevents him from dealing with one who does not know, and to whom material information cannot be made known. If, however, the fact within the knowledge of the director is of a character calculated to affect the selling price, and can, without detriment to the interest of the company, be imparted to the shareholder, the director, before he buys, is bound to make a full disclosure. In a certain sense the information is a quasi asset of the company, and the shareholder is as much entitled to [381] the advantage of that sort of an asset as to any other regularly entered on the list of the company's holding. If the officer should purposely conceal from a stockholder information as to the existence of valuable property belonging to the company, and take advantage of this concealment, the sale would necessarily be set aside. The same result would logically follow where the fact giving value to the stock was of a character which could not formally be entered on the record. Where the director obtains the information giving added value to the stock by virtue of his official position, he holds the information in trust for the benefit of those who placed him where this knowledge was obtained, in the well-founded expectation that the same should be used first for the company, and ultimately for those who were the real owners of the company. The director cannot deal on this information to the prejudice of the artificial being which is called the corporation, nor, on any sound principle, can be permitted to act differently towards those who are not artificially but actually interested. . . . If, then, any sort of trustees, they are necessarily subject to the obligations and restrictions which inhere in that relation as to property intrusted to them. The shares are but the paper evidence of the interest which the stockholder has in the property under the control of the director. In their sale, the stockholder disposes not only of the lithographed or engraved scrip, but of his holdings in property. And when the director deals with a stockholder for the purchase of shares, he is not buying paper,

but in effect is buying an undivided and substantial interest in property which has been committed to the director's care, custody, and control. Equity abhors mere names, and looks to the substance. Whether the corporation be treated as an enlarged and amplified form of partnership, and the director as managing partner, or whether he is called an agent or trustee, elected by the stockholders to represent them in the management of the concern, he occupies a fiduciary position and is essentially within the rule which requires agents, attorneys, bailees, partners, trustees, or other [382] fiduciaries, to exercise the highest degree of good faith as to all matters connected with the property committed to their care. . . . To say that a director who has been placed where he himself may raise or depress the value of the stock, or in a position where he first knows of facts which may produce that result, may take advantage thereof, and buy from or sell to one whom he is directly representing, without making a full disclosure, and putting the stockholder on an equality of knowledge as to these facts, would offer a premium for faithless silence, and give a reward for the suppression of truth. It would sanction concealment by one who is bound to speak, and permit him to take advantage of his own wrong—a thing abhorrent to a court of conscience. . . . When it is admitted, as it must be, both from the very nature of his duty and from the rulings of nearly all the cases, that he is trustee for the shareholder, how is it possible, in principle, to draw the line and say that, while trustee for some purposes, he is not for others immediately connected therewith? That the incidents of the trust relation stop short at the very point where it is vitally important to the shareholder that they should become active? For it must not be forgotten that the right to good faith in dealings concerning the stock is one of the very few which the individual shareholder is in a position to assert in his own name. Except in a few other instances the company itself is the only proper party to enforce the obligation arising from the trust relation of the director. In contracts with reference to the shares, the stockholder himself can enforce the rights arising from the quasi trust. . . . While not decided, it is in one case suggested that a stockholder, in dealing with a director, should recognize his superior opportunities for knowledge, and be warned thereby to exercise special caution. But the fiduciary relation fully warrants exactly the opposite course. Here, at least, the beneficiary may be off guard, and may rely implicitly not only on what is said, but also on the supposition that nothing important will be left unsaid, by the officer. Having previously [383] trusted the director in the manage-

ment of the company, he is not required, when selling his shares, suddenly to exhibit entire want of confidence. And directors generally recognize the obligations imposed, and act accordingly. But the peculiar powers and special opportunities of these fiduciaries call for an enlargement rather than a restriction of the rule requiring disclosures. . . . The obligations of his office bring him peculiarly within the general doctrine which declares that concealment of material facts may of itself amount to a fraud where from any reason one has the right to expect full information from another, or where one knows that the other is laboring under a delusion in respect to the property sold, and yet keeps silence. . . . 'A suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to, a false representation.'

In *Stewart v. Harris*, 69 Kan. 498, 77 Pac. 277, 66 L.R.A. 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873, the defendant was president and general manager of a bank, and bought 12 shares of stock therein, then worth \$350 per share, for \$110 per share, without disclosing the improved condition of the bank's affairs. The trial court instructed the jury as follows:

"You are instructed that the president, or other managing officer of a corporation doing business as a bank, stands in relation of a trustee to all the stockholders who are not themselves engaged in the active management of the bank, and before any managing officer of a bank, who is acquainted with its condition and affairs, can rightfully purchase the stock of such bank from stockholders who are not actively engaged in the management and operation of the bank, such managing officer must inform such stockholders of the true condition of the bank and its affairs and assets, and must give to such stockholders all the information affecting the value of the stock which such managing officer himself possesses; and a [384] purchase, from a stockholder who is not acquainted with the condition and affairs of the bank, of his stock in such bank, by one of the managing officers, without first having informed such stockholder of the true condition of the bank and of the amount and value of its assets, is a fraud on the part of such managing officer, and renders him liable to pay the stockholder the full value of the stock, without reference to the price agreed on at the time of the sale, provided the stockholder himself does not know the value of the stock."

This instruction was approved on substantially the grounds stated in the Georgia case from which we have quoted. In following

these decisions, Doan, J., tersely states, in *Steinfeld v. Nielsen*, 12 Ariz. 381, 100 Pac. 1004, what we regard as the law:

"Undoubtedly the law makes it the duty of an officer or director of a company, who is seeking to purchase from a stockholder the latter's holdings of stock, to disclose to the latter facts which have come to him by virtue of his relations to the company, and not known to the stockholder, or which may not be readily ascertained by the stockholder, and to disclose such plans and purposes as the corporation may have for the future which have a bearing upon the value of the stock of the company; but the underlying principle upon which this duty rests is that the officer or director, being the agent of a corporation, and so in a sense the agent of a stockholder, may not take advantage of the knowledge which he thus acquires, and which every member of the corporation is entitled to know, in dealing with such stockholder."

But when the cause was again before it, the court, after the admission of Arizona as a state *Steinfeld v. Nielsen*, 15 Ariz. 424, 139 Pac. 879, speaking through Ross, J., receded from the former holding, saying that:

"An officer or director may purchase the stock of his company from stockholders with the same freedom as a stranger, and, in so doing, the fact that he may be possessed of inside information as to the future plans and policies of his [385] company is not permitted to militate against him," citing the decisions heretofore mentioned and quoting the following from *Strong v. Repide*, 213 U. S. 419, 29 S. Ct. 521, 53 U. S. (L. ed.) 853: "The supreme courts of Kansas and of Georgia have held the relationship existed in the cases before those courts because of the special facts which took them out of the general rule, and that under those facts the director could not purchase from the shareholder his shares without informing him of the facts which affected their value."

That the writer of the opinion in *Strong's* case was mistaken in saying that the decisions were based on special facts which took them out of the general rule clearly appears from our quotation from the Georgia case and the language of the instruction in the Kansas case. The question was left undecided in *Strong v. Repide*, though the margin of evidence held to discriminate between constructive fraud and active fraud was decidedly narrow, though enough to condemn the conclusions in *Tipppecanoe County v. Reynolds*, supra, and several other decisions. That court had previously declared its position in *Jackson v. Ludeling*, 21 Wall. 616, 22 U. S. (L. ed.) 492, which is clearly expressed in the syllabus as follows:

"Managers and officers of a company where capital is contributed in shares are, in a very legitimate sense, trustees alike for its stockholders and its creditors, though they may not be trustees technically and in form. They accordingly have no right to seek their own profit at the expense of the company, its shareholders, or even its bondholders."

The Supreme Court of Nebraska, in *Barber v. Martin*, 67 Neb. 445, 93 N. W. 722, where a director of an insurance company had bought of a confiding stockholder 18 shares of its capital stock at \$50 per share, without informing her of a prospective sale at \$115 per share which he made immediately thereafter, held that he was required to pay over the difference, on the principle that:

"The relation between officer and stockholder is that of [386] trustee and *cestui que trust*. The officer cannot use the confidence reposed in him for personal profit. If his conduct is impeached and brought under review, it will closely scrutinized. The burden was upon Barber to show that he had dealt fairly with the stockholders, and he was inhibited by every rule of equity and fairness from taking to himself the benefit of a transaction, if that benefit was inconsistent with the faithful discharge of his trust."

The High Court of Chancery of England, in *Walsham v. Stainton*, 1 De Gex J. & S. (Eng.) 678, held that a fiduciary relation existed between the purchasing managers of a company and the shareholders in dealing with the stock of the latter, and that, 38 years after the transaction, the executor of the latter, might recover of the purchasing manager the loss suffered. But in *Percival v. Wright* [1902] 2 Ch. D. (Eng.) 421, the contrary view was expressed, without referring to the previous decision. This led to the enactment of statutes under which directors are held to be trustees for shareholders, paid for their services rendered, and not permitted to profit in any way by information which comes to them by virtue of their positions. In *Gadsden v. Bennetto*, 23 Manitoba 33, the court approves *Walsham v. Stainton* and says that *Percival v. Wright* should not govern the case. The New York Court of Appeals has not passed upon the question, and a decided tendency to recede from *Carpenter v. Danforth*, supra, is manifested in the more recent decisions of the Supreme Court. In *Stark v. Soule*, 45 Hun 588, 9 N. Y. St. Rep. 555, it is said that there is no legal embarrassment in the way of purchasing stock shares by a director from a stockholder, yet because of the superior knowledge of the former, slight circumstances which have the effect of misleading the seller to take less than value might afford ground for redress, and in *Von Au v. Magenheimer*,

Introductory.

It is the purpose of this note to review the recent cases passing on the purchase of stock by an officer or director as affected by his fiduciary relation to the stockholder. For a discussion of the earlier cases see the notes to *Stewart v. Harris*, 2 Ann. Cas. 873, and *Beach v. Miller*, 17 Am. St. Rep. 298.

Majority Rule.

RULE STATED.

While the authorities are agreed that the relation of officers and directors concerning the affairs and care of the property of the corporation is fiduciary in character (see 7 R. C. L. tit. *Corporations*, p. 456) there is apparently a conflict of opinion as to whether such a relationship exists between them and the individual stockholders. The weight of authority is seemingly in conflict with the reported case and is to the effect that officers and directors do not sustain any fiduciary relation to individual stockholders with respect to their holdings of stock, and may deal with them and purchase their stock practically on the same basis as strangers, and in the absence of actual fraudulent representations or concealment a purchase so effected will not be invalid for a mere failure to disclose any information the directors may have affecting the value of the stock so purchased. *Tackey v. McBain* [1912] A. C. (Eng.) 186, 106 L. T. N. S. 226, 81 L. J. P. C. 130; *Strong v. Repide*, 213 U. S. 431, 29 S. Ct. 521, 53 U. S. (L. ed.) 860, 6 Philippine 680; *DuPont v. DuPont*, 242 Fed. 98; *Steinfeld v. Nielsen*, 15 Ariz. 424, 139 Pac. 879, *modifying* rule announced in 12 Ariz. 403, 100 Pac. 1094; *Bacon v. Soule*, 19 Cal. App. 428, 126 Pac. 384; *Bawden v. Taylor*, 254 Ill. 464, 98 N. E. 941, *affirming* 166 Ill. App. 443; *In re Shreveport Nat. Bank*, 118 La. 664, 43 So. 270; *Commonwealth Title Ins. etc. Co. v. Seltzer*, 227 Pa. St. 410, 76 Atl. 77, 136 Am. St. Rep. 896; *Porter v. Healy*, 244 Pa. St. 427, 91 Atl. 428; *Shaw v. Cole Mfg. Co.* 132 Tenn. 210, 177 S. W. 479, L.R.A. 1916B 706; *Haverland v. Lane*, 89 Wash. 557, 154 Pac. 1118. See also *Buchler v. Black*, 213 Fed. 80; *Hechelman v. Geyer*, 252 Pa. St. 123, 97 Atl. 193.

A director may freely purchase the company's stock and occupies no relation of trust to an individual stockholder which prohibits him using whatever advantage his position may afford him through knowledge of its business and conditions superior to that of the stockholder for gaining information which affects the value of the stock. *DuPont v. DuPont*, 242 Fed. 98.

While directors occupy a trust relation to the corporation which they direct, their duty does not apply to the stockholders in the sale and purchase of stock. Dealing in its own stock is not a corporate function, and in buying or selling stock directors may trade like any outsider, provided they do not affirmatively act or speak wrongfully, or intentionally conceal facts with reference to it. *Shaw v. Cole Mfg. Co.* 132 Tenn. 210, 177 S. W. 479, L.R.A. 1916B 706.

In *Haverland v. Lane*, 89 Wash. 557, 154 Pac. 1118, the court said: "It must be borne in mind that the transaction was a sale of stock from one stockholder to another, the purchaser being an officer of the company. Was there a legal duty upon the defendant to disclose his market? The duty of a stockholder, he being an officer, when purchasing stock from another stockholder, has been defined by this court in *O'Neile v. Ternes*, 32 Wash. 528, 73 Pac. 692. The court adopted the text of 21 Am. & Eng. Enc. of Law (2d ed.) 898: 'The doctrine that officers and directors are trustees of the stockholders applies only in respect to their acts relating to the property or business of the corporation. It does not extend to their private dealings with stockholders or others, though in such dealings they take advantage of knowledge gained through their official position.' This is the holding of all the courts. *Cook, Corporations* (7th ed.) sec. 320; *Beach, Corporations*, secs. 246, 614. It would seem, then, if we grant that defendant was bound to disclose anything that might affect the corporation, that he was under no duty to reveal a contract and a market that was the result of a personal venture. There is nothing in the law that will prevent a stockholder, although he be an officer, from dealing in the shares of the corporation. He may find a market and buy stock to fill it. If his purchaser is willing to pay more than the stock is worth to get control of the company, or for any ulterior purpose, it is of no concern to the seller. If the purchaser is under personal contract to deliver to a third party, he is not bound to disclose his market. If it is for the benefit of the corporation he is . . . In the case at bar, the sale was entirely independent of the corporation. It did not involve its tangible assets in any way or affect their value. The parties dealt face to face. Plaintiffs knew that defendant had been purchasing stock and wanted theirs. They were suspicious of him and voiced their suspicions. They had access to the books of the company. They knew that the company was subject to a receivership if it passed its interest payments. They no doubt entertained a natural belief that others were seeking the property for their own advantage and benefit. Taking their suspicions at their full

worth, they amounted to no more than this: they were apprehensive that the sale was for the benefit of some one with means to rejuvenate the Consolidated Company. But that was not enough to defeat the sale if they got a fair price. . . . The defendant was not an agent but a buyer. He bought on the market at the seller's price. The parties dealt at arm's length. The law will presume that defendant bought for an advantage, and under the authority of our own decision in *O'Neile v. Ternes*, supra, he was not bound to disclose his market and is consequently entitled to the advantage of his trade."

So it was impliedly held in *Tackey v. McBain* [1912] A. C. (Eng.) 186, 106 L. T. N. S. 226, 81 L. J. P. C. 130, that a director was not bound to disclose private information to a stockholder who sold his stock to the director at a lower price than that at which he would have sold it if he had been in possession of the information which the director had at the time of the sale. It appeared that the defendant who was the managing director of an oil producing company, received information that a "certain well had commenced to produce oil in unprecedented quantities, on the strength of which information he bought additional stock on the market. It was held that an action by a stockholder who sold his stock on the market against the director to recover the difference in price could not be maintained, though the defendant prior to the purchase of the stock made an untrue statement as to the recent operations of the company on the strength of which the plaintiff was induced to sell his stock.

In *Wann v. Scullin*, 210 Mo. 429, 109 S. W. 688, it appeared that an officer of a corporation who was also a stockholder of another corporation which was seeking to secure control of the stock of the first corporation advised the plaintiff to dispose of her stock to the latter corporation without mentioning the fact that he was interested in the last named corporation. It was held that the concealment was not a fraud on the plaintiff.

EXCEPTIONS TO RULE.

By reason of the existence of special circumstances, a fiduciary duty may exist so as to create an exception to the general rule and impose on an officer or a director the duty of disclosing information possessed by him with regard to the operations of the company which may affect the value of the stock he seeks to purchase. *Allen v. Hyatt*, 30 Times L. Rep. (Eng.) 444, affirming 17 Dominion L. Rep. 7, affirming 8 Dominion L. Rep. 79, which affirmed 20 Ont. W. Rep. 594, 3 Ont. W. N. 370, which affirmed 18 Ont. W. Rep. 850, 2 Ont. W. N. 927; *Gadsden v. Bennetto*, 9 Dominion L. Rep. 719, 23

Manitoba 33, 49 Can. L. J. 308, 23 West. L. Rep. 633, reversing 5 Dominion L. Rep. 529, 21 West. L. Rep. 886; *Strong v. Repide*, 213 U. S. 431, 29 S. Ct. 521, 53 U. S. (L. ed.) 860; *George v. Ford*, 36 App. Cas. (D. C.) 315; *Jacquith v. Mason*, 99 Neb. 509, 156 N. W. 1041; *Commonwealth Title Ins. etc. Co. v. Seltzer*, 227 Pa. St. 410, 76 Atl. 77, 136 Am. St. Rep. 896; *Black v. Simpson*, 94 S. C. 312, 77 S. E. 1023, 46 L.R.A. (N.S.) 137; *Morrison v. Snow*, 26 Utah 247, 72 Pac. 924.

Not only a moral but an equitable obligation is imposed on a managing director to disclose all information relating to the operations and financial conditions of the corporation, to a stockholder who relies on him as a friend and fellow shareholder, to keep him informed of the company's standing, and where he induces the stockholder to constitute him his agent to sell the stock and then buys the stock himself he is guilty of a fraud. *George v. Ford*, 36 App. Cas. (D. C.) 315.

Where directors of a corporation secured the consent of a majority of the shareholders for the sale of all the assets of the corporation, and surreptitiously acquired the shares with a profit to themselves, it was held that under the circumstances a trust or fiduciary relation was established between the directors and the shareholders. *Allen v. Hyatt*, 30 Times L. Rep. (Eng.) 444, affirming 17 Dominion L. Rep. 7, affirming 8 Dominion L. Rep. 79, which affirmed 20 Ont. W. Rep. 594, 3 Ont. W. N. 370, which affirmed 18 Ont. W. Rep. 850, 2 Ont. W. N. 927.

If the facts within the knowledge of the director are of a character calculated to affect the selling price and can, without detriment to the interest of the company, be imparted to the shareholder, the director before he buys the holdings of a stockholder is bound to make a full disclosure. In a certain sense this information is a quasi asset of the company and the shareholder is as much entitled to the advantage of that sort of an asset as to any other asset regularly entered on the list of the company's holdings. *Jacquith v. Mason*, 99 Neb. 509, 156 N. W. 1041, wherein it was held that a director must return the profits realized on a sale of stock which he purchased from the plaintiff at a reduced price without disclosing the fact that he was offered a much higher price for the stock before his purchase from the stockholder.

Where officers of a company who were appointed by the directors a committee, combined to dispose of all the company's land at a secret profit to themselves, the acquisition of shares by them from shareholders at about half of their actual value, without disclosing the fact that the property in question was sold at a price which doubled the value of

the shares, was held to be such fraudulent concealment as to render their purchase of the stock voidable. The information they had as to the purchase price of the corporate property was held, under the circumstances, to be received in a fiduciary capacity. *Gadsden v. Bennetto*, 23 Manitoba 33, 9 Dominion L. Rep. 719, reversing 5 Dominion L. Rep. 529, 21 West. L. Rep. 886, wherein it was said: "With great deference, I do not think that the law laid down in *Percival v. Wright* [1902] 2 Ch. (Eng.) 421, and the American case of *Carpenter v. Danforth*, 52 Barb. (N. Y.) 581, should govern this case. The two defendants were members of the committee appointed to sell this land; and, after a sale was made by suppressing the facts, they buy, through X, but really for themselves, this stock. It is well to observe that they were authorized to sell the land and shares; probably it was thought that, as selling the land was really a winding-up of the company, the purchaser might require to get all the stock in order really to make title. The defendants, with X, conspired together to suppress the facts and get the shareholders' property. It would be strange if in such a flagrant case of fraud the court could not grant relief, and I see no necessity for citing authorities. The very recent case of *Allen v. Hyatt*, 8 Dominion L. Rep. 79, is quite applicable, and justifies granting relief to the plaintiff. . . . The position of the members of the committee in this case is very different from that of ordinary directors of a company as regards their fiduciary relations; and this case is quite distinguishable from *Percival v. Wright* [1902] 2 Ch. (Eng.) 421. In the present case the committee was acting outside the ordinary duties of directors; they were appointed for the purpose of securing and bringing in a proposal for disposing, not only of the land, which was the property of the company, but the shares, which were the property of the individual shareholders. On any proposal being received by them which involved the acquisition of the shares, they were bound to disclose to the shareholders, the interested parties, the nature of the proposal and the price offered. If the proposal took the form of acquiring all the company's property and leaving the shares out of account, the shareholders would be immediately interested in that proposal, because their shares would become worthless when the property was transferred, and they could only look for reimbursement to their share of the purchase money on a distribution being made. If the committee, acting under its duties to the company and the shareholders, secured a highly advantageous offer, they were bound to make full disclosure of the offer to the company and the shareholders. The members of the committee

were the confidential agents of the company and the shareholders. Their concealment of Cooper's offer, which so greatly enhanced the value of the shares, with a scheme in view to buy the shares at a low price, was a breach of the duty and a fraud upon the shareholders whose shares they acquired, by means of that concealment, at a price far less than their intrinsic value."

In *Strong v. Repide*, 213 U. S. 431, 29 S. Ct. 521, 53 U. S. (L. ed.) 860, the court said: "It is here sought to make defendant responsible for his actions, not alone and simply in his character as a director, but because, in a consideration of all the existing circumstances above detailed, it became the duty of the defendant, acting in good faith, to state the facts before making the purchase. That the defendant was a director of the corporation is but one of the facts upon which the liability is asserted, the existence of all the others in addition making such a combination as rendered it the plain duty of the defendant to speak. He was not only a director, but he owned three-fourths of the shares of its stock, and was, at the time of the purchase of the stock, administrator general of the company, with large powers, and engaged in the negotiations which finally led to the sale of the company's lands (together with all the other friar lands) to the government at a price which very greatly enhanced the value of the stock. He was the chief negotiator for the sale of all the lands, and was acting substantially as the agent of the shareholders of his company by reason of his ownership of the shares of stock in the corporation and by the acquiescence of all the other shareholders, and the negotiations were for the sale of the whole of the property of the company. By reason of such ownership and agency, and his participation as such owner and agent in the negotiations then going on, no one knew as well as he the exact condition of such negotiations. No one knew as well as he the probability of the sale of the lands to the government. No one knew as well as he the probable price that might be obtained on such sale. The lands were the only valuable asset owned by the company. Under these circumstances and before the negotiations for the sale were completed the defendant employs an agent to purchase the stock, and conceals from the plaintiff's agent his own identity and his knowledge of the state of negotiations and their probable result, with which he was familiar as the agent of the shareholders and much of which knowledge he obtained while acting as such agent and by reason thereof. The inference is inevitable that at this time he had concluded to press the negotiations for a sale of the lands to a successful conclusion, else why would he desire to purchase more shares which, if no

sale went through, were, in his opinion, worthless, because of the failure of the government to properly protect the lands in the hands of their then owners? The agent of the plaintiff was ignorant in regard to the state of the negotiations for the sale of the land, which negotiations and their probable result were a most material fact affecting the value of the shares of stock of the company, and he would not have sold them at the price he did had he known the actual state of the negotiations as to the lands and that it was the defendant who was seeking to purchase the stock. Concealing his identity when procuring the purchase of the stock, by his agent, was in itself strong evidence of fraud on the part of the defendant. Why did he not ask Jones, who occupied an adjoining office, if he would sell? But by concealing his identity he could by such means the more easily avoid any questions relative to the negotiations for the sale of the lands and their probable result, and could also avoid any actual misrepresentations on that subject, which he evidently thought were necessary in his case to constitute a fraud. He kept up the concealment as long as he could, by giving the check of a third person for the purchase money. Evidence that he did so was objected to on the ground that it could not possibly even tend to prove that the prior consent to sell had been procured by the subsequent check given in payment. That was not its purpose. Of course, the giving of the check could not have induced the prior consent, but it was proper evidence as tending to show that the concealment of identity was not a mere inadvertent omission, an omission without any fraudulent or deceitful intent, but was a studied and intentional omission to be characterized as a part of the deceitful machinations to obtain the purchase without giving any information whatever as to the state and probable result of the negotiations, to the vendor of the stock, and to in that way obtain the same at a lower price. After the purchase of the stock he continued his negotiations for the sale of the lands, and finally, he says, as administrator general of the company, under the special authority of the shareholders, and as attorney in fact he entered into the contract of sale December 21, 1903. The whole transaction gives conclusive evidence of the overwhelming influence defendant had in the course of the negotiations as owner of a majority of the stock and as agent for the other owners, and it is clear that the final consummation was in his hands at all times. If under all these facts he purchased the stock from the plaintiff, the law would indeed be impotent if the sale could not be set aside or the defendant cast in damages for his fraud."

In *Black v. Simpson*, 94 S. C. 312, 77 S. E. 1023, 46 L.R.A.(N.S.) 137, it appeared that the defendant who was the general manager of a corporation entered into negotiations with others for the sale of the franchises and property of the corporation. After ascertaining the price for which they could be sold he conceived a plan to buy up the stock from the individual stockholders, in which plan he succeeded by concealing the value of the stock and the condition of the corporate affairs and induced the stockholders to sell at a lower price by leading them to believe that the affairs of the corporation were in bad condition. It was held that the stockholders could maintain a joint action against the defendant for an accounting of all the profits he received by the acquisition and resale of the property.

The purchase of stock by an officer or director through false or fraudulent representations, or actual concealment of facts bearing on the corporation's operations with a view to induce the sale of stock at a reduced figure, will of course be set aside. *Traer v. Clews*, 115 U. S. 528, 6 S. Ct. 155, 29 U. S. (L. ed.) 467; *Price v. Union Land Co.* 187 Fed. 886, 110 C. C. A. 20; *Black v. Simpson*, 94 S. C. 312, 77 S. E. 1023, 46 L.R.A.(N.S.) 137; *Hume v. Steele* (Tex.) 59 S. W. 812; *Morrison v. Snow*, 26 Utah 247, 72 Pac. 924. See also *Burnes v. Burnes*, 132 Fed. 485; *Stickler v. McElroy*, 45 Pa. Super. Ct. 165.

Thus where the facts indicated not only a fraudulent concealment of the value of the stock from the plaintiff stockholder, but a carefully devised plan by which the payment of dividends was withheld and no trace of the dividend was left on the books and vouchers of the corporation, the purchase of the stock by an officer who was also acting as a trustee in proceedings to dissolve the corporation was held to be fraudulent. *Traer v. Clews*, 115 U. S. 528, 6 S. Ct. 155, 29 U. S. (L. ed.) 467.

The mere fact that a director or officer of a corporation makes a purchase of shares at a fraudulent price from a stockholder who is financially embarrassed does not render the purchase fraudulent. *Steinfeld v. Nielsen*, 12 Ariz. 403, 100 Pac. 1094.

In the absence of a conspiracy to defraud a stockholder, an officer of a corporation may purchase stock of a shareholder regardless of the motive of the purchaser in procuring the sale of the stock. *Jones v. Green*, 129 Mich. 203, 88 N. W. 1047, 95 Am. St. Rep. 433.

In *Grant v. Attrill*, 11 Fed. 469, the fact that the plaintiff was induced to sell his stock to certain directors by reason of the latter having levied an assessment on the corporate stock for the purposes of the cor-

the shares, was held to be such fraudulent concealment as to render their purchase of the stock voidable. The information they had as to the purchase price of the corporate property was held, under the circumstances, to be received in a fiduciary capacity. *Gadsden v. Bennetto*, 23 Manitoba 33, 9 Dominion L. Rep. 719, reversing 5 Dominion L. Rep. 529, 21 West. L. Rep. 886, wherein it was said: "With great deference, I do not think that the law laid down in *Percival v. Wright* [1902] 2 Ch. (Eng.) 421, and the American case of *Carpenter v. Danforth*, 52 Barb. (N. Y.) 581, should govern this case. The two defendants were members of the committee appointed to sell this land; and, after a sale was made by suppressing the facts, they buy, through X, but really for themselves, this stock. It is well to observe that they were authorized to sell the land and shares; probably it was thought that, as selling the land was really a winding-up of the company, the purchaser might require to get all the stock in order really to make title. The defendants, with X, conspired together to suppress the facts and get the shareholders' property. It would be strange if in such a flagrant case of fraud the court could not grant relief, and I see no necessity for citing authorities. The very recent case of *Allen v. Hyatt*, 8 Dominion L. Rep. 79, is quite applicable, and justifies granting relief to the plaintiff. . . . The position of the members of the committee in this case is very different from that of ordinary directors of a company as regards their fiduciary relations; and this case is quite distinguishable from *Percival v. Wright* [1902] 2 Ch. (Eng.) 421. In the present case the committee was acting outside the ordinary duties of directors; they were appointed for the purpose of securing and bringing in a proposal for disposing, not only of the land, which was the property of the company, but the shares, which were the property of the individual shareholders. On any proposal being received by them which involved the acquisition of the shares, they were bound to disclose to the shareholders, the interested parties, the nature of the proposal and the price offered. If the proposal took the form of acquiring all the company's property and leaving the shares out of account, the shareholders would be immediately interested in that proposal, because their shares would become worthless when the property was transferred, and they could only look for reimbursement to their share of the purchase money on a distribution being made. If the committee, acting under its duties to the company and the shareholders, secured a highly advantageous offer, they were bound to make full disclosure of the offer to the company and the shareholders. The members of the committee

were the confidential agents of the company and the shareholders. Their concealment of Cooper's offer, which so greatly enhanced the value of the shares, with a scheme in view to buy the shares at a low price, was a breach of the duty and a fraud upon the shareholders whose shares they acquired, by means of that concealment, at a price far less than their intrinsic value."

In *Strong v. Repide*, 213 U. S. 431, 29 S. Ct. 521, 53 U. S. (L. ed.) 860, the court said: "It is here sought to make defendant responsible for his actions, not alone and simply in his character as a director, but because, in a consideration of all the existing circumstances above detailed, it became the duty of the defendant, acting in good faith, to state the facts before making the purchase. That the defendant was a director of the corporation is but one of the facts upon which the liability is asserted, the existence of all the others in addition making such a combination as rendered it the plain duty of the defendant to speak. He was not only a director, but he owned three-fourths of the shares of its stock, and was, at the time of the purchase of the stock, administrator general of the company, with large powers, and engaged in the negotiations which finally led to the sale of the company's lands (together with all the other friar lands) to the government at a price which very greatly enhanced the value of the stock. He was the chief negotiator for the sale of all the lands, and was acting substantially as the agent of the shareholders of his company by reason of his ownership of the shares of stock in the corporation and by the acquiescence of all the other shareholders, and the negotiations were for the sale of the whole of the property of the company. By reason of such ownership and agency, and his participation as such owner and agent in the negotiations then going on, no one knew as well as he the exact condition of such negotiations. No one knew as well as he the probability of the sale of the lands to the government. No one knew as well as he the probable price that might be obtained on such sale. The lands were the only valuable asset owned by the company. Under these circumstances and before the negotiations for the sale were completed the defendant employs an agent to purchase the stock, and conceals from the plaintiff's agent his own identity and his knowledge of the state of negotiations and their probable result, with which he was familiar as the agent of the shareholders and much of which knowledge he obtained while acting as such agent and by reason thereof. The inference is inevitable that at this time he had concluded to press the negotiations for a sale of the lands to a successful conclusion, else why would he desire to purchase more shares which, if no

sale went through, were, in his opinion, worthless, because of the failure of the government to properly protect the lands in the hands of their then owners? The agent of the plaintiff was ignorant in regard to the state of the negotiations for the sale of the land, which negotiations and their probable result were a most material fact affecting the value of the shares of stock of the company, and he would not have sold them at the price he did had he known the actual state of the negotiations as to the lands and that it was the defendant who was seeking to purchase the stock. Concealing his identity when procuring the purchase of the stock, by his agent, was in itself strong evidence of fraud on the part of the defendant. Why did he not ask Jones, who occupied an adjoining office, if he would sell? But by concealing his identity he could by such means the more easily avoid any questions relative to the negotiations for the sale of the lands and their probable result, and could also avoid any actual misrepresentations on that subject, which he evidently thought were necessary in his case to constitute a fraud. He kept up the concealment as long as he could, by giving the check of a third person for the purchase money. Evidence that he did so was objected to on the ground that it could not possibly even tend to prove that the prior consent to sell had been procured by the subsequent check given in payment. That was not its purpose. Of course, the giving of the check could not have induced the prior consent, but it was proper evidence as tending to show that the concealment of identity was not a mere inadvertent omission, an omission without any fraudulent or deceitful intent, but was a studied and intentional omission to be characterized as a part of the deceitful machinations to obtain the purchase without giving any information whatever as to the state and probable result of the negotiations, to the vendor of the stock, and to in that way obtain the same at a lower price. After the purchase of the stock he continued his negotiations for the sale of the lands, and finally, he says, as administrator general of the company, under the special authority of the shareholders, and as attorney in fact he entered into the contract of sale December 21, 1903. The whole transaction gives conclusive evidence of the overwhelming influence defendant had in the course of the negotiations as owner of a majority of the stock and as agent for the other owners, and it is clear that the final consummation was in his hands at all times. If under all these facts he purchased the stock from the plaintiff, the law would indeed be impotent if the sale could not be set aside or the defendant cast in damages for his fraud."

In *Black v. Simpson*, 94 S. C. 312, 77 S. E. 1023, 46 L.R.A.(N.S.) 137, it appeared that the defendant who was the general manager of a corporation entered into negotiations with others for the sale of the franchises and property of the corporation. After ascertaining the price for which they could be sold he conceived a plan to buy up the stock from the individual stockholders, in which plan he succeeded by concealing the value of the stock and the condition of the corporate affairs and induced the stockholders to sell at a lower price by leading them to believe that the affairs of the corporation were in bad condition. It was held that the stockholders could maintain a joint action against the defendant for an accounting of all the profits he received by the acquisition and resale of the property.

The purchase of stock by an officer or director through false or fraudulent representations, or actual concealment of facts bearing on the corporation's operations with a view to induce the sale of stock at a reduced figure, will of course be set aside. *Traer v. Clews*, 115 U. S. 528, 6 S. Ct. 155, 29 U. S. (L. ed.) 467; *Price v. Union Land Co.* 187 Fed. 886, 110 C. C. A. 20; *Black v. Simpson*, 94 S. C. 312, 77 S. E. 1023, 46 L.R.A.(N.S.) 137; *Hume v. Steele* (Tex.) 59 S. W. 812; *Morrison v. Snow*, 26 Utah 247, 72 Pac. 924. See also *Burnes v. Burnes*, 132 Fed. 485; *Stickler v. McElroy*, 45 Pa. Super. Ct. 165.

Thus where the facts indicated not only a fraudulent concealment of the value of the stock from the plaintiff stockholder, but a carefully devised plan by which the payment of dividends was withheld and no trace of the dividend was left on the books and vouchers of the corporation, the purchase of the stock by an officer who was also acting as a trustee in proceedings to dissolve the corporation was held to be fraudulent. *Traer v. Clews*, 115 U. S. 528, 6 S. Ct. 155, 29 U. S. (L. ed.) 467.

The mere fact that a director or officer of a corporation makes a purchase of shares at a fraudulent price from a stockholder who is financially embarrassed does not render the purchase fraudulent. *Steinfeld v. Nielsen*, 12 Ariz. 403, 100 Pac. 1094.

In the absence of a conspiracy to defraud a stockholder, an officer of a corporation may purchase stock of a shareholder regardless of the motive of the purchaser in procuring the sale of the stock. *Jones v. Green*, 129 Mich. 203, 88 N. W. 1047, 95 Am. St. Rep. 433.

In *Grant v. Attrill*, 11 Fed. 469, the fact that the plaintiff was induced to sell his stock to certain directors by reason of the latter having levied an assessment on the corporate stock for the purposes of the cor-

puration and having threatened future assessments for the same purposes was held so to taint the sale with fraud as to render it void, the court saying: "The orator is to be supposed to know his rights. The defendant does not appear to have misrepresented or concealed any material fact relative to the corporate property or franchises. What was represented and withheld related to the policy of the management. The orator seems to have preferred to sell rather than risk the management promised; and he sold out. The course of the defendant may not have lain in the direction of the highest morality, and the whole scheme in which the orator and all were engaged may not; but this court is dealing with such rights as the law takes notice of, and not with purely moral questions. There is not enough shown as the bill is framed, to entitle the orator to rescind the contract and be restored to his stock."

Minority Rule.

In at least two jurisdictions it has been held in accord with the broad rule laid down in the reported case that a fiduciary relation does exist between a director and a stockholder with relation to the latter's shares, so that the director is bound if he proposes to purchase the shares to disclose all the information which he has obtained by virtue of his position as director which may affect the value of the stock. *Dacovich v. Canizas*, 152 Ala. 287, 44 So. 473; *Poole v. Camden* (W. Va.) 92 S. E. 454. In the case last cited it was said: "In our opinion, and according to the great weight of authority, the true conception of the relationship of director to stockholder of a corporation is that, while he is not his agent, trustee, or representative respecting his individual shares in the corporation, and having no possession of the certificates or script representing the stock, nor right or authority as such to deal in, sell, or otherwise dispose of the same, and is not any more than a third person precluded from buying or otherwise dealing with the stockholder in reference thereto, he nevertheless does sustain such fiduciary relationship to the stockholder as to impose upon him the utmost good faith respecting such dealings, and when called upon to advise him in relation thereto, and as to the value thereof, and as to the condition of the property and affairs of the corporation. He is bound at his peril to withhold no fact known to him and unknown to the stockholder affecting the value of the stock. 2 Purdy's Beach on Private Corporations, sec. 737a; 4 Thompson on Corporations (2d ed.) sec. 4031; *Oliver v. Oliver*, 118 Ga. 364, 45 S. E. 232; *Stewart v. Harris*, 69 Kan.

498, 77 Pac. 277, 66 L.R.A. 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873. And all authorities agree that, where a director misrepresents material facts peculiarly within his knowledge as a corporate officer, and the vendee relies thereon to his damage, the contract may be rescinded. *Helliwell on Stock and Stockholders*, sec. 184. In *Oliver v. Oliver*, supra, one of the leading cases cited by counsel for appellant, it is said: 'When it is admitted, as it must be, both from the very nature of his duty and from the rulings of nearly all the cases, that he is trustee for the shareholder, how is it possible in principle to draw the line and say that, while trustee for some purposes, he is not for others immediately connected therewith; that the incidents of the trust relation stop short at the very point where it is vitally important to the shareholders that they should become active?' And again: 'While not decided, it is in one case suggested that a stockholder in dealing with a director should recognize his superior opportunities for knowledge, and be warned thereby to exercise special caution. But the fiduciary relation fully warrants exactly the opposite course. Here, at least, the beneficiary may be off guard, and may rely implicitly, not only on what is said, but also on the supposition that nothing important will be left unsaid by the officer. Having previously trusted the director in the management of the company, he is not required, when selling his shares, suddenly to exhibit entire want of confidence.' It is conceded by counsel for appellant who relies upon what he calls the majority rule, denying trust relationship between director and individual stockholder, that special circumstances may create or induce that relationship, citing as instances thereof *Strong v. Repide*, 213 U. S. 419, 29 S. Ct. 521, 53 U. S. (L. ed.) 953, and *Oliver v. Oliver*, supra. Though adopting the majority rule respecting a director as the general rule, affirmed by counsel, Mr. Cook (1 Cook on Stock and Stockholders [3d ed.] sec. 320) says: 'There is no confidential relation between him and a stockholder, so far as a sale of the stock between them is concerned; and, so long as he remains silent and does not actually mislead the person with whom he deals, the transaction cannot be set aside for fraud.' In *Strong v. Repide*, supra, the point of the syllabus applicable to this discussion is: 'Even though a director may not be under the obligation of a fiduciary nature to disclose to a shareholder his knowledge affecting the value of the shares, that duty may exist in special cases, and did exist upon the facts in this case, which indicate that a director of a corporation owning friar lands in the Philippine Islands, and who controlled the action of the corporation, had so concealed his exclusive knowledge of the im-

pending sale to the government from a shareholder from whom he purchased, through an agent, shares in the corporation, that the concealment was in violation of his duty as a director to disclose such knowledge and amounted to deceit sufficient to avoid the sale; and, under such circumstances, it was immaterial whether the shareholder's agent did or did not have power to sell the stock.' Conceding the so-called majority rule to be the correct one, we think, upon the principles of the cases just referred to, recognizing the exceptions, that where a stockholder who, as in this case, is first sought by a secret agent of a director, with a proposition to buy his stock, and the stockholder goes to such director, to obtain full information respecting the value of his stock and the condition of the corporation, its plans and prospects, the reason for a recent reduction of dividends, and all other information affecting or tending to affect the value of his stock, such director cannot withhold any information within his knowledge, or in any way mislead or deceive him, or by acts, words, or conduct induce a sale of the stock to him, except upon penalty of having the sale rescinded at the option of the stockholder; that, if he undertakes to speak or become active in inducing the sale, he must speak fully, frankly and honestly, and conceal nothing to the disadvantage of the selling stockholder. Here substantially as in *Stewart v. Harris*, supra: 'Defendant suggests that plaintiff should have himself exercised more diligence in investigating the affairs of the bank; that the books of the bank were open to him. By this we are asked to say that in this case a means of knowledge is equivalent to knowledge; that a clue to the facts which, if diligently followed up, would lead to a disclosure, is equivalent to a discovery. Plaintiff could not be required to make an investigation of the books of the bank to determine its financial condition simply because it was in his power to do so. The diligence required by one to protect his interests is only such as a person of ordinary prudence would exercise under like circumstances. In a case like the one under review the trust relation existing between the parties, the superior opportunities of defendant to know of the condition of the affairs of the bank, and his actual knowledge of its affairs required no such diligence of inquiry on the part of plaintiff as is contended for by defendant. Plaintiff had the right to rely upon the belief that defendant would disclose to him the true condition of the affairs of the bank, and that he would not be called upon to investigate the condition of its affairs before he could with safety sell to the defendant his holdings of stock. It is not the intent of the law to place a restraint on the affairs of business, when

conducted fairly, honestly, and openly, nor to deprive one party to a contract of the advantage which superior judgment, greater skill, or better information may give; but it cannot give its approval to a course of dealing that will permit those occupying a trust relation to be unmindful of the trust, betray the confidence reposed, and profit by such betrayal.' We cannot further review the authorities so well collected on both sides and presented in elaborate briefs of learned counsel. Our statement of the true rule is not, we think, wholly opposed to what is regarded as the rule of the majority; it is certainly in harmony with the principles of our own decisions and is supported by reason as well as by authority; it is substantially the rule upon which the court below predicated its decree."

PEERLESS PACIFIC COMPANY

v.

BURCKHARD.

Washington Supreme Court—March 11, 1916.

90 Wash. 221; 155 Pac. 1037.

Marriage — Validity — Within Prescribed Time after Divorce.

Where a man and woman, within six months after his divorce, left Washington for Canada only to have a marriage performed, immediately returning, having had no intention to change their domicile, the marriage ceremony is void in law, and its issue illegitimate.

[See 1 Ann. Cas. 202; 79 Am. St. Rep. 368.]

Words and Phrases — "Child" as Including Illegitimate Child — Exemption Statute.

Under Rem. & Bal. Code, §§ 553, 565, providing that every person who has residing on the premises with him and under his care and maintenance his minor child is the head of a family, and that every person who has residing with him and under his care and maintenance his minor child is a householder, one living with and supporting his minor illegitimate child and its mother is not the "head of a family" or a "householder," and so not entitled to exemptions from attachment or execution, as the word "child," used in the statute without qualifying words, the context not showing any contrary meaning, does not include an illegitimate child.

[See note at end of this case.]

Statute Relating to Crime, 254.
 Statute Relating to Death by Wrongful Act, 255.
 Statute Relating to Exemption, 256.
 Statute Relating to Insurance, 256.
 Statute Relating to Naturalization of Indians, 256.
 Statute Relating to Poor, 257.
 Statute Creating Presumption of Gift, 258.
 Statute Relating to Workmen's Compensation, 258.

In Deed, 259.

In Pleading, 261.

In Insurance Policy, 261.

In Will:

General Rule, 261.

Qualification of Rule, 266.

Introductory.

It is a general rule of construction that *prima facie* the word "child" or "children," when used in a statute, will, or deed, means legitimate child or children, that is, that bastards are not within the meaning of the term "child" or "children." *Woolwich Union v. Fulham* [1906] 2 K. B. (Eng.) 240, 75 L. J. K. B. 675, *reversing* [1905] 2 K. B. 203 *affirmed* [1907] A. C. 255; *Robinson v. Georgia R. etc. Co.* 117 Ga. 168, 43 S. E. 452, 97 Am. St. Rep. 156, 60 L.R.A. 555; *Blacklaws v. Milne*, 82 Ill. 505, 25 Am. Rep. 339; *Orthwein v. Thomas*, 127 Ill. 554, 21 N. E. 430, 11 Am. St. Rep. 159, 11 L.R.A. 434; *McDonald v. Pittsburgh, etc. R. Co.* 144 Ind. 459, 43 N. E. 447, 55 Am. St. Rep. 185, 32 L.R.A. 309; *Jackson v. Hocke*, 171 Ind. 371, 84 N. E. 830; *Truelove v. Truelove*, 172 Ind. 441, 86 N. E. 1018, 88 N. E. 516, 139 Am. St. Rep. 404, 27 L.R.A. (N.S.) 220; *Bell v. Terry, etc. Co.* 177 App. Div. 123, 163 N. Y. S. 733; *Walker v. Roberson*, 28 Okla. 894, 97 Pac. 609. See also *Wheatcraft v. Wheatcraft*, 55 Ind. App. 283, 102 N. E. 42; *Brisbin v. Huntington*, 128 Ia. 106, 5 Ann. Cas. 931, 103 N. W. 144.

"It is well settled that at common law the words child and children meant only legitimate child and children." *Floyd v. Floyd*, 97 Ga. 124, 24 S. E. 451. See to the same effect *Kent v. Barker*, 2 Gray (Mass.) 535.

"In every known system of law the word 'child' means child born in lawful wedlock." *Landry v. American Creosote Works*, 119 La. 231, 43 So. 1016, 11 L.R.A. (N.S.) 387.

"The word 'child' in the absence of any facts or circumstances indicating a different interpretation, carries with it the meaning of legitimate offspring." *Tillery v. Tillery*, 155 Ala. 495, 46 So. 582.

"It is perfectly clear that the word 'children' per se imports in law legitimate chil-

dren." *Thompson v. McDonald*, 22 N. C. 463.

The general rule is that the expression "natural children" refers exclusively to children born out of lawful wedlock, though it is occasionally used in the sense of legitimate children. *Marshall v. Wabash R. Co.* 46 Fed. 269; *Lynch v. Knoop*, 118 La. 611, 10 Ann. Cas. 807, 43 So. 252, 118 Am. St. Rep. 391, 8 L.R.A. (N.S.) 480. See also *Cecil v. Com.* 140 Ky. 717, Ann. Cas. 1912B 501, 131 S. W. 781. *Compare Marshall v. Wabash R. Co.* 120 Mo. 275, 25 S. W. 179.

In Statute.

GENERALLY.

It is well settled that when the word "child" or "children" is used in a statute, without qualifying words, it means legitimate child or legitimate children, and does not include an illegitimate child or illegitimate children, unless the context broadens its meaning, or some further statutory provision clearly manifests an intention to include them.

England.—*Dickinson v. North Eastern R. Co.* 2 H. & C. 735, 33 L. J. Exch. 91, 9 L. T. N. S. 299, 12 W. R. 52, 159 Eng. Rep. (Reprint) 304; *Reg. v. Maude*, 2 Dowl. N. S. 58, 6 Jur. 646.

Canada.—*Gibson v. Midland R. Co.* 2 Ont. 658; *Hargraft v. Keegan*, 10 Ont. 272.

Alabama.—*Williams v. Witherspoon*, 171 Ala. 559, 55 So. 132.

Delaware.—*State v. Miller*, 3 Penn. 518, 52 Atl. 262.

Georgia.—*Floyd v. Floyd*, 97 Ga. 124, 24 S. E. 451; *Robinson v. Georgia R. etc. Co.* 117 Ga. 168, 43 S. E. 452, 97 Am. St. Rep. 156, 60 L.R.A. 555; *Rhodes v. Williams*, 143 Ga. 342, 85 S. E. 105; *Woodard v. State*, 18 Ga. App. 59, 88 S. E. 825.

Illinois.—*Blacklaws v. Milne*, 82 Ill. 505, 25 Am. Rep. 339; *Orthwein v. Thomas*, 127 Ill. 554, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L.R.A. 434.

Indiana.—*Jackson v. Hocke*, 171 Ind. 371, 84 N. E. 830; *Truelove v. Truelove*, 172 Ind. 441, 86 N. E. 1018, 88 N. E. 516, 139 Am. St. Rep. 404, 27 L.R.A. (N.S.) 220.

Iowa.—See *Brisbin v. Huntington*, 128 Ia. 106, 5 Ann. Cas. 931, 103 N. W. 144.

Louisiana.—*Lynch v. Knoop*, 118 La. 611, 10 Ann. Cas. 807, 43 So. 252, 118 Am. St. Rep. 391, 8 L.R.A. (N.S.) 480; *Landry v. American Creosote Works*, 119 La. 231, 43 So. 1016, 11 L.R.A. (N.S.) 387.

Massachusetts.—*Coolley v. Dewey*, 4 Pick. 93, 16 Am. Dec. 326; *Kent v. Barker*, 2 Gray 535; *Lavigne v. Ligue des Patriotes*, 178 Mass. 25, 59 N. E. 674, 86 Am. St. Rep. 460, 54 L.R.A. 814.

Mississippi.—Porter v. Porter, 7 How. 106, 40 Am. Dec. 55; Runt v. Illinois Cent. R. Co. 88 Miss. 575, 41 So. 1.

New York.—Bell v. Terry, etc. Co. 177 App. Div. 123, 163 N. Y. S. 738.

Oklahoma.—Walker v. Roberson, 21 Okla. 894, 97 Pac. 609.

Pennsylvania.—Forest City v. Damascus, 176 Pa. St. 116, 34 Atl. 351; Wettach v. Horn, 201 Pa. St. 201, 50 Atl. 1001; Buffalo Tp. v. Lewisburg, 1 Pa. Co. Ct. 121.

South Carolina.—McDonald v. Southern Ry. 71 S. C. 352, 51 S. E. 138, 110 Am. St. Rep. 576, 2 L.R.A.(N.S.) 640.

Texas.—Hayworth v. Williams, 102 Tex. 308, 116 S. W. 43, 132 Am. St. Rep. 879.

Washington.—See the reported case.

It is, of course, true that the foregoing is only prima facie the meaning to be given to the word, and that a wider meaning may, in the case of some statutes, be given to it, so as to include an illegitimate child or illegitimate children, where that meaning is more consonant with the object of the statute. Woolwich Union v. Fulham [1906] 2 K. B. (Eng.) 240, 75 L. J. K. B. 675, reversing [1905] 2 K. B. 203, affirmed [1907] A. C. 255.

The question whether the term "child," as used in a statute, includes an adopted child, is discussed in the note to Ryan v. Foreman, Ann. Cas. 1915B 780. And the construction to be given the word "child," as used in a statute providing for the adoption of children, is considered in the note to Sheffield v. Franklin, 15 Ann. Cas. 90.

STATUTE OF DESCENT AND DISTRIBUTION.

At common law, a child born out of wedlock was said to be filius nullius, and to have no inheritable blood. See the cases cited throughout this note. These expressions were of course figurative, and meant no more than that certain legal disabilities were attached to his status, one of which was his lack of capacity to inherit from his putative father or his mother or his parents' kindred.

So it has been held that the word "child" or "children," as used in statutes of descent and distribution, is to be construed in what is termed its legal or technical sense, as comprehending legitimate children only. Williams v. Witherspoon, 171 Ala. 559, 55 So. 132; Rhodes v. Williams, 143 Ga. 342, 85 S. E. 105; Blacklaws v. Milne, 82 Ill. 505, 25 Am. Rep. 339; Orthwein v. Thomas, 127 Ill. 554, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L.R.A. 434; Jackson v. Hocke, 171 Ind. 371, 84 N. E. 830; Truelove v. Truelove, 172 Ind. 441, 86 N. E. 1018, 88 N. E. 516, 139 Am. St. Rep. 407, 27 L.R.A.(N.S.) 220; Cooley v. Dewey, 4 Pick. (Mass.) 93, 16 Am. Dec. 326; Porter v. Porter, 7 How. (Miss.) 106, 40

Am. Dec. 55. Compare Rogers v. Weller, 5 Biss. 166, 20 Fed. Cas. No. 12,022 (construing Illinois statute).

The word "children," as used in the general statute of descents and distribution of Alabama (Code 1907, § 3754), means legitimate children, having heritable blood. Williams v. Witherspoon, 171 Ala. 559, 55 So. 132.

The word "child" or "children," as used in the Indiana statute of descent (Burns 1908, §§ 2992, 2993; R. S. 1881, §§ 2469, 2470), must be held to mean legitimate child or children, unless the language of the statute clearly shows that it is employed in a different sense. Truelove v. Truelove, 172 Ind. 441, 86 N. E. 1018, 88 N. E. 516, 139 Am. St. Rep. 404, 27 L.R.A.(N.S.) 220.

Under the Illinois statute of descents, by which the property of an intestate is made to descend to and among the children and their descendants, it was argued in Blacklaws v. Milne, 82 Ill. 505, 25 Am. Rep. 339, that there was nothing in the statute restricting the customary meaning of the word "children" and that the positive law of the statute should prevail over the common-law rule; and hence that it included an illegitimate child. But it was held that a later section of the statute providing that the illegitimate child or children of any single or unmarried woman should be deemed capable in law to inherit the estate of their deceased mother, was an implied recognition of the existence of the rule of the common law and an abrogation of it to a certain extent only.

However, it has been held in other jurisdictions that the word "child" or "children," when found in statutes of succession, is not to be confined to its strict common-law significance, but includes in its meaning illegitimate as well as legitimate children—in fact, all such children as are by law capable of inheriting. In re Goodman, 17 Ch. D. (Eng.) 266, reversing 14 Ch. D. 619; In re Wardell, 57 Cal. 484; Wolf v. Gall, 32 Cal. App. 286, 163 Pac. 346-350; Heath v. White, 5 Conn. 228; Dickinson's Appeal, 42 Conn. 491, 19 Am. Rep. 553; Drain v. Violet, 2 Bush (Ky.) 155; Power v. Hafley, 85 Ky. 671, 4 S. W. 683, 9 Ky. L. Rep. 369; Barron v. Zimmerman, 117 Md. 296, Ann. Cas. 1914D 574, 83 Atl. 258. See also Eaton v. Eaton, 88 Conn. 269, 91 Atl. 191. Thus, in the case of In re Wardell, supra, the court said: "It is well settled that at common law the word 'children' means those born in lawful wedlock; and such, indeed, has been its legal meaning in every known system of law. Those only were considered as legitimate whose blood was traceable to the legal marriage of a common pair. A person not born in lawful wedlock was not regarded as a member of the group known in law as the family; and

consequently was not entitled to the privileges of members of the family, or to any rights of inheritance or succession. Yet every person, whether born in lawful wedlock or not, was recognized as a member of the community, and his relations to the community, and to each member of it, and in respect of the things appertaining to it, were matters which were regulated by law. Indeed, the object of all law is to ascertain and settle the status of individuals in the social system, and to regulate the rights and duties of which each is the center. In relation to children, the common law was a rule of succession to an estate. No one could succeed to an estate in land who was not born in lawful wedlock. . . . If courts were now to restrict the word to its common-law meaning, all children born of an unlawful marriage, all children by adoption or acknowledgment of their father, and all children whose parents intermarried subsequent to their birth, would be excluded from rights of inheritance or succession. But by statute law, the offspring of marriages null in law (§ 84, Civ. Code), children born out of lawful wedlock whose parents subsequently intermarried (§ 215, id.), and children by acknowledgment or adoption of their father (§§ 224, 227, 228, and 230, id.), are all legitimate. These, although incapacitated at common law from succeeding to any rights of their father, are regarded for all purposes as legitimate from the time of their birth. Between them and the legitimate offspring of the same parents the law has established cognatic relations, and either is as capable as the other of exercising inheritable rights. Hence the term 'children,' as used in § 1307 of the law of succession, must relate to status, not origin—to the capacity to inherit, not the legality of the relations which may have existed between those of whom they may have been begotten. The word has, therefore, a statutory and not a common-law meaning; and its meaning includes all children upon whom has been conferred by law the capacity of inheritance."

In *Eaton v. Eaton*, 88 Conn. 269, 91 Atl. 191, it was said obiter: "The word 'children' in our statute of distributions is interpreted to embrace a mother's illegitimate as well as legitimate children, for the simple reason that the law regards the former as well as the latter as her children. In a word, the natural corollary of the English rule that the word 'child' or 'children,' when used in a statute, is to be restrained to signify legitimates only, is done away with, as it logically must be. That corollary is the logical consequence of the proposition that the illegitimate is the child of nobody. When that proposition is transposed into ours, that an illegitimate is the child of its mother, then

all logical foundation for the corollary that the word 'child' or 'children' in statute, will, or deed, is to be interpreted as limited to legitimates, disappears, and the logical corollary becomes the reverse, so that presumptively the word 'child' or 'children' in a will embraces offspring legitimate and illegitimate."

The word "children" in the *English* statute of distributions (22 & 23 Car. 2, c. 10, §§ 6, 7) includes not only legal children according to the English law, viz., children born in lawful wedlock, as distinguished from children born before marriage who are not legitimate according to the English law, but children born in a foreign country and legitimated under the law of that country by the subsequent marriage of their parents, and such children take by representation under that statute as children of their father. In *re Goodman*, 17 Ch. D. 266, reversing 14 Ch. D. 619.

The word "children" in the *Kentucky* statute (Gen. St. c. 31, § 1, subsec. 1 is not confined to children born in lawful wedlock, but may include in its meaning children born in lawful wedlock, children made legitimate by the marriage of their parents, children by adoption, and children who have a right to inherit, either by a general or special law. *Power v. Hafley*, 85 Ky. 671, 4 S. W. 683, 9 Ky. L. Rep. 369.

In *Barron v. Zimmerman*, 117 Md. 296, 83 Atl. 258, Ann. Cas. 1914D 574, the question presented was whether, under a system of laws by which an illegitimate child was invested with the full qualifications of legitimacy with reference to the inheritance of his mother's estate, he was within the purview of a constituent provision that the estate which the deceased mother would have inherited should pass to her "child" or "children." The court held that this question should be answered in the affirmative, saying: "It would certainly seem to be a reasonable construction of statutory provisions which are codified together as parts of the same general plan of descent and distribution to hold that one who is placed in the position of a lawful begotten child for the purpose of inheriting from his mother should be regarded as a 'child' of the mother within the intent of the law, for the purpose of succeeding to the estate which she would have inherited if she had survived. It has been decided that so far as the inheritance of the mother's estate is concerned her children all stand upon an equal footing without regard to their legitimacy. *Earl v. Dawes*, 3 Md. Ch. 231. In the case just cited the Chancellor observed that by the statute illegitimates are placed, as regards their mother's estate, 'in the condition of legitimate children in all respects and to every intent.' But if we were to deny the right here asserted by the

90 Wash: 221.

appellant, it would have to be upon the ground that although he is treated by the 'Inheritance' article of the Code as if he were a legitimate child of his mother for the purpose of being her heir at law, he is to be refused recognition as her 'child' under the same article for the purpose of representing her in the course of descent. If the several sections to which we have referred had been included in the same original enactment, it would probably not be seriously contended that an illegitimate child who was made capable by the statute of inheriting from his mother should not be regarded as her 'child,' under that unqualified description in the act, with a view to participation in the estate which she would have inherited had she lived.

... We must hold that one who, being a child in fact, is made a child in law with respect to inheritance from his mother, cannot be denied recognition as her 'child' under section 27 for the purpose of inheriting property to which she, if she had survived, would have been entitled. This interpretation of the law does not disregard, but is consistent with the rule, applied by this court in an early case, that legislation modifying the common law disqualifications of illegitimate children should be strictly construed."

So, the right of inheritance of legitimate and illegitimate children alike being a creature of law, when the law provides means for making legitimate a child born out of wedlock, it changes the status of that child, and in the absence of special provision to the contrary, he thenceforth comes within the provisions of the laws relating to legitimate children. Thereafter, a child so legitimated is included in the designation "child" or "children" when these words refer to a child or children legitimately born; and he is no longer included in the designation "illegitimate child," when that term is used in a statute, unless it is obvious that such words are intended by the legislature to include one who, though now legitimate, was formerly illegitimate. *Wolf v. Gall*, 32 Cal. App. 286, 163 Pac. 346, 350, wherein the court said: "We think these propositions are self-evident. Of what avail is it to have legitimated a child if he still labors under the disabilities of his former condition? If he has not acquired the rights by law given to, and become subject to the duties imposed upon, his new condition, there has been no change at all; for it is obvious that the fact that he was born out of wedlock has not been changed and never can be. If any stigma attaches to that condition it still remains, and all that the law can do—and all it seeks to do—is to remove the disabilities attached to the condition. We freely grant that the legislature can limit the extent to which the disabilities of an illegitimate child are removed; that

although it has granted legitimacy in general terms, it can still perpetuate former disabilities or create new ones; so that, in a statute granting rights of succession to the property of intestates, a discrimination may still be made against persons legitimated by statute."

Likewise in *Drain v. Violet*, 2 Bush (Ky.) 155, the word "children" as used in the Kentucky statute of descent and distribution (c. 30; 1 Stant. Rev. Stat. 419) was held not necessarily to be confined to children born in lawful wedlock, but to include all such children as were by law capable of inheriting, and hence was held to include an illegitimate son who, by a special legislative enactment procured by the father, had been rendered capable of inheriting from the latter.

STATUTE OF PRETERMISSION.

Under the *California* statute (Civ. Code, § 1307) providing that "when any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate," it has been held that the word "children" included an illegitimate daughter of a testatrix who was an heir of her mother by statute, and whose name had been omitted from the will and for whom no provision therein had been made, it not appearing that the omission was intentional. *In re Wardell*, 57 Cal. 484.

Under a *Washington* statute of similar character (Bal. Code, § 4601 [1 Hill's Code, § 1465]), where it appeared that an illegitimate son was only remembered in the will as the child of Martha Kornetsky, being mentioned as "Otto," instead of his real name, Arthur Kornetsky, and the legacy was to him as the child of Martha Kornetsky, and in no other capacity, it was held that as there was no other child, and as it was evident that this child was in the mind of the testator, the statute was satisfied. *In re Gorkow*, 20 Wash. 563, 56 Pac. 385.

But under the *Massachusetts* statute to the same effect, it has been held that the word "children" therein did not include illegitimate children as well as legitimate. *Kent v. Barker*, 2 Gray (Mass.) 535. The court said: "The question in this case is, what is the meaning of the word 'children' in Rev. Sta. c. 62, § 21, and whether it includes illegitimate children, as well as legitimate. It is well settled, indeed it is conceded, that at common law the words 'child' and 'children' mean only legitimate child and children. Illegitimate children are the children of nobody, and have no rights of inheritance. . . .

Have the words acquired any other meaning in the legislation of the commonwealth? We think they have not. . . . There is then no provision in the statutes, that an illegitimate child shall have any share of a testate estate, unless it be found in Rev. Sta. c. 62, § 21. And it can be found here only by enlarging the legal meaning of the words 'children' and 'child' so as to include illegitimate children, giving to the word 'children' a meaning that did not exist in the common law, and confounding what the legislature have been careful to distinguish. There is another suggestion that seems quite conclusive. The provision of Rev. Sta. c. 62, § 21, applies to the omission by a testator to provide in his will for any of his children or 'the issue of any deceased child.' Now the second section of Rev. Sta. c. 61, expressly negatives the right of an illegitimate child to claim by representation. *Curtis v. Hewins*, 11 Metc. (Mass.) 294. If therefore the construction claimed by the demandants were to be adopted, the issue of a deceased illegitimate child must be held to take a share of the estate where there is an omission to provide for them by will, although they would not take if the ancestor had died without a will; or else the word 'children' must be held to include legitimate and illegitimate children, and the word 'child,' immediately following, be limited to a legitimate child. The result is this: As at the common law illegitimate children have no rights of inheritance or descent, whatever they take is by force of the statutes. The statutes have provided for cases of inheritance, for the descent of intestate estates. They have made no provision for cases where there is an omission by a testator to provide in his will for an illegitimate child. Whether the same reasons apply to the case of an omission of an illegitimate child, and the same results should follow such omission, is a question for the legislature, and not for the court."

STATUTE AVOIDING LAPSING OF LEGACIES.

As used in the *Pennsylvania* acts (P. L. 250, Act of April 8, 1833; P. L. 565, Act of May 6, 1844), having for their purpose the avoidance of the lapsing of legacies, the word "child" does not include natural or illegitimate children. *Wettach v. Horn*, 201 Pa. St. 201, 50 Atl. 1001.

In construing the *Ontario* statute (R. S. c. 106, § 35) of the same purport, a like construction has been placed on the word "child" as used in that statute. *Hargraff v. Keegan*, 10 Ont. 272.

STATUTE RELATING TO ADMINISTRATION OF DECEDENTS' ESTATES.

The word "children" in the *Texas* statute (Sayles' Tex. St. art. 2046) providing for

the setting apart of the homestead by the probate court "for the use and benefit of the widow and minor children and unmarried daughters remaining with the family of the deceased," include both the children of the surviving widow and those of a former wife, but they must be the legitimate children of the deceased. *Hayworth v. Williams*, 102 Tex. 308, 116 S. W. 43, 132 Am. St. Rep. 879.

STATUTE RELATING TO CRIME.

It has been held that the term "child," as used in the accusation in a prosecution for the abandonment of a child, where the accusation followed the language of the statute (Pen. Code, 1910, § 116), imported a legitimate child. *Woodard v. State*, 18 Ga. App. 59, 88 S. E. 825.

Under the *English* statute (Geo. IV, c. 83, § 4) providing that among certain persons to be deemed rogues and vagabonds were "every person running away and leaving his wife or her child or children chargeable to the parish," it has been held that the word "child" did not include an illegitimate child, so that a single woman could not be convicted of running away and leaving her bastard child chargeable to the parish. *Reg. v. Maude*, 2 Dowl. N. S. (Eng.) 58, 6 Jur. 646.

In a prosecution for incest, under a statute (Ky. St. § 1219) providing that "whoever shall carnally know his or her father, mother, child, sister or brother, knowing such relation to exist, shall be guilty of felony," etc., the word "child" includes a "natural" child, as well as a "lawful" child. *Cecil v. Com.* 140 Ky. 717, Ann. Cas. 1912B 501, 131 S. W. 781, wherein the court said: "This statute was passed for the good of society, the elevation and betterment of mankind. It cannot be that it was intended to punish illicit intercourse between father and daughter if the daughter was born in lawful wedlock, and not punish such intercourse where the daughter was born out of lawful wedlock. In each case the relationship is the same, and the statute was intended to prevent sexual intercourse between persons occupying this relationship. If the child was begotten by the man, she was his daughter none the less because he failed to marry her mother. His blood courses through her veins just the same as though he had married her mother, and it is because of this blood relationship that statutes have been enacted in most every civilized country prohibiting the marriage of parent and child and visiting upon them severe punishment for carnally knowing each other. Incest was not an offense at common law, but the ecclesiastical courts punished those found guilty of this practice. It was regarded as an offense against good morals, and for this reason was punished by the ecclesiastical courts. But, aside from any moral consider-

ation, such a practice is shocking to our sense of decency, propriety and good citizenship, and any parent found guilty of it should be punished as the law directs, whether the child is a legal or a natural child. This was the conclusion reached by the trial judge and the construction which he placed upon the meaning of the word 'child' in the statute, and hence he refused to give an instruction authorizing an acquittal unless the proof showed that the child, Jose Cecil, was born in lawful wedlock or her parents married each other after her birth."

STATUTE RELATING TO DEATH BY WRONGFUL ACT.

In the majority of the jurisdictions, the rule is that the word "child," as used in the statutes giving a right of action for damages for the death by wrongful act of a child, means a legitimate child only, and hence neither the mother nor the father is entitled to maintain such an action for the death of an illegitimate child. This result is reached by a strict construction of statutes of that nature, which are in derogation of the common law, the courts holding that these statutes, giving remedies which did not exist at common law, cannot be helped by reference to statutes of descent, so as to take in the kin of bastards. *Dickinson v. North Eastern R. Co.* 2 H. & C. 735, 33 L. J. Exch. 91, 9 L. T. N. S. 299, 12 W. R. 52, 159 Eng. Rep. (Reprint) 304; *Clarke v. Carfin Coal Co.* [1891] App. Cas. (Eng.) 412; *Gibson v. Midland R. Co.* 2 Ont. 658; *Marshall v. Wabash R. Co.* 46 Fed. 269 (action under Missouri statute); *Robinson v. Georgia R. etc. Co.* 117 Ga. 168, 43 S. E. 452, 97 Am. St. Rep. 156, 60 L.R.A. 555; *McDonald v. Pittsburgh, etc. R. Co.* 144 Ind. 459, 43 N. E. 447, 55 Am. St. Rep. 185, 32 L.R.A. 309; *Lynch v. Knoop*, 118 La. 611, 10 Ann. Cas. 807, 43 So. 252, 118 Am. St. Rep. 391, 8 L.R.A.(N.S.) 480; *Landry v. American Creosote Works*, 119 La. 231, 43 So. 1016, 11 L.R.A.(N.S.) 387; *Runt v. Illinois Cent. R. Co.* 88 Miss. 575, 41 So. 1 (action under Louisiana statute); *Harkins v. Philadelphia, etc. R. Co.* 15 Phila. (Pa.) 286, 39 Leg. Int. 4; *McDonald v. Southern Ry.* 71 S. C. 352, 51 S. E. 138, 110 Am. St. Rep. 576, 2 L.R.A.(N.S.) 640. Compare *Marshall v. Wabash R. Co.* 120 Mo. 275, 25 S. W. 179; *Galveston, etc. R. Co. v. Walker*, 48 Tex. Civ. App. 52, 106 S. W. 705.

The word "child" in the Act of Parliament (9 & 10 Vict. c. 93, § 2) giving a right of action for the death by wrongful act of a parent, means legitimate child only. *Dickinson v. North Eastern R. Co.* 2 H. & C. 735, 33 L. J. Exch. 91, 9 L. T. N. S. 299, 12 W. R. 52, 159 Eng. Rep. (Reprint) 304.

As used in the *Indiana* statute (R. S. 1894, § 267; R. S. 1881, § 266) providing that a

father may maintain an action for the injury or death of a child, the word "child" means a legitimate child only. *McDonald v. Pittsburgh, etc. R. Co.* 144 Ind. 459, 43 N. E. 447, 55 Am. St. Rep. 185, 32 L.R.A. 309.

The word "child," as used in the *Georgia* statute (Civ. Code, § 3828) giving a right of action for death by wrongful or negligent act, means a legitimate child, and hence the mother of an illegitimate child cannot recover for his death. *Robinson v. Georgia R. etc. Co.* 117 Ga. 168, 43 S. E. 452, 97 Am. St. Rep. 156, 60 L.R.A. 555.

In *Harkins v. Philadelphia, etc. R. Co.* 15 Phila. (Pa.) 286, 39 Leg. Int. 4, it was held that the mother of an illegitimate child was not within the words or meaning of the *Pennsylvania* statute (Purd. 1094, Act of April 26, 1855) providing that the persons entitled to recover damages for any injury causing death should be the "husband, widow, children or parents of the deceased, and no other relative."

As used in the *Louisiana* statute (Act No. 71, 1884, Merrick Rev. Civ. Code 1900, art. 2315, p. 94) providing for the survival of a right of action for damages for death due to personal injuries to the surviving father or mother, the word "child" or "children" means a legitimate child and not a natural or illegitimate child, and hence the right of action does not survive to the mother of a natural child. *Lynch v. Knoop*, 118 La. 611, 10 Ann. Cas. 807, 118 Am. St. Rep. 391, 8 L.R.A.(N.S.) 480; *Runt v. Illinois Cent. R. Co.* 88 Miss. 575, 41 So. 1; or to the natural father and mother of such a son. *Landry v. American Creosote Works*, 119 La. 231, 43 So. 1016, 11 L.R.A.(N.S.) 387. In *Lynch v. Knoop*, supra, the court said: "The right of action, under Act 71, p. 94, of 1884, survives in the surviving mother and father. 'The right of this action shall survive in case of death in favor of the minor children.' Id. This does not include the natural mother and the natural father. The articles of the Civil Code regarding the mother of legitimate children all refer to a lawful mother. The article of the code relating to natural mothers and natural fathers is separate from those relating to the lawful mother and father. The two, the mother and the natural mother, are treated in the code differently or from a different point of view; one from the point of view that she has a natural right, the other that it is a statutory right extending no further than the terms of the statute. The following are some of the marked differences between the natural child and the legitimate child. The natural heir is to be recognized and to be placed in possession under special provisions of the law. He is a stranger to the succession from which he inherits until permission is obtained to exercise the

right of an heir. It is different with the legitimate heir. Originally the right to damages for personal injuries was not heritable. The statute has to some extent made it heritable, but it does not express the intention to include the natural mother as a person in whom the right survives, and without some expressed declaration in that respect it cannot be considered as secured under the terms of the statute. The terms of the act cannot be extended so as to include a natural mother or a natural offspring. Legitimate relationship was the legislative intent. The right does not survive in the mother further than it does in the natural child. Civ. Code, art. 3556, No. 8. Natural children, though recognized, are not children properly so called. The same is a logical conclusion as relates to the mother of the natural child. While she is the mother properly so called, she inherits from the natural child under the special provisions of our code. Articles 256, 261, 212. But this can afford no comfort to the plaintiff, for the right of inheritance is special and embraces only such rights as are in themselves heritable. The statute did not enlarge the rights of a natural mother or the mother of a natural child, and did not add to their number or extent. It only provided for the survival of certain designated rights, and as thus designated it includes the mother, and not the mother of the natural child."

However, in *Texas*, where the rule that a statute in derogation of the common law is to be construed strictly, has been abolished, it has been held that under the statute giving a right of action for the death of a mother to the children of such person, the word "children" embraces illegitimate children. *Galveston, etc. R. Co. v. Walker*, 48 Tex. Civ. App. 52, 106 S. W. 705, wherein the court said: "There can be no doubt that in this state the mother of such a child is legally entitled to its custody, its services and bound for its support. Under these circumstances it is difficult to see, in fact we fail to see, wherein the status of such a child, in reference to its mother, is in law any different from that of a legitimate child. In other words, the law regards it as her child. Having clothed it with the relationship and attributes of a child, it is believed that the legislature intended by the use of the word 'children' in the statute, to include illegitimate children as parties entitled to maintain the action in so far as they claim with reference to their mother."

Under the *Missouri* statute (Rev. St. 1889, § 4425) providing that a tortfeasor shall forfeit and pay, whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent described in the statute, the

sum of \$5,000 for every person or passenger so dying, which sum may be sued for and recovered and giving a right of action to the parents, or survivor, "if such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born child," it was held that the word "natural" was used in the sense of legitimate, though generally the expression "natural children" referred exclusively to children born out of lawful wedlock. Hence it was held that a mother could maintain an action under the statute for the death of an illegitimate son. *Marshall v. Wabash R. Co.* 120 Mo. 275, 25 S. W. 179. But compare *Marshall v. Wabash R. Co.* 46 Fed. 269, an action based on the same state of facts.

The note to *Lynch v. Knoop*, 10 Ann. Cas. 807, presents the cases dealing with the right in general of a parent to recover for the death of an illegitimate child.

STATUTE RELATING TO EXEMPTION.

The *Washington* statutes relating to the exemption from attachment or execution of the head of a family or a householder, define the head of a family as "every person who has residing on the premises with him or her, and under his or her care and maintenance, . . . his or her minor child" (Rem. & Bal. Code, § 553 [P. C. 220, § 49]); and a householder as "every person who has residing with him or her, and under his or her care and maintenance, . . . his or her minor child." (Rem. & Bal. Code, § 563 [P. C. 81, § 877]). Thereunder, in the reported case it is held that the word "child," as used in those statutes, does not include an illegitimate child, and hence that one living with and maintaining an illegitimate child is not, by reason of that fact, the head of a family and therefore exempt.

STATUTE RELATING TO INSURANCE.

In the *Massachusetts* statute (St. 1888, c. 249, § 8) limiting the beneficiaries of the mortuary fund of a fraternal beneficiary association "to the husband, wife, children, relatives of, or persons dependent upon, such member," the word "children" means legitimate children, and does not include an illegitimate daughter of a member who did not contribute to her support. *Lavigne v. Ligue des Patriotes*, 178 Mass. 25, 59 N. E. 674, 86 Am. St. Rep. 460, 54 L.R.A. 814.

STATUTE RELATING TO NATURALIZATION OF INDIANS.

By the *Curtis* act, an act relating to the naturalization of the Indians in Indian Territory (Act June 28, 1898, c. 517, 30 Stat. L. 495), Congress provided that as soon as the

roll of citizenship of any one of the Five Civilized Tribes of Indians should have been completed as required by law, and a survey of the land of that nation or tribe made, the commission should proceed to allot the exclusive use and occupancy of the surface of the land of that tribe among the citizens thereof, giving each a fair and equal share thereof. By section 16 it was provided that, when any citizen should be in possession of only such an amount of agricultural or grazing lands as would be his just and reasonable share of the lands of his nation or tribe, and that to which his wife and minor children were entitled, he might continue to use the same and receive the rents therefrom until allotment had been made to him. In *Walker v. Roberson*, 21 Okla. 894, 97 Pac. 609, it was held that the language of the foregoing section, authorizing the father to hold and receive the rents from land to which his children were entitled as their allotments until allotments were made to him, did not include the right to hold and receive rents for the prospective allotment of an illegitimate son. In other words, it was held that the words "minor children," in that section of the act, did not include minor illegitimate children. The court said: "The language of this section [the next succeeding section of the same act] clearly indicates what children are referred to in this and the preceding sections. By using the language, 'that a person should not hold land and property in excess of his share and that of his family aforesaid,' it was clearly intended that a citizen should be permitted to hold land sufficient for the allotments of himself, wife, and minor children, who were members of his family. An illegitimate son, that does not live with the putative father, and to whose mother the putative father has never been married, is not a member of such man's family, and he is not one of the children referred to by said section, for whom the father could hold land and receive rents therefrom until allotment. To have provided that the father who had never legitimated or adopted his illegitimate child, and of whose family the illegitimate child had never become a member, should have the right to hold the land of such child and receive the rents therefrom, would have worked a great injustice. The father who does not support his illegitimate child, and who has never made such a child a member of his family by legitimation has no right in law to receive the rents and profits from the property of such child; but the effect of this act, if the word 'children,' as used therein, includes an illegitimate child, would have been to authorize the putative father to hold the lands of the illegitimate child and receive the rents therefrom, although he contributed nothing whatever to

the support of such child. . . . While the word 'child' or 'children,' in the cases cited, is not used in any of them in the exact relation that it is used in the statute under consideration in this case, the cases cited cover various subjects, and clearly show the rule to be that the word 'children,' without qualifying expressions in a statute, deed of conveyance, or a will, does not include an illegitimate child."

STATUTE RELATING TO POOR.

In construing poor laws, the courts have usually held that the word "child" or "children," as used in those statutes, meant a legitimate child or children only. *Woolwich Union v. Fulham* [1906] 2 K. B. (Eng.) 240, 75 L. J. K. B. 675, *reversing* [1905] 2 K. B. 203, *affirmed* [1907] A. C. 255; *Forest City v. Damascus*, 176 Pa. St. 116, 34 Atl. 351; *Buffalo Tp. v. Lewisburg*, 1 Pa. Co. Ct. 121. Compare *Northwich Union v. St. Pancras Union*, 22 Q. B. D. (Eng.) 164, 58 L. J. M. C. 73.

A *Pennsylvania* statute (P. L. 542; Act of June 13, 1836, § 9, cl. 5) provides that "a legal settlement may be gained in any district . . . by any unmarried person, not having a child, who shall be lawfully bound as a servant, within such district, and shall continue in such service during one whole year." Thereunder it has been held that the word "child" in the clause quoted, meant only a legitimate child, and that an unmarried female, having a bastard child, might gain a settlement by hiring and service for one whole year. *Forest City v. Damascus*, 176 Pa. St. 116, 34 Atl. 351; *Buffalo Tp. v. Lewisburg*, 1 Pa. Co. Ct. 121.

The word "children" as used in the proviso to section 1 of the English Poor Removal Act of 1846 (9 & 10 Vict. c. 66), prescribing that the status of children as to removability or irremovability is to be derived from and to follow that of their parent, does not include illegitimate children. *Woolwich Union v. Fulham* [1906] 2 K. B. (Eng.) 240, 75 L. J. K. B. 675, *reversing* [1905] 2 K. B. 203, *affirmed* [1907] A. C. 255, wherein *Vaughan Williams, L. J.*, said: "As I have said, the appellant's counsel . . . argued that the proviso to the section did not apply in the case of an illegitimate child. He relied for the purpose of that argument upon the technical rule of law that the word 'child' or 'children' means a legitimate child or legitimate children, and that meaning must prima facie be given to the word whenever it occurs in a statute. It is of course true that that is only prima facie the meaning to be given to the word, and that a wider meaning may, in the case of some statutes, be given to it, so as to include an illegitimate

child or illegitimate children, where that meaning is more consonant with the object of the statute. Although that is so, I cannot say that, in the case of the enactment in question, I find any object plainly aimed at which would make it more consonant with the scope of the act that we should depart from what is *prima facie* the meaning of the word and construe it as including illegitimate children. But, apart from that consideration, there is another reason why I should hesitate so to construe it. A long time has now elapsed since 1846, and during all that length of time numerous cases must have occurred in which the question whether the proviso to § 1 of the act was applicable to an illegitimate child might have been raised; but, apparently, there is no case in the books in which that point was raised, and, when one inquires what the practice of poor law administration has been in the matter, one cannot find that there has been any practice which is inconsistent with giving to the word 'children' in the proviso its *prima facie* meaning of legitimate children. Moreover, we have had cited to us the case of *Reg. v. Maude*, 2 Dowl. (N. S.) 58, which is very much in point to the present case. The judgment in that case was delivered by Wightman, J., and he pointed out that, where the word 'child' is used in the Poor Law Amendment Act, 1834, as for example in § 56, a legitimate child only is intended, and, when it is meant that the word should have a more extensive signification, it is expressly so declared, as in § 57, by which a husband is made liable to maintain the children of his wife born before the marriage, whether legitimate or illegitimate. The effect of his judgment is to lead one to the conclusion that in these poor law statutes generally, where the word 'child' is used without more, a legitimate child is meant, and where a wider meaning is intended, the legislature has again and again added such words as 'whether legitimate or illegitimate.' Of this § 3 of the very statute which we are discussing, namely, the Poor Removal Act, 1846, affords an example. In the case of the proviso to § 1 of the Poor Removal Act, 1846, an additional reason for supposing that the word 'children' is used in the sense of legitimate children is afforded from the collocation of the word with the word 'wife,' and the fact that the term 'person' therein being used in relation to a husband, the inference arises that the children thereby contemplated are the children of such a husband and wife. Under these circumstances I cannot avoid the conclusion that in the proviso to § 1 the word 'children' must receive its *prima facie* meaning, and therefore does not apply to illegitimate children."

In an examination for an order of removal with respect to the last legal settlement of

paupers, the word "child" is a proper description of a legitimate child, as the law does not contemplate illegitimacy, *Reg. v. Totley*, 7 Q. B. 596, 53 E. C. L. 596, 115 Eng. Rep. (Reprint) 614; but does not properly describe an illegitimate child, *Reg. v. Birmingham*, 8 Q. B. 410, 55 E. C. L. 410, 115 Eng. Rep. (Reprint) 930.

In *Northwich Union v. St. Pancras Union*, 22 Q. B. D. (Eng.) 164, 58 L. J. M. C. 73, there was involved a statute (section 35 of the Divided Parishes Act, 39 & 40 Vict. c. 61) the first part of which provided that a child should take the settlement "of its father or widowed mother." The third part provided that "if any child in this section mentioned shall not have acquired a settlement for itself, or being a female, shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiry into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born." Cotton, L. J., said: "Now, though 'child' in the first part of the section applies only, as I think, to a legitimate child, yet as illegitimate children are expressly mentioned in the second, I think that as a matter of construction the words in the third part 'any child in this section mentioned' must include not only the legitimate child mentioned in the first part, but the illegitimate child mentioned in the second part."

STATUTE CREATING PRESUMPTION OF GIFT.

Under the *Georgia* statute (Code, § 2664) which declares that "the exclusive possession by a child of lands belonging originally to the father, without payment of rent, for the space of seven years, shall create conclusive presumption of a gift, and convey title to the child," etc., it has been held that the word "child" did not include an illegitimate child. *Floyd v. Floyd*, 97 Ga. 124, 24 S. E. 451.

STATUTE RELATING TO WORKMEN'S COMPENSATION.

The word "child" or "children" as used in the *New York Workmen's Compensation Law* (Consol. Laws, c. 67, § 16, Laws 1914, c. 41, as amended by Laws 1914, c. 316, McKinney's Consol. Laws, Book 64) does not include the illegitimate dependent children of the bigamous marriage of a workman. *Bell v. Terry*, etc. Co. 177 App. Div. 123, 163 N. Y. S. 733, wherein the court said: "Section 16 of the act provides that 'if there be a surviving child or children of the deceased under the age of eighteen years' an additional amount shall be provided for such child or children until such child or children ar-

rive at the age of eighteen years, and this without reference to whether the children are dependent upon the father or not. . . . In other words, the statute presumes that the children of a parent are dependent upon him or her up to the age of eighteen years and provides for them in the Workmen's Compensation Law. While, in a sense, the persons mentioned in the question are children they are not the lawful children of the decedent, and unlawful children are not favored in the law; they have only such rights as are expressly granted by statute in so far as property rights are concerned. Not only has the legislature not provided for illegitimate children under the Workmen's Compensation Law by specific language, but, by its definition of 'child' in subdivision 11 of section 3, it has clearly indicated an intention to use the word only in its legal sense, as modified. It declares that "child" shall include a posthumous child and a child legally adopted prior to the injury of the employee, and, by expressly fixing these limitations, it must be understood to have excluded any other child or children than such as would be included at common law and under the statutory definition. . . . Whatever may have been held in other jurisdictions, under ever varying language and differing conceptions of public policy, there is no justification for reading into the statute a provision which shall permit illegitimate children to share in the benefits provided for the lawful issue of one suffering through an industrial accident. If the legislature wants to assume this responsibility it should do so in plain and unequivocal language; it ought not to be done through strained and unnatural construction on the part of the courts. . . . The suggestion that section 1745 of the Code of Civil Procedure may have something to do with the answering of this question, plausible upon the surface, utterly fails when we come to analyze the language of the section in connection with that of the Workmen's Compensation Law. The language of section 16 of the Workmen's Compensation Law is that 'if there be surviving child or children of deceased under the age of eighteen years' an additional amount is to be paid. This does not say if there are surviving children of the mother but they must be surviving children of the deceased, while section 1745 of the Code of Civil Procedure provides that in an 'action to annul a marriage, upon the ground that the former husband or wife of one of the parties was living, the former marriage being in force,' and that 'it appears, and the judgment determines, that the subsequent marriage was contracted by at least one of the parties thereto in good faith, and with the full belief that the former husband or wife was dead or that the former marriage had

been annulled or dissolved, or without any knowledge on the part of the innocent party of such former marriage, the issue of the subsequent marriage, born or begotten before the final judgment, are deemed for all purposes the legitimate children of the parent, who at the time of the marriage was competent to contract, and are entitled to succeed as such, in the same manner as other legitimate children, to the real and personal estate of said parent; and the issue so entitled must be specified in the judgment, and the innocent party must be awarded their custody, and he or she is entitled to appoint a guardian of their persons by will.' It will thus be seen that this case could not come within the provisions of section 1745 of the Code of Civil Procedure, for the employee knew of the marriage which stood in the way of lawful issue, and only the surviving child or children of the deceased are entitled under the provisions of the Workmen's Compensation Law. If we indulge the presumption, hardly warranted in this case so far as the record discloses, that Delia V. Bell was an innocent party to the bigamous marriage, the code only legitimatizes the issue as to her and permits the children to inherit from her. It does not make them the legitimate children of the wrongdoing husband; they are 'deemed for all purposes the legitimate children of the parent, who at the time of the marriage was competent to contract,' and we are not to read into the statute more than the legislature has provided."

In Deed.

The word "child" or "children" in a deed or other conveyance must be held to mean legitimate children, unless the context is such as to require a different meaning, or the circumstances surrounding the execution of the paper are such as to make the words import other than legitimates. *Johnstone v. Taliaferro*, 107 Ga. 6, 32 S. E. 931, 45 L.R.A. 95; *Hall v. Cressey*, 92 Me. 514, 43 Atl. 118. See also *Bolton v. Bolton*, 73 Me. 299; *Lyon v. Lyon*, 88 Me. 395, 34 Atl. 180; *Appel v. Byers*, 98 Pa. St. 479.

In *Hall v. Cressey*, supra, it appeared that a deed conveying certain real estate contained a provision that "this deed is to take effect and go into operation on the decease of me and my wife and not before; and if my son Stephen die without children, then Stephen's third part is to go to my son George." The defendant contended that Stephen took a vested remainder in fee simple, determinable on a contingency, namely the death of Stephen without children; and that on the death of Stephen without legitimate children, the title passed to George, and so on to the defendant. The plaintiff contended that if

Stephen's remainder was not an estate in tail, then inasmuch as Stephen died leaving surviving him a child born out of wedlock, he did not in legal contemplation "die without children," and so the contingency provided for in the deed did not happen. The court said: "The first important question is: did Stephen 'die without children?' Unless he did the defendant has no title in any event. By the common law a bastard was *filius nullius*. He possessed no inheritable blood. The sins of the father were visited upon the child. Modern sentiment as expressed in modern statutes is more merciful to the unfortunate offspring of illicit intercourse. In this state, as in most others, by pursuing statutory methods, a bastard may be legitimated and may acquire rights of inheritance, and some or all of the usual consequences of consanguinity. So it was in the case at bar. Stephen gave his daughter statutory recognition. But that conferred only statutory rights and privileges. We are not concerned with the status of this child under a statute, but are endeavoring to ascertain the legal meaning of the word 'children' in a deed. We do not perceive how that meaning can be enlarged in this case; nor how the interpretation of the word can be aided by reference to a statutory condition which was created many years after the deed was executed. Unless there is something in this deed, and there is not, to show that the grantor contemplated that his son Stephen would become the father of a bastard child, and intended that child to be included in the term 'children,' we must give to the word its ordinary, common-law signification. The authorities are to the effect that the word 'child' in a will or deed means a legitimate child. . . . We therefore hold that Stephen McIntosh died 'without children,' so far as the construction of the deed is concerned."

In *Johnstone v. Taliaferro*, 107 Ga. 6, 32 S. E. 931, 45 L.R.A. 95, it appeared that a trust deed gave the residuary estate in trust "for the sole and separate use of Mary M. Barclay, the daughter of my adopted daughter Margaret Marshall, late deceased, for and during the term of her natural life, free from debts, contracts, or control of any husband with whom she may hereafter intermarry, and from and after the death of the said Mary M. Barclay, then in trust for such child or children of the said Mary M. Barclay as she may leave living at the time of her death, share and share alike, if more than one, as tenants in common, their heirs and assigns forever, the representatives of a deceased child to stand in the place of the parent, and to take per stirpes and not per capita." In holding that an illegitimate son was not a "child" of the cestui que trust within the meaning of that term as it was used by the grantor, the court said: "Florence Bar-

clay Johnstone is therefore undoubtedly an heir of his mother, Mary M. Barclay, and as such is entitled to inherit with her other children any property which she may have owned at the time of her death and which would go to her heirs at law upon her demise. But the property in controversy was not vested in Mary M. Barclay in such a way as to be transmissible to her heirs at law. Those who take this property after her death must take as purchasers under the trust deed; and therefore the question to be determined is, whether the plaintiff is a child of Mary M. Barclay within the meaning of that term as it was used by Mrs. Marshall. In other words, was it the intention of Mrs. Marshall when she signed the paper purporting to be a will, and when she afterwards incorporated it in the deed, that the provisions of that paper should be broad enough to embrace within the reach of the benefits therein provided for the illegitimate offspring of Mary M. Barclay, brought into life more than three years after the deed so made? Was it in contemplation of Mrs. Marshall when she made this deed that a child who was undoubtedly the object of her great affection should come to disgrace and have born to her a child out of lawful wedlock? A casual reading of the deed, with its provisions with reference to the care and attention which were to be given to Mary M. Barclay in her rearing and education, is all that is necessary to sufficiently demonstrate that this result was not only not contemplated by Mrs. Marshall, but would have been almost the last thing that would have occurred to her mind. No mother could have been more tender and solicitous about the future of her own child than Mrs. Marshall evidently was about the future of this girl. That the effect of holding that the plaintiff cannot take any interest in the property in controversy under the terms of the deed would be adding sorrows to the life of one already unfortunate and desolate cannot weigh with us in determining what the language of this deed means. We are irresistibly forced to the conclusion that the plaintiff cannot take any interest whatever under this deed as the child of Mary M. Barclay, and that the meaning of the word child cannot be enlarged so as to embrace him, notwithstanding the use of the word issue in another part of the deed."

The word "child" or "children" in a deed of settlement between a man and woman legally incapable of marrying, cannot be construed to include an illegitimate child then *en ventre sa mere*, nor further illegitimate children not then begotten. In *re Shaw* [1894] 2 Ch. (Eng.) 573, 63 L. J. Ch. 770, 71 L. T. N. S. 79, 43 W. R. 43.

In the case of *Edwards' Appeal*, 108 Pa. St. 283, it was held that a son born out of lawful wedlock, though legitimated by an

act of assembly, could not take by purchase under a prior deed of trust to "lawfully begotten children."

Although it is a rule of construction that *prima facie* the word "child" or "children," when used in a deed, means a legitimate child or legitimate children, where it appeared that an illegitimate child was in being at the time the grantor made a deed of trust in favor of her then unmarried daughter, with a remainder to "the child or children" of the daughter, and was the only child of the grantor's daughter in being at that time, it was held that the grantor would be presumed to have made the deed in question with reference to the existence of such grandchild. *Wheatcraft v. Wheatcraft*, 55 Ind. App. 283, 102 N. E. 42.

The cases determinative of the question whether an adopted child is within the designation of "children" or a similar phrase in a will or deed, are collated in the note to *Matter of Leask*, 18 Ann. Cas. 516.

In Pleading.

In *Tillery v. Tillery*, 155 Ala. 495, 46 So. 582, it was held that a bill was not demurrable as failing to show that the complainant was the legitimate child of the decedent, which alleged that the oratrix was the sole heir of the deceased and the daughter and only child of the deceased, as this was a distinct allegation of heirship, and the word "child" carried with it the meaning of legitimate offspring.

In Insurance Policy.

In *Shelton v. Minnis*, 107 Miss. 133, 65 So. 114, it appeared that the constitution and by-laws of a mutual benefit association stated the objects and purposes of its organization to be as follows: "The purpose for which the Odd Fellows benefit is created, is to insure the lives of the members . . . and provide an endowment fund to be paid only to the following relatives of deceased members of the association . . . viz: husband, wife, children, mother, father, sister, brother, uncle, aunt, nephew, niece, or dependent relatives." It was contended thereunder that the laws of the association did not authorize it to issue a policy on the life of a mother payable to an illegitimate child of the insured, the word "children" in the by-laws referring to legitimate children alone. In denying this contention, the court said: "It seems to us that in determining who is entitled to receive the benefits of mutual benefit associations, wherein the money contributed by its members provides the fund from which the benefits are paid, we should give a liberal construction to the by-laws of the association so as to effect the purposes of the parties to the contract. However the

common law may have limited the civil rights of bastards, it seems clear that the public policy of this state expressed in its inheritance laws carries us far away from the harsh rules of the common law. Section 1655, Code of 1906, recognizes fully and unreservedly the more humane rule that all illegitimates shall inherit from their mother. This statute seems to imply that the mother and not the innocent child shall be held responsible for her sins, and, further, that the illegitimate child shall receive from its dead mother the fruits of her labor or fortune. Is it not fair to assume that it was the purpose of this benefit association to accord to all children of a mother member the same rights and privileges the statute laws of the state have, in principle, given them—whether the children be legitimate or illegitimate? A child capable of inheriting would seem to come within the class designated by the by-laws. Certainly the child has an insurable interest in the life of its mother, and it seems equally certain that the by-laws were not designed to discriminate between legitimate and illegitimate children possessing equal rights to inherit from their mother. The mother in this case believed that her illegitimate daughter was one of her children, and so did the officers of the association. We believe they correctly interpreted the meaning of the by-laws."

The meaning of the term "children" as used to designate the beneficiaries in a life insurance policy is the subject of the notes to *Roder's Succession*, 15 Ann. Cas. 526, and *Martin v. Modern Woodmen of America*, Ann. Cas. 1913A 299.

In Will.

GENERAL RULE.

There are certain rules which are applicable to the construction of all wills, one of which is that a gift to "children" *prima facie* imports legitimate children, *Hill v. Crook*, 7 Moak (Eng.) 1, L. R. 6 H. L. 265, 42 L. J. Ch. 702, 22 W. R. 137, *affirming* L. R. 6 Ch. 311, 40 L. J. Ch. 216, 24 L. T. N. S. 488, 19 W. R. 649; *Dorin v. Dorin*, 13 Moak (Eng.) 90, L. R. 7 H. L. 568, 45 L. J. Ch. 652, 31 Times L. Rep. 281, 23 W. R. 570; *In re Eve* [1909] 1 Ch. (Eng.) 796, [1909] W. N. 86; as much so as if the very word "legitimate" had been introduced before it, *Dorin v. Dorin*, *supra*; *In re Ayles*, 1 Ch. D. (Eng.) 282, 45 L. J. Ch. 223; *In re Bolton*, 31 Ch. D. (Eng.) 542, 55 L. J. Ch. 308, 34 W. R. 325. This construction will not yield to mere conjecture, or to anything short of the clearest evidence of an opposite intention. *Hill v. Crook*, *supra*. And if the testator has legitimate children, parol or extrinsic evidence cannot be received to show that illegitimate children were intended. *Ellis*

v. Houstoun, 10 Ch. D. (Eng.) 236; Crosby v. Lewis, 2 Edm. Sel. Cas. (N. Y.) 27; Shearman v. Angel, Bail. Eq. (S. C.) 351, 23 Am. Dec. 166. See also Gardner v. Heyer, 2 Paige (N. Y.) 11. In Crosby v. Lewis, *supra*, the court said: "In this case the question was as to the meaning of the term 'children,' used in the will of the testator, and whether, in the term 'children,' could be included an illegitimate child. In this case there are legitimate children to answer the description contained in the will—and that being so, I think the illegitimate child is not included. There is nothing in the will itself manifesting any intention to include the illegitimate child, and such an intention cannot be inferred from any facts out of the will, nor can evidence of such facts be admitted for the purpose of showing the intention of the testator."

But in a case wherein it appears that a testator had illegitimate children, it is proper to look into circumstances dehors the will, to see whether there are any persons answering the description of the legatees in the legal sense of the term, and if it appears that there are no such persons, it is then allowable to prove the situation of the testator's family, to enable the court to ascertain who were intended by the testator as the objects of his bounty. *Wilkinson v. Adam*, 1 Ves. & B. 422, 35 Eng. Rep. (Reprint) 163, *affirmed* 12 Price 570; *Swaine v. Kennerley*, 1 Ves. & B. 469, 35 Eng. Rep. (Reprint) 182; *Gill v. Shelley*, 2 Russ. & M. 336, 9 L. J. Ch. 68, 39 Eng. Rep. (Reprint) 422; *Gardner v. Heyer*, 2 Paige (N. Y.) 11. See also *Miller v. Miller*, 79 Hun 197, 30 N. Y. S. 116. In the case first cited it appeared that the testator was never married, but for a long time lived and cohabited with M. Smith, in a dwelling house owned or provided by him and furnished at his expense; during which time, between June, 1806, and March, 1815, she had by him five children. All these children were, with the knowledge and consent of the testator, baptized by his name. One of them died in infancy, and the other four, a son and three daughters, were by him placed at school and acknowledged as his children, and were generally reputed as such by his friends. He died a bachelor, and these children by M. Smith are the only persons he ever acknowledged or recognized as his children. By his will he gave to his son John \$10,000, to be paid to him when he arrived at the age of twenty-four, the interest in the meantime to be applied to his maintenance and education. He also gave to each of his daughters \$3,000, payable at the age of twenty-one, and the interest in the meantime to be applied to their education and support. He directed his executors and trustees to pay \$65 to M. Smith quarter yearly during her

life, if she remained single and had no more children. He devised and bequeathed all the residue of his real and personal estate to his executors and trustees and the survivor of them in fee, in trust to pay two-thirds of the income thereof to his son John, and one-third to his daughters during their lives, with remainder to their issue. And he gave cross remainders to the survivors in case any of the children should die without issue. The court said: "The testator could not have intended legitimate children which he might have by a future marriage; for one of the objects of his bounty is described as his son John, and the others as his daughters. It would require too great a stretch of credulity to suppose the testator not only contemplated a marriage and the birth of issue, but that he also anticipated he should have but one son, who would be named John, and that all the other children of the marriage would be daughters; that he should die before they arrived of age, and that they would all need testamentary guardians."

For a general discussion of the admissibility of parol evidence in aid of the construction of a will, see the note to *Hitchcock v. Home Missions*, Ann. Cas. 1915B 1, wherein the construction of words of relationship as including illegitimates is considered at page 61.

The term "children" in a will *prima facie* means legitimate children, and hence, where there are legitimate children in existence at the time of the making of the will so as to satisfy the words of the bequest or devise in their primary sense, the law is well settled that under a bequest or devise to "children" as a class, illegitimate or natural children are not included, unless the testator's intention to include them is manifest, either by express designation or necessary implication.

England.—*Mason v. Bateson*, 26 Beav. 404, 53 Eng. Rep. (Reprint) 953; *Boyes v. Bedale*, 1 Hem. & M. 798, 71 Eng. Rep. (Reprint) 349; *Matter of Overhill*, 1 Smale & G. 362, 17 Eng. L. & Eq. 323, 22 L. J. Ch. 485, 17 Jur. 342, 65 Eng. Rep. (Reprint) 159; *Bagley v. Mollard*, 1 Russ. & M. 581, 39 Eng. Rep. (Reprint) 581; *Mortimer v. West*, 3 Russ. 370, 38 Eng. Rep. (Reprint) 615; *Harris v. Lloyd*, 1 T. & R. 311, 37 Eng. Rep. (Reprint) 1119; *Swaine v. Kennerley*, 1 Ves. & B. 469, 35 Eng. Rep. (Reprint) 182; *Cartwright v. Vawdry*, 5 Ves. Jr. 530, 31 Eng. Rep. (Reprint) 719, 25 Eng. Rul. Cas. 501; *Godfrey v. Davis*, 6 Ves. Jr. 43, 31 Eng. Rep. (Reprint) 929; *Meredith v. Farr*, 2 Y. & C. Ch. 525, 63 Eng. Rep. (Reprint) 235, set out at length *infra*, in subdivision *Qualification of Rule*; *In re Wilson*, L. R. 1 Eq. (Eng.) 247, *affirmed sub nom. Shaw v. Gould*, L. R. 3 H. L. 55; *In re Wells*, L. R. 6 Eq. (Eng.) 599; *Paul v. Children*, L. R. 12 Eq.

(Eng.) 16; In re Ayles, 1 Ch. D. (Eng.) 282, 45 L. J. Ch. 223; Ellis v. Houstoun, 10 Ch. D. (Eng.) 236; Megson v. Hindle, 15 Ch. D. (Eng.) 198; In re Andros, 24 Ch. D. (Eng.) 637, 52 L. J. Ch. 793, 32 W. R. 30; In re Haseldine, 31 Ch. D. (Eng.) 511, 34 W. R. 327; In re Bolton, 31 Ch. D. (Eng.) 542, 55 L. J. Ch. 398, 34 W. R. 325; In re Hall, 35 Ch. D. (Eng.) 551; In re De Wilton [1900] 2 Ch. (Eng.) 481, 69 L. J. Ch. 717, 83 L. T. N. S. 70, 48 W. R. 645; In re Du Bochet [1901] 2 Ch. (Eng.) 441, 70 L. J. Ch. 647, 84 L. T. N. S. 710, 49 W. R. 588; In re Pearce [1914] 1 Ch. (Eng.) 254, Ann. Cas. 1916A 410, 83 L. J. Ch. 266, 110 L. T. N. S. 168, 58 Sol. J. 197, *affirming* [1913] 2 Ch. 674, and *overruling* Dorin v. Dorin, 13 Moak (Eng.) 90, L. R. 7 H. L. 568, 45 L. J. Ch. 652, 31 Times L. Rep. 281, 23 W. R. 570. See also In re Kerr, 4 Ch. D. (Eng.) 600.

Georgia.—Hicks v. Smith, 94 Ga. 809, 22 S. E. 153.

New Jersey.—Heater v. Van Auken, 14 N. J. Eq. 159.

New York.—Cromer v. Pinckney, 3 Barb. Ch. 466; Crosby v. Lewis, 2 Edm. Sel. Cas. 26; Collins v. Hoxie, 9 Paige 81; Van Voorhis v. Brintnall, 23 Hun 260; Miller v. Miller, 79 Hun 197, 30 N. Y. S. 116. See also Gardner v. Heyer, 2 Paige 11.

North Carolina.—Thompson v. McDonald, 22 N. C. 463; Kirkpatrick v. Rogers, 41 N. C. 130.

Pennsylvania.—Bealafeld v. Slaughtenhaupt, 213 Pa. St. 565, 62 Atl. 1113; Kemper v. Fort, 219 Pa. St. 85, 12 Ann. Cas. 1022, 67 Atl. 991, 123 Am. St. Rep. 623, 13 L.R.A. (N.S.) 820.

South Carolina.—Shearman v. Angel, Bailey Eq. (S. C.) 351, 23 Am. Dec. 166.

Wisconsin.—In re Scholl, 100 Wis. 650, 76 N. W. 616.

In the case last cited it appeared that a testatrix gave and bequeathed her property "one-twelfth to the children of each of my deceased brothers and sisters;" and "in case of the decease of either, . . . I bequeath his or her share to be equally divided among his or her children." The court held that the word "children," as used by her, did not include the illegitimate great-grandchild of a deceased sister, in the absence of any evidence that the testatrix intended to include that child, saying: "If we adopt as the sense in which the word 'children' was used the ordinary meaning attributable thereto, the illegitimate must be excluded. The description 'child,' 'son,' 'issue,' and words of that nature, includes legitimates only. . . . The mere fact of the existence of lawful children does not make it impossible for the term to be construed so as to include illegitimates

if from other parts of the will it is clear that they were intended to be included in the distribution of the testator's bounty. The same rule that includes grandchildren and great-grandchildren in the term 'children' will include illegitimates, adopted children, step-children, or any other class to whom the term may reasonably apply. . . . The rule at common law under which illegitimates were not deemed to have any heritable blood from their father or mother and could not be given any by the marriage of the parents, finds no place in our system. In its stead the more humane policy of the civil law has been adopted—a policy which considers justice to the innocent as outweighing the controlling idea, so called, of the common law, the discouragement of illegitimacy. The importance of the latter is by no means diminished in legal contemplation, but the injustice and futility of punishing the innocent result of illicit commerce as an effectual warning against the sin of it, is recognized in the more practical and intelligent system under which we live. That situation, which we may reasonably assume the testatrix had in mind in making the testamentary disposition of her property, is quite persuasive in determining what she intended. In view of it, less evidence than under the old system will sufficiently show that the intention was to include illegitimate children in giving to a class as children, the mother of the class being the inheritable blood that induced the bequest; but the existence of the policy referred to cannot do away entirely with the rule that the general term cannot include the particular class unless the intention to do so appears by necessary implication. It was not the policy of the common law alone that led to the rule. So we are not permitted to say that, the policy being changed, the rule has ceased to exist. The plain, ordinary meaning of the word still is, presumptively, legitimate children, but the inference arising from its use, unexplained, is somewhat weakened, so that evidence or circumstances of less weight than before are deemed sufficient to rebut it. . . . Now any reasonable evidence that the testator intended to include illegitimates would be sufficient, and where the class, in order to participate, must do so through the mother, less evidence would include illegitimates than if they were reached through the father in the line of descent. . . . It is said by some text writers that the rule of necessary implication no longer exists. In that they are in error. The rule remains but is satisfied by less evidence. It follows from what has preceded that there must be some evidence to supplement the policy of the statute in order to warrant us in saying that the testatrix intended by the term 'children' to include the illegitimate son

of Sallie Yerger. We fail to find any such evidence."

In *Heater v. Van Auken*, 14 N. J. Eq. 159, the court said: "The residuary clause of the will in question, under which the children of Mary Heater claim title, contains no express designation, by name or otherwise, of her illegitimate children. The testator's intention to include them in that devise, if it exist, must appear by necessary implication from other parts of the will. Does it so appear? The testator, after giving to his wife the sole use of all his real estate during her life, so far as necessary for her comfortable support, gives, in the first place, to his wife's daughter, Mary Heater and her 'children,' all the residue of the profits of the real estate. He then declares it to be his will that his wife and her daughter and daughter's 'children' aforesaid shall have the management, use, and profits of all his goods and chattels during the life of his wife. By the residuary clause, the testator, after the decease of his wife, gives all the residue of his estate, both real and personal, to the said Mary Heater during her life, and after her decease to her 'children,' to be divided equally among them. These are the only provisions in the will in favor of the children of Mary Heater, as a class, by the designation of 'children.' None of them contain the least intimation, on the part of the testator, of an intention to enlarge the legal import of the term 'children' used in the will, much less any necessary implication of such intention. If these clauses stood alone there would be no room for question. But the will contains other provisions in favor of the illegitimate children of Mary Heater, which are relied upon as furnishing evidence of an intention on the part of the testator to include them in the general designation of 'children.' After making the provisions already referred to, and giving the use of all the moneys due him to his wife during her life, the testator, after the death of his wife, gives to Mary Heater's son John one hundred and fifty dollars, to be paid to him when he shall arrive at full age, and to the said Mary's second son, William, one hundred dollars, to be paid to him when he shall arrive at full age; and he further orders and directs, that if his wife shall die before the said John and William should arrive at the age of twenty-one, they shall have the interest of the moneys due the testator to assist them in obtaining education until they arrive at full age. These clauses show that John and William were the reputed sons of Mary Heater, and that the testator recognized them as such; and if Mary Heater had then been unmarried, and had no legitimate children, they would have raised a strong presumption that the testator intended to include them under the gen-

eral designation of children. But at the date of the will Mary Heater was a married woman and had lawful children, who fully answered the designation given to the intended objects of the testator's bounty. In such case the mere fact that the testator has recognized the illegitimate offspring as a son or child will not entitle him to take under a devise to children. . . . But the provisions of this will, so far from raising a necessary implication that the testator intended by the term children to include the illegitimate children of Mary Heater, afford a strong presumption of a directly contrary intention. The testator, by the several clauses of his will, made provision for the 'children' of Mary Heater as a class. These provisions, by their terms, clearly operate in favor of her legitimate children only. He then makes special provision for her two illegitimate sons by name. He gives to each a legacy payable at twenty-one, and in the event of the death of his widow before that time, makes provision for their education. He makes no special provision whatever for either of her legitimate children, who were younger, and as it would seem, in a situation more to require this peculiar provision for their protection. This marked distinction between the two classes of children indicates a discrimination in the testator's mind between them, and an intention not to include the illegitimate sons under the general provisions in favor of the children. It cannot be presumed that the testator intended to make the illegitimate rather than the legitimate children of Mary Heater the favorite objects of his bounty, which must be the result if they share the benefits of the residuary devise."

In *Dorin v. Dorin*, 13 Moak (Eng.) 90, L. R. 7 H. L. 568, 45 L. J. Ch. 652, 31 Times L. Rep. 281, 23 W. R. 570, the Lord Chancellor (Lord Cairns) said: "My Lords, I adhere to the conclusions which I was able, upon the consideration of the case of *Hill v. Crook*, L. R. 6 H. L. (Eng.) 265, to draw from the various authorities there cited. According to those conclusions, I feel myself bound to ask whether, with a knowledge of the position, and what are called the surrounding circumstances, at the time the testator made his will, there is anything upon the face of the will which enables me to say that those who in the eye of the law were not his children, were intended by him to take under the general expressions used in his will, namely, 'I leave her' (meaning his wife) 'at liberty to direct the disposal of the property amongst our children, by will, at her death, in such manner as she shall think fit, and should she make no will I desire that the property existing at her death shall be divided as far as it may be practicable to do so equally between my children by her.' The testator who

used these expressions had been married to the wife of whom he speaks the day before he made his will. He had had two children by her, who at that time were of age, as I gather, the elder of about eight or nine, and the younger nearly three. They were clearly illegitimate children. I ventured to put to the learned counsel who argued the case at the bar, this question: supposing that it had been in the mind of the testator, and we do not know and cannot know what his mind was except by his own expressions—supposing it had been in his mind not to take any notice of these children in his will, or to make any provision for them by his will, but to make a provision for them in some other way, and to use his will to designate merely his wife and any legitimate children who might be afterwards born, would not every word in the will be satisfied? Undoubtedly every word would be satisfied. Therefore, if that is so, you are not able to say that the will upon the face of it constrains you to depart from what is the ordinary and prima facie legal meaning of the word 'children.' When the case is considered that is the true result. There is no case whatever which would enable us, in the interpretation of this will, to strain the word 'children' beyond its ordinary legal meaning."

In *Bealafeld v. Slaughterhaupt*, 213 Pa. St. 565, 62 Atl. 1113, it appeared that the testator married a woman who had at the time an illegitimate son about seven years old who was not a son of the testator; that this son lived with the testator and his wife as a part of the family until he was seventeen years old and until shortly before the making of the will in question; that the testator had by this wife seven children who were the plaintiffs or whose interest was owned by the plaintiffs; that in his will the testator gave all his property to his wife, the mother of the children named, for life or widowhood, and at her death the property to be sold by his executor and to be divided share and share alike "among her children and mine." The court said: "We have no doubt that the illegitimate child of the mother can take nothing under the terms of this will, because of the well-established rule of law that the word 'children' and like words are to be applied only to legitimate children unless the illegitimate children are otherwise described so as to leave no doubt that they are to be included."

In *Thompson v. McDonald*, 22 N. C. 463, it appeared that a testator bequeathed all his property to his two sisters, with an express limitation that if either of them should die without a child or children, living at her death, the whole should pass to the surviving sister. In denying the contention that the limitation over to one sister did not take

effect, because the other died leaving an illegitimate child, the court said: "Now, without deciding upon the effect of a bequest explicitly made to the children which a woman may have, whether legitimate or natural, or upon the effect of a limitation, in case a woman should not leave living at her death any child, whether legitimate or natural, it is enough to say, upon the present occasion, that it is perfectly clear that the word 'children' per se imports in law legitimate children; and that none but legitimate children can be understood as embraced therein, unless, upon the instrument to be construed, it manifestly appears that natural children were thereby intended. . . . Nor is this legal import of the term 'children' at all altered by the acts of our legislature, which permit, where a woman dies intestate, and without legitimate children, 'those commonly called illegitimate or natural children' to succeed to the property of their mother. They are not thereby made, in law, the children of their reputed mother, but enabled to take her property where there are none such, under the description of persons 'commonly called illegitimate or natural children.'"

In *Hicks v. Smith*, 94 Ga. 809, 22 S. E. 153, the court said: "What is the legal status of this plaintiff? Whether he sues as the heir at law of his reputed father, or by virtue of a supposed right as a purchaser under his great-grandfather's will, he cannot recover, because the estate to his father was limited by the express terms of the will to enjoyment by him during his natural life; at his death, the remainder interest in fee was vested in his children, and he having none, in the children of his brother. Does this plaintiff come within the class of persons who could take under this provision of the will? Was he in legal contemplation the child of Thomas A. Parsons? Was he such a child as the testator can be legally presumed to have had in contemplation at the time of the execution of the will? We have seen that, though he might have been of the blood of Thomas A. Parsons, and while he was, at the instance of his reputed father, made legitimate by an appropriate order of the court, yet that the legal effect of such judicial legitimation was only to so far confer upon him a status as a legitimate child as to enable him to inherit from his father. For all other purposes he was still a bastard. He could take by force of the statute as the heir of his father, but he could not thus take as a purchaser under the will of his great-grandfather. There is nothing in the will justifying the inference that it was the intent of the great-grandfather to include him as a legatee thereunder. His rights are referable to strict law. No presumptions will be indulged in his favor, and we will presume that the testator intend-

ed to use the word children with reference to its strict legal significance, rather than as in its conventional sense it is occasionally employed. To undertake to presume at this late day that it was the purpose of this testator to provide by his will for all his descendants, legitimate or illegitimate, and that he intended as he employs the term children to apply it indiscriminately to all descendants without reference to antecedents or the circumstances of birth, not only does violence to his express desire legally manifested by the terms of his will, but it may not wholly consist with his idea of the propriety of indiscriminately mixing up descendants. His ideas upon the propriety of begetting illegitimate, and after they were begotten, to what extent the father's obligation to provide for them would justify their adoption, might have greatly differed from those of his grandson. He might have been perfectly willing that this grandson in the high and honorable state of lawful wedlock, without reference to the walks of life from whence his wife might come, should transmit his name and with it his estate to his posterity, while, on the other hand, he might not have been willing that, stepping aside from this honorable estate, this grandson should bring reproach upon his name by conferring it upon one whose only title to estate or name resulted, not from the order of nature operating in accordance with the ordinances of God, but by virtue of the statute in such case made and provided. At any rate, whatever may have been the intention of the testator with respect to such descendants, he used no such language as expressly or by fair implication can justify the inference that he intended to use the word children in other than the sense in which, according to its strict legal significance, it is authorized to be employed. He used no language which would embrace within its meaning the plaintiff or designate him as an intended recipient of his bounty. He therefore took no estate under the will in question, has no interest in the property in controversy."

An illegitimate child of a sister of the testator, although described in the earlier part of the will by the word "nephew," has been held not to take under a subsequent general gift to the "children" of the testator's brothers and sisters. In *re Hall*, 35 Ch. D. (Eng.) 551. And an illegitimate child referred to as "my grandson" was held not entitled to take under a bequest to "children." *Megson v. Hindle*, 15 Ch. D. (Eng.) 198. So, under a bequest in an English will to the "children" of an Englishman domiciled in England, who afterwards became domiciled in a foreign country, and there married the mother of his illegitimate children, whereby they became legitimate by the law of that

country, such children cannot take under his will in England, on the ground that the word "children" in an English will must be construed to mean children lawfully begotten, unless an intention appears in the will to use the term in a different sense. *Boyes v. Bedale*, 1 Hem. & M. 798, 71 Eng. Rep. (Reprint) 349; In *re Wilson*, L. R. 1 Eq. 247, *affirmed* sub nom. *Shaw v. Gould*, L. R. 3 H. L. 55. See also *Goodman v. Goodman*, 3 Giff. 643, 66 Eng. (Reprint) 565; *Matter of Wright*, 2 Kay & J. 595, 69 Eng. Rep. (Reprint) 920; *Udny v. Udny*, L. R. 1 H. L. Sc. 441.

But the rule that illegitimate children cannot take *pari passu* with legitimate children, in the absence of specific directions, does not apply to a gift over, and in *Smith v. Jobson*, 32 Sol. J. (Eng.) 662, 59 L. T. N. S. 397, it was held that an illegitimate child took thereunder.

While not deciding whether the term "children" would generally embrace illegitimate as well as legitimate issue, in *Carroll v. Carroll*, 20 Tex. 731, it was held that under a devise to "my wife and children," the term included all the children of the wife, had by the testator, whether born before or after their marriage and who were alive at his death, but did not include a son of the wife who was not a child of the testator.

A devise to the "children lawfully begotten" of a son does not include a daughter born out of wedlock but subsequently legitimated by the statute on the marriage of her parents. *Honolulu Invest. Co. v. Rowland*, 14 Hawaii 271.

QUALIFICATION OF RULE.

Under the fundamental rule in the construction of wills that the intention of the testator, if not inconsistent with some rule of law, must control, and that, to ascertain that intention, the court will look to the circumstances attending the making of the will, and the state and extent of the testator's property and his family, it is held that under a bequest or devise to "children," that word is, when the intention so to interpret it is clearly evinced by him, to be construed as including illegitimate children.

England.—*Beachcroft v. Beachcroft*, 1 Madd. 430, 56 Eng. Rep. (Reprint) 159; *Woodhouselee v. Dalrymple*, 2 Meriv. 419, 35 Eng. Rep. (Reprint) 1000; *Gill v. Shelley*, 2 Russ. & M. 336, 9 L. J. Ch. 68, 39 Eng. Rep. (Reprint) 422; *Bayley v. Snelham*, 1 Sim. & St. 78, 57 Eng. Rep. (Reprint) 31, 5 Ves. Jr. 534, 31 Eng. Rep. (Reprint) 721; *Wilkinson v. Adam*, 1 Ves. & B. 422, 35 Eng. Rep. (Reprint) 163, *affirmed* 12 Price 470; *Meredith v. Farr*, 2 Y. & C. Ch. 525, 63 Eng. Rep. (Reprint) 235; *Hill v. Crook*, 7 Moak 1, L. R. 6 H. L. 265, 42 L. J. Ch. 702, 22 W. R.

137, *affirming* L. R. 6 Ch. 311, 24 L. T. N. S. 488; In re Humphries, 24 Ch. D. 691; In re Bryon, 30 Ch. D. 110, 55 L. J. Ch. 30; In re Hastie, 35 Ch. D. 728, 56 L. J. Ch. 792, 57 L. T. N. S. 168, 35 W. R. 692; In re Horner, 37 Ch. D. 695, 57 L. J. Ch. 211, 58 L. T. N. S. 103, 36 W. R. 348; In re Wood [1902] 2 Ch. 542, 71 L. J. Ch. 723, 87 L. T. N. S. 316, 18 Times L. Rep. 710, 50 W. R. 695, *reversing* [1901] 2 Ch. 578, 70 L. J. Ch. 856, 85 L. T. N. S. 447, 50 W. R. 102; In re Loveland [1906] 1 Ch. 542, [1906] W. N. 46; In re Eve [1909] 1 Ch. 796, [1909] W. N. 86; Milne v. Wood, 42 L. J. Ch. 545; In re Lowe, 61 L. J. Ch. 415, 40 W. R. 475; Clifton v. Goodbun, L. R. 6 Eq. 278; Holt v. Sindrey, L. R. 7 Eq. 170, 38 L. J. Ch. 126; Lepine v. Bean, L. R. 10 Eq. 160; Bentley v. Blizard, 4 Jur. N. S. 652; Dilley v. Matthews, 11 Jur. N. S. 425, 12 L. T. N. S. 488, 13 W. R. 676; Re Plant, 47 W. R. 183.

Canada.—Lobb v. Lobb, 22 Ont. L. Rep. 15, 17 Ont. W. Rep. 212, 2 Ont. W. N. 44 *affirming* 21 Ont. L. Rep. 262, 16 Ont. W. Rep. 200.

Indiana.—Elliott v. Elliott, 117 Ind. 380, 20 N. E. 264, 10 Am. St. Rep. 54.

New Jersey.—Tuttle v. Woolworth, 74 N. J. Eq. 310, 77 Atl. 684.

New York.—Gelston v. Shields, 16 Hun 143, *affirmed* 78 N. Y. 275.

North Carolina.—Howell v. Tyler, 91 N. C. 207; Sullivan v. Parker, 113 N. C. 301, 18 S. E. 347. See also Harrell v. Hagan, 147 N. C. 111, 60 S. E. 909, 125 Am. St. Rep. 539.

Rhode Island.—See In re Truman, 27 R. I. 209, 61 Atl. 598.

Virginia.—Bennett v. Toler, 15 Grat. 588, 78 Am. Dec. 638.

In the leading English case of Hill v. Crook, 7 Moak 1, L. R. 6 H. L. 265, 42 L. J. Ch. 702, 22 W. R. 137, *affirming* L. R. 6 Ch. 311, 24 L. T. N. S. 488, it was said that there were two classes of cases in which the prima facie interpretation of the word "children" in a will as meaning only legitimate children might be departed from. And this more concrete statement of the rule by the English court is supported, though not in terms, by the decisions of the American courts in the cases cited under the foregoing general rule. One class of cases is that in which it is impossible from the circumstances of the parties that any legitimate children could take under a general bequest to "children" in a will. See as so construing a will under those circumstances, Beachcroft v. Beachcroft, 1 Madd. 430, 56 Eng. Rep. (Reprint) 159; Woodhouselee v. Dalrymple, 2 Meriv. 419, 35 Eng. Rep. (Reprint) 1000; Bayley v. Snelham, 1 Sim. & St. 78, 57 Eng. Rep. (Reprint) 31, 5 Ves. Jr. 534, 31 Eng. Rep. (Reprint) 721; Hill v. Crook, 7 Moak 1, L. R. 6 H. L. 265, 42 L. J. Ch. 702, 22 W. R. 137, *affirming* L. R. 6 Ch. 311, 24 L. T. N. S. 488; In re Eve [1909] 1 Ch. 796, [1909] W. N. 86; Clifton v. Goodbun, L. R. 6 Eq. 278; In

re Brown, L. R. 16 Eq. 239; In re Frogley's Estate [1905] P. 137, 74 L. J. P. 72, 92 L. T. N. S. 429, 54 W. R. 48, 21 Times L. Rep. 341; Bentley v. Blizard, 4 Jur. N. S. 652; Tuttle v. Woolworth, 74 N. J. Eq. 310, 77 Atl. 684; Howell v. Tyler, 91 N. C. 207. See also Holt v. Sindrey, L. R. 7 Eq. 170, 38 L. J. Ch. 126. Thus, where a testator who was a bachelor, or a testatrix who was a spinster, bequeathed property to "children," it was held that an illegitimate child was meant, and not a legitimate child. Frogley's Estate (Eng.) [1905] P. 137, 74 L. J. 72, 92 L. T. N. S. 429, 54 W. R. 48, 21 Times L. Rep. 341; Clifton v. Goodbun, L. R. 6 Eq. (Eng.) 278; Beachcroft v. Beachcroft, 1 Madd. (Eng.) 430, 56 Eng. Rep. (Reprint) 159.

In the case of the Frogley's Estate, *supra*, it appeared that a testatrix, who died a spinster, left a will by which she gave all her property to her sister, in trust for all the children who might "belong to" her (the testatrix) at the time of her death, to be equally divided between them, share and share alike, to and for their own sole use and benefit, and if there should be only one child "belonging to" her at the time of her decease, then for the sole use and benefit of that child. And, in the event of there being no child or children "belonging to" her at the date of her death, the testatrix left all her property to her sister, the said Jane Frogley, absolutely. It also appeared that about two years after the date of the will, the testatrix gave birth to an illegitimate daughter, who married and survived her. Bargrave Deane, J., said: "I am of opinion that the grant should go to the illegitimate-daughter of the testatrix. In my view there is a great distinction to be drawn between gifts, whether by deed or will, by a man in favor of illegitimate children and gifts by the mother of an illegitimate child or children. It may well be argued that, in the former case, there is an immoral consideration; but I cannot see that such an argument applies in the case of gifts by the mother. . . . Therefore, as the child in the present case did undoubtedly 'belong to' the testatrix, that child is the person she intended to benefit, and there is nothing in the policy of the law to affect this gift. The grant will, therefore, go to Gertrude Smith, and my order to this effect will include a declaration that, on the true construction of this will, the said Gertrude Smith being the only child belonging to Sarah Eggar Frogley, the testatrix, at the date of the death of the said Sarah Eggar Frogley, is entitled to the property passing under the will."

So, where a testator devises or bequeaths property to the "child" or "children" of another person, knowing that that person has then illegitimate and no legitimate children, it has been held that it was his intention to

convey a present benefit to the illegitimate children then existing, as it would not be presumed that he intended a present benefit to a person who did not then exist and might never come into being. *Woodhouselee v. Dalrymple*, 2 Meriv. 419, 35 Eng. Rep. (Reprint) 1000; *Bayley v. Snelham*, 1 Sim. & St. 78, 57 Eng. Rep. (Reprint) 31, 5 Ves. Jr. 534, 31 Eng. Rep. (Reprint) 721; *In re Brown*, L. R. 16 Eq. (Eng.) 239; *Bentley v. Blizzard*, 4 Jur. N. S. (Eng.) 652; *Tuttle v. Woolworth*, 74 N. J. Eq. 310, 77 Atl. 684; *Howell v. Tyler*, 91 N. C. 207. See also *In re Horner*, 37 Ch. D. (Eng.) 695, 57 L. J. Ch. 211, 58 L. T. N. S. 103, 36 W. R. 348. In *Tuttle v. Woolworth*, supra, the following facts appeared: The testator devised to the trustees a house and lot, which they were directed to permit his daughter to use and occupy during her natural life, with this direction: "And after her death to convey the same to her children, or if it shall be deemed more desirable by my executors, and for the interest of said children, then to sell the said house and lot and divide the proceeds thereof among said children, share and share alike, but should the said Caroline die without issue her surviving, then I direct my said executors to sell and convey the said house and lot and distribute the proceeds thereof among her heirs," etc. The testator likewise gave to his executors and trustees certain bonds and stocks upon the trust that they should collect the income therefrom and use the same for the purpose of paying all expenses incidental to the maintenance of the above-mentioned house and lot, and if there was any balance of the said income remaining unexpected for that purpose, to pay the same to his said daughter during her natural life and upon her separate individual receipt; "and after her death to set off the said bonds and stock to her children or theirs; if the said Caroline shall die without issue her surviving or children of such issue, then said bonds and stock shall revert to my estate," etc., one of the portions to his executors in trust for the use of his daughter Caroline during her natural life, "the income of said part to be paid to my said daughter Caroline upon her separate individual receipt; and after her death the principal of said part is to be distributed among her children, if any shall her survive. If she shall leave no child or children surviving or issue of such child or children who shall likewise be entitled, then such part shall go to my son and remaining daughter [naming them]." Some time prior to the execution of this will the testator's daughter Caroline had joined a semi-religious and sociological society, whose members rejected the ideas of the marriage relation which are prevalent and lawful in this country. She there contracted an alliance with a man who became

the father of her only child, which child now claims the fund in the hands of the complainant as the child or issue of the testator's daughter Caroline, and as one who came within the terms of the will as such child or issue. This so-called child, now the claimant of the fund in question, was born in October, 1870, prior to the execution of the will under the terms of which the fund is to be distributed. It appeared that, notwithstanding the usual course of life which the daughter Caroline had chosen, the friendly and filial relations between her and her father and the other members of the family were never broken. The testator was a man of large wealth and of wide business experience. He was president of a large and successful banking institution, and a man of intelligence and high character. Some correspondence between the father and this daughter was in evidence; it was filled with expressions of respect and affection on the part of both. When her child was born she reported the fact to her father (on November 17th, 1870) by a letter, in which she gave the name of the child's father, and stated that she had given to the child himself for his middle name the family name of the testator's family, and that name the claimant still bears. It was manifest from the evidence that the testator knew that his daughter had contracted an illicit alliance with the man who was the father of her child, and that the child which was the fruit of this irregular relationship was illegitimate, and that he was her only child, her only issue, and that this knowledge came to him before the execution of his will. In fact, it appears that he had executed a prior will, which was in force at the time of the birth of the child, and that he destroyed it and executed the present will after that event and after his knowledge of it, and it is claimed, on the part of the claimant, that a proper construction of the document will award to him the whole fund, the income of which was by the will given to the daughter (his mother) for life, for the reason that the testator must by necessary implication have intended to benefit this illegitimate child, there being no legitimate issue to answer the demonstration of the will. The court said: "When the facts in this case are considered, it is quite evident that the testator meant to make provision for the only child of his daughter who was living at the date of the will, of whom he had any knowledge, or for a class of her children who might be born to her during her association with the society of which she was a member, which membership for ought he knew would continue during the remainder of her life. He could have had in contemplation, under the circumstances disclosed by the testimony, nothing but illegitimate children, because at the time he made his will there was

no probability that she would ever be the mother of children born in lawful wedlock. It must therefore be implied from the terms of the will and the circumstances surrounding its execution that the testator meant that the remainder of the share of his estate in question should go to the then living illegitimate child, or to any other illegitimate children that might be the fruit of her irregular relationships in the society which she had joined."

In *Bentley v. Blizard*, 4 Jur. N. S. (Eng.) 652, it appeared that the bequest in that case "was so expressed as clearly to exclude all but illegitimate children."

In *Holt v. Sindrey*, L. R. 7 Eq. (Eng.) 170, 38 L. J. Ch. 126, it appeared that a testator believing his daughter's marriage to one John Lattimer to be lawful, and the children of the union legitimate, whereas the contrary was the fact, gave certain property in trust during the life of his daughter Mary, the wife of John Lattimer, for her sole use, exclusive of her then present or any future husband, and after the death of his said daughter to pay the same unto all and every child or children of his said daughter begotten or to be begotten, in equal shares if more than one, and if there should be but one child then the whole to be in trust for such one child, and to be vested in the same children when they attained twenty-one, or died under that age leaving issue. And in case there should not be any such child of his said daughter Mary Lattimer, or in case all such children (if any), should die under twenty-one without leaving issue, then the testator gave the fund in trust for other persons. In holding that the children took thereunder, the court said: "Where a gift is made to a child or to children as a class the natural and proper meaning of the word 'child' or 'children' is legitimate child or legitimate children; but if the object of a gift is clearly described and clearly ascertainable from the words of the will, it matters nothing whether the object of the gift be legitimate or illegitimate, because an illegitimate child, or a number of illegitimate children as a class, if properly described, may be a legatee or legatees just as well as legitimate children. But in the construction of a will the primary and proper signification of every word is to be attributed to it. In this case it has been argued that the testator must be taken to have meant legitimate children only, and that as there are no legitimate children to answer the description this gift must altogether fail. I think it is perfectly clear upon the face of this will that the testator understood that his daughter Mary Lattimer was the wife of John Lattimer. It appears upon the face of the will that he believed her to be the lawful wife of John Lattimer.

It also appears upon the face of the will, from his referring to children 'begotten', that he knew there were in existence children born of the body of his daughter, and that they were known to him as children of this marriage. The fact that from an unknown circumstance that marriage was not a lawful marriage, though believed by the testator to be a lawful marriage; and the fact that from that unknown circumstance the children begotten of Mary Lattimer were, although the testator did not know it, illegitimate, seems to me to have nothing to do with the question whether they are or are not sufficiently described in the will. If there had been any legitimate children begotten of the body of Mary Lattimer, the description would properly apply to those children; but when it is an ascertained fact that there are no other children but the children begotten of the marriage with Lattimer; and when it is certain that children begotten of the testator's daughter are the objects of his bounty, and that there are none other to answer the description but the children of the marriage with Lattimer, I cannot say that these children were not clearly and properly described on the face of this will as the objects of the testator's bounty. The words of the will are in themselves intelligibly construed in their natural sense by reference to what it is certain the testator knew, viz., that there were children begotten of the marriage of his daughter with Lattimer." To the same effect see *In re Lowe*, 61 L. J. Ch. (Eng.) 415, 40 W. R. 475.

Likewise, under the presumption which obtains in England that a woman past a certain age is incapable of bearing children, it has been held that a bequest to the "children" of a widowed sister who was within a month of the age of sixty-eight years at the date of the will, and who then had two illegitimate and no legitimate children, was held to be a bequest to the illegitimate children. In *re Eve* [1909] 1 Ch. (Eng.) 796, [1909] W. N. 86, wherein Swinfen Eady, J., said: "I propose merely to state the law as laid down by the highest authority and apply it to the case. The term 'children' in a will *prima facie* means legitimate children, and if there is nothing else, the circumstances that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take. Then Lord Cairns said in *Hill v. Crook*, L. R. 6 H. L. 282: 'But there are two classes of cases in which that *prima facie* interpretation is departed from. One class of cases is where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest. A familiar example of that might be given in this way:—Suppose there is a bequest "to the children of my

daughter Jane," Jane being dead, and having left illegitimate children, but having left no legitimate children. There, inasmuch as the testator must be taken to have known the state of his family, and must be taken to have intended to benefit some children of his daughter Jane, and inasmuch as she had no children who could be benefited except illegitimate children, rather than that the bequest should fail altogether the courts will hold that those illegitimate children are intended, and they will take under the term "children." Applying that statement of the law to this case, I have to ask myself who could the testatrix have meant when she made this gift to the children of Mary Ann Burns, the old widowed sister who was then living with her. There were two illegitimate children whom she knew all about, and there never could be any other or legitimate children who could take under this bequest. Lord Cairns said that one class of cases in which illegitimate children may take is, where there is a gift to children and it is impossible that legitimate children should take. That is this case. In the circumstances which existed at the date of the will it was impossible that any legitimate children should take. There were none and never could be any. It is impossible to come to any other conclusion than that the testatrix intended these two children to take, and I must give effect to that intention—an intention which I arrive at not from any conjecture as to what the testatrix meant, but from the will itself with the assistance of such surrounding circumstances as I am bound to look at. I therefore decide that the two illegitimate children of Mary Ann Burns are entitled to shares in the residue." See also *In re Horner*, 37 Ch. D. (Eng.) 695, 57 L. J. Ch. 211, 58 L. T. N. S. 103, 36 W. R. 348.

Compare Matter of Overhill, 1 Smale & G. (Eng.) 362, 17 Eng. L. & Eq. 323, 22 L. J. Ch. 485, 17 Jur. 342, 65 Eng. Rep. (Reprint) 159, wherein the court said: "Now, the only circumstances, to create any doubt here, were the age of Mary Bentley at the date of the will [46], and the circumstances under which the testatrix made her will; that she knew that Mary Bentley had children, and believed her to be the wife of the individual whom she mentions as her husband. All that supports the view taken . . . in favor of the illegitimate children, but is contradicted, . . . for it is impossible not to see that this lady might have had legitimate children, and they could not have been excluded from the benefit of this gift. However improbable the contingency, if there had been legitimate children of Mary Bentley, they undoubtedly would have taken. According to the argument in favor of the only children which she had, they would have been entitled to take with

the others, and under the same description. That is forbidden by the rule of law; and therefore, with great regret, I must hold that they are not entitled under this bequest."

The other class of cases referred to as exceptional in *Hill v. Crook*, 7 Moak 1, L. R. 6 H. L. 265, 42 L. J. Ch. 702, 22 W. R. 137, *affirming* L. R. 6 Ch. 311, 24 L. T. N. S. 488, is that wherein there is, on the face of the will itself, and on a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term "children," not merely according to its prima facie meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children. See as applying that rule, *Wilkinson v. Adam*, 1 Ves. & B. 422, 35 Eng. Rep. (Reprint) 163, *affirmed* 12 Price 470; *Meredith v. Farr*, 2 Y. & C. Ch. 525, 63 Eng. Rep. (Reprint) 235; *Hill v. Crook*, 7 Moak (Eng.) 1, L. R. 6 H. L. 265, 42 L. J. Ch. 702, 22 W. R. 137, *affirming* L. R. 6 Ch. 311, 24 L. T. N. S. 488; *In re Humphries*, 24 Ch. D. (Eng.) 691; *In re Bryon*, 30 Ch. D. (Eng.) 110, 55 L. J. Ch. 30; *In re Hastie*, 35 Ch. D. (Eng.) 728, 56 L. J. Ch. 792, 57 L. T. N. S. 168, 35 W. R. 692; *In re Horner*, 37 Ch. D. (Eng.) 695, 57 L. J. Ch. 211, 58 L. T. N. S. 103, 36 W. R. 348; *In re Harrison* [1894] 1 Ch. (Eng.) 561, 63 L. J. Ch. 385; *In re Wood* [1902] 2 Ch. (Eng.) 542, 71 L. J. Ch. 723, 87 L. T. N. S. 316, 18 Times L. Rep. 710, 50 W. R. 695, *reversing* [1901] 2 Ch. 578, 70 L. J. Ch. 856, 85 L. T. N. S. 447, 50 W. R. 102; *In re Loveland* [1906] 1 Ch. (Eng.) 542, [1906] W. N. 46; *Milne v. Wood*, 42 L. J. Ch. (Eng.) 545; *Holt v. Sindrey*, L. R. 7 Eq. (Eng.) 70, 38 L. J. Ch. 126; *In re Brown* L. R. 16 Eq. (Eng.) 239; *Bentley v. Blizard*, 4 Jur. N. S. (Eng.) 652; *Dilley v. Matthews*, 11 Jur. N. S. (Eng.) 425, 12 L. T. N. S. 488, 13 W. R. 676; *In re Plant*, 47 W. R. (Eng.) 183; *Lobb v. Lobb*, 22 Ont. L. Rep. 15, 17 Ont. W. Rep. 212, 2 Ont. W. N. 44, *affirming* 21 Ont. L. Rep. 262, 16 Ont. W. Rep. 200.

So, an illegitimate child will take under a subsequent gift to "children," where there has been a sufficient description of the child in the first part of the will to show the testator's intention to include that child. *In re Humphries*, 24 Ch. D. (Eng.) 691; *In re Bryon*, 30 Ch. D. (Eng.) 110, 55 L. J. Ch. 30; *In re Smilter* [1903] 1 Ch. (Eng.) 198, [1902] W. N. 236.

In the case last cited it appeared that a testator gave certain property to the children of a nephew "including amongst such children and child Samuel Smilter Revell, the illegitimate son of my said nephew." It was held that that illegitimate son was to be considered as one of the children for all the purposes of the will, and was included in a

later bequest in the same will to the children of the testator's nephews and nieces, though not specifically mentioned therein.

Where a clause of a testator's will directed the trustees at the death of either of his daughters to pay to each of the children of the deceased daughter an equal portion of her share, discharged of said trust, the lineal descendants of any deceased child to take the part of such share as their parent would have taken if alive, it was held that the testator intended by this devise to the children of his deceased daughter to include illegitimate as well as legitimate children, especially where he presumably had full knowledge of the existence of an illegitimate child of his daughter at the time of the execution of his will. *Eaton v. Eaton*, 88 Conn. 269, 91 Atl. 191.

In the case of *In re Horner*, 37 Ch. D. (Eng.) 695, 57 L. J. Ch. 211, 58 L. T. N. S. 103, 36 W. R. 348, it appeared that the testator described his sister as "the wife of Thomas Horner," when he knew well that she was not and could not be legally the wife of the person named. Hence, it was held that his use of the correlative term "children" meant the children or offspring born of that connection, and therefore, the sister having no legitimate children, it was inferred that the testator meant her illegitimate children.

In *Hughes v. Knowlton*, 37 Conn. 429, it appeared that a testator's will provided that the remainder of his property, after the payment of his debts, should be divided equally between his two daughters, "meaning and intending that all the children that have been or may be born of their bodies shall become heirs to the same." It was held that the daughters took a fee, and that the words quoted had reference to the fact that both daughters had illegitimate children, and were meant to express the testator's disapprobation of the rigorous common-law rule as to the incapability of bastards to take property by descent.

In *Meredith v. Farr*, 2 Y. & C. Ch. (Eng.) 525, 63 Eng. Rep. (Reprint) 235, it appeared that a testator bequeathed one-half of his estate to the children of his daughter Mary, and the other half to the children of his daughter Catherine. At the date of his death, his daughter Mary had six children born in lawful wedlock and two illegitimate children, while his daughter Catherine had one legitimate and three illegitimate children. These latter three illegitimates were named in the will in another bequest to them. It was held that the legitimate children of Mary were entitled to one-half the bequest, and that all the children of Catherine, whether legitimate or not, took the other half.

Where a testatrix devised property to her daughter for life and at her death to "all

the children of her body," and it appeared that at the time these words were written there had been born of the body of her daughter two legitimate and four illegitimate children, it was held that the latter were to be considered as included in the words "all the children of her body," and in addition two other illegitimate children born after the death of the testatrix were to be included. *Sullivan v. Parker*, 113 N. C. 301, 18 S. E. 347. Compare, as to the holding with respect to after-born illegitimate children, *In re Harrison* [1894] 1 Ch. (Eng.) 561, 63 L. J. Ch. 385.

A devise of property to a daughter for life, and at her death to "be equally divided amongst her children," was held in *Bennett v. Toler*, 15 Grat. (Va.) 588, 78 Am. Dec. 638, to include an illegitimate son. The court said: "And so adhering to the principle of the rule, when the law makes the bastard child of a woman her child; endows him with every attribute of a child born in wedlock; includes him in the very class designated as children, to whom her estate is to pass in the vent of her dying intestate; a testator speaking of her children, the words must be construed to include in the class all who in law are her children."

The right of illegitimates to inherit from or through their mother is discussed in the note to *Barron v. Zimmerman*, Ann. Cas. 1914D 574.

In a few instances it has been held that the word "children," as used by a testator, meant his illegitimate children, to the exclusion of his legitimate children by a former wife. *Lepine v. Bean*, L. R. 10 Eq. (Eng.) 160; *Elliott v. Elliott*, 117 Ind. 380, 20 N. E. 264, 10 Am. St. Rep. 54; *Gelston v. Shields*, 16 Hun 143, affirmed 78 N. Y. 275. Thus, in *Elliott v. Elliott*, supra, it appeared that a testator devised his property to his wife in fee "that she may dispose of the same as she may think best for herself and my children." The court held that by the words "my children" the testator meant his illegitimate children, to the exclusion of his legitimate children by a former wife. The court said: "Here are two classes of persons to whom the words will apply, viz., two legitimate children in England, and four illegitimate children in this country. It may be conceded that when a man speaks of his children, he is ordinarily understood to mean his legitimate children. But where it is plain from the surrounding circumstances that he used the words in a different sense, they cannot be given that meaning. . . . Fourteen years prior to his death George Elliott abandoned his wife and children in England and came to America, where he married another woman, by whom he had four children. In his will he bequeathed all his property, both real and personal, to the woman whom he mar-

ried in America, in trust for the support of herself and his children, to be sold, and the proceeds expended as she might, in her judgment, deem best. So far as appears from the record in this case she had no knowledge of the existence of the plaintiff in this case; indeed, the legal presumption is that she had no knowledge that George Elliott ever had another wife, for had she possessed such knowledge she would be chargeable with the crime of living in open and notorious adultery. No such charge is made. The plaintiff, at the time of the death of his father, was about fifteen years of age, while the defendants herein were small children. In the light of these surrounding circumstances can it reasonably be said that George Elliott, by his will, intended to provide for the plaintiff, and leave his children here unprotected for and unprotected? The case of *Gelston v. Shields*, 78 N. Y. 275, is, in its facts, similar to this case. In that case Henry Shields, the testator, by his will, bequeathed certain of his property to his wife, Catharine, and bequeathed the remainder to his children, without naming them. After his death one Jane Shields, or Jane Valentine, appeared, and, claiming to be his widow, instituted suit for a dower interest in his estate, and succeeded. She had two children, who claimed to be the legitimate children of Henry Shields, deceased; but the court, construing the will in the light of the surrounding circumstances, held that the testator, in bequeathing his property to his children, must have intended to bequeath it to his children by Catharine Shields, who was designated in the will as his wife. Great stress was placed upon the fact that the will named Catharine Shields, as the guardian of the minor children of the testator. So, in this case, we think one strong circumstance in the case tending to show the intention of the testator, is the fact that George Elliott constituted Mary Ann Elliott the trustee of his property, to be expended by her for the support of his children. In our opinion the words 'my children' in the will in question mean the children of George Elliott by his wife Mary Ann Elliott."

While a general bequest to "children" may be good as a gift to illegitimate children as a class, provided it clearly appears that they were intended to be the objects of the gift, no gift, however express, to unborn illegitimate children is allowed by law, nor under a gift, good as to illegitimate children as a class, will after-born illegitimate children be permitted to take. *Pratt v. Mathew*, 22 Beav. 328, 52 Eng. Rep. (Reprint) 1134, 4 W. R. 418, *affirmed* 2 Jur. (N. S.) 1055, 25 L. J. Ch. 886, 4 W. R. 772; *Hill v. Crook*, 7 Moak (Eng.) 1, L. R. 6 H. L. 265, 42 L. J. Ch. 702, 22 W. R. 137, *affirming* L. R. 6 Ch. 311, 24 L. T. N. S. 488; *Crook v. Hill*, 3 Ch. D. 773,

46 L. J. Ch. 119; *Howarth v. Mills*, L. R. 2 Eq. 389; *Holt v. Sindrey*, L. R. 7 Eq. 170, 38 L. J. Ch. 126. And see the dicta to this effect in the majority of the cases cited throughout this note. *Compare Sullivan v. Parker*, 113 N. C. 301, 18 S. E. 347.

Thus in *Howarth v. Mills*, L. R. 2 Eq. (Eng.) 389, it was held that a bequest by a spinster who had gone through the form of marriage with the widower of her deceased sister to her "children, legitimate or otherwise," did not include after-born children, and that only the child living at the date of the will took thereunder.

The rule last stated is subject to the exception found in those cases which have construed the word "children" to mean illegitimate children begotten before the death of the testator, as children born after the date of the will and before the death of the testator, or children born in due time after his death, or en ventre sa mere. *Gordon v. Gordon*, 1 Meriv. (Eng.) 148, 35 Eng. Rep. (Reprint) 628; *Wilkinson v. Adam*, 1 Ves. & B. 422, 35 Eng. Rep. (Reprint) 163, *affirmed* 12 Price 470; *Occleston v. Fullalove*, L. R. 9 Ch. (Eng.) 147, 43 L. J. Ch. 297, 22 W. R. 305; *Crook v. Hill*, 3 Ch. D. 773, 46 L. J. Ch. 119; *In re Hastie*, 35 Ch. D. (Eng.) 728, 56 L. J. Ch. 792, 57 L. T. N. S. 168, 35 W. R. 692; *In re Loveland* [1906] 1 Ch. (Eng.) 542, [1906] W. N. 46; *Holt v. Sindrey*, L. R. 7 Eq. (Eng.) 170, 38 L. J. Ch. 126; *Dilley v. Matthews*, 11 Jur. N. S. (Eng.) 425, 13 W. R. 676. See also *In re Bolton*, 31 Ch. D. (Eng.) 542, 55 L. J. Ch. 398, 34 W. R. 325; *Earle v. Wilson*, 17 Ves. Jr. 528, 34 Eng. Rep. (Reprint) 205. *Compare Mortimer v. West*, 3 Russ. 370, 38 Eng. Rep. (Reprint) 615; *In re Lowe*, 61 L. J. Ch. (Eng.) 415, 40 W. R. 475. In *Gordon v. Gordon*, supra, Lord Chancellor Eldon said: "There are two questions in this case. Upon the first of these, which is the general question, I remain of my former opinion, that it is possible to hold, consistently with the doctrine of Lord Coke, that, if an illegitimate child en ventre sa mere is described so as to ascertain the object intended to be pointed out, it may take under that description. Then, with regard to the application of that principle to the present case, I studiously abstain from expressing any opinion as to what it would be if the words were 'to my child,' while I decide that, the words being only 'the child with which A. B. is now pregnant,' those words will do so as to give effect to the intention in its favor. . . . I repeat that this is not to be taken as governing either the question of what would be my decision if the words were 'to my child,' or that which would arise out of a bequest to an illegitimate child not only unborn, but not in esse,

even though it may be sufficiently pointed out as the child of a particular mother."

The general question whether a gift to "children" and the like includes a child en ventre sa mere, is treated in the notes to *Villar v. Gilbey*, 7 Ann. Cas. 130, and *In re Salaman*, 12 Ann. Cas. 199.

In several instances it has been held that an illegitimate child who has been subsequently legitimated is entitled to take under a general bequest to "children." *In re Andros*, 24 Ch. D. (Eng.) 637, 52 L. J. Ch. 793, 32 W. R. 30; *In re Grey* [1892] 3 Ch. (Eng.) 88; *Harness v. Harness*, 50 Ind. App. 364, 98 N. E. 357; *Gates v. Seibert*, 157 Mo. 254, 57 S. W. 1065, 80 Am. St. Rep. 625; *Morton v. Morton*, 62 Neb. 420, 87 N. W. 182; *Smith v. Lansing*, 24 Misc. 566, 53 N. Y. S. 633; *Bennett v. Toler*, 15 Grat. (Va.) 588, 78 Am. Dec. 638. In *Gates v. Seibert*, supra, it was held that a statute (R. S. Mo. 1899, § 2917) making antenuptial children legitimate, though a part of the statute of descents and distributions, was not limited in its effect to inheritance in case of intestacy but applied to those claiming to take as purchasers under a will. Thereunder, it was held that a child born out of wedlock but legitimated by the subsequent marriage of the parents and the father's recognition of her as his child shared in a devise by the father to his "children," with the legitimate children of the marriage.

It has been several times held that where a will definitely refers to illegitimate children as "children of the testator," a subsequent use of the word "children" will be deemed to include such illegitimates. *In re Parker* [1897] 2 Ch. (Eng.) 208, 76 L. T. N. S. 421; *In re Walker* [1897] 2 Ch. (Eng.) 238, 66 L. J. Ch. 622, 77 L. T. N. S. 94, 45 W. R. 647; *Lobb v. Lobb*, 21 Ont. L. Rep. 262, 16 Ont. W. Rep. 200, affirmed 22 Ont. L. Rep. 15, 17 Ont. W. Rep. 212, 2 Ont. W. N. 44. For a general discussion of the construction to be applied to words repeated in a will, see the note to *Roskrow v. Jewell*, Ann. Cas. 1914B 63.

KANSAS CITY

v.

JORDAN.

Kansas Supreme Court—February 10, 1917.

99 Kan. 814; 163 Pac. 188.

Intoxicating Liquors — Regulation of Transportation — Validity.

Under the laws of this state cities of the first class have power to pass ordinances

Ann. Cas. 1918B.—18.

regulating the transportation of intoxicating liquors for legal purposes and prohibiting such transportation for illegal purposes.

[See note at end of this case.]

Municipal Corporations — Ordinances — Subject and Title.

The ordinance attacked contains but one subject, and that subject is clearly expressed in the title.

[See Ann. Cas. 1912C 192.]

Intoxicating Liquors — Regulation of Transportation — Validity.

A city ordinance regulating the transportation of intoxicating liquors for legal purposes, and prohibiting such transportation for illegal purposes, is consistent with the law of this state regulating the transportation and delivery of intoxicating liquors.

[See note at end of this case.]

Same.

Such an ordinance as is mentioned in section 1 of this syllabus is not an unlawful regulation of interstate commerce.

[See note at end of this case.]

Same.

Such an ordinance as is mentioned in section 1 of this syllabus is a law of this state within the meaning of the United States Constitution, and of the Webb-Kenyon Act (Part 1, 37 U. S. Stat. at Large, ch. 90, p. 699, 4 Fed. St. Ann. (2d ed.) 593).

[See note at end of this case.]

Municipal Corporations — Offense under Ordinance — Negating Exceptions.

In charging an offense under a city ordinance, it is not necessary to plead any of the exceptions named in the ordinance, where such exceptions are not contained in the clause which creates the offense.

[See 6 Ann. Cas. 726; 13 Ann. Cas. 364; Ann. Cas. 1913B 135.]

Intoxicating Liquors — Regulation of Transportation — Validity.

An ordinance which attempts to regulate the transportation of intoxicating liquors within the city for legal purposes, and to prohibit such transportation for illegal purposes, but which does not permit the transportation of such liquors for all of the purposes recognized as legal by the law of the state, is invalid; and a judgment quashing a complaint drawn under such an ordinance will be sustained.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Wyandotte county: HUTCHINGS, Judge.

Prosecution of Harry Jordan for violation of municipal ordinance. Judgment for defendant. Municipality appeals. The facts are stated in the opinion. **AFFIRMED.**

Hugh J. Smith, Lee Judy and Thomas M. Van Cleave for appellant.

Thomas A. Pollock, R. J. Ingraham and L. E. Durham for appellee.

William H. McCamish, as *amicus curiae*.

[815] MARSHALL, J.—The plaintiff appeals from a ruling of the trial court quashing a complaint drawn under a city ordinance. The ordinance, including its title, is as follows:

"ORDINANCE No. 11,500.

"An Ordinance relating to the suppression of the sale and delivery of intoxicating liquors; declaring property used in connection therewith nuisances, and providing for the abatement of such nuisances.

"Be it Ordained by the Board of Commissioners of the City of Kansas City, Kansas.

"SECTION 1. That it shall be unlawful for any person, firm or corporation to drive or operate upon any boulevard, street, avenue, alley, public highway, or public ground of the City of Kansas City, Kansas, any car, wagon, truck, or vehicle, the cargo of which consists wholly or partly of any intoxicating liquor; excepting as hereinafter provided in Section 6.

"SECTION 2. The driving or operating upon any boulevard, street, avenue, alley, public highway or public ground of said City any car, wagon, truck or vehicle, the cargo of which consists wholly or partly of any intoxicating liquor, and such car, wagon, truck or vehicle, and the cargo thereon, and any animal or animals drawing the same, are hereby declared to be common nuisances, excepting as hereinafter provided in Section 6.

"SECTION 3. The driving or operating upon any boulevard, street, avenue, alley, public highway or public ground of said city of any car, wagon, truck or vehicle, upon which is inscribed, lettered, pasted, or upon which is carried so as to be exposed to the public view, the name of any person, firm or corporation engaged in the manufacture, sale or distribution of intoxicating liquors, or upon which vehicle or cargo appears any word, sign, emblem, device or object which indicates in any way that the cargo of such vehicle above mentioned and referred to consists wholly or partly of intoxicating liquors, is hereby declared to be unlawful and to constitute a common nuisance.

"SECTION 4. Any person, company, firm or corporation violating any of the provisions of Sections 1, 2 and 3 of this ordinance shall be deemed guilty of a misdemeanor and upon conviction before the Police Judge shall be fined in any sum not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00), and be imprisoned not less than thirty days nor more than six months for each offense, and adjudged [816] to payment of costs, and shall be committed to the city jail until such fines and costs are paid.

"SECTION 5. The Chief of Police or any police officer of the City of Kansas City, Kansas, is hereby authorized upon the arrest of any person or persons found in charge of, operating, or assisting to operate any car, wagon, truck or vehicle upon any of the boulevards, streets, avenues, alleys, public highways, or public grounds of the City of Kansas City, Kansas, the cargo of which consists wholly or partly of any intoxicating liquors, or upon which appears any matter prohibited by Section 3 hereof, shall forthwith seize such conveyance or vehicle and an animal or animals drawing the same, and all intoxicating liquors thereon and hold the same until the trial of the person or persons arrested for driving or operating such conveyance or vehicle and upon conviction of such person or persons in the police court and the adjudging of such liquors and property to be a nuisance as defined in Section 1 and 2 hereof, all intoxicating liquors together with their containers so seized shall be forthwith destroyed by direction of the Chief of Police, and other property so seized shall be advertised for sale by the Chief of Police giving ten days' notice in the official city paper of the time and place of sale, and the proceeds derived from such sale shall be applied first, to the expense of the sale, and any surplus shall be applied to the payment of fines and costs of the person or persons convicted of operating such nuisance if the property belonged to such person or persons; and if such property belonged to any person or persons not a party to the suit, such proceeds shall be paid to the owner of the property; provided, that any person may have a trial as to his rights of property in any of the articles so seized by serving a notice in writing to that effect upon the Chief of Police at any time before the trial of the person from whom such property was taken, whereupon, the Police Judge shall set the same down for trial and may hear and determine the same so far as it affects the right of the officer to seize and hold the same for a violation of this ordinance, which trial may be had in connection with or separately from, the trial of the person from whom the property or goods were taken.

"SECTION 6. Nothing in this ordinance shall be construed to prevent any person from bringing into the city, personally, intoxicating liquors purchased outside of the State of Kansas, nor to prevent any such purchaser from receiving through a common carrier within the city intoxicating liquors purchased by any such person outside of the State of Kansas and to which intoxicating liquors the title vested in the purchaser outside of the State of Kansas, when such intoxicating liquors are intended to be possessed and received by such purchaser for his personal use.

"SECTION 7. All persons, firms or corporations doing business outside of the City of Kansas City, Kansas, which shall sell in such outside state or territory any intoxicating liquors to residents of the City of Kansas City, Kansas, shall file daily with the City Clerk of the City of Kansas City, Kansas, a carbon copy of each and every order taken upon [817] which such intoxicating liquor is sold, and also shall file with the city clerk the names and addresses of every purchaser to whom such intoxicating liquor is consigned, and a failure to so report such sales shall be a misdemeanor and upon conviction of such failure any person so failing shall be fined in any sum not less than five dollars nor more than twenty-five dollars."

The count of the complaint against which the motion to quash was filed is as follows:

"Before the Police Court, J. H. Brady, Judge, J. M. Dunlavy complains of Harry Jordan, and being duly sworn, on oath says that he, the said Harry Jordan, at and in the city of Kansas City, county of Wyandotte and State of Kansas, and on or about the 2nd day of November, 1915, did unlawfully drive and operate upon the streets, avenues, boulevards, alleys and public highways of said city, a certain truck or wagon, the cargo of which then and there consisted of intoxicating liquors, to wit, about eleven (11) empty and sixteen (16) full cases of beer, the said Harry Jordan not being engaged in any manner as a common carrier delivering liquors previously purchased outside of the state of Kansas, but was transporting said beer about the streets for an unlawful purpose, in violation of Section 1 of Ordinance No. 11500 of the ordinances of the City of Kansas City, Kansas."

The grounds of the defendant's motion to quash the complaint are that the complaint does not state facts sufficient to constitute an offense, and that the ordinance is invalid for a number of stated reasons.

1. The defendant insists that the ordinance is void because no power to enact it has been delegated to the city. The defendant argues that, because section 5532 of the General Statutes of 1915 authorizes cities to pass ordinances prohibiting the sale of intoxicating liquor and suppressing common nuisances, and no other authority is specifically given, the city has no power to pass any other ordinance having for its object the suppression of the traffic in intoxicating liquor.

Section 1221 of the General Statutes of 1915 reads:

"The mayor and council may levy and collect a license tax upon and regulate any and all callings, trades, professions and occupations conducted, pursued, carried on or operated within the limits of such city, including . . . express companies and agencies,

. . . and all wagons and other vehicles transporting merchandise or passengers for pay."

This statute is a part of the charter powers of cities of the first class operating under the mayor and council form of government, [818] and is retained in the charter powers of such cities operating under the commission form of government. (Gen. Stat. 1915, § 1665.) Under both forms of government cities of the first class have power—

"To make all needful police regulations necessary for the preservation of good order and the peace of the city, and to prevent injury to or the destruction of or interference with public or private property." (Gen. Stat. 1915, §§ 1094, 1508.)

This is known as the general welfare clause. Broad and varied powers are granted by this clause. A brief statement of these powers is found in section 895 of volume 3 of McQuillin on Municipal Corporations, where the author says:

"Specifically, under the general welfare clause, or by virtue of general grant of power (as will clearly appear from the sections which follow), municipal corporations are authorized to enact appropriate and reasonable ordinances, to preserve the health and provide necessary and desirable sanitary regulations for the local population, to abate nuisances and regulate various kinds of occupations that may become nuisances or detrimental to the public health; to provide for the public safety by preventing obstructions of the streets, public ways and places, regulating the use of vehicles thereon, the storing of explosives, blasting, the movement of street cars and railroad trains, the erection of buildings and other structures by establishing fire limits, and forbidding wooden buildings in designated portions of the corporate area; to preserve the morals of the inhabitants by forbidding certain acts offensive to just ideas and sentiments of decency and propriety of conduct; to establish and regulate markets, hucksters, hawkers, etc., regulate milk inspection and prevent adulteration of foods; to provide for the weighing and measuring of articles sold to the inhabitants; and finally to require or prohibit the doing of many other things incident to congested centers, to the end that the public welfare may be advanced.

"In brief, under this general grant of power, ordinances may be passed which are necessary and beneficial, and they will be adjudged valid by the courts, provided they are reasonable and consonant with the general powers and purposes of the local corporation, and not inconsistent with the laws and policy of the state."

Section 5505 of the General Statutes of 1915 imposes on mayors, marshals, police

judges, and police officers of cities the duty to notify the county attorney of any violation of the intoxicating liquor law of this state, and prescribes severe punishment and forfeiture of office for failure to comply with the statute. Sections 686a to 686o of the code of civil procedure (Gen. Stat. 1915, §§ 7603-7617), provide a simple and effective method for the removal of city officers who fail to [819] perform any duty enjoined on them by law. Section 5559 of the General Statutes of 1915 provides:

"That every wife, child, parent, guardian or employer, or other person, who shall be injured in person or property or means of support by any intoxicated person, or in consequence of intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name against any incorporated city of this state wherein the intoxicating liquors were sold, bartered or given away in violation of law which caused the intoxication of such person, for all damages actually sustained, as well as exemplary damages."

It would not be reasonable to impose these serious consequences on cities and on city officers and at the same time to deprive cities of the right to exercise every legitimate power to suppress the illegal traffic in intoxicating liquors. Sections 1094, 1221, 1508 and 1665 of the General Statutes of 1915, when construed with the statutes of this state concerning intoxicating liquors, and with those imposing heavy duties and severe penalties on cities and city officers, should be held to grant power to cities to pass ordinances regulating the transportation of intoxicating liquors for legal purposes, and prohibiting such transportation for illegal purposes. Such ordinances may properly specify the class of persons that may engage in such lawful transportation, may license or otherwise authorize them to engage therein, and may impose such restrictions and conditions as will secure their obedience to the laws of the state and to city ordinances. For the purposes of transportation, intoxicating liquors should not be classed with harmless and useful articles of trade and commerce. Such liquors should be classed with those articles that are known to be dangerous and over which cities have control for the preservation of the peace and for the protection of the health, morals and safety of the city. In other words, intoxicating liquors should not be classed with flour and clothing, but should be classed with explosives, poison, diseased animals, and articles that spread contagion and disease among men, and should be treated accordingly. Much of the reasoning found in *State v. Missouri* Pac. R. Co. 96 Kan. 609, Ann. Cas. 1917A 612, 152 Pac. 777, is applicable here. The

city has authority to regulate the legal transportation in intoxicating liquors and to prohibit their illegal transportation. *O'Neal v. Harrison*, 96 Kan. 339, 150 Pac. 551; *Kansas City v. Henre*, 96 Kan. 794, 153 Pac. [820] 548; *Desser v. Wichita*, 96 Kan. 820, 153 Pac. 1194, L.R.A.1916D 246; and *Kleinhein v. Bentley*, 98 Kan. 431, 157 Pac. 1190, support the conclusion that the city has authority to pass such an ordinance.

2. It is urged that the ordinance is void because the subject thereof is not clearly expressed in its title, and because the ordinance contains more than one subject. An examination of the ordinance and of its title shows that neither of these contentions can be rightfully upheld.

3. It is argued that the ordinance is void because it is repugnant to the provisions of sections 5544 to 5554 of the General Statutes of 1915. These sections of the statutes regulate the transportation and delivery of intoxicating liquors in this state, and are commonly known as the Mahin law. Section 5544 reads:

"It shall be unlawful for any railroad company, express company or other common carrier, or for any person, company or corporation to carry any intoxicating liquor into this state or from one point to another within the state for the purpose of delivery, or to deliver the same to any person, company or corporation within the state except for lawful purposes."

Ordinances regulating the transportation of intoxicating liquors for purposes recognized as legal by the laws of this state, and prohibiting the transportation of such liquors for all illegal purposes, are entirely consistent with the Mahin law. Such ordinances are valid when the purposes for which intoxicating liquors may be lawfully transported within this state are recognized.

4. The defendant argues that the ordinance is a regulation of lawful interstate commerce and therefore void. Omitting that part of the Webb-Kenyon law which is irrelevant to the subject now under consideration, the title and text of the act are as follows:

"An act divesting intoxicating liquors of their interstate character in certain cases.

"That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, . . . which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either [821] in the original package or otherwise, in violation of any law of such state, territory, or district of the United States, . . . is hereby prohibited."

(Part 1, 37 U. S. Stat. at L. ch. 90, p. 699; 4 Fed. St. Ann. [2d ed.] 593.)

Under that act, there is no interstate commerce in intoxicating liquors except as the law of the state may recognize the legality of their sale or transportation. In a decision of the Supreme Court of the United States, rendered January 8, 1917, in *Clark Distilling Co. v. Western Maryland R. Co.* 242 U. S. 311, 37 S. Ct. 180, that court said:

"As the state law forbade the shipment into or transportation of liquor in the state whether from inside or out, . . . and as the Webb-Kenyon act prohibited the transportation in interstate commerce of all liquor 'intended to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such State,' there would seem to be no room for doubt that the prohibitions of the state law were made applicable by the Webb-Kenyon Law." (p. 321.)

That decision completely disposes of the defendant's contention concerning interstate commerce.

5. The defendant insists that the ordinance is not a law of the state within the meaning of the Webb-Kenyon act. Kansas City is an agency of the state in the exercise of governmental functions. The city is authorized and commanded to assist in the suppression of the illegal traffic in intoxicating liquors. The ordinances of the city are local laws, passed under the authority of the state. In *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 17 S. Ct. 161, 41 U. S. (L. ed.) 518, the Supreme Court of the United States said:

"In view of the adjudged cases, it cannot be doubted that the legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the legislature of the state and are to be respected by all." (p. 481.)

In *New Orleans Water-Works Co. v. Louisiana Sugar Refining Co.* 125 U. S. 18, 8 S. Ct. 741, 31 U. S. (L. ed.) 607, the Supreme Court of the United States said:

"So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the constitution of the United States." (p. 31.)

[822] In *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 15 Ann. Cas. 276, 29 S. Ct. 101, 53 U. S. (L. ed.) 795, the court said:

"In this case the ordinance in question is to be regarded as in effect a statute of the state, adopted under a power granted it by the state legislature, and hence it is an act of the state within the Fourteenth Amendment." (p. 313.)

The defendant's argument that the ordinance is an interference with interstate commerce must be based on the proposition that the ordinance is a law of the state within the meaning of the federal constitution. If the ordinance is a law of the state within the meaning of constitutional inhibitions, it must be a law of the state when those inhibitions are removed. It follows that when the constitutional protection of interstate commerce in intoxicating liquors is withdrawn, there is nothing left with which the ordinance can interfere; and it follows that the ordinance, passed under authority given by the legislature, is a law of the state within the meaning of the Webb-Kenyon act.

6. The defendant contends that "the ordinance is not validated by the allegation in the complaint that the defendant was transporting the liquors about the streets for an unlawful purpose, in violation of section 1 of ordinance No. 11500." The complaint alleges more than is necessary. The exceptions named in section 6 of the ordinance are not a part of the clause which creates the offense, and therefore need not be set out in the complaint. In *State v. Thompson*, 2 Kan. 432, this court said:

"The rule is: If there be any exceptions contained in the same clause of the act which creates the offense, the indictment must show negatively that the defendant, or the subject of the indictment, does not arise within the exception. But if a proviso be in a subsequent clause or statute, or although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, it is in that case matter of defense for the other party, and need not be negatived in the pleading." (Syl. ¶ 2.)

In *Kansas City v. Garnier*, 57 Kan. 412, 46 Pac. 707, in a prosecution under a city ordinance, this court said:

"In a clause of such an ordinance distinct from the one defining the offense there was a proviso to the effect that it is unnecessary to furnish a description of property purchased from manufacturers or wholesale dealers who have an established place of business, or which has been [823] purchased at an open sale. Held that, the proviso being in a subsequent clause and not incorporated in the definition of the offense, it was unnecessary to negative it in the complaint." (Syl. ¶ 4.)

This rule was followed in *State v. Thurman*, 65 Kan. 90, 68 Pac. 1081; *State v. Buis*, 83 Kan. 273, 111 Pac. 189; and in *State v.*

Belle Springs Creamery Co. 83 Kan. 389, 111 Pac. 474, L.R.A.1915D 515.

It was not necessary for the city to plead any of the exceptions named in the ordinance, nor any existing under the laws of this state.

7. Another question presented by the motion to quash, and embraced in the attack on the validity of the ordinance, but not argued by either of the parties to this action, is this: Are the exceptions contained in section 6 of the ordinance broad enough to include the recognized lawful traffic in intoxicating liquors in this state? Section 5499 of the General Statutes of 1915 is as follows:

"Any person who shall directly or indirectly sell or barter any spirituous, malt, vinous, fermented or other intoxicating liquors, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than one hundred dollars, nor more than five hundred dollars, and be imprisoned in the county jail not less than thirty days, nor more than ninety days; provided, that any person, copartnership or corporation engaged in the wholesale drug business and having a stock, exclusive of alcohol, of not less than sixty thousand dollars may sell alcohol for medicinal, mechanical and scientific purposes to registered pharmacists who are actually and in good faith engaged in the retail drug business, such sales to be in quantities of not less than one gallon nor more than five gallons."

This statute gives certain wholesale druggists a legal right to sell alcohol to certain registered pharmacists. If the ordinance does not expressly or impliedly make an exception in favor of all legitimate transportation of intoxicating liquors, it cannot be upheld. In this state, a registered pharmacist who legally purchases alcohol from a wholesale druggist has a right to have that alcohol transported over the streets of the city and delivered to him at his place of business. Because the exceptions in section 6 of the ordinance do not include all transportation in intoxicating liquor recognized as legal by the laws of this state, the ordinance must be held invalid. It follows that the motion to quash the complaint was properly sustained.

The judgment is affirmed.

NOTE.

In the reported case the court sustains the validity of an ordinance making it unlawful to drive on any street in the city a vehicle loaded in whole or in part with intoxicating liquors, or bearing the name or advertisement of a manufacturer or a dealer in intoxicants. The court holds that the ordinance is a legitimate exercise of the police power, and that

it is a "law of the state" within the meaning of the Webb-Kenyon Act. The subject of state regulation of the transportation of intoxicating liquors is discussed in the note to *State v. Missouri Pac. R. Co.* Ann. Cas. 1917A 612, 622. Whether a municipal ordinance is a "law" is considered in the note to *In re Siegel*, Ann. Cas. 1917C 684.

MANCHESTER TOWNSHIP SUPERVISORS

v.

WAYNE COUNTY COMMISSIONERS.

Pennsylvania Supreme Court—April 16, 1917.

257 Pa. St. 442; 101 Atl. 736.

Statutes — Repeal — Effect of Repeal of Repealing Act — Revival of Former Act.

County commissioners must keep in repair so much of an abandoned turnpike as passes through a township, as required by Act April 20, 1905 (P. L. 237), and Act April 25, 1907 (P. L. 104), where Act May 10, 1909 (P. L. 499), repealing such prior acts, was itself repealed by Act March 15, 1911 (P. L. 21), since the rule that, where a repealing statute is repealed, the original statute is revived, is not affected by Const. art. 3, § 6, providing that no law shall be revived, amended, or extended by reference to its title only, and that so much as is revived shall be re-enacted and published at length.

[See note at end of this case.]

Same.

Such constitutional provision is restricted in its application to express statutory revivals of prior statutes, and does not abrogate the common-law rule that, when a repealing statute is itself repealed, the first statute is revived without formal words, in the absence of any contrary intention, expressly declared or necessarily implied from the enactment.

[See note at end of this case.]

Appeal from Court of Common Pleas, Wayne county: SEARLE, Judge.

Action by Supervisors of Manchester Township, plaintiffs, against Commissioners of Wayne county, defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

Charles A. McCarty and M. E. Simons for appellants.

E. C. Mumford and J. O. Mumford for appellees.

[444] STEWART, J.—In 1898 the County of Wayne, by proceedings instituted under the Act of June 2, 1887, P. L. 306, which provides for the taking over by counties of turnpike roads, or such parts of them as lay within their respective limits, and freeing the same from tolls, appropriated the Little Equinunk and Union Woods Turnpike Road, which had been constructed through Manchester Township in said county. From that time to the present this turnpike road has been used and maintained as a township road by Manchester Township, free of tolls. In 1916, the supervisors of the township presented their petition to the Court of Common Pleas setting forth the above stated facts and praying that a writ of mandamus issue, directed to the commissioners of the county, requiring them, in relief of the township, to maintain and keep in repair said appropriated turnpike road. An alternative writ followed, to which the commissioners made answer admitting the facts to be as stated, but denying the legal liability of the county for the maintenance and repair of the road. After a full hearing of the case, a peremptory writ was awarded. The appeal is from the judgment so rendered. A brief review of the legislation touching the condemnation and appropriation by counties of turnpike roads is necessary to an understanding of the real issue. The condemnation of this particular road was, as we have said, under the general Act of June 2, 1887, P. L. 306. By the eleventh section of this act it is provided that, "When any turnpike, or portion thereof, shall have been condemned under the provisions of this act, for public use, free of tolls or toll gates, and the assessment of damages therefor shall have been paid by the proper county, such turnpike or portion thereof shall be properly repaired and maintained at the expense of the proper city, township or district as other public roads or streets therein are by law repaired and maintained." As will be observed, by this act, the burden of the maintenance of such turnpike road, after [445] its taking over, except as to such parts thereof as are within the limits of the city, is placed upon the townships through which the road passes. The act makes the turnpike, when paid for, a public road, to be kept and maintained as other public roads. The law so continued until 1905, when by the Act of April 20, 1905, P. L. 237, it was provided that, "When any turnpike or part thereof has been or may hereafter be appropriated or condemned for public use, free of tolls, under any existing laws, and the assessment of damages therefor shall have been paid by the proper county, such turnpike, or part thereof, shall be properly repaired and maintained at the expense of the county, city or borough in which the

said turnpike, or part thereof, lies, or the same may be imposed under any existing laws by the said county, city or borough." By the second section of the act, all acts or parts of acts inconsistent with the terms of the act were repealed. One certain effect of this act was to relieve the townships of the burden of repair and maintenance of the roads taken over which had been imposed on them by the earlier act. This Act of 1905 was a wholly separate and independent piece of legislation. It was not an amendment of any act, nor did it repeal any act; it did not pretend to do either. It did, however, supersede so much of any existing act as was repugnant to any of its provisions. There was but one existing act—the Act of June 2, 1887, *supra*,—that could possibly conflict with it, and that only in the one provision in the earlier act that imposed the expense of repair and maintenance upon the township, whereas the later act imposed it on the counties. It follows that the Act of June 2, 1887, remained in full force, unaffected by the Act of April 20, 1905, except in the particular mentioned. Then followed the Act of April 25, 1907, which, as indicated in its title, was amendatory of the Act of April 20, 1905. But the amendment went no further than to bring within the provisions of the earlier act "abandoned turnpikes and turnpikes belonging to [446] companies or associations which had been dissolved, or may hereafter be dissolved," leaving the burden of repairing and maintenance where the Act of April 20, 1905, had placed it, namely, on the counties, except in cities and boroughs. This amending act was without other effect on the Act of June 2, 1887. Then came the Act of May 10, 1909, which, in Section 1, provided as follows: "When any turnpike, or part thereof, has been or may hereafter be appropriated, or condemned for public use, free of tolls, under any existing laws, and the assessment of damages therefor shall have been paid by the proper county, or when any turnpike company or association has heretofore abandoned or may hereafter abandon its turnpike or any part thereof; or when any turnpike company or association owning any turnpike has theretofore been dissolved, or may hereafter be dissolved, by proceedings under any existing laws of this Commonwealth, such turnpike, or part thereof, shall be properly repaired and maintained at the expense of the township, city or borough in which the said turnpike, or part thereof, lies." By the second section of this act, the Acts of April 20, 1905, and of April 25, 1907, are expressly repealed, so too, "all other acts, or parts of acts, in so far as they are inconsistent with the provisions of this act." Next came the Act of March 15, 1911, P. L. 27, which in its terms expressly repealed, without more, the

Act of May 10, 1909, leaving the general Act of 1887 otherwise unaffected. The effect of this act was to restore to the original Act of June 2, 1887, the eleventh section as it had appeared in the original enactment, but which had been superseded by the Act of 1905.

The present proceeding was begun on the theory that the Act of May 10, 1909, which in express terms repealed the Acts of 1905 and 1907, itself having been repealed by the Act of March 15, 1911, it necessarily resulted that both these repealed acts were revived and restored. If this be a correct view of the law, it must follow that the case was properly ruled in the court below. It is insisted [447] on the part of appellants that no such effect can be given to the repealing Act of 1909, in view of the constitutional provision, Section 6, of Article III, of the Constitution, which declares that, "No law shall be revived, amended, or the provisions thereof be extended, or conferred, by reference to its title only, but so much thereof as is revived, extended or conferred, shall be re-enacted and published at length." If this latter view be correct, then it must result that with the fall of the Acts of 1905 and 1907 fell also the Act of June 2, 1887, as an efficient and operative piece of legislation, inasmuch as the eleventh section of the latter act, as originally passed, imposed the expense of repair and maintenance on the township, and this section having been repealed by Act of 1905, placing the burden on the counties, except as a revival follows of one or other of these acts upon the repealing Act of 1909, the burden of repair and maintenance rests nowhere, and the Act of 1887 is worse than idle. Certainly it could not have been within the legislative intent to produce such result. While legislative intent is properly a subject for consideration in the interpretation of statutes, it counts for nothing when the matter for consideration is the conformity or want of conformity to constitutional requirements. It is the legal consequences of the repeal of the Act of 1909, and that alone, that we have here to consider. Did the repeal of that act operate to revive and renew the several acts which it had repealed? If this question were to be decided on common law principles, it would be of simple solution, since it is a familiar rule governing statutory construction under the common law, that when a repealing statute is itself repealed, the first statute is revived without formal words for that purpose, in the absence of any contrary intention, expressly declared or necessarily to be implied from the enactment. The contention on the part of appellants, however, is that the constitutional provision above quoted has abrogated this common law rule, with the result that since the adoption

[448] of the Constitution no act can be revived or renewed, except in the manner there prescribed. That the provision may be so read, without doing violence to the language employed, must be admitted. This, however, is far from conclusive, for if with equal reason a restricted meaning can be derived from the language employed, in the absence of any express repeal of the common law rule, the presumption that none was intended must prevail. We say this in view of the situation that existed previous to the adoption of the Constitution, suggesting, as it does, the mischief that the provision was manifestly intended to remedy. It is a matter of common knowledge, at least among those whose duties have familiarized them with the history of legislation in the State, that prior to the adoption of the present Constitution, it was of so frequent occurrence that statutes were revived, or amended as the case might be, by simple reference to the title, that it became almost a settled custom to so legislate, with the unfortunate result that much legislation was enacted improvidently, without that intelligent consideration and understanding of the matters involved which is so essential to the procurement of wise and wholesome legislation. The purpose of the provision was to put an end to this method of legislating by requiring in every case that the proposed revival or amendment be re-enacted and published at length, to the end that intelligent action might better be secured. "Inseparable from the history of the Constitution and the facts surrounding its creation, and therefore a potent element in the construction of its general terms, is the consideration of the objects and purposes to be accomplished, or the mischiefs designed to be remedied or guarded against. In the interpretation of statutes, these reflections may enlarge or restrict the natural and literal significance of the words used, and they are applicable with the same effect to the interpretation of the Constitution." Endlich on Interp. Stat. Sec. 518.

If we are correct in our statement as to the object and [449] intent to be accomplished by the constitutional provision—and this we think cannot be questioned—it would seem to follow that notwithstanding the general terms employed in the constitutional provision, the plain intent was that it should be restricted in its application to what may be designated as express statutory revivals as distinguished from revisals by operation of law, since the latter could not fall within the mischief the provision was intended to guard against, nor could its requirements as to re-enactment and publication be at all applicable where the revival was by common law. This particular constitutional provision is not peculiar to our State. In one form

or other it appears in most state constitutions adopted in recent years. The fact that in many of the states which have adopted the provision a legislative enactment has followed forbidding revival of statutes by the common law rule, shows how general is the conception that more is needed to overcome the common law rule than such a constitutional provision as we are considering, because of the latter's susceptibility to two different constructions. In Pennsylvania we have no such statutes. A very well considered and entirely convincing opinion is to be found in the case of *Wallace v. Bradshaw*, 54 N. J. L. 175, 23 Atl. 759. The provision in the constitution of the State of New Jersey differs in no material respect from the provision in our own, and exactly the same question we have here was there adjudicated in a reversal of the lower court. In the opinion of the court, as delivered by the Chief Justice, this occurs (176): "The phrase that 'no law shall be revived or amended by reference to its title alone' cannot be forced into a signification that will comprehend any revival that is not a statutory one, for there is not, and cannot be, a revival by operation of law, that can be said to operate on the act revived 'by reference to its title alone.' The clause obviously would have to be interpolated to impart to it that breadth of efficacy claimed for in the decision before us. Thus, it would be necessary [450] to transmute it into some such form as this: 'No law shall be revived by operation of law, nor shall it be revived or amended by reference to its title alone.' And the harmony that would exist in the sentence thus constructed, and its freedom from all tautology, would seem to demonstrate that these methods of revival are diverse and distinct things, and that only one of them is embraced in this constitutional expression. I cannot agree to the proposition that because the people, in their constitution, have declared that a law shall not be revived by a statutory reference to its title, that they have thereby likewise declared that it shall not be revived by the operation of a well-known rule of the common law. And this is plainly the sense in which the provision was expounded."

What is here stated applies with equal force to the provision in the Constitution of this State, since there is no material difference in the language employed, and our conclusion is the same with respect to the latitude to be allowed it.

The judgment is affirmed and the appeal is dismissed.

NOTE.

Effect of Repeal or Amendment of Repealing Statute as Reviving Repealed Statute.

Introductory, 281.

Common-law Rule, 281.

Statutory Rule:

Rule Stated, 283.

Limitations of Rule, 284.

Introductory.

In the great majority of jurisdictions rules of statutory construction have been enacted abrogating the common-law rule that the repeal of a repealing statute operates to revive the original statute. However there are many decisions in those jurisdictions which were rendered prior to the adoption of the statutes, and these have been cited *infra*, in the subdivision *Statutory Rule*, for the value they may have as authority in those jurisdictions which still adhere to the common-law rule. In the jurisdictions cited under the subdivision *Common-law Rule* the only decisions reported treat of the common-law rule, and reference should be had to the statutes of those jurisdictions for possible modifications thereof which have not been passed on judicially.

Common-law Rule.

The rule that by the repeal of a repealing statute the original statute is thereby revived is to be found in the earliest records of the common law and is undisputed. As was said by Sir William Blackstone: "If a statute that repeals another, is itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose." 1 Blackstone Com. 90. This doctrine is uniformly adhered to except where it has been changed by statute. *Harrison v. Walker*, 1 Ga. 32; *James v. Dubois*, 16 N. J. L. 285; *Wallace v. Bradshaw*, 54 N. J. L. 175, 23 Atl. 759, *reversing* 53 N. J. L. 315, 21 Atl. 941; *Brinkley v. Swicegood*, 65 N. C. 626; *Chicago, etc. R. Co. v. Holliday*, 45 Okla. 536, 145 Pac. 786; *Buckwalter v. Lancaster County*, 12 Pa. Super. Ct. 272; *Ex p. Doran*, 2 Pars. Eq. Cas. (Pa.) 467; *York County v. Wrightsville, etc. R. Co.* 7 Watts & S. (Pa.) 236; *Lamb v. Cleveland*, 19 Can. Sup. Ct. 78. And see the reported cases. See also the cases cited *infra* in the subdivision *Statutory Rule*, but decided prior to the adoption of the various statutes, as there pointed out.

The common-law rule is based on the presumption of an intention to revive on the part of the legislature. Thus it was said in *Butner v. Boifeuillet*, 100 Ga. 743, 28 S. E.

464: "While the general rule seems to be that where the provisions of an act, repealing a prior statute upon the same general subject, are in turn themselves repealed, such repeal operates to restore to their efficacy as law the provisions of the prior repealed statute, such general rule is not without clearly defined and well recognized exceptions. The rule itself rests upon the theory that each expression of the legislative mind represents the legislative intent at the time of that expression, and that the repealing statute indicates a change of the legislative purpose as expressed in the prior law, and, therefore, when the repealing statute is in turn repealed, without any reference to the pre-existing law, the presumption is that the legislature intended by the repeal to restore the order of things existing under the repealed statute."

So where it appears that the legislature did not intend that the original statute should be revived the rule does not apply. *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 52 Fed. 690, *affirmed* 171 U. S. 345, 18 S. Ct. 862, 43 U. S. (L. ed.) 191, 43 Fed. 174, wherein it was said: "I am not disposed to deny the truth of the general proposition that the repeal of a repealing law does, in the absence of any special circumstances, revive the law repealed. . . . But the question is one of the intention of the legislature. In the case before the court the legislature of North Carolina had, by the law of 1885, made an appropriation to the industrial school of \$5,000 annually. By an act of assembly, passed in 1887, which must be construed to be substituted for the act of 1885, and therefore to be a repealing law, the legislature of North Carolina appropriated to such school all the surplus arising from the proceeds of the tax on fertilizers. In 1891, an act of the legislature was passed, the effect of which, it is conceded, was to repeal the appropriation made to the state industrial school by the act of 1887. It is contended by Mr. Hill, for the plaintiff, that the repeal in 1891 of the act of 1887 revived the act of 1885, and that it results from this revival that \$5,000 of the fund arising from the present tax on fertilizers is now appropriated to the state industrial school. The same argument is used to show that by existing legislation \$500 of the proceeds of the tonnage tax on fertilizers is annually appropriated to the North Carolina Industrial Association, which is, as the court is informed, a negro agricultural fair. The argument drawn from this contention is that the state to-day appropriates at least \$5,500, annually, of the money derived from the tonnage tax to purposes other than the cost of inspection of fertilizers, and that this fact proves that the amount of the tonnage tax was intentionally made larger than was necessary. The

court is of the opinion that such was not the intention of the legislature. This court had at its June term, 1890 (43 Fed. 609), decided that the then existing tax upon commercial fertilizers was unconstitutional, and had given as a reason for one of its positions, to wit, that the then existing tax on fertilizers could not be supported on the ground of its being an inspection tax, the fact that a large portion of the proceeds of such tax was appropriated for other than inspection purposes. At the ensuing session of the legislature of North Carolina in January, 1891, an act was passed which has been hereinbefore recited, and which in express terms repeals all laws conflicting with itself. By the first section of this act, which imposes a tax of twenty-five cents per ton on all commercial fertilizers, the legislature declares the purpose of the tax to be for inspection only. The previous law has imposed a tax of \$500 per brand upon every brand and description of fertilizer, and declared the same to be a privilege tax. The tonnage tax of twenty-five cents is declared by the first section of the act of 1891 to be substituted for the \$500 privilege tax. This court will not infer, simply for the purpose of enforcing an ancient rule of law having for its basis only the presumed intention of legislatures, that the purpose declared in the act of 1891 is falsely declared, and by an implication which contradicts the declared will of the legislature, that the repeal of sections of the code which had been declared unconstitutional should have only the effect of reviving earlier laws equally objectionable with those that were attempted to be repealed."

Where the repealing statute consists of a revision and substitute for the original it is held that no revival results from the repeal of the revision. *Butner v. Baifeuillet*, 100 Ga. 743, 28 S. E. 464, wherein it was said: "But this rule can have no application in a case where the statute repeals absolutely a prior existing law and substitutes for it another and more comprehensive scheme of legislation, which undertakes to deal with the whole subject to which the prior statute relates. Accordingly . . . the repeal of a statute which was a revision of and a substitute for a former act to the same effect which was, therefore, repealed, cannot be deemed to revive the previous act; for this would be plainly contrary to the intention of the legislature."

So in *Cochrane v. King County*, 12 Wash. 518, 41 Pac. 922, it was said: "If the act of 1888 had been specially repealed in one not covering its entire subject-matter, such contention of the appellants could be successfully maintained. But it is evident that the effect of a repeal flowing from the fact that the entire subject-matter of the act had been

included in a subsequent statute would not have the effect of reviving a former statute, which had itself been repealed in the same way."

Nor does the rule apply where a local or special law is repealed by another local or special law, and the latter is subsequently repealed. In such a case the original statute is not revived if there is a general law governing the subject. In re Hazle Tp. 6 Kulp. (Pa.) 491; Durr v. Com. 3 Pa. Ct. Rep. 525; In re Knox St. 12 Pa. Super. Ct. 534; Compensation for Boarding Prisoners, 20 Pa. Dist. 570.

And where the repealing act is repealed before it takes effect, its repeal does not affect the original act in any way, it never having actually become inoperative. Adam v. Wright, 84 Ga. 720, 11 S. E. 893; Clark v. Reynolds, 136 Ga. 817, 72 S. E. 254.

Statutory Rule.

RULE STATED.

By statute, in the great majority of jurisdictions, it is now provided in effect that the repeal of a repealing statute shall not operate to revive the original statute unless it is expressly so provided in the last repealing statute.

England.—Mount v. Taylor, L. R. 3 C. P. (Eng.) 645, 37 L. J. C. P. 325, 18 L. T. N. S. 476, 16 W. R. 866. (But see the following cases decided prior to the adoption of the statute, and in which the common-law rule was applied: Tattle v. Grimwood, 3 Bing. 493, 13 E. C. L. 62; Fuller v. Redman, 26 Beav. (Eng.) 600.)

United States.—U. S. v. Philbrick, 120 U. S. 52, 7 S. Ct. 413, 30 U. S. (L. ed.) 559.

California.—Yolo County v. Colgan, 132 Cal. 265, 64 Pac. 403, 84 Am. St. Rep. 41; Suydam v. Los Angeles R. Co. 27 Cal. App. 157, 149 Pac. 55.

Illinois.—Sullivan v. People, 15 Ill. 233; People v. Sweitzer, 266 Ill. 459, Ann. Cas. 1916B 586, 107 N. E. 902.

Indiana.—Teter v. Clayton, 71 Ind. 237; Baum v. Thoms, 150 Ind. 378, 50 N. E. 357, 65 Am. St. Rep. 368. (But see the following cases decided prior to the adoption of the statute and applying the common-law rule: Doe v. Naylor, 2 Blackf. (Ind.) 32; Lindsay v. Lindsay, 47 Ind. 283; Longlois v. Longlois, 48 Ind. 60.)

Kansas.—Renter v. Bauer, 3 Kan. 503; State v. Prather, 84 Kan. 169, 112 Pac. 829, 36 L.R.A.(N.S.) 1084.

Kentucky.—Lowe v. Phelps, 14 Bush (Ky.) 642; Rice v. Com. 61 S. W. 473, 22 Ky. L. Rep. 1793.

Louisiana.—Tallamon v. Cardenas, 14 La. Ann. 514; Witkouski v. Witkouski, 16 La. Ann. 232.

Michigan.—Dykstra v. Holden, 151 Mich. 289, 115 N. W. 74; Grand Rapids, etc. R. Co. v. Cheboygan Circuit Judge, 159 Mich. 210, 123 N. W. 591.

Minnesota.—State v. Otis, 58 Minn. 275, 59 N. W. 1015.

Missouri.—State v. Huffsachmidt, 47 Mo. 73; State v. Stewart, 47 Mo. 382; State v. Slaughter, 70 Mo. 484.

New Mexico.—State v. Elder, 19 N. M. 393, 143 Pac. 482. (But see the following cases decided prior to the adoption of the constitution of 1912, and applying the common-law rule: Milligan v. Cromwell, 3 N. M. 327, 9 Pac. 359; Seewald v. Reynolds, 3 N. M. 344, 9 Pac. 376.)

New York.—People v. Steuben County, 183 N. Y. 114, 75 N. E. 1108, affirming 93 App. Div. 604, 87 N. Y. S. 1144, affirming 41 Misc. 590, 85 N. Y. S. 244; Matter of Remsen Ave. 153 App. Div. 418, 138 N. Y. S. 594. (But see the following cases decided prior to the adoption of the statute, and applying the common-law rule: Merchants' Bank v. Spalding, 12 Barb. (N. Y.) 302; People v. New Rochelle, 26 Hun (N. Y.) 488; McMillan v. Bellows, 37 Hun (N. Y.) 214; Rome v. Knox, 14 How. Pr. (N. Y.) 268; Sarsfield v. Van Vaughner, 14 Abb. Pr. (N. Y.) 297; Van Denburgh v. Greenbush, 66 N. Y. 1; People v. Montgomery County, 67 N. Y. 109, 23 Am. Rep. 94; People v. Wilmerding, 136 N. Y. 363, 32 N. E. 1099, reversing 62 Hun 391, 17 N. Y. S. 102; Ottman v. Hoffman, 6 Misc. 56, 126 N. Y. S. 881, affirmed 7 Misc. 714, 28 N. Y. S. 28; Matter of Sweeley, 12 Misc. 174, 33 N. Y. S. 369.

South Carolina.—Addison v. Sujette, 50 S. C. 192, 27 S. E. 631; Lyles v. McCown, 82 S. C. 127, 17 Ann. Cas. 430, 63 S. E. 355.

West Virginia.—State v. Mines, 38 W. Va. 125, 18 S. E. 470; State v. Wirt County Ct. 63 W. Va. 230, 59 S. E. 684, 981.

Wisconsin.—Smith v. Hoyt, 14 Wis. 252; Goodno v. Oshkosh, 31 Wis. 127.

In several jurisdictions there seem to be no decisions involving the effect of the repeal of a repealing statute since the adoption of statutes providing that such a repeal cannot operate to revive the original statute. However prior to the adoption of these prohibiting statutes the common-law rule was in force, as appears from the following cases: Janes v. Buzzard, Hempst. 259, 13 Fed. Cas. No. 7,206 b. (construing the law of the Territory of Arkansas); Middlesex Turnpike Co. v. Freeman, 14 Comm. 85; People v. Wintermute, 1 Dak. 63, 46 N. W. 694; Coe v. Aroostook County Com'rs, 64 Me. 31; Com. v. Mott, 21 Pick. (Mass.) 492; Com. v. Churchill, 2 Metc. (Mass.) 118; Hastings v. Aiken, 1 Gray (Mass.) 163.

In the United States courts the common-law rule prevailed until the passage of the Act of Feb. 25, 1871 (Rev. Stat. § 12, 7 Fed.

St. Ann. 136), which declared that "whenever an act is repealed, which repealed a former act, such former act shall not thereby be revived unless it shall be expressly so provided." *U. S. v. Philbrick*, 120 U. S. 52, 7 S. Ct. 413, 30 U. S. (L. ed.) 559.

In *State v. Elder*, 19 N. M. 393, 143 Pac. 482, it was said: "Prior to the adoption of our constitution, there was nothing in the organic act or in the laws of Congress relating to the territory of New Mexico which forbade the repeal of an act repealing a law and the revival of the original law by such repeal."

It is not material whether the repealing act is repealed expressly or by the enactment of a repugnant act. *Milne v. Huber*, 3 McLean 212, 17 Fed. Cas. No. 9,617, wherein the court construing the Ohio act abrogating the common-law rule said: "By a general act, passed 14th of February, 1809 [Laws 1809, p. 162], it is provided, 'that whenever a law shall be repealed, which repealed a former law, the former law shall not thereby be revived unless specially provided for.' This provision, it is contended, applies only to laws expressly repealed, and not to an appeal by the repugnancy of the latter act. That the repugnancy does not repeal, but suspends the prior act, which is restored to its full vigor on the repeal of the repugnant act. This distinction seems not to be sustained. Whether the repeal be express or by reason of a repugnant act, subsequently passed, cannot be material in regard to this question. If the repealing act be repealed, it cannot, under the statute cited, give life to the act first repealed."

Statutes providing that the repeal of a repealing act shall not have the effect to revive the original act unless expressly so provided are prospective and not retroactive in their nature and apply only to future and not to past repeals. *Teter v. Clayton*, 71 Ind. 237.

LIMITATIONS OF RULE.

A statute abrogating the common-law rule as to the revival of an act by the repeal of the repealing act, has no application where the effect of an act is not to abrogate entirely a former act but merely to withdraw from the operation of the earlier act a portion of the cases included within its terms, leaving the earlier act still in force except as to the cases specifically provided for by the later one. Under such circumstances the repeal of the later act has the effect of again bringing the cases provided for by it within the operation of the original act. *Mount v. Taylor*, L. R. 3 C. P. (Eng.) 645, 37 L. J. C. P. 325, 18 L. T. N. S. 476, 16 W. R. 866; *Brown v. Barry*, 3 Dall. 365, 1 U. S. (L. ed.)

638 (interpreting the Virginia act); *Savings Bank v. Collector*, 3 Wall. 495, 18 U. S. (L. ed.) 207; *Heinssen v. State*, 14 Colo. 228, 23 Pac. 995; *People v. Sweitzer*, 266 Ill. 459, Ann. Cas. 1916B 586, 107 N. E. 902; *Edworthy v. Iowa Sav. etc. Assoc.* 114 Ia. 220, 86 N. W. 315; *State v. Prather*, 84 Kan. 169, 112 Pac. 829, 36 L.R.A.(N.S.) 1084; *Dykstra v. Holden*, 151 Mich. 289, 115 N. W. 74; *McConiha v. Guthrie*, 21 W. Va. 134; *State v. Wirt County Ct.* 63 W. Va. 230, 59 S. E. 884, 981; *State v. Sawell*, 107 Wis. 300, 83 N. W. 296.

In *Smith v. Hoyt*, 14 Wis. 252, it appeared that a general statute required the defendant in civil actions to answer in twenty days. An act adopted in 1858 (Laws 1858, c. 113) gave the defendant in foreclosure six months in which to answer. This was repealed by a still later act. It was contended that the first statute was repealed by the act of 1858 as to foreclosure suits, and that on the repeal of that act the statute abrogating the common-law rule of revival prevented the revival of the statute first named. In answer to this contention the court, after declaring that the act of 1858 did not strictly repeal the first or general statute but merely excepted a class of cases from its operation, said: "That being so, where the statute creating the exception is repealed, the general statute which was in force all the time would then be applicable to all cases according to its terms. And this would be no violation of the rule of construction before referred to, that the repeal of a repealing act should not revive the act repealed. The act of 1858 was equivalent to a proviso attached to the general rule, that it should not be applicable to foreclosure defendants. But if a proviso creating an exception to the general terms of a statute should be repealed, courts would be afterwards bound to give effect to it according to those general terms, as though the proviso had never existed. And this could not be said to revive a repealed statute. The rule against this relates to cases of absolute repeal, and not to cases where a statute is left in force, and all that is done in the way of repeal is to except certain cases from its operation. In such cases the statute does not need to be revived, for it remains in force, and the exception being taken away, the statute is afterwards to be applied without the exception."

In *State v. Mines*, 38 W. Va. 125, 18 S. E. 470, the court holding the statute respecting the effect of the repeal of a repealing act inapplicable to the repealing act under consideration said: "Section 20 of chapter 35 of the code was broad and comprehensive applying every statute of limitation against the state. The act of 1875 only changed or modified to a certain extent—that is, pre-

vented its operation as to judgments and claims of the state, leaving it in all other respects operative—simply made an exception to the generality of the operation of the statute; and when that act was itself repealed, and the exception or limitation was no longer in force, said section 20 operates free of that exception. It was only a partial abrogation of section 20. It would have been different, had it been a total abrogation.”

So in *Pepin Tp. v. Sage*, 129 Fed. 657, 64 C. C. A. 169, it appeared that a statute defining the boundaries of a township and city was nullified by the enactment of a statute placing a part of the territory within the limits of a village. It was held that under the Minnesota constitutional provision prohibiting the revival of a repealed statute by the repeal of the repealing act, the statute was not revived by the repeal of the village act. Applying the exception as set out above the court said: “We think these provisions are not applicable to the act dissolving the village. Originally the township and city included the territory in question, and the special acts which placed it within the village contain no reference whatever to the township or city, or to their boundary lines, or to the statutes defining them. The statutes creating the township and the city were not at any time repealed, but were left in force. The township and the city were not at any time extinguished, but remained in existence under the operation of those statutes. The effect of the special acts creating the village and defining its boundaries was to except the territory covered by it from the township and the city and from the operation of the statutes creating them. Subject to that exception, the legislative will, as at all times registered and expressed in living, operative, and valid statutes—not enactments entirely repealed, either expressly or by implication—placed this territory in the township and city. When the special acts which by implication put that exception upon these statutes were repealed, the exception was at an end. These statutes and their definitions of the boundaries of the township and city were then operative as if there had been no exception. They did not need to be revived because they had not been repealed.”

In *Cassell v. Lexington, etc. Turnpike Road Co. (Ky.)* 9 S. W. 502, it was said: “The argument of counsel that the last-mentioned act did not operate to restore to the state the right to vote at the elections, because its construction must be controlled by section 22, c. 21, Gen. St., we think is also unsound. That section is as follows: ‘Where a law which may have repealed another shall be repealed, the previous law shall not be revived unless the law repealing it be passed during the same session of the general assembly.’ That provision, we think, has no application

to this case, for the Act of May 15, 1886, as has been before said, did not, nor was intended to, repeal that part of the original charter giving the right to the state to vote at the election of officers, but simply to suspend the exercise of that right; and consequently, when the corporation ceased, in the language of the repealing act, ‘to be subject to the provisions of the Act’ of May 15, 1886, eo instante the right was revived. Moreover, the intention of the legislature to have the elections held in the same manner as they were previous to that act being clearly shown, the right of the state to cast its votes at such election necessarily follows.”

But compare *State v. De Bar*, 58 Mo. 395, wherein it was held that the repeal of an act excepting the city of St. Louis from the operation of the general law in relation to the regulation of bawdy houses did not operate to revive the general law in St. Louis.

Where the first repealing act operates by way of implication and does not directly or expressly repeal the original act the constitutional provision abolishing the doctrine of statutory revivor does not apply. *Home Ins. Co. v. Taxing Dist. 4 Lea (Tenn.)* 644; *State v. King*, 104 Tenn. 156, 57 S. W. 150; *Zickler v. Union Bank, etc. Co.* 104 Tenn. 277, 57 S. W. 341. In *State v. King*, supra, the court in setting out the constitutional provision abolishing the doctrine of statutory revivor said: “In view of this provision of the constitution, it is contended that the doctrine of statutory revivor no longer obtains in this state, and that therefore the act of 1890, repealing the act of 1895 does not revive the original law placing Montgomery county in the eighth chancery division; that, consequently, that county is left unprovided for, since the legislature failed, or refused, to pass any other act providing her with chancery court privileges. Without going into a general discussion of the doctrine of revivor, because not necessary for a proper and correct determination of the case before us, we simply say that the act of 1895 detaching Montgomery county from the eighth chancery division, and the act of 1899 repealing same, do not fall within the constitutional provision requiring that acts repealing, reviving, or amending acts shall specify in their caption, or otherwise, the law repealed, revived, or amended, for the reason that the act of 1895 was an act which merely repealed, by implication, the original law placing Montgomery county in the eighth chancery division. Whatever may be the law as to the revival of laws which have been expressly repealed by repealing the repealing act, it has been held in this state, and we think upon sound principle, that when a law has been repealed by implication merely, the repeal of the act which thus impliedly re-

peals the former law, revives such former law, and this for the reason that such former law was never, in fact, repealed, but its operation merely suspended or interrupted by the adoption of another rule."

But the contrary rule has been announced in *Texas*. *Stirman v. State*, 21 Tex. 734, wherein the court in construing the Texas statute of 1840 said: "This rule has been abolished by the provision of the Act of January, 1840 (Art. 2348), to the effect that when one law, which shall have repealed another, shall itself be repealed, the former law shall not be revived without express words to that effect. The law makes no distinction between express and implied repeals, and it would not be convenient, nor are we authorized, to give an effect to one different from that attached to the other."

It has been held that a statute of the kind under consideration did not apply where the act repealed was merely amendatory of the original act by adding further prohibitions and did not repeal it. *Hannibal v. Guyott*, 18 Mo. 515, wherein it was said: "The Act of the 16th of February, 1847, did not repeal the act of 1835; it was declared to be amendatory of this act; it did not profess to repeal this act, nor was it the design of the legislature to repeal the act of 1835, which had been incorporated in the digest of 1845, but to add other and further restraints to the provisions of this act. The principle, therefore, invoked in this case, of the repeal of a repealing statute not reviving the original law, does not apply. In order to apply this rule of construction, the statute must, at least, repeal or profess to repeal the former law, or some clause or provision of it. The legislature designed to change the English rule of construction, which was, that the repeal of a repealing statute was the revival of the statute first repealed. If we are correct, in supposing that the act of 1847 did not repeal the act of 1835 and 1845, respecting inns and taverns, but that it only added a further restraint to those already contained therein, then it must follow, that the removal of this additional restraint by the repeal of the act of 1847, left the act of 1835 and 1845 as it originally stood."

Where it is clear that the legislature intended the original act to be revived, the court will so construe the statute as to give effect to that intention. *Manlove v. White*, 8 Cal. 376, wherein it was said: "The learned counsel for appellant contends that the fifty-fifth section of the Act of 29th April, 1857, repealed the thirty-ninth section of the Act of 29th April, 1851, and that the supplementary Act of April 30, 1857, did not revive it, and could not do so, under the provisions of the Act of March 14th, 1853, which provides that the repeal of a repealing act does

not revive the act repealed, without express words. (Com. L. 214.) There is certainly a great deal of force in the position of counsel. The language of the act in regard to repealing statutes is certainly very strong and explicit, that the repealed act can only be revived by express words. But if we take the construction contended for as correct, for the sake of the argument, the legitimate result would be this: that neither the old or the new sheriff would be authorized to collect the unpaid taxes. For it is clear that the supplemental act must, under any construction, modify the Act of April 29th, 1857; and, therefore, the former sheriff would not be compelled to deliver over the assessment-roll to the new sheriff, and the latter would have no means and no authority to make the collections. The intention of the legislature, in passing the supplementary Act of April 30, 1857, is too clear to admit of any doubt. The reason that induced the passage of this supplementary act would seem to be the fact, that the then present incumbents were elected with the thirty-ninth section of the act of 1851 in force, and looked to the completion of the collections as a part of their duties. It was considered by the legislature in the nature of a contract, binding in good conscience upon the state. The case is a special one, under the circumstances, there being no doubt as to the true intention of the legislature."

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY

v.

KINNEY.

Ohio Supreme Court—November 28, 1916.

95 Ohio St. 64; 115 N. E. 505.

Constitutional Law — Liberty of Contract.

Liberty of contract is not an absolute and unlimited right, but upon the contrary is always subservient to the public welfare.

Contracts — Public Policy.

The public welfare is safeguarded not only by constitutions, statutes and judicial decisions, but by sound and substantial public policies underlying all of them.

Master and Servant — Contract Limitation of Liability — Validity.

A contract between an employer and an employee, which nullifies or lessens any legal duty that the employer owes to the employee relative to safeguarding the life, limb, safety,

health or welfare of the latter, is contrary to public policy, and, therefore, null and void. Such void contract between employer and employee is not validated by any subsequent assignment, whereby the assignee is relieved or acquitted from liability for any or all negligent acts causing death or any personal injury to said employee, though with full knowledge of all the facts to all the parties.

[See note at end of this case.]

Same.

Mary Kinney, a car cleaner, entered into a contract of employment in writing with the Pullman Company, in which contract it was provided, among other things, that Mary Kinney, in consideration of her employment and wages therefor by the Pullman Company, would assume all risks of accident or casualty incident to such employment and would release the Pullman Company from all liability therefor. Said contract further recited that the Pullman Company had a contract of carriage with the railway company, whereby the Pullman Company had promised and agreed to protect the defendant railway company from any and all liability arising out of the negligence of the defendant railway company, or its employees, in causing death or injuries to any of the employees of the Pullman Company. Said contract between Mary Kinney and the Pullman Company recited the substantial terms of such release in the contract between the railway company and the Pullman Company, and further contained the provision that the Pullman Company might assign its release on the part of Mary Kinney to any railroad company carrying the Pullman Company's cars. Held: Said contract between Mary Kinney and the Pullman Company, so far as it undertook to release the latter, or any railroad company, from negligent acts causing death or injury to said Mary Kinney, was invalid because contrary to public policy.

[See note at end of this case.]

(Syllabus by court.)

Error to Court of Appeals, Hamilton county.

Action by Mary Kinney, plaintiff, against Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, defendant. Judgment for plaintiff. Defendant brings error. The facts are stated in the opinion. **AFFIRMED.**

Mortimer Matthews, Mitchell Wilby and Maxwell & Ramsey for plaintiff in error.

Thomas L. Michie and John W. Sadlier for defendant in error.

[65] **WANAMAKER, J.**—On July 8, 1912, Mary Kinney, a woman 42 years of age, entered the employment of the Pullman Company as a car cleaner at a wage of \$1.25 per day.

On the 16th day of October, 1912, in the course of her employment, she was seriously

injured by a movement of one of the trains of The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Thereupon Mary Kinney brought suit against the railway company, in the court of common pleas, for damages by reason of said injuries, averring in her petition in substance that on said 16th day of October, 1912, she was on one of the Pullman Company's cars known as the "Montgomery," and that while about to alight from the car the railway company, without any warning or [66] notice, and without giving her time and opportunity to alight therefrom, carelessly and negligently started the car with force and violence and with a jerk; whereby plaintiff was then and there thrown to the ground and permanently and severely injured.

The defendant railway company answered, setting up the defenses of a general denial, contributory negligence and exclusive negligence of the plaintiff; and for a special defense, known as Number 4, pleaded that Mary Kinney at the time of her injuries had entered into a contract with the Pullman Company wherein it was agreed that she, the said Mary Kinney, in consideration of employment and wages therefor by the Pullman Company, would assume all risks of accident or casualty incident to such employment and service, and would forever release, acquit and discharge said Pullman Company from all liability therefor.

The railway company further answered, averring the fact to be that the Pullman Company had promised and agreed to protect the defendant railway company and hold it harmless from all and any liability it might be under to employees of the said Pullman Company, or for any injuries sustained by them while so cleaning said sleeping cars, whether injuries were caused by negligence of the defendant railway company or its employees, or otherwise.

The defendant railway company further pleaded that the said agreement between Mary Kinney and the Pullman Company recited the fact of the agreement between said Pullman Company and the railway [67] company, and that she, the said Mary Kinney, had ratified the contract between said Pullman Company and the defendant railway company, and did agree to protect, indemnify and hold harmless the said Pullman Company in respect to any and all sums of money it might be compelled to pay in consequence of any injury or death happening to her, and that she did agree that said agreement between her and said Pullman Company might be assigned to the defendant railway company, or any other corporation, and used in its defense.

Upon trial had in the court of common pleas Mary Kinney recovered a judgment for

\$4,000. This judgment was affirmed by the court of appeals. Error is here prosecuted to reverse that judgment.

The one big question in this case for the consideration of this court grows out of the fourth defense, to which the plaintiff demurred, which demurrer was sustained by the trial court and exemptions taken. The question here is as to the sufficiency of that defense.

The ground upon which the demurrer was sustained was that that part of the contract between Mary Kinney and the Pullman Company, pleaded as a fourth defense by the defendant railway company, was null and void upon the ground that the same was contrary to public policy.

What is the meaning of "public policy?" A correct definition, at once concise and comprehensive, of the words "public policy" has not yet been formulated by our courts. Indeed the term is as difficult to define with accuracy as the word "fraud" [68] or the term "public welfare." In substance it may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellowmen, having due regard to all the circumstances of each particular relation and situation.

Sometimes such public policy is declared by constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people—in their clear consciousness and conviction of what is naturally and inherently just and right between man and man.

It regards the primary principles of equity and justice and is sometimes expressed under the title of social and industrial justice, as it is conceived by our body politic.

When a course of conduct is cruel or shocking to the average man's conception of justice, such course of conduct must be held to be obviously contrary to public policy, though such policy has never been so written in the bond, whether it be constitution, statute or decree of court.

It has frequently been said that such public policy is a composite of constitutional provisions, statutes and judicial decisions, and some courts have gone so far as to hold that it is limited to these. The obvious fallacy of such a conclusion is quite apparent from the most superficial examination.

[69] When a contract is contrary to some provision of the constitution, we say it is prohibited by the constitution, not by public policy. When a contract is contrary to a statute, we say it is prohibited by a statute,

not by a public policy. When a contract is contrary to a settled line of judicial decisions, we say it is prohibited by the law of the land, but we do not say it is contrary to public policy.

Public policy is the cornerstone—the foundation—of all constitutions, statutes and judicial decisions; and its latitude and longitude, its height and its depth, greater than any or all of them. If this be not true, whence came the first judicial decision on matter of public policy? There was no precedent for it, else it would not have been the first.

This is recognized in three well-known and well-considered Ohio cases, *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *State v. Bell Telephone Co.* 36 Ohio St. 296, 38 Am. Rep. 583, and *Lake Shore, etc. R. Co. v. Spangler*, 44 Ohio St. 471, 8 N. E. 467, 58 Am. Rep. 833.

The state has a high and vigilant regard for the life, health and safety of its citizenship, as is evidenced by the variety and number of its laws specially enacted to conserve the same. A person may not take his own life. A person's life cannot be wrongfully taken by another; that is prohibited by the statutes against homicide. One person may not deprive another of limb, or assault him, from the slightest to the most aggravated degree, without incurring the penalties of the law.

[70] Coming now more specifically to the large class of persons involved in the case at bar, the employer and the employee:

As undoubted evidence of this broad humanitarian policy of the state to safeguard the life, limb, health and safety of its people employed in the industrial world, the people of Ohio in 1912 by an overwhelming vote adopted an amendment to the Ohio Constitution known as Section 34, Article II, which reads: "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power."

Another amendment of the same nature was adopted by the people at the same time, known as Section 35, of said Article II, providing among other things for workmen's compensation, "and taking away any or all rights of action or defenses from employees and employers; but no right of action shall be taken away from any employee when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employees."

Statute after statute has been enacted imposing the duty upon the employer to provide a reasonably safe place for the employee to

work, reasonably safe ways to and from such place of employment, reasonably safe tools and appliances, reasonably safe protection from dangerous machinery, and the like, together with numerous provisions for light, heat, [71] sanitation, etc., all with a view of safeguarding the life, limb, health and safety of the employee. All these constitutional provisions and statutes are bottomed upon that broad humanitarian public policy, to wit, the state's high and vigilant regard for the safety of life, limb, health and general welfare of its people, particularly the working class.

The irresponsible taking of human life or limb or health is not allowed by the state, or any of its agencies, when the same is directly and deliberately attempted by any individual or class of individuals as against any individual or class of individuals. Such a proposition is so atrocious and offensive that all men must recoil therefrom and repudiate the same. If such a course of conduct between individuals may not prevail directly and deliberately, by what species of judicial jugglery shall it be permitted to result from the indirect and passive methods known as negligence, carelessness, failure to take any regard whatsoever for the safety, life or limb of others, even though such be expressly provided for in the so-called contract of employment.

Why should a court recognize in any person, artificial or natural, the right to do a wrong to some other person? How can it be said to be the right of one person, whether by contract or otherwise, to take the life or limb of another person wrongfully and negligently, and wholly without liability or responsibility for such wrongful and negligent act?

If a contract between employer and employee, whereby the employee assumes all risks no matter [72] how negligent the employer may be, must be upheld by courts as a valid contract, the enormous increase in industrial casualties, the loss of life and limb that would suddenly and inevitably follow, would be almost inconceivable. We would have a veritable army of crippled unfortunates and maimed dependents, deprived of life's joys and blessings, filling our almshouses as paupers and charges upon the state's financial resources, entailing a burdensome system of taxation. Wholly apart from the higher humanitarian questions involved, the increased burden thus placed upon the state for charitable purposes would be, in and of itself, sufficient to affect contracts of this character with a vital public interest. Courts should not hesitate to hold such contracts wholly null and void.

Therefore, upon the general fundamental principles of public policy upon which the Ohio Constitution and its laws are founded,

as well as from the spirit of many of our constitutional principles, such a policy as is contained in the Pullman Company contract in the case at bar is clearly in conflict with the sound and humane public policy of the state.

But it is claimed that contracts of this character are no longer open to doubt; that they have been adjudicated and held valid by the federal courts. The chief case relied on by plaintiff in error to sustain this contention of validity is that of *Robinson v. Baltimore, etc. R. Co.* 237 U. S. 84, 35 S. Ct. 491, 59 U. S. (L. ed.) 849. The opinion is by Mr. Justice Hughes.

Plaintiff in error claims that that case is squarely in point and decisive of this cause in favor of plaintiff in error. An examination of that case [73] discloses the fact that the suit was brought for personal injuries "under the Employers' Liability Act." That act applied only to employers and employees in railway service engaged in interstate commerce, and the question was whether or not a person employed by the Pullman Company was an employee of the railroad company within the purview of said act. This is apparent from the second and third paragraphs of the syllabus, which respectively read:

"A contract between the Pullman Company, as employer, and its employee releasing the employer, and also all railroad corporations over whose lines the employer's cars were operated, from all claims for liability in personal injury sustained by the employee, held in this case valid unless the employee of the Pullman Company was also the employee of the railroad company, in which case that provision of the contract would be invalid under § 5 of the Employers' Liability Act."

"Congress in legislating on the subject of carriers by rail was familiar with the situation and used the term employee in its natural sense and did not intend to include as employees of the carrier persons on interstate trains engaged in various services for other masters."

It is quite apparent that that suit being brought under the employers' liability act was governed by the provisions of that act and that the word "employee," as therein used, did not include persons who were not employees of the railway company, and therefore that the act did not include and protect a [74] porter, employed by the Pullman Company, in charge of a Pullman car.

The opinion is brief and clear and fully discloses the fact that the whole question turned upon the construction of that statute and the use of the word "employee" therein. No question of public policy seems to have been raised in that case, at least it is in no wise discussed in the opinion. The *Robinson* case has no application here.

It may be said in passing that it is also claimed in the case at bar that Mary Kinney was at least a *de facto* employee of the plaintiff in error, the railway company, and that, therefore, by virtue of Section 9013, General Code, said contract was invalid.

That section reads as follows:

"No railroad company insurance society or association, or other person shall demand, accept, or enter into an agreement or stipulation with a person about to enter, or in the employ of a railroad company whereby he stipulates or agrees to surrender or waive any right to damages against a railroad company, thereafter arising for personal injury or death, or whereby he agrees to surrender or waive in case he asserts such right, any other right."

As in the Robinson case, under the federal statute, so in this case, under the Ohio statute, the employee is clearly not within the terms of the statute. She was not an employee of a railroad company, and, as such, the statute in and of itself has no application.

[75] The case, however, particularly relied upon by plaintiff in error as controlling and decisive of the case at bar, is known as the Voigt case, reported in 176 U. S. 498, 20 S. Ct. 385, 44 U. S. (L. ed.) 560. The opinion is by Mr. Justice Shiras. The syllabus in the latter publication reads as follows:

"An express messenger occupying an express car, in charge of express matter, in pursuance of a contract between the railroad company and the express company, is not a passenger within the meaning of the rule of public policy which denies the validity of contracts limiting the liability of a carrier to a passenger for negligence, and cannot recover of the railroad company for injuries sustained in a collision, where the contract between the companies exempts the railroad company from such liability, while his own contract, voluntarily entered into as a condition of employment, assumes all such risks and stipulates that he will indemnify and hold his employer harmless from all liability for such accident or injury."

If this is sound doctrine it would seem at first blush to sustain the claims of plaintiff in error. In the opinion Justice Shiras says, at page 505:

"The Circuit Judge thought the case could not be distinguished from the case of New York Cent. R. Co. v. Lockwood, 17 Wall. 357, 21 U. S. (L. ed.) 627, where a recovery was maintained by a drover injured whilst travelling on a stock train of the New York Central Railroad Company proceeding from Buffalo to Albany, on a pass which certified that he had shipped sufficient stock to give him a right to pass free to Albany, but which provided that the acceptance of the pass [76] was to be considered a waiver of all claims for

damages or injuries received on the train. This court held that a drover travelling on a pass, for the purpose of taking care of his stock on the train, is a passenger for hire, and that it is not lawful for a common carrier of such passenger to stipulate for exemption from responsibility for the negligence of himself or his servants. This case has been frequently followed, and it may be regarded as establishing a settled rule of policy. . . .

"The principles declared in those cases are salutary, and we have no disposition to depart from them."

Mr. Justice Shiras continuing, on page 506, says:

"Upon what principle, then, did the cases relied on proceed, and are they applicable to the present one? They were mainly two. First, the importance which the law justly attaches to human life and personal safety, and which therefore forbids the relaxation of care in the transportation of passengers which might be occasioned by stipulations relieving the carrier from responsibility. This principle was thus stated by Mr. Justice Bradley in the opinion of the court in the case of New York Cent. R. Co. v. Lockwood: 'In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common law rule which charged the common carrier as an insurer. Why charge him as such? Plainly, for the purpose of raising the most stringent motive for the exercise [77] of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other, it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put aside the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms.'

"The second fundamental proposition relied on to nullify contracts to relieve common carriers from liability for losses or injuries caused by their negligence is based on the position of advantage which is possessed by companies exercising the business of common carriers over those who are compelled to deal with them. And again we may properly quote a passage from the opinion in the Lockwood case as a forcible statement of the situation:

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He can-

not afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier may present; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business. . . . If the customer had any real freedom of choice, if he had a reasonable or practicable alternative, and if the employment [78] of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is almost concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse, to say the least, to the dictates of public policy and morality."

Justice Shiras continues:

"Upon these principles we think the law of to-day may be fairly stated as follows: 1. That exemptions claimed by carriers must be reasonable and just, otherwise they will be regarded as extorted from the customers by duress of circumstances, and therefore not binding. 2. That all attempts of carriers, by general notices or special contract, to escape from liability for losses to shippers, or injuries to passengers, resulting from want of care or faithfulness, cannot be regarded as reasonable and just, but as contrary to a sound public policy, and therefore invalid."

Justice Shiras further continues:

[79] "But are these principles, well considered and useful as they are, decisive of, or indeed applicable to, the facts presented for judgment in the present case?"

"We have here to consider not the case of an individual shipper or passenger, dealing at a disadvantage, with a powerful corporation, but that of a permanent arrangement between two corporations embracing within its sphere of operation a large part of the transportation business of the entire country. We need not, in this inquiry, examine the nature of the business of an express company, or rehearse the particular services it renders the public."

In the Voigt case the United States Express Company had a contract with the Bal-

timore & Ohio Southwestern Railway Company very similar to the contract in the case now before this court.

Justice Shiras undertakes to distinguish between a contract made by the railroad company as on employer with its employee and a contract made between an express company and railway company, or between the Pullman Company and a railway company.

He says, at page 512, "that Voigt, the defendant in error, had agreed in writing to indemnify the express company against any liability it might incur by reason of said agreement between the companies, so far as he was concerned, and further agreed to release the railroad company from liability for injuries received by him while being transported in the express cars; that, in consideration of such agreement on his part, Voigt was employed [80] as an express messenger, and while so employed, and while occupying as such messenger a car assigned to the express company, received injuries occasioned by a collision, on December 30, 1895, between the train which was transporting the express car and another train belonging to the same railroad company."

Mr. Justice Shiras continues:

"It is evident that, by these agreements, there was created a very different relation between Voigt and the railway company than the usual one between passengers and railroad companies. Here there was no stress brought to bear on Voigt as a passenger desiring transportation from one point to another on the railroad. His occupation of the car, specially adapted to the uses of the express company, was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the express company. He was on the train, not by virtue of any personal contract right, but because of a contract between the companies for the exclusive use of a car. His contract to relieve the companies from any liability to him, or to each other, for injuries he might receive in the course of his employment, was deliberately entered into as a condition of securing his position as a messenger. His position does not resemble the one in consideration in the Lockwood and similar cases, where the dispensation from liability for injuries was made a condition of a transportation which the passenger had a right to demand, and which the railroad companies were under a legal duty to furnish."

[81] Mr. Justice Shiras, in reviewing the Lockwood and other cases, bottoms the judgment of the court, holding that such contracts are invalid because contrary to public policy, upon the two following propositions:

"First, the importance which the law justly attaches to human life and personal safety.

"Second, advantage which is possessed by companies exercising the business of common carriers over those who are compelled to deal with them."

Justice Shiras bases these propositions very largely upon the reasoning of Mr. Justice Bradley in the Lockwood case, which he again quotes, as follows:

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle, or stand out and seek redress in the courts. . . . In most cases, he has no alternative but to do this, or abandon his business. . . . If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, . . . then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it."

[82] Now Mr. Justice Shiras attempts to make some surface distinctions between the contract that the railroad company had with the express company as to its messenger in the Voigt case and the contract which the railroad company had with the drover in the Lockwood case. These distinctions are at the most surface distinctions, technical distinctions. At the bottom there is no real difference in principle. Can it be said "that the importance which the law justly attaches to human life and personal safety" applies to a drover but does not apply to an express messenger, and does not apply to an employee such as the car cleaner, Mary Kinney? This sort of leopard-spot public policy which Justice Shiras attempts to lay down in the Voigt case is wholly indefensible and unconscionable.

The law regards with equal tenderness and concern the life of the passenger, rich or poor, the life of the drover, the life of the express messenger, the life of a Pullman porter, the life of a car cleaner. It may and should recognize different degrees of care, dependent upon the relation and circumstances of the parties, and the law does recognize such distinctions, but to say that the parties may so contract as to permit one to avoid and escape all thought or care for the safety of the life, limb or health of the other is as barbarous a policy as was ever suggested in any court of justice.

Does the state's regard for human life and its conservation, with consequent liability for its wrongful loss or impairment, rest on one public policy for a drover, another public

policy for an expressman, another public policy for a Pullman [83] porter, and yet another public policy for a car cleaner?

Richard Hooker, in his definition of law, used these immortal words, among others:

"All things in Heaven and earth do her [the law] homage, the very least as feeling her care and the greatest as not exempt from her power."

The quoted language of Justice Bradley in the Lockwood case applies with no more force there than it does in the Voigt case, or than it does in the Kinney case at bar. Substitute for "drover" the word "expressman," or, as in this case, the words "car cleaner" or the word "employee," and you have the same public policy—varying in circumstances, it is true, but nevertheless the same public policy for which Justice Bradley so ably and vigorously contends, to wit, the state's high regard for the safety of human life.

Now applying the second ground of that public policy recognized by Justice Bradley in the Lockwood case, to wit, the inequality of the parties to the contract, if here we substitute for the word "drover" the word "porter," "expressman" or "car cleaner," is there not indeed a greater inequality in the case at bar between Mary Kinney, the car cleaner, and the Pullman Company than there was in the Lockwood case between the shipper, called the drover, and the railway company? Indeed the very doctrine announced by Mr. Justice Bradley in the Lockwood case, and quoted with high approval by Mr. Justice Shiras in the Voigt case, should have persuaded the court in the latter case to a judgment absolutely contrary to the one rendered.

[84] Abraham Lincoln in his great message to the federal congress, delivered on July 4, 1861, among other things said that "the leading object of government . . . is to elevate the condition of men." To that paramount purpose and policy all the agencies and branches of government, including the judiciary, are thoroughly committed. We are now asked to substitute for that fundamental policy a contractual doctrine that *endangers the condition of men*, makes widows of their wives, orphans of their children, destroys or impairs their usefulness as citizens and their earning capacity as workers, and all because it has been so written in a contract, the parties to which are upon such unequal terms that there is no more liberty of contract in this case—indeed not as much—than there was in the Lockwood case between the drover and the railway company. That contract was found invalid as against Lockwood. This contract should be likewise held invalid as against Mary Kinney.

Judgment affirmed.

Nichols, C. J., Johnson, Donahue, Newman, Jones and Matthias, JJ., concur.

NOTE.

By the great weight of authority a contract by which a servant undertakes to release his master from liability for future negligence is void as against public policy. See the notes to *Johnston v. Fargo*, 6 Ann. Cas. 1, and *Shohoney v. Quincy*, etc. R. Co. Ann. Cas. 1912A 1143. The decisions are in conflict as to the validity of a contract whereby a railroad company is released from liability to the employees of a sleeping car company whose cars it hauls. See the notes to *Denver*, etc. R. Co. v. *Whan*, 12 Ann. Cas. 732; *Coleman v. Pennsylvania R. Co.* Ann. Cas. 1915B 529; and *Louisville*, etc. R. Co. v. *Church*, 130 Am. St. Rep. 29, 47. The decisions sustaining the latter class of contracts rest on the view that the carriage of employees of a sleeping car company is not one of the legal duties of a railroad company. See *Denver*, etc. R. Co. v. *Whan*, *supra*. The reported case involves a contract between a sleeping car company and one of its employees, which not only released the employer from liability for future negligence, but, reciting an agreement between the employer and a railroad company, provided that the employee's release should inure to the benefit of the railroad company. This contract the court holds to be void as against public policy and to afford no defense to an action against the railroad company for a negligent injury to the employee.

VENNEN

v.

NEW DELLS LUMBER COMPANY.

Wisconsin Supreme Court—October 26, 1915.

161 Wis. 370; 154 N. W. 640.

Workmen's Compensation Acts — Disease as Accident — Typhoid from Impure Drinking Water.

Under Workmen's Compensation Act (St. 1913, §§ 2394—1-2394—31), § 2394—3, declaring that liability for the compensation provided for in lieu of other liability shall exist against an employer for any personal injury accidentally suffered by an employee, where an employee is performing a service growing out of and incidental to his employment, the right to compensation for the death of an employee resulting from typhoid fever caused by the furnishing of polluted drinking water falls within the act; the disease being incurred as an incident to the employment.

[See note at end of this case.]

Same.

Where an employee contracts typhoid fever by reason of impure drinking water furnished by the master, his death from the disease is an "accident," within St. 1913, § 2394—3, making the employer liable for injuries proximately caused by accident; the term "accident" being used in its popular significance, as including injuries produced by negligence.

[See note at end of this case.]

Appeal from Circuit Court, Eau Claire county: **HIEBEE**, Judge.

Action by Frieda Vennen, administratrix of estate of Gerhard Vennen, plaintiff, against New Dells Lumber Company, defendant. Judgment for defendant. Plaintiff appeals. **AFFIRMED.**

[371] This is an action to recover damages alleged to have been sustained by the plaintiff as administratrix of her husband's estate and as his widow on account of her husband's death.

The defendant is a corporation organized under the laws of the state of Wisconsin. The deceased, Gerhard Vennen, was employed by the defendant during the spring and early summer of the year 1914. The defendant was engaged in operating a manufacturing lumber establishment located on the Chippewa river in the city of Eau Claire, Wisconsin. In connection with its establishment the defendant maintained an outhouse and two toilets for its employees working there and a toilet in its principal office building. All of the sewage from these toilets was discharged into the river near defendant's establishment. The pleadings allege that the defendant in supplying water for its boilers not only secured water from the city waterworks, but also used water from the river, which was obtained by means of intake pipes; that the defendant was negligent in placing its intake pipes in such location that they carried into the boilers water that was contaminated by the sewage, and that this water through defendant's negligence became mixed with the water from the city waterworks because of improper connecting pipes. It is further alleged that the defendant negligently permitted and caused the employees to drink of this polluted water and thereby caused the deceased, Gerhard Vennen, to become sick with typhoid fever, which resulted in his death on July 25, 1914.

The defendant alleges and claims that the court had no jurisdiction of the matter because the defendant at the time [372] here in question had more than four employees engaged in a common employment and that it had filed notice of election to accept the provisions of the Workmen's Compensation

Act, and that the plaintiff's intestate had never filed any election not to accept the provisions thereof.

Plaintiff demurred to this defense on the ground that it did not state facts sufficient to constitute a defense. The circuit court ordered that the demurrer be overruled. From such order this appeal is taken.

Fred Arnold and Daniel H. Grady for appellant.

Sturdevant & Farr for respondent.

SIEBECKER, J.—This appeal presents an important question as to the liability and nonliability of employers under the provisions of the Workmen's Compensation Act. The ruling upon the demurrer to the answer assumes that the facts stated in the pleading exist as alleged, regardless of evidence in respect thereto. Sub. (3) sec. 2394—3, Stats., provides that where the right to compensation under the provisions of the Workmen's Compensation Act exists for personal injury or death, it shall be the exclusive remedy against the employer for such injury or death. *Milwaukee v. Althoff*, 156 Wis. 68, 145 N. W. 238, L.R.A.1916A 327; *Smale v. Wrought Washer Mfg. Co.* 160 Wis. 331, 151 N. W. 803.

By sec. 2394—3 it is enacted:

"Liability for the compensation herein after provided for, in lieu of any other liability whatsoever, shall exist against an employer for any personal injury accidentally sustained by his employee, and for his death, in those cases where the following conditions of compensation concur: . . .

"(2) Where . . . the employee is performing service growing out of and incidental to his employment. . . .

[373] "(3) Where the injury is proximately caused by accident, and is not intentionally self-inflicted."

The facts alleged show that the parties to the action were subject to the Compensation Act. The inquiry then is, Was Vennen's death proximately caused by accident while he was "performing service growing out of and incidental to his employment"? The inference from the alleged facts is reasonably clear that Vennen at the time of the alleged injury resulting in his death was "performing service growing out of and incidental to his employment." The contention that an injury resulting from carelessness or negligence is not one that can be said to have been accidentally sustained in the sense of the Compensation Act is not well founded. As declared in *Northwestern Iron Co. v. Industrial Commission*, 154 Wis. 97, Ann. Cas. 1915B 877, 142 N. W. 271, L.R.A.1916A 366, "In giving construction to such statutes words are to be taken and con-

strued in the sense in which they are understood in common language, taking into consideration the text and subject matter relative to which they are employed." The words should be given, as intended by the lawmakers, their popular meaning. *Sadowski v. Thomas Furnace Co.* 157 Wis. 443, 146 N. W. 770. "A very large proportion of those events which are universally called accidents, happen through some carelessness of the party injured, which contributes to produce them. . . . Yet such injuries, having been unexpected and not caused intentionally or by design, are always called accidents, and properly so." Accidents without negligence are rare as compared to accidents resulting from negligence. Opinion of Paine, J., in *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 1 Am. Rep. 157. The intention of the legislature to include accidental injuries resulting from negligence within the language of the Compensation Act is so manifest that there is no room to indulge in construction of the language employed. In the popular sense the words as used in the Compensation Act, referring to a [374] personal injury accidentally sustained by an employee while performing services growing out of and incidental to his employment, include all accidental injuries, whether happening through negligence or otherwise except those intentionally self-inflicted.

The inquiry is, Was the disease from which it is alleged Vennen died proximately caused by accident? Do the facts and circumstances alleged in the case set forth the conditions to entitle an employee to compensation "for any personal injury accidentally sustained" which was "proximately caused by accident" while "performing service growing out of and incidental to his employment?" We have already noticed that the alleged injury was, under the facts stated in the pleadings, received by deceased while in plaintiff's employ and while he was "performing service growing out of and incidental to his employment." Whether or not the alleged accidental injury caused Vennen's death is sufficiently pleaded and remains a question for determination from the evidence at the inquest of the case. There remains the important inquiry. Do the allegations state a case showing that Vennen's death is attributable to "accident" in the sense of the Compensation Act? It is urged that the contracting of typhoid disease, under the facts and circumstances stated, does not show that his death was due to an accidental occurrence. The term "accidental," as used in compensation laws, denotes something unusual, unexpected, and undesigned. The nature of it implies that there was an external act or occurrence which caused the personal injury or death of the employee. It contemplates an event not within one's foresight and

expectation, resulting in a mishap causing injury to the employee. Such an occurrence may be due to purely accidental causes or it may be due to oversight and negligence. The fact that deceased became afflicted with typhoid fever while in defendant's service would not, in the sense of the statute, constitute a charge that he sustained an accidental injury, but the allegations go [375] further and state that this typhoid affliction is attributable to the undesigned and unexpected occurrence of the presence of bacteria in the drinking water furnished him by the defendant as an incident to his employment. These facts and circumstances clearly charge that Vennen's sickness was the result of an unintended and unexpected mishap incident to his employment. These allegations fulfil the requirements of the statute that the drinking of the polluted water by the deceased was an accidental occurrence while he was "performing service growing out of and incidental to his employment." It is alleged that the consequences of this alleged accident resulted in afflicting Vennen with typhoid disease, which caused his death. Diseases caused by accident to employees while "performing service growing out of and incidental to his employment" are injuries within the contemplation of the Workmen's Compensation Act. This was recognized in the case of Heileman B. Co. v. Industrial Commission, 161 Wis. 46, 152 N. W. 446, and Voelz v. Industrial Commission, 161 Wis. 240, 152 N. W. 830. The English Compensation Act made employers liable to employees for "personal injury by accident arising out of and in the course of the employment." Under this act it has been held that contraction of a disease may be caused by accident. See the following cases: Brintons v. Turvey [1905] A. C. 230. A workman became infected through a bacillus from the wool which he was assorting, resulting in giving him the disease of anthrax of which he died, and it was held that it was a case of "injury by accident." Alloa Coal Co. v. Drylie [1913] 1 Scots L. Times 167, 4 N. & C. C. A. 899. Drylie, a workman in a coal pit, through accident was exposed to icy cold water up to his knees and became chilled which made him sick, resulting in pneumonia of which he died. Upon the evidence adduced the court found that the pneumonia was caused by the chill and that death resulted from "injury by accident." The cases wherein liability has been found distinguish between [376] disease resulting from accidental injury and disease which results from an idiopathic condition of the system and not attributable to some accidental agency growing out of the employment. The latter class of diseases are held not to be within the contemplation of the act.

We are of the opinion that the decision of the trial court holding that the facts pleaded show that Vennen's death was caused by accident while performing service growing out of and incidental to his employment is correct and that the demurrer was properly overruled.

BY THE COURT.—The order appealed from is affirmed.

BARNES, J. (*dissenting*).—By sec. 2394—3 liability exists under the Compensation Act, where employer and employee are under it, (1) for "any *personal injury* accidentally sustained" by the employee while "performing service growing out of and incidental to his employment, . . . where the injury is proximately caused by accident, and is not intentionally self-inflicted," and (2) for death where the employee is performing such service and where the injury causing death is "proximately caused by accident" and not intentionally self-inflicted.

To justify recovery under this statute, where death does not ensue, there must be a *personal injury actually sustained*, which injury is proximately caused by accident. Where recovery is sought for death, the statute does not in express terms say that a personal injury must actually be sustained, but only that there must be an injury "caused by accident."

I think it is very improbable that the legislature intended to give compensation where death resulted from an accident and deny it in case of mere disability, and that by fair implication it was intended to allow compensation for death only where it resulted from "personal injury." In other words, if recovery can be had in case of death from typhoid fever, then indemnity should be allowed for disability and [377] medical attendance in case of recovery. If this be so, then two things must occur as a condition precedent to recovery: there must be a personal injury and it must be caused by accident. If the taking of typhoid germs into the system is a "personal injury" and an "accident" within the meaning of the law, then the decision is right. If there can be a recovery in the case of typhoid fever, then the same result would follow for tuberculosis, pneumonia, smallpox, anthrax, ordinary colds, and other diseases, where the sick employee was able to trace the cause of his sickness to some unusual conditions in the surroundings in which he worked. If I understand the opinion correctly, most if not all diseases may be accidental, and recovery may be had on account of the same, except those of an "idiopathic" character. Idiopathy is defined as "a morbid state or condition not preceded and occasioned by any other disease; an individual or personal state of feeling; a men-

tal condition peculiar to one's self." Idiopathic is defined as "of or pertaining to a morbid state; not secondary or arising from any other disease; as an idiopathic affection." Cent. Dict.

The peculiar concern of this court is to get at the legislative intent. When the court ascertains that intent, it has no only performed its full duty but has exhausted its legitimate powers. It has no right to curtail or extend the provisions of any statute.

The Compensation Act as now construed by the court will, I think, add materially to the liabilities popularly supposed to exist under the act, if it does not double them. If the legislature so intended, well and good. I cannot bring myself to believe that it did so intend.

It is a matter of common knowledge that cases of sickness and disease are much more numerous than cases of what are commonly known as accidents. The Compensation Act was passed after an exhaustive study of the subject of industrial insurance by a committee of the legislature which covered a [378] period of two years. There were two classes of acts in operation in other jurisdictions, one covering diseases and accident, the other, not in terms at least covering disease. If it had been the purpose of the legislature to include the large class of cases that would result from sickness, it is fair to presume that it would have done so in express and unmistakable terms, and not by the use of language that is at least popularly understood not to include them. In the numerous discussions on the proposed law before the legislature, which are fresh in mind, it does not appear to have occurred to anyone that diseases were included or intended to be included. In the four years that have elapsed since the original act was passed thousands of cases of sickness other than those of an "idiopathic" character must have arisen where there was ground for claiming that the sickness was contracted in the course of employment, and yet this is the first case where the claim was made that the Compensation Act applies to sickness. Even the representative of the deceased is not making such a claim here. On the contrary she is resisting it and insisting that she is free to pursue her common-law remedy.

Now the words "personal injury" are words commonly and ordinarily used to designate injury caused by external violence, and they are not used to indicate disease. Neither do we speak of sickness as an "accident" or an "injury." When we hear that someone has suffered an accident we at once conclude that he has suffered some more or less violent external bodily injury. It is in this sense, I think, that the words "personal injury" and "injury . . . caused by accident" are used in the statute. When our neighbor has ty-

phoid fever, we do not think of classifying his ailment as an "accident," an "injury," or a "personal injury." It is only by an extremely far fetched and I believe illogical construction of the words referred to that they can be held to include disease not resulting from some external violence.

It is well nigh a demonstrable certainty that the legislature [379] never intended to provide compensation for sickness not resulting from external bodily violence. Wisconsin was one of the pioneers in this kind of legislation. It was known that it would entail large burdens on our manufacturers, who would thus be placed at a disadvantage in competing with employers in other states where no such law was then in existence. The law was an optional one and is so yet. As was expected, there was a great deal of hesitancy on the part of employers about coming under it. Had it been supposed that it provided compensation for disease or sickness, it is probable that the purpose of the law would have been practically nullified. The effect of the decision in this case is of course conjectural, but it is not without the range of possibilities that some at least of those who are now under the act will exercise their election not to remain under it. It is now a generally accepted truism that many diseases attack those who are physically weak and run down rather than those who are strong and able to throw off unwelcome disease germs. The weak must work as well as the strong or else be taken care of by the public, and should they be discriminated against in the matter of securing employment much harm would follow. The question whether we should or should not have insurance against sickness is one of legislative policy. The manner of paying such insurance, if decided upon, is also a question of legislative policy within constitutional limits. I do not question the power of the legislature to pass an option law such as we have providing for indemnity against disease. What I do say is, that the legislature has not done so, and that the act passed has been stretched by construction so as to add to it, in all probability, as large a class of claims and liabilities as that actually included in the original act.

The great weight of authority is contrary to the decision in this case. In *Fenton v. Thorley* [1903] A. C. 443, it is said that the words "by accident" are used to qualify the word "injury," confining it to certain classes of injuries [380] and excluding other classes, as, for instance, injuries by disease or injuries self inflicted by design. In *Broderick v. London County Council* [1908] 2 K. B. 807, 15 Ann. Cas. 885, the inhalation of sewer gas by which an employee contracted enteritis was held not to be a personal injury by accident. Paralysis resulting from exposure to

contact with lead was held not to be an injury caused by accident. *Steel v. Cammell* [1905] 2 K. B. 232, 2 Ann. Cas. 142. An abscess in the hand produced by continuous rubbing of a pick handle held not to be an injury produced by accident. *Marshall v. East Holywell Coal Co.* 93 L. T. N. S. 360. Working with a blistered finger among red lead and oil which produced an inflammation and swelling not an injury produced by accident. *Walker v. Lilleshall Coal Co.* [1900] 1 Q. B. 488. Copper poisoning resulting from contact with dust produced by filing is not an injury produced by accident. *Hichens v. Magnus Metal Co.* 35 N. J. Law J. 327. Death from anthrax from handling animals that died from this disease held not injury caused by accident. *Sherwood v. Johnson*, 5 B. W. C. C. 686.

The Michigan court has held that since an accident is an unforeseen event occurring without design, the Compensation Act of that state (which is similar to ours on the point under discussion) does not cover occupational diseases, which are diseases arising from causes incident to certain employments. *Adams v. Acme White Lead, etc. Works*, 182 Mich. 157, Ann. Cas. 1916D 689, 148 N. W. 485, L.R.A.1916A 283.

Kindred cases dealing with the subject under consideration have arisen under policies of accident insurance. They hold that disease not resulting from or produced by external violence is not an accident for which recovery can be had under such contracts. *Bacon v. U. S. Mutual Acc. Assoc.* 123 N. Y. 304, 25 N. E. 399, 20 Am. St. Rep. 748, 9 L.R.A. 617; *Smith v. Travelers' Ins. Co.* 219 Mass. 147, 106 N. E. 607, L.R.A.1915B 872; *Sinclair v. Maritime Passengers' Assur. Co.* [381] 3 El. & El. 478, 107 E. C. L. 478; *Dozier v. Fidelity, etc. Co.* 46 Fed. 446.

By sec. 2394—11, Stats. it is provided that no claim to recover compensation under secs. 2394—3 to 2394—31, inclusive, shall be maintained unless, within thirty days after the occurrence of the accident which is claimed to have caused the injury or death, notice in writing be given to the employer stating the time and place of the injury. This must mean that the legislature had in mind something definite and tangible, something that could be located as to time and place, where it used the word "accident." I do not see how this statute can be complied with in a typhoid fever case.

The New Jersey court, following what it conceives to be the English rule, holds that "where no specific time or occasion can be fixed upon as the time when the alleged accident happened, there is no injury by accident within the meaning of the compensation act." *Liondale Bleach, etc. Works v. Riker*, 85 N. J. L. 426, 80 Atl. 929.

The latest expression of the English courts on the subject to which attention has been

called is *Eke v. Hart-Dyke* [1910] 2 K. B. 677. There a laborer died from ptomaine poisoning caused by the inhalation of sewer gas. It was held that this was not an injury caused by accident, one of the concurring judges saying that there could be no recovery for injury by accident where you cannot give a date, and adding: "It is hardly a lawyer's question."

In *Brintons v. Turvey* [1905] A. C. (Eng.) 230, 2 Ann. Cas. 137, cited in the majority opinion is discussed in *Eke v. Hart-Dyke*, where it is referred to as an extreme case, the logic of which could be approved only on the theory that the anthrax germ which was floating in the air and which lodged in the eye of the deceased produced an abrasion which developed infection. In the decision the case is compared with a spark flying from an anvil and injuring the eyesight.

The Scotch case cited in the opinion (*Alloa Coal Co. v. Drylie* [382] [1913] 1 Scots. L. Times 167, 4 N. & C. C. A. 899) is authority for affirming the decision in the present case, but is much more restricted in its application than is the present decision. The opinion of Lord Dundas, which was concurred in by a majority of the judges, states:

"The present case could never be fairly cited in the future as indicating that the court is willing to hold that a mere ordinary disease (*e. g.* pneumonia) entitles a workman to compensation. The court must be satisfied . . . that the disease was attributable to some particular event or occurrence of an unusual and unexpected character incident to the employment, which could, in the light of the decisions, be fairly described as an accident."

I think this is the only decided case to which attention has been called which tends to support the decision of the court, while the cases to the contrary are numerous. In the two Wisconsin cases cited the disease for which recovery was allowed was proximately caused by an injury resulting from external violence.

NOTE.

Disease as an Accident.

- I. Introductory, 298.
- II. Under Accident Insurance Policy:
 1. Accident Causing Diseased Condition, 298.
 2. Pre-existing Disease Not Contributing to Injury, 308.
 3. Pre-existing Disease Co-operating with Accident, 305.
- III. Under Workmen's Compensation Act:
 1. Supervening Disease Resulting from or Rendered Possible by Injury:
 - a. In General, 309.

- b. Infection of Injured Eye, 315.
- c. Disease of Mind, 317.
- 2. Supervening Disease Independent of Injury, 318.
- 3. Pre-existing Disease Aggravated, Accelerated, or Revived by Injury:
 - a. Under American Acts, 319.
 - b. Under English Act, 322.
- 4. Pre-existing Disease Causing Injury, 323.
- 5. Nonoccupational Disease Caused by Employment:
 - a. In General, 325.
 - b. Pneumonia or Rheumatism Resulting from Exposure in Employment, 328.
- 6. Strain or Overexertion, 330.
- 7. Former Injury Resulting in or Contributing to New Incapacity, 334.
- 8. Occupational Disease:
 - a. Under Michigan Act, 335.
 - b. Under English Act, 336.
- 9. New York Act, 339.

I. Introductory.

The purpose of this note is to review the recent decisions involving the question of disease as an accident. For a discussion of the earlier cases on the subject see the notes to *Brintons v. Turvey*, 2 Ann. Cas. 137; *Broderrick v. London County Council*, 15 Ann. Cas. 885; *Sullivan v. Modern Brotherhood of America*, Ann. Cas. 1913A 116; and *Paul v. Travellers' Ins. Co.* 8 Am. St. Rep. 758. The note includes all cases passing on the question whether compensation may be recovered for disease under a workmen's compensation act which applies only to injuries received "by accident." The question whether disease is within an act allowing compensation for "injury" or "personal injury" is discussed in the notes to *Hurle's Case*, Ann. Cas. 1915C 619; and *Stertz v. Industrial Ins. Commission*, reported post, this volume, at page 354.

In discussing the question whether disease is within the purview of a policy of accident insurance, this note excludes the construction of a clause in an accident insurance policy excepting death caused by disease, that question being considered in the notes to *White v. Standard L. etc. Co.* 5 Ann. Cas. 83; *Rathman v. New Amsterdam Casualty Co.* Ann. Cas. 1917C 459; and *Cary v. Preferred Acc. Ins. Co.* 115 Am. St. Rep. 997. As to whether an intentional exertion causing a strain or other internal injury is an "accidental" means of injury, see the notes to *In re Scarr*, 1 Ann. Cas. 787; *Stone v. Fidelity, etc. Co.* Ann. Cas. 1917A 86; and *Horsfall v. Pacific Mut. L. Ins. Co.* 98 Am. St. Rep. 846.

II. Under Accident Insurance Policy.

1. ACCIDENT CAUSING DISEASED CONDITION.

Where an accident causes a diseased condition which results in the disability or death of the insured under a policy of accident insurance the accident is considered the cause of the injury or death and the insurer is liable on the policy. *Fidelity, etc. Co. v. Stacey*, 143 Fed. 271, 6 Ann. Cas. 955, 74 C. C. A. 409, 5 L.R.A. (N.S.) 657, reversing 137 Fed. 1012; *Preferred Acc. Ins. Co. v. Patterson*, 213 Fed. 595, 130 C. C. A. 175; *Aetna L. Ins. Co. v. Wicker*, 240 Fed. 398, 153 C. C. A. 324; *National L. etc. Ins. Co. v. Singleton*, 193 Ala. 84, 69 So. 80; *Aetna L. Ins. Co. v. Fitzgerald*, 165 Ind. 317, 5 Ann. Cas. 551, 75 N. E. 262. 112 Am. St. Rep. 232, 1 L.R.A. (N.S.) 422; *Lehman v. Great Western Acc. Assoc.* 155 Ia. 737, 133 N. W. 752, 42 L.R.A. (N.S.) 562; *General Acc. etc. Assur. Corp. v. Meredith*, 141 Ky. 92, 132 S. W. 191; *Continental Casualty Co. v. Mathis*, 150 Ky. 477, 150 S. W. 507; *National L. etc. Ins. Co. v. Cox*, 174 Ky. 683, 192 S. W. 636; *Standard L. etc. Ins. Co. v. Thomas (Ky.)* 17 S. W. 275; *Thompson v. Columbian Nat. L. Ins. Co.* 114 Me. 1, 95 Atl. 229; *McAuley v. Casualty Co. of America*, 37 Mont. 256, 96 Pac. 1313; *Martin v. Manufacturers' Acc. Indemnity Co.* 151 N. Y. 94, 45 N. E. 377; *Bailey v. Interstate Casualty Co.* 8 App. Div. 127, 40 N. Y. S. 513; *International Travelers' Assoc. v. Branum (Tex.)* 169 S. W. 389; *Hall v. American Masonic Acc. Assoc.* 86 Wis. 518, 57 N. W. 366; *Cary v. Preferred Acc. Ins. Co.* 127 Wis. 67, 7 Ann. Cas. 484, 106 N. W. 1055, 115 Am. St. Rep. 997, 5 L.R.A. (N.S.) 926; *French v. Fidelity, etc. Co.* 135 Wis. 259, 115 N. W. 869, 873, 17 L.R.A. (N.S.) 1011. See also *Bernays v. U. S. Mut. Acc. Assoc.* 45 Fed. 465; *Smouse v. Iowa State Traveling Men's Assoc.* 118 Ia. 436, 92 N. W. 53; *Rathjen v. Woodmen Acc. Assoc.* 93 Neb. 629, 141 N. W. 815; *Rodey v. Travelers' Ins. Co.* 3 N. M. 543, 9 Pac. 348.

Thus in *Continental Casualty Co. v. Mathis*, 150 Ky. 477, 150 S. W. 507, an action on an accident policy insuring against total disability from accident, it appeared that the insured scratched his thumb on a carpet tack and that blood poisoning developed from the wound. In affirming a judgment for the plaintiff the court said: "In the case at bar the assured was wholly disabled for three days. Then, incited by his desire to be at his work, he was permitted by his physician to go, under caution as to prudence and care. He did not and could not do all his work, and after three days of it, again went to bed for months of illness. During all the time he had blood poison. The processes of nature were at work within his body begetting the

sure and certain result of the accident, as the infection had at once happened. To hold that these three days of partial activity, while the poison was developing, broke the immediacy or the continuity of the accident, would be to hold that an accident policy does not cover blood poisoning from accident; for always there must be the interim of time for the disease to incubate. The provision in the policy is to have a natural and reasonable interpretation. The technical position of the company would avoid the policy for about every purpose save the collection of premiums. Within the intent of the policy, sound reason, and the opinions *supra*, the insured suffered an immediate and continuous disability. Notwithstanding the fact that the blood poison resulted from the accident, the company contends that the disability resulted from illness, not accident—the precise position upon which the elder Matthis says the agent refused payment. The issue of accident was submitted to the jury aptly. Further, it is to be noted that the policy in express terms provides that peritonitis, carbuncles, ulcers, and certain other denominated ills, are illnesses within the terms of the policy, no matter what may have brought them on. Blood poison is not among them. If the company so desired to classify this common resultant from accident it should have done so with equal express care. In accident insurance jurisprudence, blood poison resulting from accident is regarded as a part of the accident, and an injury or death from it as an accidental injury or death. . . . The insured was in intense pain for months, delirious much of the time. Tubes were kept in different parts of his body for long periods to drain away the pus and poison. Even upon his recovery he was afflicted as if he had locomotor ataxia. That he recovered at all is considered by his physicians as little short of the miraculous. His troubles were the direct result of an accident, against which the company had insured him.”

In *Preferred Acc. Ins. Co. v. Patterson*, 213 Fed. 595, 130 C. C. A. 175, an action on a policy insuring against death resulting directly, independently and exclusively from bodily injury effected solely through accidental means, it appeared that the insured was injured by a fall while attempting to crank an automobile, and that at a subsequent operation it was found that the left kidney of the insured was covered with large cysts. It was found on conflicting evidence that the condition was caused by the fall. The court said: “We agree that, when a man is injured while doing merely what he intends to do, he is not injured by an accident, unless the course of his action has been interrupted or deflected by some unforeseen and unintended happening. To illustrate from the facts be-

fore us: Since the deceased was attempting to start the engine of his car by turning the crank, whatever injury he might sustain from the ordinary strain of that operation would properly be regarded as a result of what he intended to do, and therefore would not be accounted accidental. But we can hardly suppose that he intended to slip and fall in the course of the operation, and therefore if he did slip and fall, and sustained injury as the direct result thereof, the happening would be unforeseen and unintended, and the injury would be accidental. Now, unquestionably, direct testimony was given that the deceased did slip and fall, and medical testimony was also given connecting the fall directly with his subsequent death. And this may serve to bring us to the first assignment of error. The plaintiff's declaration set forth that while the decedent was—‘cranking the engine or motor of, and attempting to start, a certain automobile, the surface of said street, avenue, or highway, gave way and caved in beneath and away from the feet of the said Walter L. Patterson, causing the said Walter L. Patterson to slip, stumble, and lose his footing, whereby he was subjected to a violent wrench, strain, and shock, whereby he sustained bodily injuries which resulted directly, independently, and exclusively of any and all other causes, and which said bodily injuries were effected solely through accidental means, in the death of the said Walter L. Patterson, etc.’ The evidence at the trial did not go so far as to show that the surface of the street had ‘caved in’ beneath the feet of the deceased, but it did tend to show that the surface was loose and had ‘given way’ under his feet. In the course of the trial a hypothetical question was addressed to one of the witnesses, which stated, *inter alia*, that while the deceased was ‘attempting to crank an automobile on the 5th day of August, 1911, the crank slipped suddenly out of the socket throwing him suddenly and violently to the ground, and that immediately afterwards he arose slowly and apparently with difficulty, and complained of pain in the back, etc.’ The defendant's counsel objected on the ground that the question was not framed in accordance with the averments of the declaration, but was predicated upon a different state of facts. He therefore alleged surprise, and this, of course, was equivalent to a motion that the trial should be continued; the argument being that the plaintiff was attempting to compel the defendant to answer a case different from the case sued upon. . . . To state the argument briefly: the policy provides that recovery for a death can be had only when the insured dies from bodily injuries effected through accidental means, as a direct result of the accident, and when the death results solely from such acci-

dent, independently and exclusively of any and all other causes. Therefore, if disease existing at the time of the accident was one cause of the death, the plaintiff cannot recover. The jury was properly instructed to that effect, and the verdict therefore establishes that there was an accident, that the accident was the direct and the only cause of death, and that the insured was not diseased at the time of the accident. With these facts established by sufficient evidence, the cases relied on by the company cease to be applicable, and need not be discussed. The charge as a whole was clear and satisfactory, and we see no serious objection to the illustration complained of in the sixth assignment. And, in the absence of sufficient medical evidence concerning the difficult—and, we think we may add, the somewhat obscure—subject of the effect of a predisposition to the particular disease in question, we discover no error in the court's instruction on this subject."

In *National L. etc. Ins. Co. v. Cox*, 174 Ky. 683, 192 S. W. 636, a suit on a policy insuring against loss of life, limb, etc., resulting directly and independently of all other causes from a bodily injury effected accidentally and through external, violent and accidental means, etc., the court said: "Obviously, the . . . provision of the policy, specifying the ground of the insurance company's liability, is susceptible of but one construction. Its meaning is that in order for the beneficiary to recover upon the policy for the death of the insured, the evidence must show that the death was produced by external, violent, and accidental means independent of other causes. In other words, the accident and injury resulting therefrom must be the proximate cause of the death to make the insurance company liable. . . . There is, however, no contrariety of evidence as to the facts, that down to the time of his receiving the fall the decedent was apparently in perfect health, that immediately following the accident his body was found to contain various contusions, and his lower limbs paralyzed, and that but a day or two later he became a victim of pneumonia. When to these facts is added the weight and effect to be given the testimony of various witnesses, several of them medical experts, that the paralysis, pneumonia and his death cannot be reasonably attributable to any other cause than the injuries he sustained in the fall in the apartment house, we can readily understand how the jury arrived at the conclusion expressed in the verdict returned by them. In other words, the evidence strongly concluded to prove that the accident and consequent injuries resulting to the decedent constituted the proximate cause of his death. It follows from the conclusion we have expressed as to the weight and effect of the

evidence that the ruling of the trial court in the matter refusing the peremptory instruction for a directed verdict, asked by appellee, was not error."

In *National L. etc. Ins. Co. v. Singleton*, 193 Ala. 84, 69 So. 80, an action on an accident policy insuring against loss caused by "external, violent and accidental means," it appeared that the insured cut his lip while shaving and that infection supervened. In affirming a judgment for the plaintiff the court said: "There was evidence sufficient to carry to the jury the question whether or not the death resulted from, or was caused by, a gash cut in the lip of the insured while he was shaving, there being evidence to show that a gash was so cut, and that it became infected, and that infection spread from this small gash to his entire face and neck, and to other portions of his body, and that death was the result of this infection. *Empire L. Ins. Co. v. Gee*, 178 Ala. 492, 60 So. 90; *Birmingham Ry. etc. Co. v. Hinton*, 158 Ala. 470, 48 So. 546. If death did so result from the cutting of the lip of insured while shaving, whether he was shaving himself or was being shaven by another, we hold that the death would be within the terms of the policy which provides against 'bodily injuries effected through external, violent and accidental means.' There was no evidence whatever to show that the insured, or any other person, intentionally cut the gash; but all the evidence shows that the scar, cut or gash was an accident, and within the risk of the policy. See *Bacon v. U. S. Mut. Acc. Assoc.* 44 Hun 599. As before stated, there was no evidence tending to show an intentional injury, either by the insured or by a third party. The case therefore does not fall within the rule of cases in which the evidence does tend to show an intentional injury. These cases were discussed and reviewed by this court in the case of *Continental Casualty Co. v. Cunningham*, 188 Ala. 159, 66 So. 41, L.R.A.1915A 538."

In *General Acc. etc. Assur Corp. v. Meredith*, 141 Ky. 92, 132 S. W. 191, an action on an accident policy containing the requirement that the injuries insured against must be effected through external, violent and accidental means, it appeared that the insured, a physician, received a jolt, in stepping down from a pavement about eight inches high, which resulted in intussusception and death. In holding that he had sustained an accident within the meaning of the policy the court said: "If the deceased got a fall as above stated, when he stepped from the pavement, and this fall produced the injury to the bowel which caused his death, his life was lost from a bodily injury effected through external, violent and accidental means."

In *Etna L. Ins. Co. v. Fitzgerald*, 165 Ind. 317, 5 Ann. Cas. 551, 76 N. E. 262, 112 Am. St. Rep. 232, 1 L.R.A.(N.S.) 422, it

appeared that the insured, under an accident policy containing the provision that the bodily injuries insured against must be effected through external, violent and accidental means, sustained an injury to his hand by allowing it to rest on the bed rail for a long time while asleep, and that periostitis supervened. In holding that there was evidence to support a verdict for plaintiff the court said: "It appears from the testimony that on July 31, 1902, appellee, being much fatigued from an extended business trip, retired about 8 o'clock P. M. As he was somewhat restless, he placed his left hand between the pillow and his head, in order to raise it higher. The hand was placed on edge, with the thumb next to the head, and he fell asleep in that position. Sometime during the night, while asleep, he moved so that his hand, with his head continuing upon it as before, rested upon the edge of the bed rail, and he continued to sleep in that posture until 4 o'clock A. M., when he awoke. He found that his hand was wholly numb, and it continued in that condition for the space of half an hour. There was a black mark upon it, where it had rested upon the rail, and this mark existed for sometime thereafter. The hand pained him a great deal during the following day, and during the next night he was compelled to call a physician. The testimony of the latter, as well as that of the family physician, who took charge of the case upon returning from a vacation, shows that the pressure on the hand while upon the bed rail resulted in an inflammation of the periosteum of the metacarpal bones lying back of the third and fourth fingers, a condition which made an operation necessary and caused a protracted illness. The expert evidence shows that cases of inflammation of the periosteum, or, as the difficulty is technically termed, periostitis, are traumatic, at least for the most part, and that it is the opinion of the medical profession that all such cases are due to some injury, perhaps forgotten. The principal contention of counsel for appellant on the question of the sufficiency of the evidence is that appellee's loss of time was due to disease, and not to an injury within the terms of the contract. We hold that the policy in suit was an insurance against loss of business time by disease, provided that the disability was proximately caused by a bodily injury occasioned through external, violent and accidental means. It is the general understanding that this class of policies insures against diseases so occasioned, and where medical science reveals the fact that back of the disease stands a proximate cause, answering in all respects to the terms of the policy, it will not suffice to discharge the company that the consequence is accounted a disease. The insured cannot

know what may befall him as the result of possible injuries, and it must be taken to have been the understanding of the parties that loss of time occasioned by disease was insured against, where the disability was proximately occasioned by an injury within the provisions of the contract. It will be time enough to deal with the difficult cases suggested by appellant's counsel, involving subtle, external causes of disease, when they arise. There was no evidence tending to show that the inflammation from which appellee suffered was due to any cause other than that of the long-continuing force exerted by the weight of the head. . . . We are not here called on to consider a case where the result is one which follows from ordinary means, voluntarily employed, and in which the only element of unexpectedness lies in the fact that the pursuit of the means unexpectedly brings about a physical condition which makes disease possible. Here the element of volition was wholly absent, and the fact that during the period of unconsciousness there was a distinct and long-continued force applied, which compressed the tissues and blood vessels surrounding the bones, and thereby caused the inflammation, marks the case as one of accident. We are also of opinion that the injury was a violent one within the terms of the policy. The degree of violence is not always a controlling consideration. . . . There were present in this instance, in a substantial sense, all of the elements necessary to bring the proximate cause of the disability within the requirement that the loss of time must result from a bodily injury effected through external, violent and accidental means. The only thing that was extraordinary about the case was the result; but this will not relieve, for the company was paid for its undertaking to provide a conventional measure of indemnity against the fortuitous, provided that it proximately proceeded from such an injury as the policy describes. We hold that the evidence was sufficient to support the verdict."

In *French v. Fidelity, etc. Co.* 135 Wis. 259, 115 N. W. 869, 17 L.R.A.(N.S.) 1011, it appeared that the insured struck his leg against a small iron safe in a baggage car, and that septic poisoning resulted causing his death. The policy contained the "external, violent and accidental means" clause. In reversing a judgment for the defendant the court said: "It is urged on behalf of the respondent in support of the judgment that it does not appear that the death of the insured was the result of 'bodily injuries sustained through external, violent, and accidental means, independently of all other causes.' The proof is undisputed that the insured received the accidental injury to his leg causing an abrasion of the skin, that an infection

started at this place, and that he died fifteen days later from erysipelas or blood poisoning. The contention is that the accidental injury of itself would not have resulted fatally, but that death was due to an independent intervening cause, namely, the germs which entered the system through the wound. It must be apparent, however, that but for the accidental injury there would have been no cause for infection; that but for the abrasion the disease germs could not have entered and produced the fatal result. The wound produced by the accident was therefore the proximate and sole cause of death. *Cary v. Preferred Acc. Ins. Co.* 127 Wis. 67, 106 N. W. 1055. Counsel for respondent insists that the words 'independently of all other causes' do not mean the 'sole proximate cause;' that there was an independent intervening cause, which resulted in the death of the insured, and therefore the defendant is not liable. We cannot adopt this interpretation of the language or the conclusion sought to be drawn from the testimony. . . . We must hold, therefore, that where death results from disease which follows as a natural, though not the necessary, consequence of an accidental physical injury, it is within the terms of the accident policy, the death being deemed the proximate result of the injury and not of the disease as an independent cause."

In *Woodmen's Acc. Assoc. v. Hamilton*, 70 Neb. 24, 96 N. W. 989, wherein it appeared that the insured under an accident policy died from a complication of diseases after the injury to the liver in a runaway accident, the court said: "The other question, as to the sufficiency of the evidence to sustain the verdict, is given very little attention by plaintiff in error and seems hardly to have merited more. It is true that the death of the insured on June 10 was the result of a complication of diseases, but the evidence tends very strongly to indicate that they resulted from a violent injury to his liver, which came from the runaway accident of March 26. We do not feel disposed to disturb the finding of the jury in reference to this matter."

In *Railway Mail Assoc. v. Dent*, 213 Fed. 981, 130 C. C. A. 387, L.R.A.1915A 314, the court said: "While in the woods in the suburbs of St. Paul, Minn., Dent accidentally came in contact with poison ivy, with the result that an eruption appeared between his fingers two or three days afterwards, and grew until it covered his limbs and body and in about seven weeks caused his death. The essentials of a recovery by Mrs. Dent—so far as any contentions advanced make these a matter for present consideration—are that her husband's death was caused by 'accident,' that the accident alone resulted in producing 'visible external marks of injury,' and that his death did not result from poison or other

injurious matter 'taken or administered' accidentally or otherwise. His contact with the poison ivy happened by chance, and was in ignorance of its character, was unintentional and involuntary, and the result from his conscious act was unexpected. This would seem to make it an accident within the customary meaning, as clearly as if he had been stung by a poisonous insect or bitten by a poisonous reptile. *U. S. Mut. Acc. Assoc. v. Barry*, 131 U. S. 100, 9 S. Ct. 755, 33 U. S. (L. ed.) 60; *Western Commercial Travelers' Assoc. v. Smith*, 20 C. C. A. 223, 85 Fed. 401, 40 L.R.A. 653; *Omberg v. U. S. Mutual Acc. Assoc.* 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413. The phrase 'injury by accident' in the English workmen's compensation act was held by the House of Lords to include an infection with anthrax while handling wool. In *Brintons v. Turvey* [1905] App. Cas. (Eng.) 230, the Lord Chancellor said: 'I think in popular phraseology, from which we are to seek our guidance, it [the act] excludes, and was intended to exclude, idiopathic disease; but when some affection of our physical frame is in any way induced by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase "accident causing injury" because the injury inflicted by accident sets up a condition of things which medical men describe as disease. Suppose in this case a tack or some poisoned substance had cut the skin and set up tetanus. Tetanus is a disease; but would anybody contend that there was not accident causing damage?' This has especial bearing on the argument that Dent died of a disease, that is, blood poisoning, and not from accident. The testimony was that contact with ivy operates much like a burn, in that when the eruption covers the body it seals the skin against the natural discharge of secretions, and blood poisoning results. The ultimate effects of many injuries indisputably external and accidental might be similarly described. A like contention was before this court in *Western Commercial Travelers' Assoc. v. Smith*, supra. Next, the accident alone must have produced 'visible external marks of injury.' There is no doubt that contact with the ivy directly and alone caused the condition described; no other cause is suggested. Nor is it disputed that the eruption, first on the hands and then on the limbs and body, was both visible and external. True, it did not appear until two or three days after the contact; but it was not provided it should show at once. It came soon and in the natural course, and was of a character that left no doubt of the immediate cause."

However in *McAuley v. Casualty Co. of America*, 37 Mont. 256, 96 Pac. 131, an action on a policy insuring against injuries effected through external, violent and acciden-

tal means, it appeared that the insured sustained an injury to his leg while descending from a street car, and that erysipelas entered the wound and death resulted. In holding that the evidence was insufficient to support a recovery the court said: "The motion for a nonsuit should have been sustained. The plaintiff failed to prove the cause of the death of his wife. His contract with the defendant provided that the company should become liable only in the event that injuries, effected solely through external, violent and accidental means, should, directly and independently of all other causes, result in loss of life. In order to recover the plaintiff was bound to prove that the death of his wife was caused by such an injury. This he failed to do. The only positive testimony produced by him was to the effect that the cause of the death of Mrs. McAuley was erysipelas. Whether the disease was introduced into her system through the scratch she received, or whether its baneful properties slumbered in her blood prior to that time, whether it was communicated to her body from her clothing or a bandage, or from some projecting portion of the car, we do not know, the doctors did not know, and the jury could not know. As actions like this are founded upon express contract, it is incumbent upon the plaintiff to prove, by some substantive testimony, that the event has occurred, upon the happening of which defendant has agreed to become liable. Having failed in this regard, the plaintiff should have been nonsuited. Several authorities are cited by the respondent to the effect that where death results from blood poisoning, following as a natural, but not the necessary, consequence of a wound, however slight, as from the prick of a pin or a lead pencil, the wound will, in insurance cases like the one at bar, be deemed the proximate cause of death. In this case, however, there was no testimony, not even a medical opinion, that the erysipelas was caused or aggravated by the wound on Mrs. McAuley's leg; that is to say, there is no testimony to the effect that the erysipelas germ was communicated to the deceased through the abrasion on her leg, nor is there any evidence that the abrasion caused the disease to become manifest. For aught we know the erysipelas was entirely independent of the abrasion, and the result would have been the same had no abrasion of the skin existed. The failure to call a physician until the patient was almost dead probably destroyed all chance of making this proof."

2. PRE-EXISTING DISEASE NOT CONTRIBUTING TO INJURY.

If a pre-existing disease does not contribute with the accident which results in the

disability or death of the insured under a policy of accident insurance the accident is considered the proximate cause and the insurer is liable under the policy. *Collins v. Casualty Co. of America*, 224 Mass. 327, 112 N. E. 634, L.R.A.1916E 1203; *Driskell v. U. S. Health, etc. Ins. Co.* 117 Mo. App. 362, 93 S. W. 880; *Fetter v. Fidelity, etc. Co.* 174 Mo. 256, 73 S. W. 592, 97 Am. St. Rep. 560, 61 L.R.A. 459. Thus in the case first cited the court said: "Considered in connection with the other provisions, it is clear that defendants undertook to insure the deceased against death resulting from bodily injuries received from an external, violent and accidental agency. If plaintiff's injury was inflicted in the manner alleged, that is, by the chance injection of scalding water into his ear, it certainly was accidental, violent and external, and we need waste no words in defining these terms. The important question that may arise under certain possible phases of proof is this: What is meant by the term, 'If death should result solely from such injuries?' We think the only reasonable interpretation to be placed upon this clause is to say that the injury must stand out as the predominant factor in the production of the result and not that it must have been so virulent in character as necessarily and inevitably to have produced that result regardless of all other conditions and circumstances. People differ so widely in health, vitality and ability to resist disease and injury, that what may mean death to one man would be comparatively harmless to another and, therefore, the fact that a given injury may not be generally lethal does not prevent it from becoming so under certain conditions; and if, under the peculiar temperament or condition of health of an individual upon whom it is inflicted, such injury appears as the active, efficient cause that sets in motion agencies that result in death, without the intervention of any other independent force, then it should be regarded as the sole and proximate cause of death. The fact that the physical infirmity of the victim may be a necessary condition to the result does not deprive the injury of its distinction as the sole producing cause. In such case, disease or low vitality do not arise to the dignity of concurring causes, but, in having deprived nature of her normal power of resistance to attack, appear rather as the passive allies of the agencies set in motion by the injury."

In *Fetter v. Fidelity, etc. Co.* 174 Mo. 256, 73 S. W. 592, 97 Am. St. Rep. 560, 61 L.R.A. 459, wherein it appeared that the insured died from a hemorrhage resulting from the rupture of the healthy tissue of a partly cancerous kidney, caused by a fall, in affirming a judgment for the plaintiff the court said:

"There is no question but that the fall of the insured against the table, striking his side heavily against its edge, was accidental, that it produced the rupture of the kidney which caused the hemorrhage which caused his death. All the witnesses concur in that. They also concur in the opinion that, conceding the previous existence of the cancer, the man would not have died as and when he did if the accident had not occurred; that whilst death from the cancer might have resulted, it would probably have been deferred several years. But the contention of the defendant is that the accident would not have resulted in the rupture if the cancer had not been there; as defendant's witness Dr. Hall said: 'The exciting cause of the hemorrhage was the injury and the predisposing cause was the cancer.' On this testimony the defendant says that the death was not the result of the accident 'independent of all other causes.' If we should give to those qualifying words of the policy the meaning that is now claimed by defendant they were intended to have, there would be scarcely any limit to their nullifying influence. Dr. Hall said in explanation of what has just been quoted, of his testimony: 'The predisposing cause is the remote cause.' If, therefore, there could be discovered in a man's body after his death any condition, before undiscovered and unsuspected, that, under scientific tests, would render him more amenable to accidents or less capable of resisting their influence, the policy would not cover the case. The fact that a man is sixty-nine years old, yet with an activity of body ordinarily found only in one much younger, might have something to do both with the fact of an accident and its result, and thus his age and unusual activity could be said to be a predisposing cause—remote, perhaps, as the learned witness designated the cancer in this case—still, in such case, in that sense, the accident could not be said to have been the cause of the death 'independent of all other causes.' The causes referred to in the policy are the proximate or direct, not the remote causes. This was evidently the view of the trial court when it modified the second instruction asked by defendant, inserting the word 'direct' before the word 'cause,' thereby directing the jury that they could not find for the plaintiff unless they found that 'the accident was the sole and only direct cause of the death of the insured,' and that view of the law was correct."

In *Collins v. Casualty Co. of America*, 224 Mass. 327, 12 N. E. 634, in holding that recovery could be had for the effects of a rupture, on a finding that the insured's predisposition to rupture did not cause the accident, the court said: "The more difficult question arises however under the defend-

ant's contention that there was no evidence that the death of the insured resulted 'directly and independently of all other causes' from the accidental fall which the assured suffered on December 15, 1910. So far as we know the true construction of that provision of the policy is a question of novel impression. The provision of the policy in question in *Cheswell v. Fraternal Accident Association* [199 Mass. 267] *ubi supra*, was that the company would agree to pay to the beneficiary 'the sum of twelve hundred fifty dollars if the death of the certificate holder shall result from such injuries alone' within ninety days from the date of said accident. And there was a similar provision in *Freeman v. Mercantile Mut. Acc. Assoc.* 156 Mass. 351. But the decisions in those cases do not go far as a help in the decision of the case at bar. Neither the plaintiff nor the defendant has brought to our attention any case involving a consideration of the proper construction of such a clause in a policy of accident insurance and no case of that kind has come to our attention. The defendant has not laid stress upon the provision of the policy that the death must result 'directly' from the injury in question. This may be because of the provision that the injury need not cause 'immediate' disability. Under these circumstances we do not stop to consider that provision and proceed to the consideration of the provision that death must result from the injury 'independently of all other causes.' We are of opinion that, in a case where a surgical operation becomes necessary in order to deal properly with the effects of an injury within the policy of accident insurance and the insured dies as a result of the operation, death results 'independently of all other causes from such injuries.' Although he dies from some 'obscure physiological poisoning due to certain unknown changes in the bodily functions brought about by etherization,' it is plain, and in fact it was testified to by one of the doctors, that 'the operation consisted of etherization, just as essentially as it did of my [the] operation on him, cutting with the knife.' If the jury found in the case at bar (as indeed they must have found) that the occasion of the death was an 'obscure physiological poisoning due to certain unknown changes in the bodily functions brought about by etherization,' they were bound, or at least they were warranted in finding that that was a mere incident of the operation, which operation again was the only proper way of dealing with the rupture which was caused by 'accidental means' within the terms of the policy. If they did so find the insured came to his death from an incident of what was a proper treatment of the injury (which injury was within the policy). If this effect of etherization was an incident of the opera-

tion and that was found to be a necessary or proper result of the injury, it was not another outside cause but an incident of a cause within the policy and in that case death resulted 'directly and independently of all other causes from such [the] injuries.'

3. PRE-EXISTING DISEASE CO-OPERATING WITH ACCIDENT.

Where pre-existing disease co-operates with an accident to produce the disability or death of the insured under a policy of accident insurance the accident cannot be considered the sole and exclusive cause and the insurer is not liable under the policy. *New Amsterdam Casualty Co. v. Shields*, 155 Fed. 54, 85 C. C. A. 122; *Maryland Casualty Co. v. Morrow*, 213 Fed. 599, 130 C. C. A. 179, 52 L.R.A.(N.S.) 1213; *Crandall v. Continental Casualty Co.* 179 Ill. App. 330; *Feder v. Iowa State Traveling Men's Assoc.* 107 Ia. 538, 78 N. W. 252, 70 Am. St. Rep. 212, 43 L.R.A. 693; *Rathman v. New Amsterdam Casualty Co.* 186 Mich. 115, Ann. Cas. 1917C 459, 152 N. W. 983, L.R.A.1915E 980; *Appel v. Aetna L. Ins. Co.* 86 App. Div. 83, 83 N. Y. S. 238, *affirmed* 180 N. Y. 514, 72 N. E. 1139; *Niskern v. United Brotherhood*, etc. 93 App. Div. 364, 87 N. Y. S. 640. See also *Stout v. Pacific Mut. L. Ins. Co.* 130 Cal. 471, 62 Pac. 732. Thus in *New Amsterdam Casualty Co. v. Shields*, supra, the court said: "The policy provides: 'Loss of life by accident as used in this policy shall be deemed to mean death from bodily injuries not intentionally inflicted by the assured, which independently of all other causes are effected solely and exclusively by external, violent and accidental means and which shall result in the death of the assured within ninety days of the event causing the injury.' In this case it is conceded that the disease of appendicitis, with its consequences and complications, caused the death of the insured, but the real question of fact lies farther back, and is, whether the fall against the dashboard, acting independently of any other cause, produced this disease. If the insured recovered from his former attacks of this disease, so that it no longer existed in his body, and there was only a susceptibility to have it in case a proper exciting cause should arise, and in this case the fall against the dashboard proved to be such exciting cause, the case would be for recovery under the policy; but if because of the former attacks there was not merely a susceptibility to a further attack, but the actual disease itself existed, liable to be rendered active and virulent by an injury such as that suffered by the insured, in that event the active disease which resulted in death would not be regarded as the result of the fall alone, but

as the joint result of the fall and the latent disease, and hence there could be no recovery under the policy."

In *Rathman v. New Amsterdam Casualty Co.* 186 Mich. 115, Ann. Cas. 1917C 459, 152 N. W. 983, L.R.A.1915E 980, an action on a policy insuring against the result of injuries effected, independently of other causes, solely and exclusively by accidental means, it appeared that the insured was in a general diseased condition and while returning from Europe jumped or fell overboard and was lost. In holding that the insurer was not liable since the death was contributed to by a pre-existing disease, the court said: "It must be conceded as largely conjectural whether assured's death was accidental or intentional and suicidal. There are evidential facts in the case persuasive of the latter view, while the legal presumptions against self-destruction are in favor of the former. Conceding, however, that it was accidental, plaintiff cannot recover if the accident was caused or contributed to by illness or disease."

In *Feder v. Iowa State Traveling Men's Assoc.* 107 Ia. 538, 78 N. W. 252, 70 Am. St. Rep. 212, 43 L.R.A. 693, the court said: "The evidence tended to establish the following: The decedent, at the time of his death, was about twenty-six years of age, and had been in Denver, where his death occurred, about nine months. He was suffering from consumption, and went to Denver, and resided there, on account of his health. He was benefited by the change of climate and medical treatment he received, and his health had been considerably improved, and was constantly improving, at the time of his death. During the day of his death he had been as well as usual, and in the evening was with two of his brothers in their office. Preparatory to leaving it, the decedent went to a window to close the shutters. A chair stood in front of the window, and he stood on his toes, and reached over the chair toward the shutters, and, as he did so, blood began to flow from his mouth. He was placed on a lounge, and died within a few minutes. The cause of his death was a hemorrhage from a ruptured artery, and the evidence would have authorized the conclusion that the rupture of the artery was not due to the disease from which he was suffering. There is no evidence that he fell, slipped, lost his balance, failed to catch the shutter when he reached for it, or that it moved at his touch more or less readily than he had expected it would move: in other words, there is no evidence whatever that anything was done or occurred which he had not foreseen and planned, excepting the rupture of the artery, and the consequences which resulted from it." . . . "The certificate in suit made the defendant liable if the death of Feder resulted from

an accidental cause. The evidence shows that the cause was the ruptured artery; but that was not accidental, if it was the natural result of an act voluntarily done by Feder. That he did anything but what he intended to do, in attempting to close the shutters, is not shown nor claimed. It is not even shown that he made any unusual exertion in what he did. Had the artery been ruptured while the decedent was sitting quietly in his chair, or while walking at a moderate pace, there would be no ground for claiming that the rupture was accidental; and we do not think that, because the act of closing the shutters may have required a little more exertion than would have been required to remain seated or to walk leisurely, the rupture was accidental. So far as is shown, it may have been, and probably was, due to a weakened or diseased condition of the artery. But, however that was, we are satisfied that there was no evidence which would have authorized the jury to find that the rupture was accidental, within the meaning of the certificate. We conclude that the district court was right in directing a verdict for the defendant, and the judgment rendered is therefore affirmed."

In *Appel v. Aetna L. Ins. Co.* 86 App. Div. 63, 83 N. Y. S. 238, affirmed 180 N. Y. 514, 72 N. E. 1139, an action on a policy containing the "external, violent and accidental means" provision, it appeared that while the insured was riding a bicycle the regular movement of a muscle injured a diseased appendix and septic peritonitis intervened. The court said: "We can conceive of no theory upon which it can be said, from the facts disclosed by the evidence, that the death of the insured resulted from 'bodily injuries, effected . . . through external, violent, and accidental means,' within the meaning of the policy. Riding the bicycle was in no sense an accident or accidental; the insured planned for and deliberately entered upon the project, and, so far as appears, it was carried out precisely as intended. He sustained no fall or shock, came into collision with nothing, he went where he chose, selected his route, his wheel at all times under perfect control, and he brought into play such muscles of the body, and only such, as he willed. The result of such ride, while extraordinary, in no manner proves that it was accidental. If the deceased had had a weak heart, and had deliberately and in the usual way walked rapidly up a hill, which caused the heart action to stop, could it be said that death was the result of accident? It might have been unwise to undertake to reach the top of the hill on foot, and of course the result was not anticipated, but there was no accident about it. The most that can be said in such cases, and in the case at bar, is that the result was accidental, but the means

which produced it were not accidental. As we have seen, the evidence wholly fails to show that the deceased did anything which he did not fully intend to do, or that what he did was not done precisely as intended; therefore the result of such acts—his death—was not produced by 'accidental means.' . . . Our attention has not been called to any case which holds, and we have failed to discover any authority for the proposition, that a result which is produced by means all of which, and every detail of which, was intended, can be said to have been produced by accidental means, simply because the result which followed the employment of such means, exactly in the manner intended, was different from the result anticipated. In order that the plaintiff may succeed in the case at bar, it is necessary that we should assent to that exact proposition. We think that is not the proper construction or true meaning of the language of the policy in suit."

In *Stokely v. Fidelity, etc. Co.* 193 Ala. 90, 69 So. 64, L.R.A.1915E 955, a death resulting from a fit of coughing following a surgical operation was held not to be accidental, the court saying: "There would have been no stitches nor any rupture but for the disease and the wound it made necessary."

However in some cases recovery has been allowed where pre-existing disease co-operated with an accident. *Fidelity, etc. Co. v. Meyer*, 108 Ark. 91, 152 S. W. 995, 44 L.R.A.(N.S.) 493; *Hall v. General Acc. Assur. Corp.* 16 Ga. App. 66, 85 S. E. 600; *Continental Casualty Co. v. Lloyd*, 165 Ind. 52, 73 N. E. 824; *Mitchell v. Fidelity, etc. Co.* 35 Ont. L. Rep. 280, 26 Dominion L. Rep. 784, 9 Ont. W. N. 341, affirmed in 37 Ont. L. Rep. 335, 28 Dominion L. Rep. 361, 10 Ont. W. N. 311. Thus in *Fidelity, etc. Co. v. Meyer*, supra, the court said: "While standing in a wagon preparatory to seating himself, he was thrown backwards by the sudden and unexpected start of the horse, which caused him to fall on his back or right side in the region above the hip and strike an iron handhold upon the wagon seat. He threw both hands to his side and at once complained of the injury. The evidence tends to show that he continued to complain of the injury, and was confined to his bed from that time until his death, which occurred several weeks later. A few days after the accident he began to have hemorrhages from the mouth, which continued at intervals until his death. A short time after the accident he also commenced having hemorrhages from the bowels, and these continued until death. Prior to the accident he had every appearance of being a healthy man, and gave no evidence of having a fatal disease; but a post mortem held several days after his death revealed the fact, according to some of the testimony,

that there was a diseased condition or tumorous growth on the head of the pancreas which enveloped the duodenum. Some of the surgeons gave opinions that the growth was a cancer of at least several months standing. While this was not directly disputed by other testimony, there is evidence to the effect that the physical condition of the man was inconsistent with the long continued presence of a malignant cancer and that, therefore, the tumorous growth was dormant rather than malignant, or that it might have been the result of the blow at the time of the accident. The autopsy developed the fact that the hemorrhage from the bowels resulted from a rupture of the duodenum or of the pancreas which enveloped it, but the testimony leaves a doubt as to whether this did not result from the erosion caused from the alleged cancerous growth or from the blow at the time of the accident. The evidence is sufficient, we think, to warrant the finding that the rupture was caused by the blow and that death resulted from this injury."

In *Continental Casualty Co. v. Lloyd*, 165 Ind. 52, 73 N.E. 824, recovery was allowed where a cerebral hemorrhage was caused by a fall, although a pre-existing tumor of the brain was a remote concurring cause, the court saying: "Here it is shown, without dispute, that there was a tumor upon Lloyd's brain. But it does not necessarily follow that it was a proximate cause of his death. Dr. Ohlmacher, a pathologist of learning and experience, and who conducted the autopsy for appellant, and appeared as a witness in its behalf, testified that the autopsy disclosed that a blood clot, or thrombus, had formed within the walls, and effectually plugged the artery at the point where the channel was narrowed by the tumor. He further testified, in effect, that at the point of obstruction the tumor had contracted the caliber of the artery to about one-half its normal size, which, however, in capacity, in the absence of thrombus, would be sufficient to nourish the brain and prolong life indefinitely, and perhaps for years, without marked inconvenience to the individual; that blood outside its natural sphere, or when it comes in contact with any other matter other than the peculiar substance of which the inner coating of the blood vessels is composed, speedily coagulates, or forms an organized clot; that when death came to Lloyd the tumor had penetrated and weakened the walls of the vessel, and a rupture of the inner coating at the point of stricture, thereby bringing the blood in contact with the matter of the outer wall, would conduce to thrombus, which, in fact, is the usual way in which clots from injury are formed. The substance of this testimony of Dr. Ohlmacher is that at death, excluding

the blood clot, the tumor on Lloyd's brain had not reached a fatal stage, and probably would not have produced death for years to come, and, furthermore, that the fatal clot might have been caused by a rupture of the inner coating of the artery by a sudden influx of blood into the narrowed duct from a violent exertion of the heart. This evidence, when considered together with the testimony of Dr. Schleiker, the insured's age, his weight, the unexpectedness and severity of his fall, the speedy development thereafter of symptoms of brain pressure, the total absence of all premonitory symptoms of tumor or brain disorder prior to the fall, leaves no room for argument but that the jury had before it legal evidence, both direct and indirect, in support of its conclusion that Lloyd's death was caused by accident, independently of all other causes. And it makes no difference whether it found that the cause closest the death was hemorrhage of the brain, or an organized blood clot within the walls of the cerebral artery. It had the right to find that the accidental fall was the cause that put his life in jeopardy, because it incited the fatal energy of the tumor, which was at least dormant, and would have remained so for an indefinite period, and, perhaps, until death from some other cause would have supervened. The tumor had impaired the resisting strength of the artery, but had not effected immediate danger to life. It was proper under the evidence for the jury to view the impairment as a condition, and not as a cause, and to find that the fall was the originating, efficient, direct and proximate cause of death; that is, that the fall set in motion a force that progressed upon present existing conditions in natural, usual sequence to effect the fatal result. Twelve bricks are set in a row, eight inches apart. By accident the first is toppled and falls against number two, which in turn falls against and throws number three, and so on until number twelve is cast down by number eleven, and inflicts injury. With a proper footing number twelve might, or might not, have fallen. In such case could it be said that because brick number twelve had a weak and imperfect footing such imperfection was the direct, dominant, proximate cause of the injury? Who knows that the artery would not have been ruptured by the fall if it had been in a normal condition? Or who can tell that the insured would not have died from some other cause if the fall had not animated and accelerated the energy of the tumor. In fact, Dr. Ohlmacher testified that the autopsy disclosed in the vital organs of the deceased, in addition to the tumor, 'some affection of the mitral valve of the heart, some consequent enlargement of the heart, a beginning broncho-pneumonia, a beginning acute Bright's

disease, and a moderate fatty change in the liver.' From these considerations it seems clear that the jury, in its search for the proximate cause of death, had the right to conclude that even though the fall would not have produced death but for the impaired artery, the tumor at most was a remote and not a proximate, efficient cause."

In *Hall v. General Acc. Assur. Corp.* 16 Ga. App. 66, 85 S. E. 600, wherein it appeared that the acceleration of an incurable chronic disease of the kidneys was caused by a fall, the court said: "To our minds, the fact that Judge Hall may have had an incurable disease, which by the acceleration of its influence and effect may have caused the death, would not necessarily preclude a right of recovery, although it was stipulated in the contract of insurance that the amount stipulated should be paid only when death resulted solely and exclusively from the injury. Presumably the company knew from the application of Judge Hall, which was made twenty-six days before the accident, that he was suffering from an incurable affection of the kidneys. If they did not know it, they could have known it, for there is no change in the answer that there was any concealment on the part of Judge Hall of his true condition at the time the application was made. To hold in any case that a contract which stipulates that the loss for death should be payable only when the loss results solely and exclusively from an injury, would be to hold that death must, in every case, be instantaneous and the immediate effect of the injury in question, for it is a matter of common knowledge that almost every human being has some weak spot in his organism which might to a larger or smaller degree contribute to bring about death in a particular way in that particular case, although another person under the same circumstances might not have died. Except in the case of a human being who is in perfect health, or unless the death is instantaneous, death never supervenes when it cannot be said that there was perhaps more than one cause which contributed to the fatality. If a company which writes accident insurance insures one who is suffering from a number of maladies against loss of life solely and exclusively due to the accident, and an accident happens which perhaps would not have caused the death of a normally healthy person, and yet which, by precipitating the baneful effects of the maladies, shortens the life of the person in question by any appreciable length of time, no matter how short, the injury, as the underlying essential proximate cause, must at least be said to have produced the result which otherwise would not have happened at the time and place at which it occurred. In the present case the insured

was in many respects a vigorous man; he was afflicted with an incurable disease of the kidneys which sooner or later was certain to have terminated his life. How long he might have lived but for the injury which accelerated the effects of his disease is immaterial. The true question in the case is whether he would have died at the time that he did die if he had not received the injury, conceding the injury to have been the result of an accident. If the jury should find that his fall was due to disease, and not an accident due to his misplacing his foot or miscalculating the distance to be descended from the edge of the sidewalk to the roadway of the street, or other accidental cause, there would be no right of recovery, because the loss, in that event, would not be due solely and exclusively to an accident as the proximate cause, but might be due to the disease. This is the first fact for a jury to determine. However, if on the other hand the assured accidentally slipped and fell upon the street, the mere fact that the fall hastened his death by aggravating the disease so that he only lived a week, when even if he had not fallen he might not have lived as much as a month, would not defeat a recovery on the policy. It may be granted that the words of the policy which restrict the indemnity for death losses to those resulting solely and exclusively from bodily injuries through external, violent, and accidental means might avoid the contract in the present case if consideration be given only to the matter of predominance of the various causes which may have contributed to Judge Hall's death, instead of focusing the investigation upon the ascertainment of the proximate and primary cause, but for which death might or might not have resulted at the time that it occurred. In the view most strongly favorable to the defendant, the testimony showed that Judge Hall's tenure of life was more than ordinarily uncertain, but it did not show that he would have died when he did if he had not fallen, for, on the contrary, there was evidence that the fall, by aggravating the complaint from which he was suffering, probably hastened his death. In our view of the case, it is for a jury to declare, from all the facts in proof, what was the proximate cause of the death of the insured. If there was only one proximate cause of the bodily injury and this was brought about by 'external, violent, and accidental means,' such as an accidental slipping and falling, the insurance company would be liable upon its contract without regard to the fact that the assured was badly diseased and that the results of the fall in his case would naturally be more serious than if he had been in perfectly good health and a young man."

III. Under Workmen's Compensation Act.

I. SUPERVENING DISEASE RESULTING FROM OR RENDERED POSSIBLE BY INJURY.

a. In General.

Where a supervening disease is directly caused by an accidental injury received in the course of the employment and results in incapacity or death, the incapacity or death is held to be caused by an accidental injury, within the meaning of a workmen's compensation act.

England.—Walker v. Mullins, 1 B. W. C. C. 211; Powers v. Smith [1910] 3 B. W. C. C. 470; Groves v. Burroughes, 4 B. W. C. C. 185; Wright v. Kerrigan [1911] 2 Ir. R. 301; Wood v. Davis [1911] 5 B. W. C. C. 113; Stapleton v. Dennington Main Coal Co. 5 B. W. C. C. 602; Adams v. Thompson [1911] 5 B. W. C. C. 19; Chandler v. Great Western Ry. Co. [1912] W. C. Rep. 168, 106 L. T. N. S. 479, 5 B. W. C. C. 254; Amys v. Barton [1912] 1 K. B. (Eng.) 40, [1913] W. N. 205, 81 L. J. K. B. N. S. 65, 105 L. T. N. S. 619, 28 Times L. Rep. 29, 5 B. W. C. C. 117; Mitchell v. Glamorgan Coal Co. 23 Times L. Rep. 588; Jenkins v. Standard Colliery Co. 105 L. T. N. S. 730, 28 Times L. Rep. 7; Howe v. Fernhill Collieries, 107 L. T. N. S. 508, [1912] W. C. Rep. 408; Fleet v. Johnson [1913] W. C. & Ins. Rep. 149, 57 Sol. J. 226, 29 Times L. Rep. 207; Lewis v. Port of London Authority [1914] W. C. & Ins. Rep. 157; Fitzgerald v. Murphy, 45 Ir. L. T. 200. See also Cronin v. Silver [1911] 4 B. W. C. C. 221; Swinbank v. Bell [1911] 5 B. W. C. C. 48; Tynron v. Morgan [1909] 2 K. B. 68, 78 L. J. K. B. 857; Marshall v. Orient Steam Nav. Co. [1910] 1 K. B. 79, 79 L. J. K. B. 204, 101 L. T. N. S. 584, 54 Sol. J. 64, 26 Times L. Rep. 70; Pretschel v. Preis, 31 Times L. Rep. 156, [1915] W. C. & Ins. Rep. 11; Tucker v. Oldbury Urban District Council [1912] 2 K. B. 317, [1912] W. C. Rep. 238, 106 L. T. N. S. 669, 5 B. W. C. C. 296; Burvill v. Vichers [1916] 1 K. B. 180, 85 L. J. K. B. 256, 114 L. T. N. S. 29.

California.—Great Western Power Co. v. Pillsbury, 171 Cal. 69, 151 Pac. 1136, L.R.A. 1916A 281.

Illinois.—Frey v. Kerens-Donnewald Coal Co. 271 Ill. 121, 110 N. E. 824.

New Jersey.—Newcomb v. Albertson, 85 N. J. L. 435, 89 Atl. 928.

Wisconsin.—Kill v. Industrial Commission, 160 Wis. 549, 152 N. W. 148, L.R.A. 1916A 14; Milwaukee First Nat. Bank v. Industrial Commission, 101 Wis. 526, 154 N. W. 847.

Thus in Newcomb v. Albertson, 85 N. J. L. 435, 89 Atl. 928, it appeared that a chauffeur suffered a Colle's fracture of

the right arm when cranking an automobile, and that during the course of treatment an abscess of the fleshy part of the thumb developed which resulted in ankylosis of the thumb, due to the abrasion and an infection of the skin from the rubbing or pressure of an unguarded or unpadded splint. In holding that the condition of the thumb was an injury caused by accident, the court said: "Section 2 of the workmen's compensation act provides for compensation for personal injuries to an employee by accident arising out of and in the course of his employment. The defendant expressly confines his argument to the award of compensation for the injury to the thumb and two fingers. The only question for us is whether those injuries were due to the accident. The question is not, strictly speaking, whether the accident was the proximate cause of the ankylosis of the thumb or whether the infection was the natural result of the accident. Those questions are presented under section 1, placitum 1, of the statute, but the language in section 2 is markedly different, omitting any reference to natural and proximate cause. If we were to go into the scholastic distinctions, we might say that the cause of the injury under section 2 was the cause sine qua non, as distinguished from the proximate cause.

In the present case, it is said that the chain of causation is broken because the infection was due to the failure of the physician to take proper precautions. There is no finding to that effect and the evidence is not before us. We cannot assume that the infection could be caused only by the negligence of the physician, and it is therefore unnecessary to decide whether such negligence would amount to such a break in the chain of causation that the employer would not be liable. We think the trial judge was right in finding that the injury in fact resulted from the accident and in holding the employer liable."

In Great Western Power Co. v. Pillsbury, 171 Cal. 69, 151 Pac. 1136, L.R.A. 1916A 281, it appeared that a workman accidentally suffered an abrasion of the skin and subsequently became disabled by blood poisoning, poisonous germs having entered through the abrasion. In holding that the claimant was entitled to compensation under the workmen's compensation act, the court said: "Dreyer was injured while in the employment of the petitioner and in the course of said employment. The only point made against the award is the claim that the accident was not the proximate cause of the disability for which the award was made. Dreyer was engaged in shaving and painting poles for the petitioner. On July 1, 1914, while at work, he accidentally caught his left hand between one of the poles and another

piece of timber, thereby bruising the flesh and knocking a small piece of skin off the back of the hand. For the next two days, July 2d and July 3d, he continued his work, but used the other hand only. On the third day the injured hand began to pain him severely. The 4th came on Saturday and no work was carried on. On Monday he was unable to work because of the condition of the hand and the severe pain therein. Inflammation and suppuration set in, the same being produced by poisonous germs entering the flesh through the break in the skin caused by the accident. It was, of course, impossible to ascertain the source of these germs or when they gained entrance, but the time that elapsed between the abrasion and the beginning of the severe pain which developed into the suppuration was the usual period of infection of the variety styled by the physician as *staphylococci*. This, it appears, is the scientific name of one form of the disease commonly termed blood poisoning by the uninitiated. The disability for which the award was made was caused by this inflammation and suppuration. We perceive no merit in the claim that this disability was not proximately caused by the injury and abrasion of the skin. Such results do ensue from such abrasions, and they are brought about by the operation of what are ordinarily considered natural forces, that is, by the intervention of infectious germs usually, or at least frequently, present in the air or on the surface of substances with which any person may come in contact, and which are invisible to the eye and imperceptible to the senses. The accident was the proximate cause of the injury within the definition of the term 'proximate cause' as elaborately stated by Justice Henshaw in *Merrill v. Los Angeles Gas, etc. Co.* 158 Cal. 503 [139 Am. St. Rep. 134, 31 L.R.A.(N.S.) 559, 111 Pac. 534]."

In *Frey v. Kerens-Donnewald Coal Co.* 271 Ill. 121, 110 N. E. 824, a mine workman was held to be entitled to compensation for disability due to paralysis resulting from a blow on the head while at work.

In *Walker v. Mullins*, 42 Ir. L. T. 168, 1 B. W. C. C. 211, wherein it appeared that a gardener while digging in his employer's garden was injured in the foot by a nail and subsequently, because of the entrance of a germ into the wound, contracted tetanus, from which he died, it was held that the death was caused by an "accident arising out of and in the course of his employment."

In *Adams v. Thompson* [1911] 5 B. W. C. C. (Eng.) 19, it appeared that a dock laborer by constantly rubbing his eye to remove bran containing grit, which had blown into his eye while he was unloading a cargo of bran, produced an abrasion of the cornea and

subsequently his eye was removed. It was held that there was evidence to sustain a finding of the county court judge that the injury was due to an accident within the act.

In *Mitchell v. Glamorgan Coal Co.* 23 Times L. Rep. 588, wherein it appeared that a workman who was employed in a colliery died from blood poisoning resulting from an injury to his finger, it was held that the county court judge could draw the inference that the accident arose in the course of his employment, Sir Gorell Barnes, P., saying that the probability was that the accident happened in the pit because accidents did happen there, rather than at the time when in the ordinary course of life accidents did not happen.

In *Powers v. Smith* [1910] 3 B. W. C. C. (Eng.) 470, it was shown that a workman was apparently thrown from a cart when the horse fell, and, having walked away with the horse, was subsequently found dead some distance away. The medical evidence was that he died from syncope, but that it was impossible to say with certainty what had caused it. The court of appeal held that it would not interfere with the decision of the judge that the dependent had not discharged the onus of proving that the death was caused by the accident.

In *Groves v. Burroughes*, 4 B. W. C. C. 185, wherein it appeared that a workman while at work opened the partly healed wound of an operation, and septic poisoning followed causing his death, it was held that the county court judge could draw the inference that the accident arose out of the employment.

However in *Wood v. Davis* [1911] 5 B. W. C. C. (Eng.) 113, it was held that the county court judge was not warranted in inferring, in the absence of evidence, that a scratch on a collier's knee which caused blood poisoning resulting in death had been received while at work.

In *Chandler v. Gréat Western R. Co.* [1912] W. C. Rep. (Eng.) 168, 106 L. T. N. S. 479, 5 B. W. C. C. 254, it was held that septic infection of a cut on workman's hand did not entitle him to compensation under the Workmen's Compensation Act of 1906, where the cut was received at home, and that to attribute the infection to his employment was at the best a mere surmise, although it was shown that noxious matter worked through a bandage into the cut in the course of his work.

In *Amys v. Barton* [1912] 1 K. B. (Eng.) 40, [1911] W. N. 205, 81 L. J. K. B. 65, 105 L. T. N. S. 619, 27 Times L. Rep. 29, 5 B. W. C. C. 117, in which the death of a workman from blood poisoning was alleged to have been caused by the sting of a wasp while he was at work, and the county judge

held that the accident "arose out of" the employment, Cozens-Hardy, M. R., said: "I have come to the conclusion that the decision of the learned county court judge cannot be supported, because there is no evidence that the accident arose out of the employment. I assume for the purpose of my decision that there was sufficient evidence to show that the deceased man was on October 18 stung by a wasp when he was engaged in working for Barton, the present appellant, and that the sting of that wasp introduced into his system the poison which ultimately led to his death on November 1; but that is only part of the necessary proof. It must never be forgotten that the accident must not only arise in the course of the employment, but must also arise out of the employment. If I may venture to repeat what I said in *Craske v. Wigan* [1909] 2 K. B. 635, 638, 'it is not enough for the applicant to say "The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place." He must go further and must say "The accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some peculiar danger." Unless something of that kind is established the applicant must fail, because the accident is not one arising out of and in the course of the employment.' In this case the man was an engine-driver. He was employed by the year. On this particular occasion he was threshing his master's wheat: he was engaged in a field, the engine being there, and the wheat being threshed: there were a few wasps there, no great number according to the evidence, but there were some, probably what are known as drowsy or sleepy wasps. One of those, I assume, stung his foot just above the ankle, and that caused, ultimately, his death. But what is there to connect that accident with his employment? What peculiar risk was he exposed to? The learned county court judge, without any evidence, seems to have arrived at the conclusion that the wasps were beginning to hibernate in the stack, that the noise or heat of the engine woke them, or induced them to come out, and that they were irritated and stung him. There is not a particle of evidence to justify that finding, and it seems to me that the occupation of this man, so far as the sting of a wasp was concerned, did not expose him to any peculiar risk, or any greater risk than anybody who was engaged in the most ordinary occupations on a farm or elsewhere in the country was exposed to. On that short ground, following, I think, the view of this court in *Craske v. Wigan* [1909] 2 K. B. 635, and also in *Warner v. Couchman* [1911] 1 K. B. 351, I think that it is impossible to

say that there was here any risk peculiarly incident to the employment which justified the learned county court judge in his finding that the accident arose out of the employment. On that ground the case must be disposed of in favor of the appellant."

In *Howe v. Fernhill Collieries*, 107 L. T. N. S. (Eng.) 580, [1912] W. C. Rep. 408, it appeared that a collier died from acute blood poisoning, shown by the medical evidence to have been caused by a septic infection spreading from a superficial ulcer on the knee, on which there appeared to have been a superficial abrasion. Abrasions due to kneeling on coal dust were stated to be a frequent cause of blood poisoning in colliers. It was held that there was no evidence of injury by accident.

In *White v. Sheepwash* [1910] 3 B. W. C. C. (Eng.) 382, an applicant for compensation for incapacity from blood poisoning alleged to have resulted from a sore foot stated in his particulars of claim a "wound on the third toe of left foot caused by rubbing of boot which had previously become permeated by some bone manure" used by his employer, but set up at the hearing that he had knocked his toe against a seed drilling machine and that thereafter the wound was poisoned by the manure which had previously saturated and dried in his boots. It was held that the county judge correctly made an award in favor of the employer on a finding in effect that the blood poisoning resulted from the pressure of a boot which had become too tight and that this was not an "accident."

So where a disease supervenes after an accident the incapacity or death is held to be an accidental injury if the disease while not an inevitable or direct result of the accident was rendered possible thereby so that without the accident there would have been no disease. *Lovelady v. Berrie* [1909] 2 B. W. C. C. (Eng.) 62; *Hugo v. Larkins* [1910] 3 B. W. C. C. (Eng.) 228; *Langley v. Reeve* [1910] 3 B. W. C. C. 175; *Farmer v. Stafford* [1911] 4 B. W. C. C. (Eng.) 223; *Griffiths v. North's Nav. Collieries* [1912] 5 B. W. C. C. (Eng.) 21; *Thoburn v. Bedlington Coal Co.* [1911] 5 B. W. C. C. (Eng.) 128; *Cameron v. Port of London Authority* [1912] 5 B. W. C. C. (Eng.) 416, [1912] W. C. Rep. 305; *Martin v. Manchester Corp.* 5 B. W. C. C. (Eng.) 259, [1912] W. C. Rep. 289; *Dunnigan v. Cavan* [1911] Sc. Ct. Sess. 579, 48 Scot. L. Rep. 459, 4 B. W. C. C. 386; *Euman v. Dalziel* [1913] S. C. 246, 50 Scot. L. Rep. 137, [1913] W. C. & Ins. Rep. 49, 6 B. W. C. C. 900; *Thomson v. Mutter* [1913] Sc. Ct. Sess. 619, [1913] W. C. & Ins. Rep. 241; *Dunham v. Clare* [1902] 2 K. B. (Eng.) 292, 71 L. J. K. B. 683, 66 J. P. 612, 50 W. R. 596, 86 L. T. N. S. 751, 18 Times L.

Rep. 645, 4 W. C. C. 102; Ystradowen Colliery Co. v. Griffiths [1909] 2 K. B. (Eng.) 533, 2 B. W. C. C. 357; Brown v. Kent [1913] 3 K. B. (Eng.) 624, 82 L. J. K. B. 1039, 109 L. T. N. S. 293, 29 Times L. Rep. 702, [1913] W. N. 258, 6 B. W. C. C. 745; Woods v. Wilson [1915] 84 L. J. K. B. (Eng.) 1067, 31 Times L. Rep. 273, [1915] W. N. 109, 59 Sol. J. 438, 8 B. W. C. C. 288; Hart v. Cory [1916] 1 K. B. 172, 85 L. J. K. B. 116, [1915] W. C. & I. Rep. 522, 114 L. T. N. S. 25, 60 Sol. J. 89; Bower v. Meggitt, 86 L. J. K. B. 463, [1917] W. C. & I. Rep. 40, 10 B. W. C. C. 146, 116 L. T. N. S. 178; Bayne v. Riverside Storage, etc. Co. [1914] 181 Mich. 378, 148 N. W. 412, 5 N. C. C. A. 837; Beckwith v. Spooner, 183 Mich. 323, Ann. Cas. 1916E 886, 149 N. W. 971; Ramlow v. Moon Lake Ice Co. 192 Mich. 505, 158 N. W. 1027, L.R.A.1916F 955; Reimers v. Proctor Pub. Co. 85 N. J. L. 441, 89 Atl. 931. See also *Shirt v. Calico Printers Assoc.* [1909] 2 K. B. 51, 3 British Rul. Cas. 62, 78 L. J. K. B. 528, 100 L. T. N. S. 740, 25 Times L. Rep. 451, 53 Sol. J. 430, 2 B. W. C. C. 342; *Cleverley v. Gas Light, etc. Co.* [1907] 24 Times L. Rep. 93, 1 B. W. C. C. 82; *Charles v. Walker*, 25 Times L. Rep. (Eng.) 609; *Nevich v. Delaware, etc. R. Co.* (N. J.) 100 Atl. 234.

Thus in *Ystradowen Colliery Co. v. Griffiths* [1909] 2 K. B. (Eng.) 533, wherein it appeared that pneumonia followed by bronchitis and chronic asthma resulting in permanent incapacity supervened after an injury to a workman in a colliery by the fall of a stone, *Cozens-Hardy, M. R.*, said: "This appeal raises, not for the first time, a question of some importance as to the meaning of the words used in the act, 'incapacity which results from the injury.' In the first place it is quite clear that the mere contracting of a disease, apart from those particular diseases mentioned in the Act of 1906, is not, as a general rule, an accident at all; but, given an admitted accident, it is not the law to say that a disease which has been accelerated, still more if produced, by the accident, is not a matter which comes within the four corners of the act of Parliament. This court in the case of *Dunham v. Clare* [1902] 2 K. B. 292, which certainly was not decided upon the facts of that case, but was decided on grounds of principle, laid down in most emphatic language that the test is not whether the death (it was death in that case, but in this it is partial injury) must be the natural result, or the probable result, of the accident; it may even be what *Collins, M. R.*, called the 'unnatural' consequence of the accident. Certainly it is no answer to say it was not the natural result of the accident or not the probable result of the accident. If I may venture to read a few sentences from my own

judgment in that case it will save me from repeating in longer language what I should desire to repeat here. *Ibid.* at p. 297: 'In my opinion the county court judge misdirected himself. A doctor who saw the wound on the day of the accident might have come to the conclusion that erysipelas was most unlikely to supervene, but the same doctor might subsequently have said that he was satisfied that death was the result of the injury. The question is, From what in fact has death resulted? The answer to that question does not depend upon what was at first thought to be reasonable and probable—to which I will now add 'natural.' I also think that in considering questions of this kind it is quite legitimate and proper to consider whether an accident has not accelerated an existing tendency to disease in the body, or, as some people have said, has given life to certain latent causes of mischief in the body. The case mentioned to us of *Golder v. Caledonian Ry. Co.* 40 Scot. L. Rep. 89, is a strong instance in point, and a case on tuberculosis which came before us about three years ago and is not reported, was another instance. What has the learned judge done here? There was admittedly an accident—a stone fell upon the man. Liability for the accident was not disputed, and full wages were paid for a certain time. The man is now admittedly unable to work, and he is unable to work by reason, I think it is called, among many other phrases, of chronic bronchitis, and there is evidence which is worthy of attention—I say no more than that, because it is not a question for me to deal with—that this was brought about by reason of the weakened condition of the man, the state of debilitation which was immediately caused by the accident, which so affected him that he was some two hours in getting from the colliery to his own house on that night; and in these circumstances he contracted a cold which, in his debilitated condition, has led to this consequence. It is not for me to say what view the learned judge may take when the case goes to him for rehearing and judgment, but I think we are bound to give him this direction, that the test is not whether the present condition of the man is the natural result of the injury, but he must consider the result in fact. It may be an improbable result—I will even go so far as to say, as *Collins, M. R.*, said, possibly even an unnatural result—but the question is whether the man's present condition is the result of the accident in this sense, that it is occasioned by his debilitated condition immediately after the accident and occasioned by the accident which he has met with."

In *Dunnigan v. Cavan* [1911] Sc. Ct. Sess. 579, 48 Scot. L. Rep. 459, 4 B. W. C. C. 386,

the death of a workman from pneumonia following an injury to his back from a falling stone while he was at work was held to have been caused by an injury by accident, although he walked home from the hospital two days before his death in spite of a warning by the hospital doctor that such a course was dangerous to life.

In *Euman v. Dalziel* [1913] Sc. Ct. Sess. 246, 50 Scot. L. Rep. 137, [1913] W. C. & Ins. Rep. 49, 6 B. W. C. C. 900, it was held that there was evidence to support a judgment based on conflicting medical evidence that the death of a workman from appendicitis and peritonitis while confined to his bed following a fall from a ladder which injured his ankle and caused severe pain and general shock was the result of an accident.

In *Brown v. Kent* [1913] 3 K. B. (Eng.) 624, 82 L. J. K. B. 1039, 6 B. W. C. C. 745, it appeared that a workman suffered an accident to his knee, that scarlet fever supervened and that the wound suppurated subsequently so that the joint had to be excised, thereby causing incapacity. Scarlet fever would not have caused the suppuration in the absence of the accident. It was held that the incapacity resulted from the accident, *Swinfen Eady, L. J.*, saying: "In the present case, the wound resulting from the operation (which operation was solely necessitated by the accident) did not heal, became unhealthy, suppurated, and necessitated a further operation, which has led to the present incapacity; the workman never recovered from the wound, or from the effects of the accident: the old cause of complaint never disappeared. It may well be that the fever, and the condition of the patient caused by it, much increased the risk of the formation of pus, but it was the old wound which was giving the trouble—the old wound which was suppurating. It was the evidence of Dr. Bone, accepted and agreed to by both parties, that if there had not been any accident, and consequent injury to the knee, the scarlet fever could not have caused the injury or the incapacity in question. The result is necessarily that the incapacity is the result of the accident to the knee—although probably aggravated by the scarlet fever. This entitles the workman to compensation for the accident, on the footing that the incapacity caused by it is continuing. The county court judge has, in our opinion, misdirected himself on the law. He proceeded to consider how the scarlet fever was contracted, whether the workman's lowered vitality lessened his capacity to resist the infection of scarlet fever, and said that lowered vitality was the keynote of the case—that if lowered vitality invited the scarlet fever, the chain of causation was complete, and the workman entitled to recover; if low-

ered vitality did not invite the scarlet fever, the chain of causation was broken and the workman was not entitled to recover. This was misdirection. If the incapacity is the result of the accident, the chain of causation remains unbroken, although a fresh cause arising casually and 'uninvited' by any special condition of the workman may have aggravated the original injury. Whether there existed any lowered vitality of the workman in the present case, or whether such condition did or did not invite the scarlet fever, is not material, when once it is established that the incapacity is the result of the original accident, from the direct effects of which the workman never recovered; and if the scarlet fever germ encouraged the suppuration of the wounded knee, it matters not whether the germ entered the man's body through the wound, or through his mouth."

In *Lovelady v. Berrie* [1909] 2 B. W. C. C. (Eng.) 62, wherein it appeared that a workman, employed to pick up cotton waste from the decks of ships in dock, two hours after being ordered to work in a hold came up the ladder therefrom apparently in great pain, and three days later acquired pneumonia which caused his death, and the doctor who attended him attributed the pneumonia to an injury marks of which were found on his ribs, it was held that there was evidence that the workman's death was caused by a "personal injury arising out of and in the course of the employment."

In *Thoburn v. Bedlington Coal Co.* [1911] 5 B. W. C. C. (Eng.) 128, wherein it appeared that a workman did not recover his normal health after an accident, the court sustained the finding of a county court judge that his death thirteen weeks after the accident from bronchitis following influenza was a death resulting from the injury, because the bronchitis proved fatal owing to the condition to which the accident had reduced the deceased.

In *Dunham v. Clare* [1902] 2 K. B. (Eng.) 292, 71 L. J. K. B. 685, 66 J. P. 612, 50 W. R. 596, 86 L. T. N. S. 751, 18 Times L. Rep. 645, 4 W. C. C. 102, it appeared that a workman in a factory was injured by the fall of a heavy pipe which he was carrying, which caused a wound on his toe. Subsequently phlegmonous erysipelas supervened in the wound and he died from blood poisoning caused by the erysipelas. It was held that compensation should have been allowed, *Collins, M. R.*, saying: "In my opinion, this appeal should be allowed. The learned county court judge tells us in his judgment the grounds of his decision. He found and awarded that the applicant was not entitled to compensation on the ground that death was not the result of the accident, i. e., was not the natural or probable consequence. We

have to determine whether that is not a misdirection to himself. The circumstances of the case are these: The deceased man admittedly met with an accident arising out of and in the course of his employment, which caused a wound to his toe. He was treated for that wound at the hospital as an out-patient. After a certain interval erysipelas set in, and he died of blood poisoning caused by the erysipelas. I will take it that at the time of the accident it seemed improbable, and it may even be unnatural, that erysipelas should supervene and that death should ensue. But the question we have to determine is whether that is the right standard to apply in ascertaining whether there is a liability to pay compensation under the Workmen's Compensation Act, 1897. That liability is created by s. 1, subs. 1, of the act, which provides that, if in any employment to which the act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall be liable to pay compensation in accordance with the 1st schedule to the act. Turning to the 1st schedule, I find that clause 1 prescribes the amount of compensation where death or incapacity 'results from the injury.' That is the provision which regulates the amount of the compensation. The applicant for compensation, therefore, has to show an accident causing injury, and death or incapacity resulting from the injury. In the present case there was admittedly an accident causing injury, and the only question is whether death in fact resulted from the injury. If death in fact resulted from the injury, it is not relevant to say that death was not the natural or probable consequence thereof. The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is a new act which gives a fresh origin to the after-consequences. In dealing with an obligation created by the act, we are not dealing with a case of contract or tort or with a liability of a criminal nature. In the case of contract, a person who commits a breach of it is liable for the consequences which naturally follow from the breach. So, too, in cases of tort, when the question arises whether a person is liable in respect of a breach of some duty imposed upon him, he probably, and in some cases certainly, comes under a somewhat larger liability than would be the case if it were a breach of contract, but still the liability is measured by what are the reasonable and probable consequences of his breach of duty. That lets in the consideration of reasonableness. No question of reasonableness comes into the present discussion. The act

has imposed the liability irrespective of any error of judgment or negligence on the part of the employer. The only question to be considered is, Did the death or incapacity in fact result from the injury? The county court judge, by inquiring whether death was the natural or probable consequence of the injury, has applied the wrong standard to the solution of the question. It is quite consistent to say that death resulted from the injury and yet that it was neither the natural nor the probable consequence of it. If no new cause, no *novus actus*, intervenes, death has in fact resulted from the injury."

In *Bayne v. Riverside Storage, etc. Co.* 181 Mich. 378, 148 N. W. 412, it was held that conflicting medical evidence was sufficient to support a finding of the industrial accident board that the death of a workman from pneumonia was caused by a hurt or strain of the back suffered by him, and hence that the death was caused by an accident arising out of and in the course of the employment.

In *Ramlow v. Moon Lake Ice Co.* 192 Mich. 505, 158 N. W. 1027, L.R.A. 1916F 955, wherein it appeared that an employee in the course of his employment received an injury and shock which brought on an attack of delirium tremens resulting in his death, it was held that the fact that his system has been so weakened by intemperate habits that it was unable to withstand the effects of the injury did not thereby shift the proximate cause of death from the injury to the intemperate habit.

In *Thomson v. Mutter* [1913] Sc. Ct. Sess. 619, [1913] W. C. & Ins. Rep. 241, wherein it appeared that a workman accidentally ruptured himself in the course of his employment and was operated for hernia, it was held that an arbitrator's finding that his subsequent death from heart weakness and degeneracy "set up by the strain of the operation" was the result of the accident sustained in the course of his employment was justified by the evidence, although another hernia of long standing was found and operated on at the time of the operation.

However in *Woods v. Wilson* [1913] W. C. & Ins. Rep. 569, 29 Times L. Rep. 726, 6 B. W. C. C. 750, it appeared that a workman employed in a lighter in coaling a ship sustained a blow in the stomach due to a rush of coal. Subsequently during the performance of an operation it was discovered that he had chronic appendicitis and that there was a perforation of the bowel. Three days afterwards he died from peritonitis, and a post mortem examination disclosed another perforation of the bowel. On appeal from an award in favor of the widow it was held that the award could not stand because there was no evidence to connect the death with the accident.

In *Hugo v. Larkins* [1910] 3 B. W. C. C. 228, wherein the medical experts were in conflict on the possibility of a wound in the hand on April 17th causing erysipelas of the face on July 7th, and the medical referee was improperly sworn and allowed to testify in answer to a hypothetical question that it was not impossible for the organisms of erysipelas to be latent for that length of time, it was held that there was no evidence to justify the finding that the deceased died from personal injury by accident.

In *Hart v. Cory* [1916] 1 K. B. (Eng.) 172, 85 L. J. K. B. 116 [1915] W. C. & Ins. Rep. 522, 114 L. T. N. S. 25, 60 Sol. J. 89, it was held, following *Hargreave v. Houghhead Coal Co.* [1912] A. C. (Eng.) 319, that a collier who had lost the sight of his left eye by accident could not treat the accident as a concurrent cause of a subsequent inflammation of the optic nerve of the right eye, on the ground that the loss of the left eye made his incapacity due to the diseased eye, but that there must be a direct causal connection between the accident to one eye and diseased condition of the other.

In *Farmer v. Allen* [1911] 3 B. W. C. C. (Eng.) 223, wherein it appeared that a workman while at work called out that he had hurt his back and that he died a week later of intestinal obstruction, it was held that the onus of proving an "accident" had not been discharged, there being no evidence of previous illness or pain, and no one having seen what had happened at the time of the workman's exclamation.

In *Martin v. Manchester Corp.* 5 B. W. C. C. 259 [1912] W. C. & Ins. Rep. 105, it was held that an employee at a scarlet fever hospital was not entitled to an award for a disability due to scarlet fever in the absence of evidence to show that there was a particular time, place and circumstance, by means of which the alleged "injury by accident" happened, and evidence that after an attack of influenza he had returned to work, and thereafter had been in and out of the fever ward and had cleaned out the mortuary which was not shown to have contained the body of a person who had died of scarlet fever, was not evidence to sustain a finding that the applicant had contracted the fever in the mortuary.

b. Infection of Injured Eye.

In cases involving almost identical facts as to the introduction of gonococci into an injured eye, the decisions have not been uniform as to whether the resultant gonorrhea could be regarded as an accidental injury.

Thus in *McCoy v. Michigan Screw Co.* 180 Mich. 454, 147 N. W. 572, L.R.A.1916A 323, wherein it was shown that an employee after

receiving an injury to his eye infected it with gonorrhea by rubbing it with his hand he was not entitled to compensation for its resulting loss, since the rubbing would have infected the eye if it had not been injured, the court saying: "The claimant, William McCoy, was employed by the contestant and appellant as an operator on a lathe machine. On February 1, 1913, several small pieces of steel from the machine on which he was working lodged in his eye. This, it is claimed, caused an irritation and caused him to rub his eye. At the time, claimant was being treated by Dr. A. M. Campbell for gonorrhea. On February 7th he went to Dr. Cochrane, who removed four pieces of steel from the eye. The next day the doctor removed another piece of steel and discovered that the eye had become infected with gonorrhea. He was then sent to a hospital and subsequently lost the sight of the eye. The industrial accident board affirmed an award made claimant by an arbitration committee of \$6.49 per week for 100 weeks. It is the claim of contestant and appellant that the loss of the eye was not the result of a personal injury arising out of and in the course of claimant's employment, but was the direct result of a disease unconnected in any way with his employment. At the hearing before the industrial accident board, four physicians were sworn, who testified as to the effect upon the eye of gonorrheal infection. Claimant contends that the germs would not have entered the eye had not the steel caused '(a) an inclination to rub—the inciting cause—(b) inflamed condition which made the eye susceptible to the entry of the germs, as in the case of blood poison and erysipelas.' A careful reading of the testimony of the physicians shows that the infection can easily be caused to a normal eye by rubbing the eye with a hand infected with the gonorrheal germ.

In the instant case it is not reasonable to say that he would not have rubbed his eye if the steel had not lodged there. He might not have rubbed his eye, it is true; but it is just as reasonable to suppose that he might have had occasion to rub his eye without this particular inciting cause. By the medical testimony it conclusively appears that the infection could have taken place if the steel had not been there. It must be said, from this record, that the loss of the eye was directly and immediately due to the infection caused by the gonorrhea, which it cannot be claimed is a risk incident to the employment. We are of the opinion that the facts are not capable of supporting the inference that the injury arose out of and in the course of the employment."

However in *Cline v. Studebaker Corp.* 189 Mich. 514, 155 N. W. 519, wherein the subsequent gonorrheal infection of an injured

eye, resulting in loss of vision, was found to be due to accident the court said, in distinguishing the McCoy case: "The fact that a piece of steel flew into claimant's eye in the course of his employment seems fairly well established. His testimony is to that effect, and it is corroborated by his fellow workmen. But it is not shown that this flake of steel directly caused the subsequent impairment of vision; that, on the contrary, must be attributed to the gonorrheal infection. Such is the finding of the board, and the finding is in accordance with the agreement between the parties. Nor is it probable, from the testimony of the doctors, that the germ which caused the infection was upon the steel itself. They state, however, that such a germ might get into the eye from a towel, from washing utensils, from the straps or rails of a street car, and in similar ways. The burden is therefore, as insisted by counsel for defendants, upon the claimant to show by a preponderance of evidence that the infection arose out of and in the course of his employment, instead of at some other time and in some other way. In short, under the circumstances, it was for claimant to show that the infection was connected with the accidental entry of the steel into his eye. And in this behalf counsel cite McCoy v. Michigan Screw Co. 180 Mich. 454, 147 N. W. 572, where the relation between the infection and the employment was held not to have been established. In instances like the present, however, where the claimant himself is personally free from the disease, it is hardly possible that the source of infection can be shown absolutely by direct evidence. Nor is that necessary. 'By a "preponderance of evidence" is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.' Hoffman v. Loud, 111 Mich. 156, 69 N. W. 231. As has been said, the claimant was himself personally free from the disease up to the time of the accident. Such was the testimony of the doctor who attended him, and the industrial accident board has found it to be a fact; nor does counsel for defendants dispute the correctness of the finding. The gonorrheal germ must have come from some outside source. It must also have been received not later than the time of the accident to have developed into the condition found by the doctor two days afterwards, according to his testimony. These conditions, in connection with the fact, as shown, that an injured eye is more susceptible to the infection than a normal eye, and with the further fact that at once, after the accident, a fellow workman examined the eye, using for the purpose a match wrapped in a piece of cloth, create a

considerable degree of probability that the germ got into the eye in the attempt to remove the steel. And this probability was sufficient to warrant the board in their finding that: 'The infection which destroyed the sight of the eye is not reasonably accounted for except as coming through or resulting from the accident.' Sullivan v. Modern Brotherhood of America, 167 Mich. 524, 133 N. W. 486, 42 L. R. A. (N. S.) 140, Ann. Cas. 1913A 1116. If the germ was introduced in an attempt to remove the flake of steel from the eye, it was a direct consequence of the accident, and arose out of and in the course of the employment. The attempt to remove the particle of steel was a natural and necessary result of its entry into the eye; in fact, the proofs in this case seem to fairly establish the element that was lacking in the McCoy case."

In State v. District Ct. (Minn.) 163 N. W. 755, it appeared that a mine workman while engaged in his duties was injured by a particle of ore which flew into his left eye, cutting through the cornea thereof, and imbedding itself in the eyeball. A fellow workman removed the particle from the eye at the time, using in his efforts in that respect a match and a handkerchief. The eye was immediately thereafter washed with water from a trough which was used daily by other miners for the purpose of washing their hands and faces. When the particle had been removed from the eye, blood and watery matter was discharged from the wound, the eye became inflamed, and thereafter a gonorrheal infection set in, and resulted finally in the loss of the sight of the eye. Prior to the injury the eye was normal and the workman experienced no trouble or pain therefrom. In affirming a judgment awarding compensation the court said: "The evidence is clear that the workman received some sort of an injury to his eye, in the manner stated by him, the precise character of which is in dispute. There is no dispute, however, about the fact that gonorrheal infection set in soon after the time of the injury, and thereafter progressed to such an extent that the sight of the eye was totally destroyed. And there can be no serious doubt that the facts, as claimed by the workman, disclose an accidental injury within the meaning of the compensation statute. And this, whether the gonorrheal infection resulted from the use of a soiled handkerchief in removing the particle from the eye, or from washing the eye with water from the trough which was used indiscriminately by the miners, or from a latent germ within the eye, set in motion and made active by the violence of the injury to the eyeball."

In Voelz v. Industrial Commission, 161 Wis. 240, 152 N. W. 830, wherein it was shown that an employee got something in his

eye while at work, and although he did not then have the disease, he rubbed his eye and subsequently the eye became infected with gonococci bacilli, the court in holding that a causal connection had not been shown said: "In the present case the commission did not determine the crucial question of fact in the case, namely, the question how the gonococci germs got into the eye. They say that the substance which fell in the eye may have been infected, or 'with the eye inflamed, it might have become infected by rubbing it with an infected cloth or washing it in infected water, or in other ways. This seems a reasonable conclusion.' We interpret this as meaning that it is purely conjectural as to how the infection got in the eye, hence they do not decide that question, but their legal conclusion is that, however the infection came in, it is legally traceable to the dropping of the foreign substance in the eye, because that fact inflamed the eye and induced the rubbing with an infected cloth or the washing with infected water. This would be strictly logical if it could be said (1) that the claimant would not have washed his eye or rubbed it with a towel in the absence of the injury to the eye, and (2) that only an inflamed eye could be infected by a gonorrheal infection. The difficulty is that neither of these propositions can be supported. People who have suffered no such mishaps also wash their faces and wipe their eyes with towels daily as a matter of course, and it is a well known fact that the gonorrheal infection waits not upon inflammation or injury to make its entry into the eye. It is said in the *Encyclopedia Britannica* (11th ed.), vol. 27, p. 983: 'One of the most important points in the management of a case of gonorrhea is to prevent all risk of the septic discharge coming into contact with the eye. It sometimes happens that the patient inadvertently introduces the germs into his own eye by his finger, or that his eye or the eye of some member of his household becomes inoculated by the use of an infected towel. If this happen, prompt and energetic measures must be taken to save the eye.' In the present case if it is found, upon sufficient evidence, that the claimant had no gonorrheal infection except that which developed in his eye, but it does not appear where or under what circumstances he washed the eye or what towels or cloths he used to wipe it. Apparently the substance which fell in his eye was something hard. No mention is made of it as a liquid. The claimant calls it 'something' and says he tried to get it out by rubbing. It appears by the evidence that the claimant was not working on the waste pipe or any pipe which takes water away from the wash bowl, but on the locknut of the basin cock, i. e. the cock which supplies clean water to

the bowl. If the commission had found as a fact that the infection came from the substance that dropped in the eye, it might be difficult to say that there is no evidence to support the finding, but they did not so find. On the contrary they reached the conclusion, which seems to us eminently reasonable and logical, that it might have come from this source and might also have come from a number of outside sources. In substance, the conclusions of the commission are as follows: Something fell in the plaintiff's eye, causing pain; he rubbed the eye; gonorrheal infection followed; he did not have the infection previously; we cannot determine whether the infection in the eye came from the substance which fell into it, from water with which he bathed it, or from a towel with which he rubbed it, but in either event we regard the dropping of the substance in the eye as the legal cause of the subsequent loss of sight within the meaning of the compensation act. If this be correct, then any man at work at any occupation who gets something in his eye while at work and rubs the eye, the rubbing being followed by gonorrheal infection, may recover for the loss of the eye simply on producing evidence of these facts, together with evidence tending to show that he did not have gonorrheal infection previously. We cannot agree that this is good law. It bases liability upon conjecture. Unless there be some evidence tending to show that the substance which fell in the eye caused the infection and unless that fact be found, we cannot regard the subsequent loss of the eye as proximately resulting from an injury 'incidental to and growing out of the employment.'

e. Disease of Mind.

Where neurasthenia intervenes after an accident and produces incapacity, to entitle the workman to compensation as for an accidental injury the preceding injury must be shown to be the proximate cause of the neurasthenic condition. *Holt v. Yates* [1910] 3 B. W. C. C. (Eng.) 75; *Stride v. Southampton Gas Light, etc. Co.* 85 L. J. K. B. (Eng.) 1449, [1916] W. C. & Ins. Rep. 285, 115 L. T. N. S. 498, 32 Times L. Rep. 680; *Eaves v. Blaenclydach Colliery Co.* [1909] 2 K. B. (Eng.) 73, 78 L. J. K. B. 809, 100 L. T. N. S. 751, 5 B. W. C. C. 329; *Morris v. Turford* [1913] W. C. & Ins. Rep. (Eng.) 502, 6 B. W. C. C. 606. See also *Turner v. Brooks* [1909] 3 B. W. C. C. (Eng.) 22; *Westminster Brymbo Coal, etc. Co. v. Evans*, 96 L. J. K. B. (Eng.) 47, [1916] W. C. & Ins. Rep. 241, 115 L. T. N. S. 365; *Higgs v. Unicum* [1913] 1 K. B. (Eng.) 595, 82 L. J. K. B. 369, [1913] W. C. & Ins. Rep. 263, 108 L. T. N. S. 169, 6 B. W. C. C. 205;

Ogden v. South Kirby, etc. Collieries [1913] W. C. & Ins. Rep. 463, 6 B. W. C. C. 573.

Thus in *Eaves v. Blaenclydach Colliery Co.* [1909] 2 K. B. (Eng.) 73, 78 L. J. K. B. 809, 100 L. T. N. S. 751, 5 B. W. C. C. 329, Cozens-Hardy, M. R., said: "The short material facts are these: The man was a collier and he met with an accident which arose 'out of and in the course of his employment;' that is beyond all doubt. For a considerable time he received compensation from his employers on that footing, and the learned county court judge, in a passage which I will read in a minute, finds that the evidence satisfies him that the muscular mischief caused by the accident has come to an end, or perhaps (to express what I mean to say more accurately) that so far as muscular power is concerned he is in the same condition in which he was before the accident, and so far as that is concerned he is competent now to do the ordinary work of a collier. He also finds another thing which is equally plain, that the workman is not malingering—that he is not shirking the work with any desire or intention to avoid it. The learned judge says he thinks that, although the man honestly believes he is not able to do the work, and although he is not shamming or malingering, it is sufficient for the employers to show that the muscular mischief is at an end. I am entirely unable to assent to that view. The effects of an accident are at least twofold; they may be merely muscular effects—they almost always must include muscular effects—and there may also be, and very frequently are, effects which you may call mental, or nervous, or hysterical, whichever is the proper word to use in respect of them. The effects of this second class, as a rule, arise directly from the accident from which the man suffered just as much as the muscular effects do, and it seems to me entirely a fallacy to say that a man's right to compensation ceases when the muscular mischief is ended, though the nervous or hysterical effects still remain. [The master of the rolls then quoted passages from the judgment of the county court judge to show that he had misdirected himself in applying the facts, and continued:—] The result of this judgment, however, is that the man is still suffering from the accident, and he has not wholly recovered from the nervous effects of the accident, which are just as real and just as important as the muscular effects and make him unable to work. I hope nothing that I say here will ever be supposed to give any color to malingering; and if the learned judge had found that the man was malingering, the position, of course, would have been entirely the other way, and that would have been a question of fact for him, and we should not have interfered with the finding.

The learned judge has not found that the man was malingering—he has said so in express terms—and, that being so, having regard to what I said before, he has plainly misdirected himself in the award which he made in altering the compensation, in fact terminating it, subject only to the penny a week. In my view, therefore, this appeal should be allowed."

In *Morris v. Turford* [1913] W. C. & Ins. (Eng.) Rep. 502, 5 B. W. C. C. 606, the evidence was held to justify a finding of the county court judge that a workman was suffering from neurasthenia, as the result of an accident which occurred in the course of his employment, on which finding compensation was awarded.

To warrant compensation for suicide induced by insanity the chain of causation between the injury and the insanity must be established and probably it must also appear that the death was the result of unavoidable impulse and was not merely due to an unbalanced mind. *Southall v. Cheshire County News Co.* [1912] 5 B. W. C. C. (Eng.) 251, [1912] W. C. Rep. 101; *Withers v. London, etc. R. Co.* reported in full, post, this volume, at page 341; *Malone v. Cayzer* [1909] Sc. Ct. Sess. 479, 45 Scot. L. Rep. 351.

In *Southall v. Cheshire County News Co.* [1912] 5 B. W. C. C. (Eng.) 251, [1912] W. C. Rep. 101, it was held that there was no evidence to justify a finding that suicidal tendency and death by drowning were the results of an accident which was followed by traumatic neurasthenia, where the only facts were that the workman was injured in his head by a fall, that traumatic neurasthenia supervened and gradually became worse and that eight months after the accident he was found drowned in a canal.

2. SUPERVENING DISEASE INDEPENDENT OF INJURY.

In *Harwood v. Wyken Colliery Co.* [1913] 2 K. B. (Eng.) 158, 82 L. J. K. B. 414, 108 L. T. N. S. 283, 29 Times L. Rep. 290, 57 Sol. J. 300, [1913] W. C. & Ins. Rep. 317, [1913] W. N. 53, 6 B. W. C. C. 225, it appeared that a supervening disease affecting an injured workman resulted in an independent incapacity. Cozens-Hardy, M. R., said: "This appeal raises an extremely important and, so far as I am aware, novel point. Where a workman has sustained 'personal injury by accident arising out of and in the course of' his employment, and this personal injury still exists, can an employer say that he is no longer liable to pay compensation under the act because if there had been no accident the workman would now, by reason of some supervening infirmity not due to the accident, be equally incapacitated? It may

be paralysis, or heart disease, or mere failure of powers by reason of old age. If this view is right, there is scarcely a case in which the workman may not have what have been hitherto understood to be his statutory rights challenged. No distinction can be drawn for the present purpose between the Acts of 1897 and 1906. For fifteen years this contention has not been raised. To avoid misapprehension, I am not forgetting the obligation which rests upon the workman to establish his case. If the employer proves that the man has completely recovered from the effects of the accident, has been cured, an application for compensation must fail. The date of the application is the critical date. But where the man has not completely recovered, has not been cured, I think it is not necessary for him to establish that his present incapacity is due solely to the accident. The argument on the part of the employer mainly rests upon the word 'compensation.' It is plain that 'compensation' is not used in the common law sense. Except in the case of an infant, a man who is totally incapacitated by an accident can, under the statute, get only half his average weekly earnings for a period prior to the accident. In an action for negligence against the employer the man would recover a lump sum by way of damages based, according to a proper direction from the judge, upon the actual wages lost and the probabilities of the future, together with something by way of solatium for personal suffering. There is nothing of the kind to be found in the statute. I have read Hamilton, L. J.'s judgment, with which I entirely agree, and I do not think I can usefully add anything to what he has said on this point. There are, I think, indications in the statute which tend to confirm the view I have indicated. Rule 17 of Sched. 1 provides for redemption of a weekly payment at the option of the employer. If the incapacity is permanent, the amount is the purchase-money of a government life annuity subject to a discount of twenty-five per cent. The possibility of a supervening infirmity varying the rights is not hinted at. The facts are extremely simple. Harwood was a miner. In October, 1909, he was injured by a fall of coal, two ribs were broken, and there was a permanent lesion of the right knee. Half wages were paid until February, 1910, when he was found light work at his old wages. In October, 1911, he met with a second accident, and further injured his right knee. Half wages were paid until May, 1912, when it was discovered that he was suffering from heart disease. There was no award or recorded agreement. In June, 1912, Harwood applied for compensation on the ground of total incapacity. The learned judge held that he was unable to work owing to the condition

of his knee and also owing to the condition of his heart, and that it was not proved that the heart disease was connected with the accident. In the words of the learned judge: 'If there had been no accident at all, he would still be incapable for work as a miner or banksman. I am of opinion that there is no work that the accident prevented him from doing that the heart disease has not also prevented him from doing, and that being so, on these facts my judgment must be against him.' And he made his award accordingly. For the reasons above stated I think the learned judge has misdirected himself. The appeal should be allowed with costs here and below, and the case must be remitted in order that the judge may award such weekly sum by way of statutory compensation as he may think fit."

In *Clarkson v. Charente Steamship Co. 6 B. W. C. C. (Eng.) 540, [1913] W. C. & Ins. Rep. 422*, it was held that where a ship fireman suffered an accident to his knee while at work and was operated ten days later for a rupture in the groin, and there was medical evidence that the rupture antedated the accident, an award by the county court judge in favor of the steamship company and refusing compensation to the workman was warranted.

3. PRE-EXISTING DISEASE AGGRAVATED, ACCELERATED OR REVIVED BY INJURY.

a. Under American Acts.

If a pre-existing disease which does not cause incapacity is through an accidental injury revived or accelerated so as to become the immediate cause of incapacity or death, the incapacity or death is held to result from accident. *Peoria Ry. Terminal Co. v. Industrial Board (Ill.) 116 N. E. 651*; *In re Bowers (Ind.) 116 N. E. 842*; *Indianapolis Abattoir Co. v. Coleman (Ind.) 117 N. E. 502*; *Bell v. Hayer Ionia Co. (Mich.) 158 N. W. 179*; *Stombaugh v. Peerless Wire Fence Co. (Mich.) 164 N. W. 537*; *Voorhees v. Smith Schoonmaker Co. 86 N. J. L. 500, 92 Atl. 280*; *Van Keuren v. Delvine, 165 N. Y. S. 1049*; *Milwaukee v. Industrial Commission, 160 Wis. 238, 151 N. W. 247*. See also *Hills v. Oval Wood Dish Co. (Mich.) 158 N. W. 214*.

Thus in the case of *In re Bowers (Ind.) 116 N. E. 842*, it appeared that an employee engaged in the discharge of the duties of his employment suffered a severe personal injury "by accident arising out of and in the course of his employment." He was at the time afflicted with a "progressive incurable disease" which at that time had not advanced to the stage of producing disability. The injury, however, greatly aggravated the disease and incited it to a more rapid progress

resulting in the death of the employee in less than a month. In holding that his widow was entitled to an award of compensation the court said: "Where the enterprise is being conducted and the work is being done subject to the provisions of the act, the right to an award of compensation extends to all cases of personal injury of an employee or his death 'by accident arising out of and in the course of the employment.' Section 2. The personal injury or death of the employee due to his own wilful misconduct, however, is excepted. Section 8. The act specifies a rule of admeasurement of compensation 'where the injury causes total disability,' which includes death (section 29), and also 'where the injury causes partial disability' (section 30). The term 'personal injury,' as used in the act, 'shall not include a disease in any form except as it shall result from the injury.' Section 76d. It will be observed that the act does not make specific provision for a case wherein disability or death results from a personal injury not as the sole cause, but exercising a contributory effect with some existing malady or disease, in that the former arouses the latter from a latent state or aggravates it, and thus accomplishes disability or death at an earlier date than otherwise would have resulted had the disease not been incited by the injury. It is provided, however, that: 'The rights and remedies herein granted to an employee subject to this act on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury or death.' Section 6. Respecting cases wherein an employee may be compensated on account of injuries received, the act is broader and more inclusive than the common law; that is, there are many cases wherein under the act an employee may be awarded compensation on account of injuries received, when in an action at common law he would be denied relief. In view of the provisions of section 6, to the effect that the rights and remedies created in favor of an injured employee by the act exclude all rights and remedies in his favor and against his employer at common law, it should be presumed, from a consideration of the general spirit of the act and the sound economic policy upon which it is grounded, that the legislature did not intend by the act to narrow the rights of an injured employee, but rather that the rights and remedies afforded by the act, while not circumscribed by such limits, should extend to all situations wherein, were there no workmen's compensation act, an injured employee would have his remedy at common law for injuries received, and the act should be so construed where its language reasonably

admits of such construction; the general purpose of the act being to substitute its provisions for pre-existing rights and remedies."

In the case of *In re Williams* (Ind.) 116 N. E. 842, decided in the same opinion as the *Bowers* case, it appeared that an employee who suffered a nonserious injury arising out of and in the course of his employment was afflicted with progressive arteriosclerosis which had not progressed to the point of disability. The personal injury greatly accelerated and aggravated the progress of the disease so that the employee became totally and probably permanently disabled. It was held that the employee was entitled to compensation on the ground that his injury was the cause of his disability. In the case of *In re Colan*, 116 N. E. 842, also decided with the *Bowers* case, it appeared that where latent tuberculosis of the spine was incited to a virulent activity by a severe blow on and over the spine in the region of the dorsal and lumbar vertebrae, received in the course of the workman's employment, the workman was held to be entitled to compensation for the resulting disability.

In *Peoria Ry. Terminal Co. v. Industrial Board* (Ill.) 116 N. E. 651, it appeared that a railroad fireman fell from the engine while engaged in his employment and died from a hemorrhage of the brain and fracture of the skull. There was medical evidence that a soft spot found on the brain at the autopsy was due to a syphilitic condition. In affirming an award the court said: "Counsel for plaintiff in error contend that the proof does not show that the accident and injury arose out of and in the course of the employment of the deceased, as required by the statute as construed by this court. There is no question, under the decisions, that the burden rests upon the claimant to show, by competent testimony, not only the fact of the injury, but that it arose out of and in the course of the employment of the deceased, and that such proof must be based upon something more than a mere guess, conjecture, or surmise. . . . Even where a workman dies from a pre-existing disease, if the disease is aggravated or accelerated under certain circumstances which can be said to be accidental, his death results from injury by accident. Acceleration or aggravation of a pre-existing disease is an injury caused by accident."

In *Milwaukee v. Industrial Commission*, 160 Wis. 238, 151 N. W. 247, it appeared that an instructor suffering from an advanced stage of arterial sclerosis was struck in the head by a basket ball which caused the rupture of a blood vessel in his head and resulted in his death. In holding that the claimant was entitled to compensation the court said: "The finding that the injury

received at the time of the accident proximately caused his death does not rest upon such clear and uncontradicted testimony. The deceased was undoubtedly suffering from an advanced stage of arterial sclerosis at the time he was injured. Had he not been so suffering, the blow he received would in all probability have caused no serious injury. As it was, the blow ruptured one of the blood vessels in his head. What follows is thus described by the commission in its opinion: 'He turned pale, put his hands to his head, walked into the schoolhouse, had a vomiting spell, a swollen ridge appeared on the side of his head where he had been struck, and soon thereafter he lapsed into unconsciousness. An ambulance was called and he was removed to his house. He did not regain consciousness until the next morning. From that time until his death on December 27th, following, he had vomiting spells each day. His memory was poor and he seemed to be in a dazed condition, and he recognized his wife with difficulty; in fact he never recovered from the results of the ruptured blood vessel brought on by the blow of the basket ball and he died from the effects of it; that, except for the injury, states the attending physician, he would probably have lived three of four years.' There was evidence to sustain such statements, and hence it is deemed the finding of the commission has a sufficient basis to rest upon. The evidence tending to rebut it rests almost wholly upon the improbability that the blow from a basket ball could produce such serious results. It seems to be quite satisfactorily shown that in the instant case, at least, it did. An elaborate and interesting argument was made to the effect that the result which followed in this case was not one that could have been reasonably anticipated and hence the death was not proximately caused by the injury. It is argued that there can be no proximate causation without the element of reasonable anticipation of the same or some result similar to that which actually follows. It is a sufficient answer to this argument to say that the right to recover under the workmen's compensation act is not dependent upon a question of negligence or upon the concomitant conceptions of negligence under the common law. Proximate cause as applied to negligence law has, by definition, included within it the element of reasonable anticipation. Such element is a characteristic of negligence, not of physical causation. As long as it was necessary to a recovery to have a negligent act stand as the cause of an injury, it did no harm to characterize causation in part at least in terms of negligence. But when, as under the compensation act, no act of negligence is required in order to recover, the element of negligence, namely,

Ann. Cas. 1918B.—21.

reasonable anticipation, contained in the term 'proximate cause,' must be eliminated therefrom; and the phrase 'where the injury is proximately caused by accident,' used in the statute, must be held to mean caused in a physical sense, by a chain of causation which both as to time, place, and effect is so closely related to the accident that the injury can be said to be proximately caused thereby. To incorporate into the phrase 'proximately caused by accident' all the conceptions of proximate cause in the law of negligence would be to lug in at one door what the legislature industriously put out at another. Proximate cause, under the law of negligence, always has to be traced back to the conduct of a responsible human agency; under the compensation act the words 'proximately caused by accident' in terms relate to a physical fact only, namely, an accident. Hence if the injury or death can be traced by physical causation not too remote in time or place to the accident, then such injury or death was proximately caused by the accident, irrespective of any element of reasonable anticipation. The term 'proximately' was no doubt used to exclude physical causes so remote in time or place, or both, as to make them of doubtful value in tracing the relation between cause and effect."

So where a workman suffered a hernia through a particular strain causing a sudden protrusion of the intestine it was held that he was entitled to compensation in spite of the presence of structural weakness or actual pain antedating the injury. *Bell v. Hayes Ionia Co.* 192 Mich. 90, 158 N. W. 179.

In *Voorhees v. Smith Schoonmaker Co.* 86 N. J. L. 500, 92 Atl. 280, the court said: "The deceased, a man of middle age or over, worked in a wood-working shop of prosecutor, and at the time of the seizure just preceding his death was working at a task of furrowing sixteen posts, each six inches square and weighing about one hundred pounds apiece. To do this he had to get each post upon the table of the furrowing machine and push it forward against the knives by body pressure, which was exerted by pressing his abdomen forcibly against the end of the post. Each post had to be run through twice. After Voorhees had finished thirteen of the posts he sat down, evidently in great pain, and shortly afterward sent for a doctor who had him taken home, where he died three days later. He vomited blood and passed bloody stools, and the doctor pronounced the trouble internal hemorrhage. After death the undertaker, as he testified, found the body in such condition that he had it buried a day earlier than originally intended. It was in evidence that there was a large bruise on the abdomen where the pressure had been exerted on the ends of the posts. The effort of the defense

was to show that death was produced by a rupture resulting from cancer. The family refused to consent to an autopsy, but that was their right. It must be conceded that much of the evidence points to cancer and an internal rupture of some kind. But it was quite plain and the trial court was fully justified in finding that the rupture occurred while the deceased was in the very act of doing some unusually heavy work. So that even if deceased was suffering from internal cancer, it was quite within the province of the court to find that the proximate cause of death was the unusual and forcible pressure on parts weakened by disease, which but for the unusual strain would have held out for a considerable period."

b. Under English Act.

The English decisions seem to recognize the principle that compensation may be allowed for the acceleration of a pre-existing disease by an accidental injury, although the results are somewhat conflicting, due perhaps to the fact that the findings of fact of the various county court judges and arbitrators are binding on appeal if they are based on sufficient evidence. *M'Innes v. Dunsmuir*, 1 B. W. C. C. 226, [1908] Sc. Ct. Sess. 1021, 45 Scot. L. Rep. 804; *Dotzauer v. Strand Palace Hotel* [1910] 3 B. W. C. C. 387; *Trodden v. McLennard* [1911] 4 B. W. C. C. 190; *Willoughby v. Great Western R. Co.* 6 B. W. C. C. 28, 117 L. T. N. S. 132; *Doughten v. Hickman*, 6 B. W. C. C. 77, [1913] W. C. & Ins. Rep. 143; *Scales v. West Norfolk Farmers' Manure, etc. Co.* 6 B. W. C. C. 188, [1913] W. C. & Ins. Rep. 165; *Broforst v. Steamship Bloomfield* [1913] 6 B. W. C. C. 613, [1913] W. C. & Ins. Rep. 594; *Golder v. Caledonian R. Co.* 5 F. (Ct. Sess.) 123, 40 Scot. L. Rep. 89; *Hawkins v. Powell's Tillery Steam Coal Co.* [1911] 1 K. B. (Eng.) 988, 80 L. J. K. B. 769, 104 L. T. N. S. 365, 27 Times L. Rep. 282, 55 Sol. J. 329, 4 B. W. C. C. 178; *Lewis v. Wrexham Collieries*, 85 L. J. K. B. 1456, [1916] W. C. & Ins. Rep. 275; *Beare v. Garrod* [1915] W. C. & Ins. Rep. 438; *Lloyd v. Sugg* [1900] 1 Q. B. 481, 2 W. C. C. 5; *Walker v. Murrays* [1911] Sc. Ct. Sess. 825, 48 Scot. L. Rep. 741, 4 B. W. C. C. 409; *Ritchie v. Kerr* [1913] Sc. Ct. Sess. 613, [1913] W. C. & Ins. Rep. 297, 6 B. W. C. C. 419; *Spence v. Baird* [1912] Sc. Ct. Sess. 343, 49 Scot. L. Rep. 278, 5 B. W. C. C. 542, [1912] W. C. Rep. 18. See also *Tulford v. Northfleet Coal, etc. Co.* [1907] 1 B. W. C. C. 222; *Taylor v. Bolekow*, 5 B. W. C. C. 130.

Thus in *Golder v. Caledonian R. Co.* 5 F. (Ct. Sess.) 123, 40 Scot. L. Rep. 89, wherein it appeared that a workman suffering from nephritis which probably would have proved fatal in a few years received an injury in the

course of his employment which hastened the operation of the disease and caused his death in a few months, it was held that the death resulted from the injury.

In *Scales v. West Norfolk Farmers' Manure, etc. Co.* 6 B. W. C. C. 188, [1913] W. C. & Ins. Rep. 165, wherein it appeared that a stoker in the course of his employment which involved a great abdominal strain suffered a strangulation of a pre-existing hernia for which he wore a truss, his subsequent death from the effect of the strangulation was held to be due to an "accident arising out of and in the course of the employment," *Cozens-Hardy, M. R.*, saying: "It may well be that an act which admittedly involves considerable strain may be done many times without producing bad results, and yet the next time may end in an accident, and because the man had used in safety the heavy raking iron many times, that did not lessen the risk of strain which he ran from the hernia, and was incidental to his employment."

In *Broforst v. Steamship Bloomfield* [1913] 6 B. W. C. C. 613, [1913] W. C. & Ins. Rep. 594, wherein it was shown that a ship fireman had an apoplectic stroke after working for some time in the stokehold of a steamship, although the medical evidence tended to show that the workman was in a diseased condition and that such a stroke would be likely to be brought on by such exertion, the evidence was held to warrant the inference drawn by the county court judge that the injury was caused by "accident" within the meaning of the act.

Where it was shown by the medical evidence that a workman who fell while loading heavy bags onto trucks was suffering from fatty degeneration of the heart but that the disease was not so far advanced that he would have died without being subjected to some strain, it was held that there was evidence to support the finding of the county court judge that the man died from an accident arising "out of and in the course of" his employment within the meaning of s. 1 of the Workmen's Compensation Act of 1906. *Doughton v. Hickman*, 6 B. W. C. C. 77, [1913] W. C. & Ins. Rep. 143.

In *Dotzauer v. Strand Palace Hotel* [1910] 3 B. W. C. C. (Eng.) 387, wherein it appeared that a hotel scullion who had erythromelalgia, which made his skin unusually sensitive, was disabled by inflammation of his hands, and loss of his nails after washing dishes in hot water with caustic soda and soft soap, his disability was held to be an "injury by accident" within the meaning of sec. 1 of the Workmen's Compensation Act of 1906.

In *Spence v. Baird* [1912] Sc. Ct. Sess. 343, [1912] W. C. Rep. 18, it appeared

that a workman suffering from heart disease, which was of long standing and of a progressive nature and would have made itself manifest in any event, in lifting a derailed hutch in the course of his employment, felt a sharp pain in the vicinity of his heart, which was followed by palpitation and shortage of breath. It was held that an arbiter could find that the workman had sustained an "accident arising out of and in the course of his employment" within the meaning of the workmen's compensation act.

In *Trodden v. McLennard* [1911] 4 B. W. C. C. (Eng.) 190, in which it was shown that a workman fell into the water from a rope ladder while descending the side of a ship and was dead when picked up, there being medical evidence that the death was caused by heart failure solely, which might have followed any slight exertion, it was held that the finding of the county court judge that the death was due to "accident arising out of and in the course of the employment" was sustained by the evidence.

In *Lloyd v. Sugg* [1900] 1 Q. B. 481, 2 W. C. C. 5, it was shown that a jar to a workman's hand caused it to swell and brought on gout in the hand. It appeared that the workman had previously been treated for gout in the hand and elbow. It was held that the injury was caused by an accident and that he was entitled to compensation.

But where a workman suffered a cerebral hemorrhage while moving a weight in the course of his employment and in the customary manner of doing the work, it appearing that his arteries were in a degenerate condition at the time, his final disablement by permanent paralysis following a second attack four days later was held not to have been caused by an accident arising out of and in the course of his employment. *M'Innes v. Dunsmuir* [1908] Sc. Ct. Sess. 1021, 45 Scot. L. R. 804, 1 B. W. C. C. 226.

So in *Walker v. Murrays* [1911] Sc. Ct. Sess. 825, 48 Scot. L. Rep. 741, 4 B. W. C. C. 409, it appeared that a farm laborer's death resulted from strangulation of an old hernia following a recurrence which occurred while he was engaged in his employment. It was held that an arbitrator's decision refusing compensation on the ground that it was not shown that the applicant had sustained an accident was not unreasonable, there being no proof of a specific cause for the recurrence.

In *Hawkins v. Powell's Tillery Steam Coal Co.* [1911] 1 K. B. (Eng.) 988, 80 L. J. K. B. 769, 104 L. T. 365, 27 Times L. Rep. 232, 55 Sol. J. 329, 4 B. W. C. C. 178, wherein it was shown that a colliery workman while at work became ill and died of angina pectoris, it was held that the applicant had not

proved "by direct evidence or by legitimate inference from the facts proved" that the disease was due to what took place in the colliery and not elsewhere, the medical evidence being that the angina pectoris was of long standing and might have produced death from several causes.

In *Ritchie v. Kerr* [1913] Sc. Ct. Sess. 613, [1913] W. C. & Ins. Rep. 297, 6 B. W. C. C. 419, it was shown that a farm laborer died from "failure of the heart" while lifting baskets of corn to feed a bruising machine, the heart failure being alleged to have been contributed to by the strain from the exertion made by the deceased in lifting the baskets of corn to the level of his shoulders. It was held that the facts did not authorize an inference by the arbitrator that the death was due to an "injury by accident" within the meaning of the workmen's compensation act, since there was no particular event or occurrence to which the death could be attributed.

In *Ashley v. Lilleshall Co.* 5 B. W. C. C. 85, it was held that the evidence was insufficient to show that a workman suffering from Bright's disease had received the accidental injury by which it was claimed that the progress of the disease was accelerated.

4. PRE-EXISTING DISEASE CAUSING INJURY.

Where an injury is incurred by reason of a pre-existing diseased condition the decisions are conflicting under varying facts as to whether the incapacity is the result of an accidental injury. *Wicks v. Dowell* [1905] 2 K. B. (Eng.) 225, 2 Ann. Cas. 732, 7 W. C. C. 14; *Thackway v. Conelly* [1909] 3 B. W. C. C. (Eng.) 37; *O'Hara v. Hayes*, 3 B. W. C. C. (Eng.) 586, [1910] 44 Ir. L. T. 71; *Fennah v. Midland Great Western Ry.* 4 B. W. C. C. (Eng.) 440; *Kerr v. Ritchies*, 6 B. W. C. C. (Eng.) 419, [1913] Sc. Ct. Sess. 613, 50 Scot. L. Rep. 434, [1913] W. C. & Ins. Rep. (Eng.) 297; *Black v. New Zealand Shipping Co.* 6 B. W. C. C. (Eng.) 720; *Butler v. Burton-on-Trent Union*, 106 L. T. N. S. (Eng.) 824, [1912] W. C. Rep. 222; *La Veck v. Parke*, 190 Mich. 604, 157 N. W. 72; *Van Gorder v. Packard Motorcar Co.* (Mich.) 162 N. W. 107; *Carroll v. What Cheer Stables Co.* reported in full, post, this volume, at page 346. Thus in *Thackway v. Conelly*, supra, wherein it appeared that a bus driver whose heart was in an abnormal condition died following a fall from the box of his bus, and the county court judge believed from conflicting evidence that the cause of the fall was heart failure, it was held that the death had not been shown to have been caused by an accident.

In *Black v. New Zealand Shipping Co.* 6 B. W. C. C. (Eng.) 720, wherein it appeared that an officer died from heart failure on

board ship six days after leaving port, although there was medical evidence that the death was due to heart failure caused by the continuous strain of superintending the loading of a ship day and night for several days, it was held that the county court judge properly found that there was no evidence of "accident."

In *Butler v. Burton-on-Trent Union*, 106 L. T. N. S. (Eng.) 824, [1912] W. C. Rep. 222, it appeared that a workman while sitting on steps which were not dangerous and talking to the labor master was seized with a fit of coughing, due to lung disease, which made him dizzy and caused him to fall down the steps and the injury received caused his subsequent death. It was held that there was no evidence to support a finding that the accident arose out of his employment.

In *Kerr v. Ritchies*, 6 B. W. C. C. (Eng.) 419, [1913] Sc. Ct. Sess. 613, 50 Scot. L. Rep. 434, [1913] W. C. & Ins. Rep. 297, a finding that the sudden death of a workman from heart failure while at work lifting baskets filled with corn was due to accident was held not to be supported by evidence, it appearing that nothing unusual or unexpected had happened prior to the occurrence of the illness although the sheriff substitute also found that the strain arising from the exertion was a contributing cause of the heart failure.

In *O'Hara v. Hayes*, 3 B. W. C. C. (Eng.) 586, [1910] 44 Ir. L. T. 71, where it appeared a workman having progressive heart disease of some years' standing suffered collapse and death while hurrying to the train for his employer with a heavy parcel weighing seventeen pounds, it was held that a county court judge properly found that the workman's death resulted from the disease and was not an "accident" within the meaning of the workmen's compensation act.

In *Van Gorder v. Packard Motorcar Co.* (Mich.) 162 N. W. 107, in holding that compensation should not have been awarded for the death of a workman from a fractured skull caused by a fall due to epilepsy the court said: "In the instant case the deceased was performing the ordinary services of his trade, that of a plumber and steam fitter. He was standing on a scaffold a few feet from the floor. There is no claim that the scaffold was improperly constructed or in any way unsuitable for the service. Due to no conditions arising out of his employment, but solely to his predisposition to epilepsy, of which his employer had no notice, he fell from the scaffold, receiving an injury from which death resulted. The fall was caused and caused only by the epileptic fit. The fit was the direct and only cause of his injury. We do not think it would be seriously contended that had he fallen in an epileptic fit while standing on the floor and received the

injury he did that the injury arose out of the employment, and that the defendant was liable. *Collins v. Brooklyn Union Gas Co.* 171 App. Div. 381, 156 N. Y. S. 957. The height from which he fell, here only a short distance, could not change the liability for the injury. The most that can be said is that the height from which deceased fell may have aggravated the extent of the injury. A person falling a greater distance may be more seriously injured than one falling a lesser distance; but it does not change the question of responsibility, of liability. The distance of the fall might contribute to the extent of the injury, but it was not a contributory cause to the fall. When the deceased was seized with the epileptic fit he would have fallen, no matter where he was, and the employer cannot be held responsible because that unfortunate seizure occurred when the workman was on a scaffold, a few feet from the floor. Our own cases clearly recognize the rule that in order to render the employer responsible there must be a concurrence of the two elements, viz.: (1) That the accident occurred in the course of the employment; and (2) that it arose out of it. If it did not arise out of the employment, but arose out of something else, the employer is not liable. *McCoy v. Michigan Screw Co.* 180 Mich. 454, 147 N. W. 572, L.R.A.1916A 323; *Klawinski v. Lake Shore, etc. R. Co.* 185 Mich. 643, 152 N. W. 213, L.R.A.1916A 342. We must adhere to this construction of the statute, if any force or effect be given to the expression arising 'out of' the employment. The legislature has so written the law and adopted the language of the English statute with the construction there placed upon it. This unfortunate man fell to his death when in an epileptic fit, which did not arise out of his employment and for which his employer was not responsible. We are therefore constrained to reverse the case."

However in *La Veck v. Parke*, 190 Mich. 604, 157 N. W. 72, wherein it appeared that a workman suffered paralysis resulting from rupture of a small blood vessel in his brain, caused by heat and overexertion and a diseased condition of the arteries known as arterial sclerosis, the court refused to review the action of the industrial accident board granting compensation on the ground that the paralysis was an accident.

In *Wicks v. Dowell* [1905] 2 K. B. (Eng.) 225, 2 Ann. Cas. 732, 7 W. C. C. 14, wherein it appeared that a workman was seized with an epileptic fit and fell into the hold of a ship from which he was engaged in discharging coal, and was seriously injured and that he had been subject to such fits previous to the accident, it was held that the injuries were caused by an accident arising "out of and in the course of" his employment,

Mathew, L. J., saying: "The case affords an illustration of the rule that one should look to the immediate, and not to the remote, cause. In this case the immediate cause of the injury was the fall. I see no reason why we should hold that there was not an accident within the meaning of this statute. The true mode of dealing with the case is shown by a reference to the insurance cases that were cited during the argument. In *Fenton v. Thorley* [1903] A. C. (Eng.) 443, 446, Lord Macnaghten said: 'One other remark I should like to make. It does seem to me extraordinary that anybody should suppose that when the advantage of insurance against accident at their employers' expense was being conferred on workmen, Parliament could have intended to exclude from the benefit of the act some injuries ordinarily described as "accidents" which beyond all others merit favorable consideration in the interest of workmen and employers alike.' If we apply that view to the particular case, and treat the claim as an action brought upon a policy of insurance against accidents arising out of the employment of the assured, there can be no question that such a policy would cover the case. In my opinion we ought not to go back along the train of circumstances and trace the accident to some remote source when it is plain that the man was in fact injured by falling from the place where he was standing, and where it was his duty to stand, in discharge of his duty to his employer."

In *Fennah v. Midland Great Western Ry.* 4 B. W. C. C. (Eng.) 440, it appeared that an engine driver died in great pain after a fall while at work on his engine at a station and that he had previously collapsed and fainted at least three times under similar circumstances, although the medical evidence was that he "undoubtedly had a sound heart." It was held that there was sufficient evidence to justify a finding of fact that the man's death resulted from injury by accident arising out of and in the course of his employment.

5. NONOCCUPATIONAL DISEASE CAUSED BY EMPLOYMENT.

a. In General.

Where a nonoccupational disease is contracted by a workman in the course of his employment, the consequent incapacity or death of the workman is the result of an accident and in some cases this has been held to be so although there was a pre-existing weakness. *Karemaker v. Steamship Corsican* [1911] 4 B. W. C. C. (Eng.) 295; *Sherwood v. Johnson*, 5 B. W. C. C. (Eng.) 686; *Higgins v. Campbell* [1904] 1 K. B.

(Eng.) 328, 6 W. C. C. 1, 89 L. T. N. S. 660; *Davies v. Gillespie*, 105 L. T. N. S. (Eng.) 494, 28 Times L. Rep. 6, 56 Sol. J. 11, 5 B. W. C. C. 64; *Edmunds v. Peterson*, 28 Times L. Rep. (Eng.) 18, 5 B. W. C. C. 157; *Scott v. Pearson* [1916] 2 K. B. (Eng.) 61, 85 L. J. K. B. 285, [1916] W. C. & Ins. Rep. 128, 114 L. T. N. S. 833, 60 Sol. J. 428, 32 Times L. Rep. 412; *McKinnon v. Hutchinson* [1915] Sc. Ct. Sess. (Eng.) 867; *United Paperboard Co. v. Lewis* (Ind.) 117 N. E. 276; *Dove v. Alpena Hide, etc. Co.* (Mich.) 164 N. W. 253; *State v. District Ct.* (Minn.) 164 N. W. 585; *Liondale Bleach, etc. Works v. Riker*, 85 N. J. L. 420, 89 Atl. 929; *Archibald v. Workmen's Compensation Commissioner*, 77 W. Va. 448, 87 S. E. 791; *Heileman Brewing Co. v. Industrial Commission*, 161 Wis. 46, 152 N. W. 446. See also *Dean v. London, etc. Ry.* [1910] 3 B. W. C. C. (Eng.) 351; *Bellamy v. Humphries* [1913] 6 B. W. C. C. (Eng.) 53, [1913] W. C. & Ins. Rep. 169; *Nikkiczuk v. McArthur*, 9 Alberta L. Rep. 503, 28 Dominion L. Rep. 279, 34 West. L. Rep. 674; *Finley v. Tullamore Union* [1914] 2 Ir. 233; *Warner v. Couchman* [1911] 1 K. B. (Eng.) 351, 80 L. J. K. B. 526, 103 L. T. N. S. 693, 4 B. W. C. C. 32, 55 Sol. J. 107, 27 Times L. Rep. 121; *Harding v. Brynddur Colliery Co.* [1911] 2 K. B. (Eng.) 747, 80 L. J. K. B. 1052, 105 L. T. N. S. 55, 27 Times L. Rep. 500, 55 Sol. J. 599, 4 B. W. C. C. 269; *Pyper v. Manchester Liners* [1916] 2 K. B. (Eng.) 691, 85 L. J. K. B. 1459, [1916] W. C. & Ins. Rep. 301, 115 L. T. 406, 60 Sol. J. 706, 32 Times L. Rep. 723; *Hutchison v. McKinnon* [1916] 1 A. C. (Eng.) 471, [1916] W. C. & I. Rep. 17, 114 L. T. N. S. 570, 60 Sol. J. 320, 32 Times L. Rep. 283, 85 L. J. P. C. 98; *London, etc. Shipping Co. v. Brown* [1905] Sc. Ct. Sess. (Eng.) 488, 42 Scott. L. Rep. 357. And see the reported case.

Thus in *Higgins v. Campbell* [1904] 1 K. B. (Eng.) 328, 6 W. C. C. 1, 89 L. T. N. S. 660, it was held that anthrax caused by a germ from wool getting in a pimple on a wool sorter's neck was a disease caused by "accident."

In *Scott v. Pearson* [1916] 2 K. B. (Eng.) 61, 85 L. J. K. B. 285, [1916] W. C. & Ins. Rep. 128, 114 L. T. N. S. 833, 60 Sol. J. 428, 32 Times L. Rep. 412, Lord Cozens-Hardy, M. R., said: "The applicant in this case is a young woman who was employed as a farm servant. It was her duty to look after and feed young calves. It is admitted that the calves had ringworm in the early part of February. On February 13 she noticed that her arm was breaking out in scabs. The doctor whom she consulted reported that it was a case of 'cattle ringworm,' which is distinguishable from ordinary ringworm. It is a fungus growth. It

might be contracted from the calves, who would be likely to push against her, or it might be conveyed by a stick used by her to keep the cattle in their pen. The applicant and her father and the doctor were all examined, and their evidence was to the effect above stated. But the cross-examination of each witness was, by the judge's direction, 'reserved,' and there was no cross-examination, for the learned county court judge did not call upon the respondent. His own note of his judgment is as follows: 'I was of opinion on the above facts that the applicant had not proved an injury by accident, and therefore made my award for the respondent.' His view apparently was that it was a case of disease, and not an industrial disease within s. 8, and that therefore there could be no 'injury by accident.' With great respect I think this is an error. The Anthrax Case [1905] A. C. 230, is decisive on this point. The very recent case in the House of Lords of Glasgow Coal Co. v. Welsh [1916] 2 A. C. 1, decided on the 6th of the present month, is a strong instance. A miner contracted rheumatism and recovered compensation in the following circumstances: He was employed as a brusher. But water had accumulated in the pit, and he was directed to bale it out. To do this he had to stand for eight hours up to his chest in the water. This was followed by a severe attack of rheumatism. The sheriff-substitute found that this was an accident arising out of his employment; and the House of Lords dismissed the employers' appeal. It by no means follows that the applicant will establish her claim to an award when the case is fully tried out. But assuming that the statements of the witnesses are the truth—as the learned judge assumed—I think there was a case which called for an answer by cross-examination, and probably by direct evidence. The notes with which we have been furnished, including a letter written by the county court judge, are meagre. It is not suggested that the period between the appearance of cattle ringworm in the calves and February 13 was either too long or too short for the recognized period of incubation, whatever it may be, or that the young woman had been in contact with the diseased cattle in addition to the calves. The applicant will have to satisfy the arbitrator that there was an accident within the meaning of *Fenton v. Thorley* [1903] A. C. 443, namely, contact with the diseased calves, either direct, or indirect through a stick, at a date fixed with reasonable certainty, and that such accident conveyed the cattle ringworm to her. If these facts are established, there is no legal difficulty in making an award in her favor."

In *Dove v. Alpena Hide, etc. Co.* (Mich.) 164 N. W. 253, in which it appeared that a

workman inhaled infected dust when handling hides, it was held that his death from septic infection and heart disease resulting therefrom was an accident because it was an unusual event in that kind of work.

In *State v. District Ct.* (Minn.) 164 N. W. 585, it was held that freezing in the course of the employment is an accidental injury.

In *Edmunds v. Steamship Peterston*, 28 Times L. Rep. (Eng.) 18, 5 B. W. C. C. 157, the evidence was held sufficient to support the finding of a county court judge that the death of a steamship's second engineer, who was asphyxiated by the fumes of a fire in a stove in his cabin during the night, was caused by an accident which arose out of and in the course of the workman's employment, although the engineer had been forbidden to use the stove at night.

However, in *Walker v. Hockney* [1909] 2 B. W. C. C. (Eng.) 20, a slowly acquired paralysis of a workman's right leg resulting from the strain of riding a heavy carrier tricycle in the course of his employment, and resulting in incapacity for work after five years, was held not to be due a "personal injury by accident."

In *Bellamy v. Humphries* [1913] 6 B. W. C. C. (Eng.) 53, [1913] W. C. & Ins. Rep. 169, compensation was refused a weaver for incapacity due to the entrance of a microbe, which had no special relation to his employment, into an abrasion which appeared after he had rubbed his eye to remove dust, there being no evidence as to when the microbe entered.

In *Dean v. London, etc. Ry. Co.* [1910] 3 B. W. C. C. (Eng.) 351, it appeared that a gas fitter shortly after inhaling gas died from paralysis due to cerebral hemorrhage. Seven months before he had had a transient attack of paralysis due to the same cause. The county court judge's decision that the death was not due to gas poisoning was not disturbed, the question being one of fact.

In *Hutchison v. McKinnon* [1916] 1 A. C. (Eng.) 471, 85 L. J. P. C. 98, [1916] W. C. & Ins. Rep. 17, 114 L. T. N. S. 570, 60 Sol. J. 320, 32 Times L. Rep. 283, Lord Sumner said: "My Lords, the accident, which happened to the respondent seaman in the course of his employment, was due to his own mistake in believing that a solution of caustic soda was pure cold water and in drinking it accordingly. The whole question is whether there was evidence that this accident arose out of his employment. All we know of the affair is to be found in the stated case. There are no other competent materials. The facts proved or supposed to be proved in evidence are there carefully tabulated. The words 'I found upon these facts that the accident arose out of and in the course of his employment' do not state further evidence or a

further fact found, but are the conclusion—be it one of law only or partly of law and partly of fact—to which the learned sheriff-substitute was led by his previous findings, and in his view it is implicit in them. The can from which the respondent drank was not his own. We are not told that he made any mistake about this. It belonged to the boatswain and the donkeyman, who messed together. We know that they used it for brewing tea, but that carries us no further. We do not know whether they also used it for cooling their drinking water; we do not know whether it was like the tins used by others for cooling drinking water, or whether the tins used by others, who did not mess with the boatswain and the donkeyman, were similar to one another or diverse. It is true that its shape or character did not prevent the respondent from making his unfortunate mistake; but whether that was because of its similarity to other tins, or because he was too confident that it contained drinking water to be deterred by its difference from other tins, again we do not know. There is no evidence about it. My Lords, in this state of the evidence I think that there is nothing to show any causal connection between the accident and the employment. The accident was one which might have happened to any one who drank the contents of a vessel that did not belong to him without first finding out what they were. It was in no way incident to a seaman's employment as such. Again, the sanction given by the ship's officers to the practice of leaving the ship's drinking water about in tins to cool might amount, and probably did amount, to an authority to the seamen to take this method of preparing for use the drinking water with which they had to be supplied; but it amounts to no more. There is no evidence that the sanction extended to the give and take which is spoken of. There is no evidence that the practice, by which seamen drank where they had not drawn, formed any part of the ship's routine or the men's employment. It may have been known to the officers—most things are that happen on board ship—but this is pure conjecture. I think that in doing what he did the respondent, so far as the evidence goes, added a risk of his own to the risks incident to his employment. Where the question in debate is whether or not there is evidence to support a particular conclusion of fact, it is always necessary to begin by scrutinizing the evidence given, and this equally where there is a full note of the evidence, or only such a condensed summary of it as is given in this stated case. It is doubly necessary to be strict where the appellate tribunal must take the facts as found and is limited to the question of law, namely, whether there was evi-

dence to support the conclusion. With all respect to Lord Guthrie, I think that such an expansion of the stated case by interpretation and inference as his judgment contains is inadmissible. My Lords, if any distinction at all is to be drawn, as, of course, it must be drawn, between arising 'out of' and arising 'in the course of' an applicant's employment, the stated case discloses no evidence of arising 'out of.' To hold that it does is either to make 'arising out of' and 'arising in the course of' mean the same thing, or is to carry the evidence by conjecture beyond the limits of the case. I think that the appeal should be allowed."

In *Liondale Bleach Dye, etc. Works v. Riker*, 85 N. J. L. 426, 89 Atl. 929, it appeared that a workman after ten days' service in a bleachery was affected with a rash pronounced by a medical testimony to be a condition of eczema, and one physician testified that this could be caused by acids. The trial judge found that the condition was caused by contact with dampened goods. In holding that the condition was not due to accident the court said: "The English courts seem at last to have settled that where no specific time or occasion can be fixed upon as the time when the alleged accident happened, there is no injury by accident within the meaning of the act. This seems a sensible working rule, especially in view of the provisions of the statute requiring notice in certain cases within fourteen days of the occurrence of the injury—a provision which must point to a specific time. We need not consider in this case the question of the effect of a finding by the trial judge as in *Brintons v. Turvey* [1905] A. C. (Eng.) 230. Not only is there no such finding of fact, but the learned trial judge rested upon a construction of the statute which makes the word 'accident' include 'those events which were not only the result of violence and casualty, but also those resulting conditions, which were attributable to and caused by events that take place without one's foresight or expectation.' This, however, is to make the employer's liability turn on resulting conditions rather than on the fact of injury by accident. There may indeed be compensation awarded for resulting conditions where you once put your finger on the accident from which they result; but the ground of the action fixed by the statute is the injury by accident, not the results of an indefinite something which may not be an accident."

In *Evans v. Dodd* [1912] 5 B. W. C. C. (Eng.) 305, the evidence was held to sustain a finding by the county court judge that eczema resulting gradually from exposure to fumes or splashes of carbon bisulphate in which a workman was employed to dip rings with his fingers was not an "accident" within

the meaning of the workmen's compensation act.

b. Pneumonia or Rheumatism Resulting from Exposure in Employment.

Under the English workmen's compensation act where pneumonia or rheumatism results from exposure in the course of the employment it is an accidental injury only if it is attributable to some particular event of an unusual character. *Coyle v. Watson* [1915] A. C. 1, 7 B. W. C. C. 259, reversing 1 Scot. L. T. 174; *Drylie v. Alloa Coal Co.* 6 B. W. C. C. 398; *McLuckie v. Watson* [1913] Sc. Ct. Sess. 975, 50 Sc. L. Rep. 770, [1913] W. C. & Ins. Rep. 481; *Barbeary v. Chugg* [1915] W. C. & Ins. Rep. 174; *Glasgow Coal Co. v. Welsh*, 85 L. J. P. C. 130, [1916] A. C. 1, [1916] W. C. & Ins. Rep. 79, 114 L. T. N. S. 809, 60 Sol. J. 336, 32 Times L. Rep. 539, 9 B. W. C. C. 371, Ann. Cas. 1916E 161, affirming [1915] Sc. Ct. Sess. 1020; *Lyons v. Woodilee Coal, etc. Co.* [1916] W. C. & Ins. Rep. 235, [1916] Sc. Ct. Sess. 719.

Thus in *Drylie v. Alloa Coal Co.* [1913] Sc. Ct. Sess. 549, 50 Scot. L. Rep. 350, [1913] W. C. & Ins. Rep. 213, 6 B. W. C. C. 398, it appeared that a miner working overtime in a wet coal pit, was forced by rising water while the pump was being repaired to go to the pit bottom, where, during a wait of twenty minutes, he was severely chilled by water which rose to his knees, and by exposure to cold air which was descending the shaft. On reaching the head of the pit he remained for at least twenty minutes, before going to his home. Within a few days, for three of which he worked at the pit and neglected his cold, he developed pneumonia and subsequently died therefrom. It was held that the occurrence at the mine was an "accident," and that the death from pneumonia was a death resulting from injury by accident. This is said to be the first case in which an arbitrator in Scotland decided that a death which resulted from pneumonia following a neglected cold was a death resulting from injury by accident. Lord Dundas in his judgment said that the case could not be cited as indicating that the court was willing to hold that an ordinary disease, e. g., pneumonia, entitles a workman to compensation, but that the disease must be attributable to some particular event or occurrence of an unusual and unexpected character, incidental to the employment, which could, in the light of the decisions, be described as an accident.

In *Coyle v. Watson* [1915] A. C. 1, 7 B. W. C. C. 259, reversing 1 Scot. L. T. 174, it appeared that a miner while waiting to ascend to the surface after a wreck in the mine, and in accordance with orders, was subjected to a strong current of air, and as

he had been sweating at his work, the draft seemed very cold to him. After reaching the surface he suffered a chill which brought on pneumonia from which he died. An award in favor of the applicant was restored, Lord Parmoor saying: "The delay in the landing where the chill was caught appears to me to be clearly attributable to the wreckage of the shaft, and but for such wreckage would not have occurred. The incidents are closely connected and cannot be treated as independent and detached factors. On the other hand, it is not questioned that the delay on the landing in a draft did cause the injury which resulted in Brown's death. There are both the necessary elements to maintain a claim, a definite accident and injury fairly attributable thereto. It is not material that the wreckage of the shaft did not result in physical impact causing physical injury, or that no one could have foreseen the delay on the landing, and the subsequent chill, as a probable or natural result of the wreckage of the shaft. Such considerations do not arise in a claim under the workmen's compensation act. The workman under the act is as much entitled to compensation if death results from exposure consequent on and attributable to an accident as he would be if death had resulted from immediate physical injury. My Lords, a number of authorities were quoted by the counsel for the appellant. It is only necessary to refer to two of them. The case of *Victorian Rys. Com'rs v. Coultas*, 13 App. Cas. 222, was quoted as an authority for the doctrine that in ordinary accident cases some form of physical impact is a necessary element to found a claim for damage. The case does not appear to support this contention, nor do I think that any such contention could be supported. The following passage occurs in the judgment: 'Their Lordships are of opinion that the first question, whether the damages are too remote, should have been answered in the affirmative and on that ground, without saying that "impact" is necessary, that the judgment should have been for the defendants.' The second case is *Drylie v. Alloa Coal Co.* [1913] Sc. Ct. Sess. 549. My Lords, I am unable to distinguish this case from the present case. It cannot be material, for the purpose of a claim under the workmen's compensation act, whether the chill resulted from exposure to a current of air or to cold water, so long as the exposure is attributable to the accident, and has caused the injury on which the claim to compensation is founded."

In *Glasgow Coal Co. v. Welsh* [1916] A. C. (Eng.) 1, 85 L. J. P. C. 130, [1916] W. C. & Ins. Rep. 79, 114 L. T. N. S. 809, 60 Sol. J. 336, 32 Times L. Rep. 359, 9 B. W. C. C. 371, Ann. Cas. 1916E 161, affirming [1915] Sc. Ct. Sess. 1020, it appeared that a workman em-

ployed as brusher in a mine was directed to bale out water which had accumulated in the pit bottom in consequence of the breakdown of the pump. In order to do so he was obliged to stand in water up to his chest for eight hours, and a few weeks later became unfit for work from subacute rheumatism. It was held that the injury was sustained by accident within the meaning of the act, Lord Wrenbury saying: "My Lords, in this case the workman sustained 'personal injury' in the form of a physical ailment or illness, namely, subacute rheumatism. For the purpose of the construction of the act, it must be immaterial whether the 'personal injury' is death, or the loss of a limb, or disease, or illness. In each case the personal injury is not, and cannot be, the accident. It is the result of the accident. The phrase in the act is 'personal injury by accident.' In this and in every case the inquiry must be whether the personal injury which has been sustained was sustained in such a state of circumstances as that it was sustained 'by accident.' I call particular attention to the fact that the language of the act is not 'personal injury by an accident,' but 'personal injury by accident.' This means, I conceive, personal injury, not by design, but by accident, by some mishap unforeseen and unexpected; accidental personal injury. While, on the one hand, it is true that the personal injury cannot be the accident which satisfies the phrase 'by accident,' yet, on the other hand, it is at the same time true that the result is a factor which assists in determining whether the injury was sustained by accident or not. If a man undresses on the beach in order to enjoy a bath in the sea, goes voluntarily into the water, and is drowned by reason of the existence of a strong current, no one could deny that his death was accidental, that his death was by accident. In this case his going into the water was not accidental; the existence of the current was not accidental; but there was a factor which caused his death to be 'by accident,' and that was that unintentionally—perhaps by ignorance—he miscalculated the forces with which he had to do; he did not know of the current, or he thought that he was a strong enough swimmer to cope with it. He was wrong. The mishap which resulted from his bathing in this dangerous place was accidental. He had no intention or thought of going to his death. No other person intervened to conduce to the result. The sufferer's death was an unexpected event, an untoward result; it was by accident. If he had not been drowned it would be accurate to say that happily there had been no accident. That which I endeavor to express is perhaps best summarized by saying that although the 'personal injury' (the death or disease or whatever it

is) cannot be the accident, yet the contraction of the disease or the incurring of the death may be by accident. The fact of disease is not an accident, but the contraction of disease may be by accident. Sect. 8, subs. 10, in using the words 'if the disease is a personal injury by accident,' means, I think, 'if the disease is a personal injury incurred by accident.' My Lords, after these general observations I do not feel that any useful purpose will be served by traveling through the numerous cases which have been cited. The question is whether such facts have been found as that the arbitrator could from those facts arrive at the conclusion that the rheumatism was contracted under such circumstances as that the personal injury was by accident. The only finding which I need set out is: '9. That the rheumatism from which the respondent suffered was caused by the extreme and exceptional exposure to cold and damp, to which he was subjected on the occasion in question.' Suppose the events had been that under directions given by the employer the man had gone into the water, and it had proved unexpectedly to be eight feet deep, and that he had been drowned. No one, I think, would dispute that his death would have been by accident. The accident would have arisen from miscalculation or ignorance as to the depth of the water, by reason of which the man was exposed to danger and was drowned. Is there any difference of principle between the case in which the water went over his head and caused death and the case in which the water extended as high as his chest and caused rheumatism? I think not. In all these cases it is essential to bear in mind that the appellate judge has not to determine whether he would have arrived at the conclusion at which the arbitrator arrived, but has to see whether such facts are found as that the arbitrator could arrive at that conclusion. Here the sequence of the language in the case after the finding which I have quoted shows that the arbitrator's finding is that the rheumatism was an injury caused by the extreme and exceptional exposure to cold and damp; in other words, that the extreme and exceptional exposure to cold and damp was that which caused the personal injury to be by accident. I take this to mean that neither employer nor man anticipated that the cold and damp would have been so extreme as to cause the illness; that the exposure of the man to it was an untoward event; that the result was unexpected; that the outcome was a mishap; and that consequently the injury was by accident. Whether I should have been of that opinion or not, I think the arbitrator could properly so hold. I may add that the events of October 23 have, in my judgment, no bearing upon the matter. There was an accident on

October 23 no doubt, but that accident caused nothing in the events of October 28. Suppose there is a railway accident by collision, and that a breakdown gang is sent to deal with the matter, and that a member of the breakdown gang is injured when dealing with it. The fact that he is sent to deal with the results of an accident by collision does not show that he suffered from the accident by collision. The fact that there was such an accident has no bearing upon the question whether he was injured by accident or not. So here the fact that the water would not have been there if the pump had not accidentally broken down on October 23 has no relevance to the question whether on October 28 the man was the victim of an accident. The conclusion at which I arrive is that upon the facts found the arbitrator could hold as matter of law that the injury was by accident."

However, in a case where no unusual event was shown, *McLuckie v. Watson* [1913] Sc. Ct. Sess. 975, 50 Sc. L. Rep. 770, [1913] W. C. & Ins. Rep. 481, it was held that where a miner stood in water for thirty minutes at the pit bottom in order to ascend the shaft sooner than his turn would have come had he waited on dry ground, and suffered a chill which resulted in deafness, his consequent incapacity for work was not caused by an "injury by accident" within the meaning of the workmen's compensation act.

6. STRAIN OR OVEREXERTION.

It is generally held that a strain or rupture from overexertion is an accidental injury, at least if it can be attributed to some particular time and is not the result of the ordinary work which the employee assumed to perform. In some instances such a holding has been made though it appeared that the strain was preceded by a structural weakness of the workman. *Beaumont v. Underground Electric R. Co.* 5 B. W. C. C. (Eng.) 247, [1912] W. C. Rep. 123; *Borland v. Watson* [1912] Sc. Ct. Sess. (Eng.) 15, 49 Scot. L. Rep. 10, 5 B. W. C. C. 514; *Aitkin v. Finlayson* [1914] Sc. Ct. Sess. 770; *Marshall v. Sheppard*, 6 B. W. C. C. (Eng.) 571, [1913] W. C. & Ins. Rep. 477; *Brown v. Kemp* [1913] 6 B. W. C. C. (Eng.) 725, [1913] W. C. & Ins. Rep. 595; *McArdle v. Swansea Harbor Trust Co.* 113 L. T. N. S. (Eng.) 677, 8 B. W. C. C. 489, 85 L. J. K. B. 733, [1915] W. C. & Ins. Rep. 448; *Stewart v. Wilsons, etc. Coal Co. Sc. Ct. Sess.* 5 F. (Eng.) 120, 40 Sc. L. Rep. 80; *Boardman v. Scott* [1902] 1 K. B. (Eng.) 43, 4 W. C. C. 1; *Timmins v. Leeds Forge Co.* 83 L. T. N. S. (Eng.) 120, [1900] 16 Times L. Rep. 521; *Robbins v. Original Gas Engine Co.* 191 Mich.

122, 157 N. W. 437; *Hurley v. Selden-Breck Constr. Co.* (Mich.) 159 N. W. 311; *Schroetke v. Jackson Church Co.* (Mich.) 160 N. W. 383; *Kutschmar v. Briggs Mfg. Co.* (Mich.) 163 N. W. 933; *State v. District Ct.* (Minn.) 162 N. W. 678; *Manning v. Pomerene* (Neb.) 162 N. W. 492; *Zappala v. Industrial Ins. Commission*, 82 Wash. 314, 144 Pac. 54, L.R.A.1916A 295; *Poccardi v. Public Service Commission*, 75 W. Va. 542, 84 S. E. 242, L.R.A.1916A 299; *Bystrom v. Jacobson*, 162 Wis. 180, 155 N. W. 919, L.R.A.1916D 966; *Casper Cone Co. v. Industrial Commission*, 165 Wis. 255, 161 N. W. 784. See also *Purse v. Hayward*, 1 B. W. C. C. (Eng.) 216; *Richards v. Sanders* (1912) 5 B. W. C. C. (Eng.) 352, [1912] W. C. Rep. 407; *Higgins v. Higgins* [1916] 1 K. B. (Eng.) 640, 85 L. J. K. B. 1224, [1915] W. C. & Ins. Rep. 605, 114 L. T. N. S. 59; *Griga v. Harelda*, 26 Times L. Rep. (Eng.) 272; *Grove v. Michigan Paper Co.* 184 Mich. 449, 151 N. W. 554.

Thus in *Bystrom v. Jacobson*, 162 Wis. 180, 155 N. W. 919, L.R.A.1916D 966, in holding that a strain to the muscles of the side suffered by an employee while lifting at his work was an accident which entitled him to compensation, the court said: "The question raised in this case is whether the injury for which compensation was granted was 'proximately caused by accident' within the meaning of those words, in sub. (3) sec. 2394—3, of the Workmen's Compensation Law. On behalf of appellant, it is contended that the statute calls for an accident in the sense of the application of some violence or external force to the person of the workman, that a physical ill caused by the labor the workman is engaged in is not sufficient. It is considered that the term 'accident' as used in the workmen's compensation act has a much broader signification than that contended for by counsel for appellant. It is susceptible of being given such scope that one would hardly venture to define its boundaries. Courts have indulged in very general statements in regard to it, but have not worked out any very definite guide. True, as stated by a textwriter, such term has been more discussed, probably, in adjudications, 'than any other word in the whole English language.' What the meaning of it is, in the technical sense, is quite different from what it is in the popular sense. . . . The thing which occurred was somewhat unusual. It was unexpected and undesigned. There was no external occurrence. The lifting of the heavy block while the workman was not in an advantageous position to do so required him to unduly strain the muscles of his right side. The undue strain was not foreseen or expected. A mishap resulted—a muscular spasm and consequent disability. There was, plainly, the physical causation spoken of in

Milwaukee v. Industrial Commission, 160 Wis. 238, 246, 151 N. W. 247—the effort to handle the block while the workman was so circumstanced as to cause a perilous strain on the muscles of his right side. We cannot well add anything of value by further discussion. As we have seen, authorities, English and American, generally agree that the term ‘accident’ when used in workmen’s compensation laws should be taken in the broad sense above indicated—as including violent straining of the muscles, resulting in a rupture or other bodily hurt to an employee from over-physical exertion in performing his work. It is considered that it was so used by the legislature in sub. (3) sec. 2394—3, of the statutes, and that the trial court in this case reached the correct conclusion.”

In *Robbins v. Original Gas Engine Co.* 191 Mich. 122, 157 N. W. 437, the court allowed compensation for a rupture sustained during the employee’s work, saying: “The Michigan law does not award compensation for all personal injuries suffered by an employee, but for accidental injuries only. *Adams v. Acme White Lead, etc. Works*, 182 Mich. 157, 148 N. W. 485, L.R.A.1916A 283. The vital question which the industrial accident board had to determine was not whether on January 22, 1915, it was discovered that claimant had hernia, but was whether claimant on that day suffered an accidental injury, arising out of and in the course of his employment. Accepting respondents’ proposition as true, it may be said that upon the occasion in question, by reason of a strain or effort of claimant, in performing his duties, an undiscovered and undiscoverable, but previously formed, sac was pushed through the left inguinal ring and muscles. So much injury claimant then and there suffered, to alleviate, if not to cure, which medical attention and treatment were required. It is compensation for that injury which is claimed and was allowed. Was it an accidental injury within the meaning of the law? It has been said of the expressions ‘accident’ and ‘accidental,’ employed in an act having a purpose similar to ours, that they were used with their popular and ordinary meaning. Happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected. . . . The statute seems to contemplate that an accidental injury may result by mere mischance; that accidental injuries may be due to carelessness, not wilful, to fatigue, and to miscalculation of the effects of voluntary action. There is testimony in the record, although it is not very conclusive, to support a finding that claimant was suddenly, and accidentally, put at disadvantage by the act of his fellow workman and the sticking of the engine on the concrete floor, and that the rupture and imme-

diate protrusion of the abdominal sac were caused by his efforts to retrieve his position and do his work. It is assumed that it was the first time the sac had been forced through the abdominal wall. If it is also assumed that there was a certain lack of physical integrity in the parts where the injury was manifested, still I think claimant may have compensation for the injury he suffered. I decide only the particular case, and in doing so decline to hold, upon this record, that claimant suffered from disease and not from accidental injury.”

In *Hurley v. Selden-Breck Constr. Co.* (Mich.) 159 N. W. 311, a brick mason who, as the result of particular strain sustained, while laying terra cotta window sills, suffered a hernia which became strangulated, was held to be entitled to compensation for accidental injury, although structural weakness or actual pain may have antedated the injury.

In *Poccardi v. Public Service Commission*, 75 W. Va. 542, 84 S. E. 242, L.R.A.1916A 299, compensation was allowed for the death of a workman by dilatation of the right ventricle of the heart during a surgical operation for a hernia caused by a strain while at work, on the theory that the rupture was an accident.

In *Casper Cone Co. v. Industrial Commission*, 165 Wis. 255, 161 N. W. 784, compensation was allowed for a rupture sustained while at work although the workman was physically unsound at the time, because of inguinal hernia sac.

In *Brown v. Kemp* [1913] 6 B. W. C. C. 725, [1913] W. C. & Ins. Rep. 595, it appeared that a brewer’s assistant while at work felt a severe internal pain and subsequently discovered that he had ruptured himself. It appeared that twenty-two years before he had had a hernia in the same place and had worn a truss until about five years before the later injury. The county judge held that there was “injury by accident” but that it did not “arise out of the employment.” The court of appeal held that there was misdirection, since “accident” having been found the evidence proved that it arose “out of the employment,” *Cozens-Hardy, M. R.*, saying: “It is not in the least analogous to the case of an industrial disease like lead poisoning, where you cannot say the moment that it comes on, and as to which, but for the provision in the act with reference to industrial diseases, there would be no accident at all. There is a finding here, and there could not help being a finding here, that there was an accident of such a kind as to cause a rupture; it was substantially in the place of the old rupture but the county court judge calls it a fresh rupture. I think that is a perfectly accurate term.”

In *Zappala v. Industrial Ins. Commission*, 82 Wash. 314, 144 Pac. 54, L.R.A.1916A 295, in holding that a hernia received in the course of a workman's employment was the result of a fortuitous event the court said: "Respondent suffers from a hernia and, claiming to have received it under circumstances entitling him to relief under the workmen's compensation act, filed his claim with the industrial insurance commission. The claim was rejected upon the ground that the hernia complained of was not the result of 'some fortuitous event' within the language of the act. Respondent then appealed to the lower court, where, over the objection of the commission, the case was submitted to a jury to determine whether or not the injury was such as fell within the act. Verdict was returned for respondent, and the commission appeals. The determinative question arises under § 3 of the act (Laws 1911, p. 346; 3 Rem. & Bal. Code, § 6604-3), providing that (p. 349) 'the words injury or injured, as used in this act, refer only to an injury resulting from some fortuitous event as distinguished from the contraction of disease.' The respondent was in the employ of a cooperage company and on the day of the alleged injury was pushing a heavily loaded truck. The language of the respondent, in describing the circumstances under which the injury was received, was 'that the car ran harder than usual, and he tried three or four times to start it but could not move it. Then he put all his strength into it, gave a jerk, and hurt himself; felt a sudden pain; could not move for a little while; put his hands where he felt the hurt, and called for help; looked at himself and saw a swelling, a small lump where he was hurt; that he had never had any pain there before or any previous rupture.' There was other corroborative evidence. It is the contention of the commission that these circumstances do not disclose that the injury resulted from 'a fortuitous event,' and that no accident occurred which produced the injury; contending that, inasmuch as respondent did not slip or fall, nothing struck him, and nothing happened out of the ordinary which produced the rupture or hernia, it cannot be said that the hernia resulted from some fortuitous event. 'Fortuitous' is defined as: 'Occurring by chance as opposed to design; coming or taking place without any cause; accidental; casual;' and a fortuitous cause is said to be, 'a contingent or accidental cause.' Standard Dictionary. In construing the language of the act, we must have in mind the evident purpose and intent of the act to provide compensation for workmen injured in hazardous undertakings reaching 'every injury sustained by a workman engaged in any such industry; and make a sure and certain award therefor,

bearing a just proportion to the loss sustained, regardless of the manner in which the injury was received.' *State v. Clausen*, 65 Wash. 150, 117 Pac. 1101, 37 L.R.A.(N.S.) 466, and that the act should be liberally interpreted, to the end that the purpose of the legislature in suppressing the mischief and advancing the remedy be promoted even to the inclusion of cases within the reason although outside the letter of the statute, and that every hazardous industry within the purview of the act should bear the burden arising out of injuries to its employees regardless of the cause of the injury. *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685. The sustaining of an injury while using extreme muscular effort in pushing a heavily loaded truck is as much within the meaning of a fortuitous event as though the injury were the result of a fall or the breaking of the truck. To hold with the commission that if a machine breaks, any resulting injury to a workman is within the act, but if the man breaks, any resulting injury is not within the act, ~~is too~~ refined to come within the policy of the act as announced by the legislature in its adoption and the language of the court in its interpretation. The machine and the man are within the same class as producing causes, and any injury resulting from the sudden giving way of the one, while used as a part of an industry within the act, is as much within the contemplation of the act as the other. When the appellant admits that the breaking of the truck because of the application of unusual force with resultant injury to the workman is covered by the act, then it must admit that the tearing of muscles or the rupture of fibers, or whatever it is that causes hernia, while exercising unusual effort, is likewise covered by the act; for there can be no sound distinction between external and internal causes arising from the same act and producing the same result."

In *Boardman v. Scott* [1902] 1 K. B. (Eng.) 43, a workman who, while engaged in removing a beam from a loom, ruptured several fibers of the muscles of his back which incapacitated him for work was held to have sustained a personal injury by accident within the meaning of s. 1 of the Workmen's Compensation Act of 1897, *Collins, M. R.*, saying: "I think that in this case the workman was injured by an accident. It appears to me that the cases cited by the appellants' counsel are really all consistent, and that they are all opposed to his contention. We have in the present case, in my opinion, the element which is there said to be essential to an accident, namely, that it should be something fortuitous and unexpected. The workman was doing work which, no doubt, he was accustomed to do, but, in the course

of doing it, he got a beam into such a position that, unless it was balanced by a sudden and rapid movement on his part, it would have fallen. He was obliged to adopt rapid means to meet a sudden emergency, and, in so doing, he caused an unexpected strain to the muscles of his back. The decisions cited do not affect to give an exact definition of an 'accident,' but I think they show that in the present case there were all the necessary elements of one. The decisions after all can only furnish illustrations on each side of the line. I think that the present case furnishes a very good illustration of that element of the fortuitous and unexpected, which is the essential characteristic of an accident. For these reasons I think that the appeal must be dismissed."

In *Timmins v. Leeds Forge Co.* 83 L. T. N. S. (Eng.) 120, 16 Times L. Rep. 521, a workman's rupture caused by the lifting of a plank which had been frozen to others was held to be an injury by accident within the meaning of the act, as there was evidence of something fortuitous and unexpected.

In *Borland v. Watson* [1912] Sc. Ct. Sess. (Eng.) 15, 49 Scott. L. Rep. 11, 5 B. W. C. C. 514, it appeared that a workman in the course of his employment on rising from a kneeling position felt a severe pain in his knee. An examination revealed that one of the cartilages of the knee was ruptured, and incapacity resulted. Three years previously while in other employment the workman had suffered a severe "wrench" of the same knee. It was held that the claimant had suffered an "injury by accident" within the meaning of the act.

However in *Kutschmar v. Briggs Mfg. Co.* (Mich.) 163 N. W. 933, in holding that a workman was not entitled to compensation for a rupture sustained while engaged in his ordinary employment, on the ground that it was not an accident, the court said: "In the case at bar it conclusively appears from claimant's own testimony that he received no accidental injury. He was engaged at the moment of his injury in his usual and ordinary employment and in the usual and ordinary way. In the course of such employment it was his duty to lift the iron bar once in about every fifteen minutes, about ninety or one hundred times a day. We are of opinion that an employee who receives an injury in the nature of a hernia, while engaged in his usual and ordinary employment, without the intervention of any untoward or accidental happening, is not within the provisions of the compensation act, which as we have held provides compensation for accidental injury only."

In *Beaumont v. Underground Electric R. Co.* 5 B. W. C. C. (Eng.) 247, [1912] W. C. Rep. 123, it was held that there was no evi-

dence to support a finding that a workman had strained his heart at work so as to sustain an injury by accident arising out of the employment, it appearing that the workman was suffering from heart disease and had to leave work because of failure of the heart and the judge disbelieving the only evidence of an accident which was that the workman strained his heart turning a heavy valve.

In *Marshall v. Sheppard*, 6 B. W. C. C. (Eng.) 571, [1913] W. C. & Ins. Rep. 477, it appeared that a workman on leaving a powder magazine, his place of employment, was clean and apparently in good health but that when he arrived at his employer's office he was covered with mud and was in great pain. He subsequently died following an operation for strangulated hernia. The medical evidence was that the vomiting which supervened might have caused the strangulation. It was held that the county court judge was justified in holding that the applicant, the widow, had failed to discharge the burden of proof that the injury which resulted in the workman's death was caused by an accident arising out of and in the course of the employment, *Cozens-Hardy, M. R.*, saying in the judgment: "It is a pity that no question could be asked of his wife, as to what the deceased said happened to him, but that is the state of the law."

In *State v. District Ct. (Minn.)* 162 N. W. 678, it appeared that a workman was stricken with paralysis caused by the rupture of a blood vessel due to muscular strain and exertion in propelling a wheelbarrow in his employment. In sustaining a finding that the rupture of the blood vessel was an accident within the meaning of the Workmen's Compensation Law, the court said: "The act provides for compensation to be paid by the employer 'in every case of personal injury or death of his employee, caused by accident, arising out of and in the course of employment,' etc. G. S. 1913, § 8203. The word 'accident' means 'an unexpected or unforeseen event, happening suddenly and violently, with or without human fault and producing at the time injury to the physical structure of the body.' G. S. 1913, § 8230 (h). That the death of the decedent occurred in the course of his employment is sustained. This is the effect of the authorities." But see to the contrary *Roper v. Greenwood*, 83 L. T. N. S. (Eng.) 471, in which it was held that a county court judge properly found that internal injury suffered by a woman from the strain of unusual exertion did not arise from an accident within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act of 1897.

In *M'Millan v. Singer Sewing Mach. Co.* 6 B. W. C. C. (Eng.) 345, [1913] Sc. Ct. Sess. (Eng.) 340, 50 Scot. L. Rep. 220,

wherein a collector alleged that in order to finish his work he had overexerted himself in climbing the stairs of a tenement, because "sweated," and suffered a chill which resulted in pleurisy, it was held that he did not aver an "accident" within the meaning of the act and that his application was properly dismissed by the arbitrator without proof.

In *Olson v. Steamship Dorset* [1913] 6 B. W. C. C. (Eng.) 658, [1913] W. C. & Ins. Rep. 604, wherein it appeared that a ship's stoker was found in a condition of heat apoplexy in a coal bunker adjoining the stokehold of a ship in the tropics, an arbitrator's finding on the medical evidence that the apoplexy might have been caused by the heat of the sun or of the stokehold and that it was not proved that the fit had been brought on by the work the man had been doing at the time, and that therefore the apoplexy was not caused by an accident out of the employment, was not disturbed.

In *Johnson v. Steamship Torrington* [1909] 3 B. W. C. C. (Eng.) 68, it was held that since the question as to whether the workman did in fact sustain a "personal injury by accident arising out of and in the course of his employment" was one of fact for the judge, his finding on conflicting medical evidence that the death of a ship fireman who had been seen frequently drinking water while in the stokehole was caused by cerebral hemorrhage due to the heat and the drinking of excessive quantities of water would not be set aside.

In *Rodger v. Paisley School Board* [1912] Sc. Ct. Sess. (Eng.) 584, 49 Scot. L. Rep. 413, 5 B. W. C. C. 547, [1912] W. C. Rep. 157, wherein it appeared that a school janitor in the course of his employment in carrying a message fainted in the street owing to the heat of the day, and fell backwards striking his head upon the pavement, it was held that the injury by accident did not arise out of the employment.

In *Blakey v. Robson* [1912] Sc. Ct. (Eng.) 334, [1912] W. C. Rep. 86, wherein it appeared that a plumber who was in a state of impaired vitality at the time suffered heat apoplexy on a hot July day while at work, it was held that, assuming that there was an accident, it did not arise out of the employment, because there was no special danger to which he was exposed because of the employment.

In *Parry v. Ocean Coal Co.* 106 L. T. N. S. (Eng.) 713, 5 B. W. C. C. 421, [1912] W. C. Rep. 212, it was held that where a workman having an old hernia was seized with a severe pain while at work in a mine, and died as the result of the strangulation of the hernia, an award in favor of the widow was improper in the absence of evidence that the deceased was doing anything which was likely to cause a strain.

7. FORMER INJURY RESULTING IN OR CONTRIBUTING TO NEW INCAPACITY.

In three English cases compensation has been refused where a former injury resulted in or contributed to a new incapacity, while in two cases arising under American acts an award of compensation was sustained under similar facts. *Noden v. Galloways* [1912] 1 K. B. 46, 81 L. J. K. B. 28, [1912] W. C. Rep. 63, 105 L. T. N. S. 567, 55 Sol. J. 838, 28 Times L. Rep. 5; *Taylor v. Clark*, 111 L. T. N. S. 882, 84 L. J. P. C. 14, 58 Sol. J. 738; *Paton v. Dixon* [1913] Sc. Ct. Sess. 1120, 50 Scot. L. Rep. 866, [1913] W. C. & Ins. Rep. 517; *Southwestern Surety Ins. Co. v. Pillsbury*, 172 Cal. 768, 158 Pac. 762; *Winter v. Atkinson-Frizelle Co.* 88 N. J. L. 401, 96 Atl. 360. See also *Deem v. Kalamazoo Paper Co.* 189 Mich. 655, 155 N. W. 584. In *Southwestern Surety Ins. Co. v. Pillsbury*, 172 Cal. 768, 158 Pac. 762, it appeared that a workman was injured and received compensation and that subsequently after his return to work he was incapacitated by sciatica alleged to be due to the previous injury. In refusing to disturb a finding that the incapacity was due to the former injury and an award of compensation, the court said: "We are convinced that the statute intended to give to the words used their ordinary meaning, and that the expression 'accident arising out of and in the course of the employment' is broad enough to include the injury received by Petersen. There is no contention that he was engaged in anything outside of his ordinary employment when he was injured, so we pass to the next contention of petitioner that there is no substantial proof that the continuing disability had any connection with the accidental injury. Dr. Lohse, who testified upon this subject, gave it as his opinion that there was 'some other cause producing a persistence of his sciatica than the injury.' At the hearing it was agreed that a medical referee be appointed to report upon the condition of Petersen. Dr. Hyman accordingly made a report to the effect that the patient exhibited the signs commonly associated with 'sciatica.' The 'X-ray' examination showed no lesion. The conclusions of Dr. Hyman were as follows: 'It is impossible to state the anatomic basis of the sciatic pain and the pain in the back complained of. Most of the signs of sacroiliac trauma are lacking, but the lesion cannot be excluded. Spinal injury, of which there is no evidence, can produce the same complex. The patient should be given the benefit of an attempted reduction under anaesthetic, followed by immobilization in plaster including the right thigh. If the lesion be sacroiliac slip, there will probably be complete recovery in four weeks. If not, the immobilization may or may not help him.' (The italics

are ours.) Dr. Schaller, while declaring that certain symptoms pointed to psychoneurosis, also expressed the opinion that there were 'a number of symptoms' which appeared to him to indicate 'sacroiliac trouble.' As the patient had never suffered from sciatica before the accident, and as the original lesion was as indicated by the pain somewhere in the sacroiliac region, there is some testimony to support the finding of the commission. In other words, the finding that the condition in which Petersen was found to be at the time of the hearing resulted from the accident was based upon a determination drawn from conflicting testimony, and we may not disturb it."

In *Winter v. Atkinson-Frizelle Co.* 88 N. J. L. 401, 96 Atl. 360, wherein it appeared that a strain had produced heart irregularity and aneurism of the aorta, it was held that there was evidence to warrant a finding that the sudden death of the workman while lifting after his return to work resulted from an accident arising out of and in the course of his employment.

However in *Noden v. Galloways* [1912] 1 K. B. (Eng.) 46, 81 L. J. K. B. 28, [1912] W. C. Rep. 63, 105 L. T. N. S. 567, 55 Sol. J. 838, 28 Times L. Rep. 5, it appeared that a workman in 1902 in the course of his employment met with an accident which necessitated the amputation of the first finger of his right hand. He was paid compensation until the stump healed but was unable to resume his former work. Subsequently he was re-employed and eventually after using a heavy pneumatic hammer which caused considerable vibration his hand became inflamed and he was obliged to stop work. On his claim for compensation the county court judge awarded compensation on the ground that the accident of 1902 was one of the contributing causes of the later incapacity but the court of appeal held that taking all the circumstances together the later injury did not involve an accident.

In *Paton v. Dixon* [1913] Sc. Ct. Seas. 1120, 50 Scot. L. Rep. 866, [1913] W. C. & Ins. Rep. 517, a workman was refused compensation for total incapacity resulting from aneurism of the heart, it appearing that he had sustained an injury to his back in December, that he resumed his old work the following May and was not troubled with pain in the cardiac region until July, and that he became totally incapacitated owing to the aneurism on the 15th day of August.

8. OCCUPATIONAL DISEASE.

a. Under Michigan Act.

The Michigan workmen's compensation act does not cover occupational diseases. *Fox v.*

Peninsular White Lead, etc. Works, 84 Mich. 676, 48 N. W. 203; *Adams v. Acme White Lead, etc. Works*, 182 Mich. 157, Ann. Cas. 1916D 689, 148 N. W. 485, L.R.A.1916A 283; *Landers v. Muskegon (Mich.)* 163 N. W. 43. Thus in *Adams v. Acme White Lead, etc. Works*, supra, it appeared that an employee died of lead poisoning, an occupational or industrial disease. In holding that the Michigan workman's compensation act does not include industrial diseases because they are not accidents the court said: "We are of opinion that in the Michigan act it was not the intention of the legislature to provide compensation for industrial or occupational diseases, but for injuries arising from accidents alone. If it were to be held that the act was intended to apply to such diseases, it would, in so far as it does so, be unconstitutional and in violation of section 21 of article 5 of the constitution of this state, which provides that: 'No law shall embrace more than one object, which shall be expressed in its title.' That the act, if it were held to apply to and cover occupational diseases is unconstitutional in so far as it does so is shown by the fact that the body of the act would then have greater breadth than is indicated in the title. A careful analysis of the title of the act shows that the controlling words are, 'providing compensation for accidental injury to or death of employees.' No compensation is contemplated except for such injuries. The prefatory words are generally dependent upon the above-quoted clause. The only compensation provided is for 'accidental injury to or death of employees,' and the last clause of the title restricts the right to compensation or damages in such cases 'to such as are provided by this act.'"

In *Landers v. Muskegon (Mich.)* 163 N. W. 43, wherein it appeared that a fireman as the result of becoming wet at a fire contracted lobar pneumonia and died, in holding that the fireman's death was not due to "accident" within the workmen's compensation act the court said: "The events which caused the death of Landers, undoubtedly, arose out of and in the course of his employment, but did those events constitute an accident within the meaning of the compensation act? An 'accident' is defined, in *Fenton v. Thorley* [1903] A. C. (Eng.) 443, 72 L. J. K. B. 790, as follows: 'The expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked for mishap or an untoward event which is not expected or designed.' This definition is approved in *Adams v. Acme White Lead, etc. Works*, 182 Mich. 165, 148 N. W. 485, L.R.A.1916A 283, Ann. Cas. 1916D 689, L.R.A.1916A 283. Landers was employed as a fireman. It was a part of his regular duties to go to fires and

help extinguish them. In doing so, it was not an unusual thing for him to get wet. Not only does the proof show, but we think it is a matter of common knowledge, that firemen are subjected to exposure and drenching while attempting to extinguish fires. . . . We must therefore conclude that pneumonia was brought on, not by an unexpected event, but by an event which was an incident to his regular employment. . . . If it can be said in the present case that the diplococcus germ was dormant in the system of the deceased, and that it was aroused to activity by his exposure at the fire, the case must fail, because the thing which aroused the germ into activity was caused by events which were incident to his regular employment, and not by the unusual and unexpected event."

b. Under English Act.

As the English workmen's compensation act specifically covers enumerated industrial diseases, only incidental questions can arise thereunder. The following recent cases deal with the allowance of compensation for industrial diseases under that act: *Haylett v. Vigor* [1908] 2 K. B. 837, 1 B. W. C. C. 282, 77 L. J. K. B. 1132, 99 L. T. N. S. 674, 24 Times L. Rep. 885; *Leaf v. Furze* [1914] 3 K. B. 1068; *Garnant Anthracite Collieries v. Rees* [1912] 3 K. B. 372, 107 L. T. N. S. 279, [1912] W. C. Rep. 396, 81 L. J. K. B. 1189; *Dean v. Rubian Art Pottery* [1914] 2 K. B. 213, [1914] W. C. & Ins. Rep. 147, 110 L. T. N. S. 594, 58 Sol. J. 302, 30 Times L. Rep. 283, 83 L. J. K. B. 799; *Timpson v. Mowlem*, 112 L. T. N. S. 885, 84 L. J. K. B. 1449, [1915] W. C. & Ins. Rep. 219; *Jones v. New Brynmally Colliery Co.* 106 L. T. N. S. 524, 5 B. W. C. C. 375, [1912] W. C. Rep. 281; *Taylor v. Burnham* [1910] Sc. Ct. Sess. 705, 47 Scot. L. Rep. 643; *Darroll v. Glasgow Iron, etc. Co.* [1913] Sc. Ct. Sess. 387, [1913] W. C. & Ins. Rep. 80, 50 Scot. L. Rep. 226, 6 B. W. C. C. 354; *McGowan v. Merry* [1915] Sc. Ct. Sess. 34; *McTaggart v. Barr*, 52 Sc. L. Rep. 125, 8 B. W. C. C. 376; *Jones v. Guest, Keen & Nettlefolds Lim.* [1915] W. C. & Ins. Rep. (Eng.) 508, 60 Sol. J. 75; *Bedford v. Cowtan* [1916] W. C. & Ins. Rep. (Eng.) 158; *Westminster Brymbo Coal, etc. Co. v. Evans* [1916] W. C. & Ins. Rep. (Eng.) 241; *Chorley Colliery Co. v. Bolton* [1916] W. C. & Ins. Rep. (Eng.) 329. See also *Keary v. Russell*, 8 B. W. C. C. (Eng.) 410.

In *Leaf v. Furze* [1914] 3 K. B. (Eng.) 1068, *Horridge, J.*, said: "In this case the plaintiff left the employment of Messrs. J. & J. Charlesworth on January 5, 1912. On January 20 the certifying surgeon under

s. 8 of the Workmen's Compensation Act, 1906, gave a certificate to the effect that the plaintiff was suffering from nystagmus, one of the diseases to which the Workmen's Compensation Act, 1906, applies; that he was thereby disqualified from earning full wages at the work at which he had been employed; and that the disablement commenced on January 6, 1912. The plaintiff brought this action in the county court against the person representing the board of management of the scheme. He claims that he was entitled to the benefit of the scheme which has been refused. The county court judge gave judgment for the plaintiff for 50*l.* 1*s.* No question is raised as to the form of the action or as to the amount awarded. The only question is as to the liability of the defendants. We have to consider whether the plaintiff, having contracted this disease while in the employment of Messrs. Charlesworth, is entitled to compensation under this scheme. That depends on the construction of clause 2 of the scheme, which contains these words: 'the scheme is intended to be and is in substitution for the Employers' Liability Act, 1880, the Workmen's Compensation Act, 1906, and common-law liability, and is intended to provide a fund for the payment of compensation to any member of the scheme in respect of personal injury caused by accident arising out of or in the course of such member's employment. . . .' A scheme of this kind can only be sanctioned under s. 3 of the Act of 1906 if the registrar of Friendly Societies certifies that it provides scales of compensation not less favorable to the workmen than the corresponding scales contained in the act; and where there are subscriptions or contributions by the workmen they get benefits in addition to the benefits provided by the act commensurate with their subscriptions. Therefore we start with this; the scheme itself is one which is in place of the Workmen's Compensation Act, 1906. It follows that 'accident' must be used in the sense in which it is used in all the provisions of the act; that is to say, it must include disablement from any one of the industrial diseases included in the third schedule with all the concomitant conditions and provisions of s. 8 of the act. The date of this disablement is by s. 8, subs. 4, of the act that date which the certifying surgeon certifies as the date on which it commenced, which is in the present case January 6, 1912; but the liability in respect of it is by s. 8, subs. 1, thrown back upon the employer who within the twelve months previous to the date of disablement, namely, January 6, 1912, last employed the workman in the employment to the nature of which the disabling disease was due. In other words the liability is thrown back upon the defendants. It attached while

the plaintiff was still in their employment and a member of the scheme. The judgment of the county court judge was therefore right, and this appeal must be dismissed."

In *Haylett v. Vigor* [1908] 2 K. B. (Eng.) 337, 1 B. W. C. C. 282, 77 L. J. K. B. 1132, 99 L. T. N. S. 674, 24 Times L. Rep. 885, in which it appeared that a painter who had worked for many years for others showed signs of "plumbism" shortly after his employment by the "first defendants," he was removed to the hospital but all traces of "plumbism" had passed away before his removal, but he died in less than two weeks. Cozens-Hardy, M. R., said: "The question turns upon the true construction of s. 8, sub-ss. 1 and 2, and, so far as I am aware, this is the first case in which that section has been considered in this court. Now the section has no application unless Haylett's death was 'caused by' a 'disease mentioned in the third schedule.' The material words in the third schedule are 'lead poisoning or its sequelae.' In my opinion these words have no operation unless it is established to the satisfaction of the county court judge that lead poisoning was either the proximate or the ultimate cause of death. It is not sufficient that death was caused by something which may in some cases be a sequela of lead poisoning but may also be a sequela of gout or alcoholism. In short, it must be proved that death was a consequence of lead poisoning in the case of this particular individual, not necessarily a direct or immediate consequence, but at least a remote consequence. Now all that is proved is that Haylett died of granular kidney. That does not suffice to bring the case within the operation of the section. But it was argued that subs. 2 enlarges the scope of the section and throws upon the employer the burden of proof. I am unable to follow the argument. That subsection presupposes death caused by a disease mentioned in the third schedule and in no way alters the operation of subs. 1. When once it has been proved that death was caused by lead poisoning or its sequelae, in the sense in which those words must be interpreted, then the burden of proof is thrown upon the employers of the deceased painter to make out that the death was not due to the nature of the employment at the date of the disablement. It was under this subsection that Messrs. Vigor, who were Haylett's last employers, were relieved from responsibility by the learned county court judge. This subsection does not create a liability. Its only use is to saddle the liability upon the proper person. It deals only with evidence, and it has no effect whatever until the applicant has brought the case within the operation of the earlier part of the section. For these reasons, with the utmost

respect to the very careful and learned county court judge, who took a different view, I am of opinion that the appeal ought to be allowed."

In *Dean v. Rubian Art Pottery* [1914] 2 K. B. (Eng.) 213, [1914] W. C. & Ins. Rep. 147, 110 L. T. N. S. 594, 58 Sol. J. 302, 30 Times L. Rep. 283, 83 L. J. K. B. 799, wherein compensation was claimed for a death alleged to be due to industrial disease it appeared that the deceased had worked for the employers in a process involving the use of lead for four days and four and one-half days, the last of which expired nearly a month before his death. With that exception he had not worked in any lead process for twelve months before his death, but for many years prior to that he had regularly worked for other firms in different processes involving the use of lead, and had contracted lead poisoning of long standing. His death was due immediately to pneumonia, but the lead poisoning had so seriously affected his heart that his death was in fact caused by lead poisoning. Eve, J., said: "It is contended on the applicant's behalf that the case is brought within subs. 2 of s. 8, and that a presumption being thereby raised that the disease was due to the employment by the respondents, the burden is cast upon them of rebutting that presumption. The learned county court judge has taken the view that the applicant has not brought the case within subs. 2, and I agree with him. The date of the disablement here is the date of the death (subs. 4 (b)), May 15, and whether the words in subs. 2 'at or immediately before' are to be read as applicable both to the date of the disablement and suspension, or whether, as seems to me quite reasonable, the subsection should be read as though it ran 'If the workman at the date of the disablement or immediately before suspension was employed,' etc., I cannot bring myself to hold that the employment in this case, which terminated on April 19, can be said to have been employment 'at or immediately before' May 15. I think the county court judge was quite right in holding that the applicant's rights fall to be determined under subs. 1 and not under subs. 2. Before turning to subs. 1, I desire to emphasize the fact that even in a case coming within subs. 2 it is only a presumption which is raised, and in my opinion it is open to the employer to rebut that presumption by any available evidence. He may prove, if he can, that the disease was not 'due to the nature of that employment.' What is that employment? Obviously the employment in which the workman was employed at or immediately before the disablement. This seems to me to show that in a case falling within subs. 2 the employer may rebut the presumption raised in favor of the

workman or his dependents bringing himself or themselves within the subsection, by proving that the disease was not due to the particular employment in the disease-producing process in which the workman was employed at or immediately before the date of the disablement. This conclusion assists greatly in the construction of subs. 1. It has been argued on behalf of the applicant that inasmuch as under that subsection we have two things proved—the one, the death of the workman caused by lead poisoning, and the other his employment by the respondents within twelve months previous to his death in a process involving the use of lead—the right to compensation from the respondents follows unless they can avoid or mitigate their liability under one or other of the provisions to paragraph (c) subs. 1. If this be sound, and if my construction of subs. 2 be right, this extraordinary result follows—that, whereas in cases where the proximity of employment and death raises a presumption in favor of the workman, the employer can give evidence rebutting the presumption, and proving that the disease was not due to the particular employment at or immediately before the death, yet in cases where no presumption in favor of the workman arises the employer is precluded from proving that there is no connection between the particular employment by him and the disease from which the man died. Indeed counsel went so far as to submit, in answer to a question put to him by the bench, that under subs. 1 an employer could not escape liability even if he were in a position to prove to demonstration that in consequence of precautionary measures adopted in his works the disease could not be due to the particular employment, if once it had been proved that the workman's death was caused by the disease, and that he had been employed within the preceding twelve months in an employment to the nature of which the disease was due. In my opinion, the imposing of such a construction on subs. 1 brings about a result which is so inconsistent with subs. 2, and so manifestly unjust, as to be well nigh impossible, and I do not think we ought to accede to the arguments urged on behalf of the appellant on this point. I think under both subs. 1 and 2 it is open to the employer to prove, if he can, that the disease from which the man died was not due to the particular employment by him, but of course his position otherwise under the two subsections is essentially different. In cases coming under subs. 2 it is on him to rebut the presumption which the facts raise in favor of the workman. In cases coming under subs. 1 there is no presumption either way, and it is for the workman or his dependents to prove his or their case. The present, as I have already

said, is a case coming within subs. 1. The learned county court judge has arrived at the conclusion that the applicant has failed to prove her case. There was material to support that conclusion, and in my opinion it is impossible for us to dissent from it. I think the appeal fails."

In *Garnant Anthracite Collieries v. Rees* [1912] 3 K. B. (Eng.) 372, 107 L. T. N. S. 279 [1912] W. C. Rep. 306, 81 L. J. K. B. 1189, compensation had been awarded a collier under the Workmen's Compensation Act of 1906 for nystagmus, an industrial disease, and that although no longer suffering from the disease the workman was unable to do his former work because of an increased susceptibility owing to his first attack. It was held that the effects of the accident, the industrial disease, still continued to exist and that the applicant was entitled to compensation, *Cozens-Hardy, M. R.*, saying: "It is not for me to say whether the learned county court judge was right or not in the view which he took of conflicting medical evidence; he was entitled to take the view which he did, and although it was merely evidence of opinion, medical evidence, like other expert evidence of this kind, must be merely evidence of opinion. I think, therefore, upon that ground this appeal fails, and the learned judge's award ought to stand. But then it was said that this is no doubt an industrial disease, but that it is unlike some of the industrial diseases which are described as producing poisoning and its sequelae. There is no question of sequelae here, and nobody alleges that there are sequelae here. The simple question is, have the effects of the accident, that is, of the industrial disease, been got rid of and disappeared? The learned judge has found that they have not. He has found that the susceptibility to nystagmus was increased, and that being so, it seems to me we cannot interfere with the award, and that the appeal must be dismissed with costs."

In *Jones v. New Brynmally Colliery Co.* 106 L. T. N. S. (Eng.) 524, 5 B. W. C. C. 375, [1912] W. C. Rep. 281, it appeared that a collier had entirely recovered from nystagmus, an industrial disease within the meaning of s. 8 of the Workmen's Compensation Act of 1906, and there was no evidence that the attack had rendered him more liable to the danger of a recurrence though he possessed a physical susceptibility to the disease not common to all colliers. It was held that there was not sufficient evidence to support an award because of the fact that his employers would not permit him to work for them underground again.

In *Westminster Brymbo Coal, etc. Co. v. Evans* [1916] W. C. & Ins. Rep. (Eng.) 241, it was held that evidence tending to show

that a coal miner's insanity was the result of nystagmus, an industrial disease, should have been admitted, on the theory that it might have satisfied the county court judge that it was a sequelae of nystagmus since injuries resulting from an accident include anything which is a result of the original injury.

9. NEW YORK ACT.

The New York workmen's compensation act defines a personal injury as including "such disease or infection as may naturally and unavoidably result therefrom." The New York decisions have accordingly been collected under one heading because of the possible influence of that provision on the determination of any question within the scope of this note. See *Plass v. Central New England R. Co.* 169 App. Div. 826, 155 N. Y. S. 854; *Mazzarisi v. Ward*, 170 App. Div. 868, 156 N. Y. S. 964; *Rist v. Larkin*, 171 App. Div. 71, 156 N. Y. S. 875; *Sullivan v. Industrial Engineering Co.* 173 App. Div. 65, 158 N. Y. S. 970, 973; *Uhl v. Guarantee Constr. Co.* 174 App. Div. 571, 161 N. Y. S. 659; *Fowler v. Risedorph Bottling Co.* 175 App. Div. 224, 161 N. Y. S. 535; *Days v. Trimmer*, 176 App. Div. 124, 162 N. Y. S. 603; *Hiers v. Hull*, 178 App. Div. 350, 164 N. Y. S. 767; *Naud v. King Sewing Mach. Co.* 95 Misc. 676, 159 N. Y. S. 910. See also *Heitz v. Ruppert*, 218 N. Y. 148, 112 N. E. 750, L.R.A. 1917A 344; *Kohler v. Fromann*, 167 App. Div. 533, 153 N. Y. S. 559; *Putnam v. Murray*, 174 App. Div. 720, 160 N. Y. S. 811; *Banks v. Adams Express Co.* 176 App. Div. 916, 162 N. Y. S. 479.

In *Hiers v. Hull*, supra, it appeared that a weigher of hides while handling hides received an abrasion on his hand due to wet salt from the hides, which permeated his gloves and caused a swelling. Subsequently while handling diseased hides, anthrax germs contained therein were communicated to him through the abrasion. In holding that he had sustained an accidental injury the court said: "There is a broad distinction between the present case and the case of an occupational disease. The latter is incidental to the occupation, or is a natural outcome thereof. It is expected, usual, and ordinary. This disease incurred by the claimant was unexpected, unusual, and extraordinary, as much so as if a serpent concealed in the hides had attacked him. There is no difference in principle because the attack, instead of being made unexpectedly by a concealed serpent, was made unexpectedly by a concealed disease germ. There seems to be no question in this case but that the claimant contracted the disease in the manner and under the conditions above indicated. We think the circumstances constitute an accidental injury, with-

in the meaning of the statute." In regard to the special provision which defines an injury for which compensation may be made as "Only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom," it was further said in that case: "However, there is another theory on which this award may be upheld. The claimant, in the course of his employment and as a result thereof, had received an abrasion on his hand or a fissure therein. This may properly be deemed an accidental injury arising out of and in the course of his employment, and the disease or infection caused by the anthrax germ may be deemed 'such disease or infection as may naturally and unavoidably result' from such injury, within the meaning of the statute."

In *Plass v. Central New England R. Co.* 169 App. Div. 826, 155 N. Y. S. 854, it appeared that a workman in the course of his employment as a railroad section laborer was poisoned by ivy, and that blood poisoning supervened confining him to his bed where he contracted congestion of the lungs from which he died. In affirming an award in favor of the workman, the court said: "It has been held that contact with poison ivy which results in death is an accidental death within a policy covering death by external, violent and accidental means. (*Railway Mail Assoc. v. Dent*, 213 Fed. 981 [130 C. C. A. 387, L.R.A.1915A 314].) The injury cannot be called an occupational disease. Plass actually, inadvertently, came in physical contact with poison ivy. The poison to his system caused thereby resulted in his sickness and reduced his power of resistance and made him susceptible to bronchitis. The attending physician treated him for ivy poisoning and then found he had developed more or less infection, the blebs breaking open, and in that way he became infected and while in bed contracted bronchitis, which afterward developed oedema of the lungs and he died quite suddenly. The commission has found that the ivy and septic poisoning was the remote cause of his death and that his poisoned condition predisposed him to the acute congestion of the lungs of which he died. We are not at liberty to review the findings of the commission upon a question of fact. There is certainly some evidence to warrant the finding."

In *Rist v. Larkin*, 171 App. Div. 71, 156 N. Y. S. 875, it appeared that a workman, to save himself from injury when one of the timbers of a crane broke, jumped into a river and contracted a heavy cold and pleurisy which subsequently developed into pulmonary tuberculosis. In upholding an award in favor of the workman, the court said: "The finding of the commission that claim-

ant's present condition is the result of the accidental breaking of the timber, and that his going into the river resulted therefrom, is not unreasonable, and has some evidence to sustain it. We cannot question it. While the claimant jumped into the water, he did so to prevent a personal injury resulting from the accidental breaking of the timber. The jumping into the river was therefore not a voluntary act, but was the result of the accident, which put the claimant in such peril that his getting wet must be considered accidental rather than voluntary. Subdivision 7 of section 3 of the Workmen's Compensation Law defines injury and personal injury to mean only accidental injuries arising out of and in the course of employment, and such disease or infection as may naturally and unavoidably result therefrom. We consider the claimant in the same position as if the accident had thrown him into the river, and clearly his being accidentally thrown ten feet into the water was an injury within the meaning of the act, and the disease following has been found to naturally and unavoidably result from that injury. He at the time apparently was not physically disabled by jumping into the water, and it was not then quite clear what injury he had sustained; but it has developed that the injury was very serious."

In *Mazzarisi v. Ward*, 170 App. Div. 868, 156 N. Y. S. 964, in holding that the death of a workman from septicaemia resulting from injuries to the abdomen and bladder was the result of an accidental injury, the court said: "The 'driving' of 'sheeting' was, indubitably, under the evidence and the authorities, the driving of 'sheet piling,' and brought Mazzarisi's employment within group eleven of the enumerated employments, to wit, 'pile driving.' The fact that the deceased may, at the moment he met with injury, have been engaged in performing a physical act more approximately incident to the making of this sheeting than to the driving of it down into the sand could not, had the same been found by the commission, or were the same required by the evidence, require reversal of the award. The immediate cause of death was septicaemia, which actually, naturally, and apparently unavoidably, ensued from the injuries to the abdomen and bladder occasioned by the decedent's fall. Workmen's Compensation Law, § 3, subd. 7. The commission's inquiry on this point was thorough and skilful; this court has no reason to challenge its conclusion. Doubtless there was a diseased condition before the injury; it may be that the injury would not have caused his death but for these antecedent conditions; the injury may have been but one of the concurring causes, set in motion by the injury. None of these facts, if

found or clear from the evidence, would warrant vacating the present award."

In *Van Keuren v. Dwight Divine & Sour*, 165 N. Y. S. 1049, wherein it appeared that a workman at the time of an injury arising out of and in the course of his employment had dormant tuberculosis, which was aggravated by the injury so that it became acute and caused his death, it was held that the right to compensation was secured, even though the disease itself may not have resulted from the injury.

In *Fowler v. Risedorph Bottling Co.* 175 App. Div. 224, 161 N. Y. S. 535, it was held that an employee who, while engaged in a hazardous employment, suffered a cerebral hemorrhage as the result of an unusual strain or exertion suffered an accidental injury within the meaning of the Workmen's Compensation Law.

In *Naud v. King Sewing Mach. Co.* 95 Misc. 676, 159 N. Y. S. 910, wherein it was alleged that a workman was injured by inhaling certain poisonous gases and fumes which occasioned permanent injury to his lungs and other portions of the body, in holding that the injury was accidental if the allegations of the complaint were true, the court said: "We fail to see therefore, if the allegations of the complaint are true, that the plaintiff's injuries were the result of the defendant's negligence, why the plaintiff was not fairly entitled to compensation for his injuries under the provisions of the compensation act, as a 'disability . . . resulting from an accidental injury, . . . arising out of and in the course of his employment.' *Jensen v. Southern Pac. Co.* 215 N. Y. 514; *Winfield v. New York Cent. etc. R. Co.* 216 N. Y. 284; *Connors v. Semet-Solvay Co.* 94 Misc. 406. An 'accidental injury' as used in this statute is clearly distinguishable from an injury in the nature of a vocational disease, sustained in the course of an employment, where from the inherent nature of the work disease is likely to be contracted. 'Accidental' has been defined as 'happening by chance, or unexpectedly taking place, not according to the usual course of events; casual; fortuitous.' *North America L. etc. Ins. Co. v. Burroughs*, 69 Pa. St. 43, 8 Am. Rep. 212. In insurance policies providing for an indemnity, 'accidental' cause is defined as 'an event happening without human agency, or, if happening through human agency, an event which under the circumstances is unusual, and not expected to the person to whom it happens.' Within these recognized definitions of the word 'accidental,' if the injuries sustained by the plaintiff were occasioned in the manner alleged in the complaint, they were clearly 'accidental' within the meaning of the Workmen's Compensation Law; and the plaintiff would have been enti-

[1916] 2 K. B. 772.

tled to compensation as provided in that act. When therefore the compensation commission found and determined, after a hearing, that the plaintiff's injuries were not the result of an 'accident' it found by necessary implication that such injuries were not due to the defendant's negligence, or occasioned as alleged in the complaint. The importance and legal significance of this adjudication by the compensation commission arises out of the fact that by the provisions of section 20 of the Compensation Law the commission is required to determine the claim made before it for compensation, after notice to the interested parties, and an opportunity to present evidence and be represented by counsel. The act then declares that 'The decision of the commission shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law.' Therefore it is that the holding of the commission that the plaintiff's injuries were not due to 'accident' makes that question res adjudicata as to the plaintiff and the defendant in this action, and precludes a further inquiry into the questions of fact in this action."

In *Days v. Trimmer*, 170 App. Div. 124, 162 N. Y. S. 603, it was held that a frost-bite received by a helper on a coal delivery wagon while at his work and from which ulcers developed was an accidental injury.

In *Uhl v. Guarantee Constr. Co.* 174 App. Div. 571, 161 N. Y. S. 659, in affirming an award in favor of the claimant for compensation for the death of an employee from heart failure due to sudden dilatation of the heart resulting from the aggravation of a cardiac lesion by unusually heavy lifting, the court said: "We are not called upon to determine whether the evidence clearly established that this death was accidental. The finding of the commission upon a question of fact is conclusive upon us, and the only question is whether there is any evidence to sustain such a finding. If there is no evidence, the finding may be treated as error of law. If the heavy and unusual strain aggravated the cardiac lesion, and caused a sudden dilatation of the heart, and consequent heart failure, resulting in death, the death may well be considered as accidental and within the act. In *Broleski v. Nichols Copper Co.* 171 App. Div. 959, 155 N. Y. S. 1096, the deceased had chronic heart disease, the valves of the heart being thick and curled up; but he came to his death through overexertion or from an electric shock, and the award of the commission was sustained. In *McCaill v. New York Transp. Co.* 201 N. Y. 221, 94 N. E. 616, 48 L.R.A.(N.S.) 131, Ann. Cas. 1912A 961, the injured person died of delirium tremens, precipitated or hastened by the accidental injury, caused by the defendant's negligence, and it was held that the

negligence was the proximate cause of the death. In the present case there was no perceptible physical injury; but death resulting from a strain, as stated, may well be called accidental."

WITHERS

v.

LONDON, BRIGHTON AND SOUTH COAST RAILWAY COMPANY.

England—Court of Appeal—July 25, 1916.

[1916] 2 K. B. 772.

Workmen's Compensation Acts — Disease as Accident — Suicide from Supervening Insanity.

No compensation can be recovered under the workmen's compensation act by the dependents of a workman who, having sustained an accidental injury, became insane from despondency over his slow recovery and committed suicide, there being no direct causal connection between the insanity and the injury.

[See note at end of this case.]

[772] Appeal from an award of the judge of the Southwark County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

[773] The following statement of facts is taken from the judgment of the learned county court judge:

The deceased man was an engine-driver for the respondents and met with an accident to his right thumb on October 26, 1915. The wound became septic and was a long time healing, and the railway company paid him compensation at the rate of £1 a week. The injury was always local and had no physical effects on the brain. The deceased was very nervous about himself from the first, and after Christmas he began to be depressed and neurasthenic, and this condition gradually got worse up to March. On March 3 he was seen both by his own doctor and by the respondents' doctor. The thumb was then all but well, and he was told that two or three weeks at a convalescent home would probably make him fit for work. There was no doubt that he was most anxious to get back to work and that this was the point he had been worrying about. But even after what he had been told by the doctors he was in an intensely melancholic condition, and talked of going to the workhouse and of being afraid to go home and sit down with his children. On

March 4 he had his dinner at home and appeared more cheerful than he had lately been. He went out about 4.15 and walked to Battersea Park Station. He was standing at one end of the platform near the edge as the Brighton express was approaching at 4.33, and he was seen to put up his hands in the attitude of diving and jump head foremost in front of the engine which killed him. He had shown no sign of insanity before the accident of October, and there did not appear to be any record of insanity in the family. His widow and other dependents applied for compensation, and the question was whether his death was the result of the accident.

It was agreed by the parties that this was a case of suicide. The only question at issue was whether the death by suicide resulted from the injury caused by the accident of October 28, 1915.

The learned judge said that it did not appear to have been settled by authority whether suicide even under the influence of insanity could be the result of injury by accident for the purposes of the Act. He did not himself see why it should not be so where there was a clear case of insanity in the legal sense and clear proof of its having been induced by the accident. In such a case it might well be held that the suicidal impulse was a mere symptom of a mental illness [774] induced by the injury and that there was no act intervening that was really the man's own. But in the present case he was not satisfied that either of the above matters was proved.

That the man's mind was unsound from the medical point of view was clear, because he was found to be in an intensely melancholic condition after all rational basis for depression was at an end, and his fears as to going to the workhouse and so on were mere delusions. But there was nothing to show that he was incapable of understanding the nature or quality of his act or that his delusions were such as would have justified him had they been facts. Possibly there was some uncontrollable impulse that accounted for the suicide, and this might have been due to the same cause as the other mental symptoms, but that was mere conjecture. As to the connection between the insanity, if any, and the injury, all that was actually proved was that there was no insanity before the injury, that symptoms of neurasthenia began to develop some two or three months afterwards, and that the depression and subsequent delusions centred on the injury and its consequences real or imagined. He did not think this proved that the injury was the cause of the mental symptoms. It was argued that the expert evidence was opposed to this finding and that in the absence of any cross-examination or contradiction he was bound to act on it. The medical evidence only came

to this: that neurasthenia was induced by the injury and the consequent enforced idleness, that neurasthenia cases often turned into something which was either insanity or on the border line of insanity, and that the witness believed the suicide was the "outcome" of the neurasthenia. This was by no means the same thing as positive expert evidence that a minor local injury such as that in question could be the cause of insanity in its legal sense or that such insanity in fact existed.

The learned judge held that the suicide was not the result of the accident and refused to give compensation. The dependants appealed.

Rigby Swift, K. C. and *Douglas Knocker* for appellants.

J. B. Matthews, K. C., Barrington-Ward and *P. Guedalla* for respondents.

Sweepstone, Stone & Co., solicitors for appellants.

C. H. Brewer, solicitor for respondent.

[775] *Lord Gwynne-Hardy, M.R.* (after stating the facts).—The death was found to be, and plainly correctly found to be, a suicide. The question is whether that was a consequence of an accident arising out of and in the course of the employment.

It has been said that there is some doubt whether suicide can be the result of an accident within the Workmen's Compensation Act. I confess I do not feel that doubt at all. I have no doubt that it may be. I have no doubt that an accident may be of such a nature that there is a lesion of the brain, a structural injury to the brain itself, which accident may lead to an unsoundness of mind which may directly lead to suicide.

[776] I do not think that the law applicable to this case can be better put than it is put in the Scotch Court of Session in *Malone v. Cayzer*, 1 B. W. C. C. 27. There are some passages in the judgments which I must read as expressing what, in my view, is the true state of the law. In that case the sheriff-substitute had declined to allow the claim to go to proof because he said that the man had died of suicide and not of the accident. It came before the Court of Session, who said that that was wrong and that it ought to go to proof in order that evidence might be called to say whether the causation was or was not made out. "The claimant," the Lord President said, "will have to do something more than say simply that there was a possibility of death arising from such an injury in such a way—she must show that it was in fact the result of the injury. I have some doubts as to whether the state of knowledge of cerebral pathology is so fixed as, in circumstances like this, to enable one to reach

such a conclusion." Then he said he himself was not able to express an opinion upon it. Then Lord M'Laren gives a very valuable judgment. He says in 1 B. W. C. C. 32, 33: "I cannot gather from the sheriff-substitute's statement anything more than this, that the man committed suicide in consequence of the depression of mind brought on by his blindness." The accident caused blindness. "There is no averment of insanity in the physiological sense of a result of disease of the brain, but merely that a man has committed suicide, and is supposed to have done so under some insane impulse." Then he says a little further down, after saying that it must go back to the sheriff-substitute, "I hope the sheriff-substitute will direct his attention to the point whether this is insanity that would be proved by medical evidence of the symptoms, or whether it is anything more than just a mode of stating the supposed cause, because there must be some cause for the suicide." And Lord Kinnear says: "The question whether death has resulted from an accident is always a question of fact."

Applying the law as there laid down, of course it is not enough merely to say this man, who committed suicide some six months after the injury to his thumb, committed suicide; you must show that the suicide was really a result of the accident. There is no physiological injury here which suffices to explain the suicide. It [777] is not said that the man's brain was in any way injured. In fact it was not. Mr. Rigby Swift, who has argued this case with great ability, does not suggest that at all. The man's injury was to his thumb, and although occasionally after a certain time he had throbbing pains coming from the thumb up to his head, there is no proof whatever, and no suggestion of proof, of any injury to the brain as such.

But then it is said the man had neurasthenia some two or three months after the injury to his thumb, and that he was depressed, both before and after that, by reason of his desire to get back to his work and his inability to do so. It is said, and quite truly, that it was not his own fault that he did not go back to work; his own doctor and the company's doctor both said that he was not in a fit state to go back; but he had neurasthenia, he had depression of spirits, although it varied from day to day. That is all we know about him. On the particular day when this event took place he was, as described by his wife, less depressed than usual. He ate his dinner at home and seemed to be better; he went out after dinner to see, I suppose, some of his friends and old comrades; he went to Battersea Park Station, and, it may be on a sudden impulse or it may not be on a sudden impulse,—I cannot tell which—he committed suicide.

Now the burden of proof of course lies upon the dependants. The county court judge must be satisfied, and we must be satisfied, so far as it is for us, that the burden of proof has been discharged.

The learned county court judge has given a judgment which on one point, and one point only, seems to me to afford some doubt. He has, if I may be allowed with great respect to say this, somewhat confused himself by attempting to draw a distinction between legal insanity and medical insanity. He says: "This man was, I think, of unsound mind, but he was not of unsound mind in the legal sense." It is a matter of common knowledge that the views of doctors and lawyers always have differed, and I suppose always will differ, on the subject of insanity. I am disposed to think that the cause of his committing suicide was that he was of unsound mind at that time. The lawyers would say that that was so. But then the learned county court judge goes on to say this. He was quite clear in his own mind that there must be a connection between the insanity and [778] the injury. Unless the chain of causation, as it has been called, is complete no claim can be made; and he says this: "As to the connection between the insanity, if any, and the injury, all that was actually proved is that there was no insanity before the injury, that symptoms of neurasthenia began to develop some two or three months afterwards, and that the depression and subsequent delusions centred on the injury and its consequences, real or imagined. I do not think this proves that the injury was the cause of the mental symptoms."

In my opinion that is quite correct; at all events we cannot differ from it. Although in the subsequent part, where he deals with legal insanity, he says something which I have a little difficulty in following, I do not think that that in any way affects the main purport of the judgment, or authorizes us to say that he has so misdirected himself that there ought to be a new trial, or that his judgment is so obscure and uncertain that there ought to be a new trial. I have very carefully considered the evidence given by the man's own doctor and by the company's doctor, and I do not think that that evidence really suffices to connect the suicide and the medical insanity, if I may use such a term, directly with the accident; it is post hoc, no doubt, but I cannot say that it is propter hoc.

I think, if we were to assent to the very able and interesting arguments which we have heard, we should be driven to say this, that wherever we find an accident which involves, as so many accidents do, depression of spirits, particularly depression of spirits in the case of a man who has been leading

an active life as a labouring man or artisan, depression at being kept from his work and idling about at home; the neurasthenia and the suicide can all be traced directly to the accident. If we were to say that we should be opening a door which, I think, we ought not to open. I think, as the Scotch Court said, that there must be some direct evidence of the insanity being a result of the accident—something more than a subsequent occurrence. The legal causation must be established and proved. To my mind it is not established and proved in this case. In my opinion, though I say it with real regret, the applicants have not made out their case here, and the decision of the learned county court judge cannot be interfered with. The appeal will be dismissed.

[779] PICKFORD, L. J.—I think it is quite clear that we cannot make an award in favour of the dependents in this case. In fact we were not seriously asked to do so. As to the question whether there ought to be a new trial, I confess I felt considerable doubt for this reason, that I thought there was, at least, a question whether the learned judge, by the distinction which he drew between legal insanity, by which I take it he meant such insanity as would afford a defense in the case of a charge of crime, and medical insanity, which meant an unhinged or insane state of mind, under which the man did things which he otherwise would not have done, had not somewhat confused himself. It seems to me in a case of this kind you must have insanity proved as resulting from, not merely following and not merely perhaps suggested by, the accident. You must have it resulting from the injury in some way. I should be very sorry to say that where you have a nervous state, with no signs of what is really called neurasthenia induced by the shock of the accident, but you have, several months afterwards, insanity produced by brooding over the consequences of the accident, and the anxiety caused by not being able to return to your work at once, that must be taken necessarily to be the result of the accident so as to give compensation. In that part of his judgment which the Master of the Rolls has read the learned judge seems to me to be giving a clear decision apart from the question whether the insanity was legal or medical. He is there speaking of the injury being the cause of the mental symptoms which he himself has found to exist; at least, that is the way I read his judgment. But there is no doubt that in the passage preceding it he has distinguished between the two, and at the end of his judgment he again says, after discussing Dr. Thackwell's evidence, "This is by no means the same thing as positive expert evidence

that a minor local injury such as that in question can be the cause of insanity in its legal sense or that such insanity in fact existed."

Now I must say that those two passages have caused considerable doubt in my mind, not by any means altogether removed now, as to whether he has not somewhat confused himself by that distinction which he has drawn, which, I think, is not a sound distinction for the purpose of this case; but he certainly, in the first passage that has been read, does not draw any such distinction, and he merely says "I cannot find that it is proved that the injury was the cause of the [780] mental symptoms." I think he was justified in finding that, and when I say justified I mean it was open to him to find that. I cannot agree that, because he says that he accepts Dr. Thackwell's statements, he must therefore, when he comes to consider them with reference to all the other facts that were proved in the case, say that he necessarily accepts Dr. Thackwell's opinions. To accept a medical witness's statements is one thing, to accept his opinions is a very different thing; and I do not think that a learned judge who says "I quite believe what the medical witness is telling me" is also bound to go on to say "therefore I shall accept his opinions," and I think that it was open to the learned judge to find as he has done. But, as I have said, my doubt has been whether he may not have somewhat confused his mind by the distinction that he draws between the two kinds of insanity, although in that passage his finding seems to be independent of any such distinction. I have my doubts about it, but, as the other members of the Court do not feel the same doubts, I do not dissent from their judgment that this appeal must be dismissed.

WARRINGTON, L. J.—I am of the same opinion. That suicide may be the result of what, in the statute, is called "personal injury by accident" I have no doubt; but in order to make out that it is the result it must first be proved that the suicide is the result or the effect of insanity and that the insanity is the result of the injury. If the second of those two questions is answered in the negative the first of the two questions really never arises. The learned judge in the present case answered the second of the two questions in the negative in the passage which has been read.

Now, as I understand it, what the learned judge means by that is that on the medical evidence all he could find was that the insanity (whether in the legal or in the moral sense is immaterial for this purpose) was the result of the depression caused by the fact of the accident and the enforced idleness

consequent upon it and the man's brooding over the fact of the accident—not that it was caused in any material sense by the injury which the man had received. If that is true, that is, in my opinion, in accordance with the views expressed in the Scotch Court of Session, which I will refer to presently, which views commend themselves to me. If we were to hold that insanity [781] is the result of the injury by accident where it is only indirectly the result—that is to say, where it is not occasioned by the injury itself, but by the consequences of the injury—I think we should be opening a door much wider than I, for one, should be prepared to.

I think I ought to justify the view I have expressed by referring to, first, one passage in the judgment of the Lord President and a passage or two in the judgment of Lord McLaren in the case of *Malone v. Cayzer*, 1 B. W. C. C. 27, 31, 32. That case came before the Court on what we should call in these Courts demurrer. The sheriff-substitute, having determined that, on the allegations made in the statement laid before the Court, there was no ground in law for those statements, had dismissed the application. The Court of Session sent it back to him in order to take the evidence and see what the real facts were. That was a case of suicide. To put it in other words, the Court decided that it was possible that suicide might be the result of the injury. The Lord President says this: "It may be a somewhat uphill matter for the claimant to prove her case. I should like to say that she will have to do something more than say simply that there was a possibility of death arising from such an injury in such a way—she must show that it was in fact the result of the injury." Then come these words: "I have some doubts as to whether the state of knowledge of cerebral pathology is so fixed as, in circumstances like this, to enable one to reach such a conclusion." I think, by his reference there to the state of knowledge of cerebral pathology, he obviously points to this: that, in his view, if insanity is to be treated as the result of the accident, it must be as the direct result, the accident or the injury having occasioned some pathological effect upon the brain, and not what Lord McLaren calls a moral result or a moral effect arising from the consequences of the accident. Now Lord McLaren takes the same view, but he puts his view with greater clearness, I think, if I may say so with respect, than the Lord President himself. What he says is this, 1 B. W. C. C. 32: "I cannot gather from the sheriff-substitute's statement anything more than this, that the man committed suicide in consequence of the depression of mind brought on by his blindness. There is no averment of insanity in the physiological sense of a result of disease

of the brain, but merely that a man has committed suicide, and is [782] supposed to have done so under some insane impulse. It seems to me that in construing the Act of Parliament, and particularly the beginning of the First Schedule, we must hold that when the Act prescribes as a condition of compensation that death results from the injury, what is within the contemplation of the statute is a material injury with death materially resulting from it." That, I think, expresses the same opinion as that which I have ventured to express, that, in order that the insanity may be treated as the result of the injury, you must find that as a physiological result, not as an indirect result from the man's brooding over the fact of the injury, or from the depression occasioned in the case of a busy man restrained by the effect of the injury from going to work.

I think, therefore, that not only was there sufficient evidence to support the finding of the learned county court judge with reference to what I have called the second of the two questions, namely, whether the insanity was the result of the injury, but that I should have arrived, on the evidence, at the same conclusion myself.

Then, if the learned judge was right on that point, the first question, whether the suicide was the result of the insanity, really never arises at all. It is only on that point that such confusion as there is in the judgment of the learned county court judge with reference to the distinction between legal insanity, or insanity in the legal sense such as would afford a defense to an indictment, and insanity or unsoundness of mind as it is regarded by the medical man, arises. It seems to me, therefore, that in reality, having regard to the view which the learned county court judge has taken, and the view which, with all respects, I take as to the answer to the second of the two questions, such difficulty as is occasioned by the apparent confusion between legal insanity and medical insanity really becomes of no importance, because it is only on the first of the two questions, whether the suicide results from the insanity, that the question what is the nature of the insanity can be material.

On the whole, therefore, I think the appeal ought to be dismissed.

Appeal dismissed.

NOTE.

The reported case holds that compensation should not be awarded under a workmen's compensation act for the death of a workman who, after receiving an injury in the course of his employment, becomes depressed and melancholy over the slowness of his recovery

and commits suicide. The subject of disease as an accident is discussed at length in the note to *Vennen v. New Dells Lumber Co.* reported ante, this volume, at page 293.

petitioner. Respondent appeals. The facts are stated in the opinion. **AFFIRMED.**

Harold W. Thatcher, Frank H. Swan and Edwards & Angell for appellant.

Mumford, Huddy & Emerson and E. Butler Moulton for appellee.

CARROLL

v.

WHAT CHEER STABLES COMPANY.

Rhode Island Supreme Court—January 5, 1916.

88 R. I. 421; 96 Atl. 208.

Workmen's Compensation Acts — Disease as Accident.

Where a hack driver in the employment of defendant stable company which had elected to become subject to the workmen's compensation act (Pub. Laws 1912, c. 831), was pitched from his seat by the motion of the hack while driving and while helpless from dizziness or unconsciousness, occasioned by a disease from which he was suffering, he is entitled to compensation for the resulting injuries, since his fall was an "accident arising out of his employment" within the meaning of article I, § 1, of the act.

[See note at end of this case.]

Same.

Where, in an action by the driver for such injuries, the evidence showed that the fall from the hack was partly the result of a positive pitching of the driver from his seat by the motion of the vehicle, and not the mere inert collapse of an unconscious man, the finding of the court below that petitioner "received a personal injury by an accident arising out of . . . said employment," will not be disturbed, since the act provides that findings of fact in the absence of fraud shall be conclusive.

[See note at end of this case.]

Same.

Whether in such a case the accident arose "out of" the employment within meaning of Laws 1912, c. 831, art. I, § 1, is to be determined by ascertaining whether the proximate cause of the injuries received was an element of, or arose out of, the employment, as disassociated from the fact that such proximate cause was set in motion or aided by petitioner's diseased condition as the remote cause.

[See note at end of this case.]

Appeal from Superior Court, Providence and Bristol counties: **TANNER, Judge.**

Petition under workmen's compensation act. William Carroll petitioner, and What Cheer Stables Company, respondent. Judgment for

[422] **PARKHURST, J.**—This cause comes before this court on respondent's appeal from a decree entered by Mr. Justice Tanner in the Superior Court on the 11th day of May, 1915, under the provisions of the Workmen's Compensation Act, so called, enacted by Public Laws of 1912, Chapter 831. In this decree it is recited that on the first day of December, 1914, the petitioner, William Carroll, was engaged at Providence, Rhode Island, in the employ of the respondent, What Cheer Stables Company, and had been engaged in this employment for the space of about five years.

That said Carroll was not engaged in domestic service or agriculture at the time, but was in the employ of the respondent as a hack driver and on the first day of December, 1914, while engaged in this employ, received a personal injury by accident arising out of and in the course of said employment.

That at said time the company had elected to become subject to the act and the employee had waived his right of action at common law.

That the injury was not occasioned by the wilful intention of the employee to bring about the injury to himself and did not result from his intoxication while on duty.

That the cause of the injury was falling from the driver's seat of a hack which the petitioner was driving in the regular course of his employment, the fall probably being due to dizziness or unconsciousness induced by a disease from which he was suffering, the evidence showing hernia, hardening of the arteries and Bright's disease.

[423] That the injuries were a broken right clavicle, broken ribs and shock to the nervous system, rendering the employee totally and permanently incapacitated for work and resulted in the permanent total incapacity of said Carroll.

That at the time of said injury the employee was receiving wages in the sum of thirteen (\$13.00) dollars per week, working seven (7) days a week, with one day off in each four weeks.

That the amount of average weekly wages at the time of receiving the injury was ten and seventy-three one-hundredths (10.73) dollars, and that the sum of twenty-eight (18.00) dollars is a reasonable charge for medical and hospital services and medicines required by the employee during the first two weeks after the injury.

And that upon the above facts the What Cheer Stables Company should pay said Car-

roll the sum of twenty-eight (\$28.00) dollars for medical services and medicines as aforesaid and the further sum of five and thirty-six one-hundredths (\$5.36) dollars per week compensation, computed from the first day of December, 1914, until further order of the court, but in no event for a period in excess of five hundred (500) weeks. Costs were awarded in the sum of twelve (12.00) dollars.

On the 13th day of May, 1915, the company filed with the clerk of the Superior Court a "claim of appeal from the *final decree* of the said Superior Court entered on the 11th day of May, A. D. 1915."

On the 27th day of May, said company filed with the clerk aforesaid its reasons of appeal which are in substance, and without stating them in full, that the decision of the justice and the decree appealed are against the law and the evidence, in various details.

The real question raised by this appeal arises from the contention of the respondent that the evidence does not show a "personal injury sustained by accident by an employee arising out of and in the course of his employment," under the language of the statute (Pub. Laws, Ch. 831, Art. I), § 1, which reads as follows:

[424] "Section 1. In an action to recover damages for personal injury sustained by accident by an employee arising out of and in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense: (a) That the employee was negligent; (b) That the injury was caused by the negligence of a fellow employee; (c) That the employee has assumed the risk of the injury."

The respondent's brief proceeds to state its contention as follows:

"This is the section of the act which defines those industrial accidents which the legislature had under consideration and against which it sought to protect the employee. Hence, to entitle the workman to compensation, the following elements must appear (1) that the workman suffered an injury; (2) that he suffered an injury by 'accident'; (3) that the injury and the accident arose 'out of' the employment, and (4) that the injury and the accident arose in the course of the employment.

"By this language the legislature intended not simply that the 'injury,' but that both the 'injury' and the 'accident' must arise out of and in the course of the employment. In the great majority of cases it would be impossible to separate the injury and the accident, so that one might arise out of the employment while the other would not. In the case before us, while we may admit for the sake of argument that the particular injury—the broken collar bone and ribs—were caused by

the fall; that the fall arose out of and in the course of the employment because the petitioner at that moment happened to be sitting on the seat of his cab,—it by no means follows that the 'accident' arose 'out of' the employment. This, we believe, is where the authorities which will no doubt appear on the petitioner's brief, have gone astray. That the 'accident' occurred 'in the course of' the employment is admitted." . . . "The respondent takes the position (1) that there is no evidence to support the finding of the presiding justice that either [425] the injury or the accident arose out of and in the course of the employment, and (2) that such finding was against the law since the legislature never intended that act to apply to accidents caused solely by a workman's previously diseased condition."

The only respect in which this decree is challenged by the appellant is as to the finding of fact that the petitioner "received a personal injury by accident arising out of . . . said employment;" and the appellant contends that the accident was solely due to the previously diseased condition of the petitioner and not at all to the employment.

It must be obvious that the petitioner, as the driver of a hack, seated at a height of four or five feet from the ground upon a moving vehicle is exposed to some risk of accident which would not be incident to an occupation carried on by a person seated upon the ground or upon a stationary platform. And this would be more so in case of an employee subject to attacks of vertigo or dizziness, or of temporary unconsciousness. Now although there is some evidence that the petitioner admitted that he had an attack of dizziness or unconsciousness just before he fell, and that caused him to fall, it is to be noted that there is no evidence that he had ever before had such an attack when he was driving; his only previous disability, so far as the evidence shows, had been a slight temporary disability due to displacement of his truss, when at work harnessing his horses, and which required him to lie down for a few minutes to readjust his truss; and he was also unable on account of his rupture to lift trunks on or off his hack. There is no evidence that he had at any time before the accident had any disability with regard to driving his horses when he was seated upon the carriage. But there is direct and positive evidence from a witness who saw him fall, who said, "I thought . . . that the horses ran against the curbstone and he fell off headfirst;" that "the horses was coming down the side of the sidewalk, not running, but not coming easy, on a kind of a gallop, and the first thing I see he was [426] pitched out headfirst on the side, that way," (illustrating); that "he was pitched up on the

side, half on the sidewalk and half on the hill." This evidence shows that the petitioner's fall was more than the mere inert fall or collapse of an unconscious man (see *Lewis v. Globe Indemnity Co. Mass. Workmen's Comp. Cas. 1912-1913*, p. 48; *Sanderson v. Same*, *Ib.* p. 224, 229); that it was a positive throwing or pitching of the driver from his seat by the movement of the hack turning or lurching into the gutter, toward or against the curbstone and might have happened to a driver in full possession of his senses; and although the justice of the Superior Court in his rescript does not allude to this evidence, it is to be presumed that, when he came to enter his final decree and decreed that petitioner "received a personal injury by accident arising out of" . . . "said employment," he made his finding upon all the evidence before him. We think that the evidence above quoted therefore was such as to warrant the finding of fact which is here challenged, and that under the decision in *Jillson v. Ross*, 38 R. I. 145, 94 Atl. 717 (July 2, 1915), we should not be justified in setting aside the decree upon this ground,—since the act provides that findings of fact, in the absence of fraud, shall be conclusive.

The evidence does not show, as claimed by the appellant, that the petitioner's fall was "caused solely by the workman's previously diseased condition," nor does the justice of the Superior Court so decide; the justice says in his decree "the fall probably being due to dizziness or unconsciousness induced by a disease from which he was suffering," etc. But the decree also finds that the accident was one "arising out of . . . said employment;" there is at least as much evidence that the fall was due to an unexpected and accidental lurch of the hack into the gutter and towards or against the curbstone, as that it was due to dizziness or unconsciousness induced by disease. It seems to this court that the decision and the decree appealed from embody a conclusive finding of fact that dizziness or unconsciousness was not the [427] sole cause of the fall and that there was evidence from which the justice could find as he did that the accident arose out of the employment.

Several cases have been cited on behalf of the petitioner where it appeared that the claimant had, prior to the accident, been suffering from disease and where it appeared that the diseased condition predisposed the claimant to the accident which occurred, and where it has nevertheless been held that the claimant was entitled to recover. In a very well considered case in the English Court of Appeal, decided in 1905, under the English Workmen's Compensation Act, *Wicks v. Dowell* [1905] 2 K. B. D. 225, 2 Ann. Cas. 732, it appears that a workman employed in un-

loading coal from a ship, who was required in the course of his duty to stand by the open hatchway through which the coal was being brought up from the hold, was seized with an epileptic fit while at work, and fell into the hold and was seriously injured; it was held that regard must be had to the proximate cause of the accident resulting in the injury, which was to be found in the necessary proximity of the workman to the hatchway; that the accident therefore arose "out of" as well as "in the course of" his employment, and that he was entitled to compensation under the act. It appeared that the employee was subject to epileptic fits; that it was his duty to stand on a wooden stage close to the edge of the hatchway; the stage being so constructed as to enable him to look down into the hold, and while standing on the stage he had to regulate the descent of the bucket into, and its ascent out of, the hold by means of a long pole, and also to give the necessary signals to the man who was working the crane; while thus engaged he was seized with an epileptic fit and fell through the hatchway into the hold and sustained very serious injuries. He had had an epileptic fit on three previous occasions. The county court judge held that the accident was due to the fit and did not arise out of the employment within the meaning of the act, and refused to award compensation. The applicant appealed. In the [428] Court of Appeal it was contended, as here, that "as the original cause of the applicant's fall was the fit with which he was seized, the cause was one which the man himself carried about with him, and that the damage which he sustained did not arise out of and in the course of his employment, but arose out of the idiopathic condition of the workman at the time." The court fully discusses and disposes of his contention upon principle and authority and determines that the thing which happened was an "accident" within the meaning of the act. The court, after discussing the rules and principles laid down in accident insurance cases, speaking through Collins, M. R., says, p. 229:

"But those authorities are in my judgment directly in point. A man is picked up at the bottom of the hold of a ship suffering from injuries: what is the cause of his condition? The proximate cause obviously is that he has fallen from a height. But it is suggested that if the occurrence is analyzed, it will be seen that the accident was caused by the idiopathic disease from which the man was suffering, and that therefore the accident did not arise out of his employment. At that point the authorities come in, to the effect that, although the cause of the fall was a fit, the cause of the injuries was the fall itself, and they are direct authorities that

the injury in the present case was caused by an accident.

"Then did the accident arise out of the man's employment? When we get rid of the confusion caused by the fact that the fall was originally caused by the fit and the confusion involved in not dissociating the injury, and its actual physical cause from the more remote cause, that is to say, from the fit, the difficulty arising from the words 'out of the employment' is removed. How does it come about in the present case that the accident arose out of the employment? Because by the conditions of his employment the workman was bound to stand on the edge of what I may style a precipice, and if in that position he was seized with a fit he would almost necessarily fall over. If that is so, [429] the accident was caused by his necessary proximity to the precipice, for the fall was brought about by the necessity for his standing in that position. Upon the authorities I think the case is clear: an accident does not cease to be such because its remote cause was the idiopathic condition of the injured man; we must dissociate that idiopathic condition from the other facts and remember that he was obliged to run the risk by the very nature of his employment, and that the dangerous fall was brought about by the conditions of that employment. I think, therefore, that the present case comes within the purview of the Workmen's Compensation Act, and that there is nothing in either the decision or the dicta of the learned Lords in *Fenton v. Thorley* [1903] App. Cas. 443 (1) which in any way qualifies the view that I have endeavored to express. The appeal must be allowed.

"Mathew, L. J. I am of the same opinion. The case affords an illustration of the rule that one should look to the immediate, and not to the remote, cause. In this case the immediate cause of the injury was the fall: I see no reason why we should hold that there was not an accident within the meaning of this statute. The true mode of dealing with the case is shown by a reference to the insurance cases that were cited during the argument. In *Fenton v. Thorley* (2) Lord Macnaghten said: 'One other remark I should like to make. It does seem to me extraordinary that anybody should suppose that when the advantage of insurance against accident at their employers' expense was being conferred on workmen, Parliament could have intended to exclude from the benefit of the act some injuries ordinarily described as "accidents" which beyond all others merit favourable consideration in the interest of workmen and employers alike.' If we apply that view to the particular case, and treat the claim as an action brought upon a policy of insurance against accidents arising out

of the employment of the assured, there can be no question that such a policy would cover the case. In my opinion we ought not to go back along the train of circumstances and trace [430] the accident to some remote source when it is plain that the man was in fact injured by falling from the place where he was standing, and where it was his duty to stand, in discharge of his duty to his employer.

"Cozens-Hardy, L. J. I agree, and have little to add. It seems plain to me on the authorities that what happened here was an 'accident.' It is also plain, and indeed is not contested, that the accident happened in the course of the employment; the only difficulty is whether it arose 'out of' the employment; on the whole I am of opinion that it did. If I could adopt the view that has been pressed upon us, that the employer is not liable for the remote consequences of a disability which the workman brings with him to his work, I should come to a different conclusion; but I think the truer view is that a man always brings some disability with him; it may be a disability arising from age; it may be of some other nature. A workman who is put in a dangerous position in order to do his work is more liable to an accident by reason of the disability which he brings with him than he would otherwise be. Again, an old man is inherently more likely to meet with an accident than a young one, but an employer could not excuse himself on the ground of the man's age. The same consideration applies to a tendency to illness or to a fit; and if a man with such a tendency is told to go to work in a dangerous position and there meets with an accident, the accident none the less arises out of his employment because its remote cause is to be found in his own physical condition.

"Appeal allowed."

The case of *Wicks v. Dowell*, supra, was followed in the case of *Driscoll v. Cushman's Express Co. Mass. W. C. C.* (July 1, 1912-June 30, 1913, pp. 125, 130), where the driver of an express wagon, employed by the defendant, while driving his wagon, suffered a fainting fit, or an "epileptiform attack," falling from his wagon and fracturing his skull, dying from the effect of the fracture. It was held by the [431] Industrial Accident Board, in review, and in confirmation of the decision of the Committee of Arbitration, that the employee was exposed to a substantial and increased risk owing to his occupation, that the injury arose out of and in the course of his employment, and that the dependent mother was entitled to compensation.

Wicks v. Dowell, supra, was cited by the court with apparent approval in *Fennah v. Midland, etc. Ry.* 45 Ir. L. T. (Eng.) 192,

4 B. W. C. C. 440, 442, a case decided in the Court of Appeal, Ireland, 1911; and has been frequently cited in argument both in the English Court of Appeal and in the House of Lords. No case has been cited to us in which that case has been criticised, modified, doubted or overruled.

A number of cases have been cited to us involving the same general principle that where the previous diseased condition or temporary illness of the employee is a contributing or antecedent cause of the accident, nevertheless the employee may recover. See *Steamship Swansea Vale v. Rice*, 4 B. W. C. C. 298, a case of temporary illness, contributing to the accident of falling overboard from a vessel. *Fennah v. Midland, etc. Ry.* 4 B. W. C. C. 440, where an engine driver, at work on his engine while stopped at a station, tightening up a nut, fell to the permanent way and died from the effects of the fall; and where it appeared that he had previously had fainting fits, it was held that recovery could be had; that it was an accident arising out of his employment; *Ismay v. Williamson*, 1 B. W. C. C. 232 (House of Lords), where the accident was a heat-stroke from a furnace which happened to a hand employed in the engine-room, and who was shown to have been in poor physical condition, not fit to stand the heat; *Clover v. Hughes*, 3 B. W. C. C. 275 (House of Lords), a case of death of a workman who had a very serious aneurism of the aorta, which ruptured while he was engaged in his ordinary occupation; disease of long standing; *M'Innes v. Dunsmuir*, 1 B. W. C. C. 226 (Court of Session, Scotland), where a workman having hardening of the [432] arteries, by over exertion brought on cerebral hemorrhage, which was more likely to occur in his case on account of the hardening of the arteries; *Maskery v. Lancashire Shipping Co.* (1914) *Stone's W. C. & Ins. Cas.* 290 (Court of Appeal, England), case of death from heat-stroke suffered by a laborer in the engine room of a steamer in the Red Sea, deceased being physically unfit for the work which involved exposure to extreme heat; citing *Ismay v. Williamson*, *supra*. See also *Morgan v. Zenaida*, 2 B. W. C. C. 19, and *Aiken v. Finlayson* (1914) *Stone's W. C. & Ins. Cas.* 398.

We are of the opinion that the decree appealed from in this case is fully supported by the evidence; and under the principles of law so clearly set forth in the above cited cases, with which we find no reason to dissent, we find that what happened to the petitioner was an "accident" under the terms of the act, and that the accident "arose out of . . . the employment."

The appellant cites a few cases which do not seem to this court to have any weight in this connection, since the court in each

case found that injury or death of the employee did not "arise out of the employment," but arose from natural causes to which anyone not so employed would have been equally subject,—*Sheldon v. Needham* (1914) *Stone's W. C. & Ins. Cas.* 274; *Rodger v. Paisley School Board* (1912) *Gordon's W. C. Cas.* 157; *Robson v. Blakey* (1912) *Gordon's W. C. Cas.* 86; *Butler v. Burton-on-Trent Union* [1912] *Gordon's W. C. Cas.* (Eng.) 222; *Thackway v. Connelly*, 3 B. W. C. C. 37, and *Nash v. "Rangatira"* (1914) *Stone's W. C. & Ins. Cas.* 490; in the latter case the accident and death were found to have arisen out of intoxication and not out of the employment. We have carefully examined all of these latter cases and find nothing therein to disturb our conclusions.

Our decision is that the decree appealed from be affirmed; that the appeal be dismissed and the cause remanded to the Superior Court for further proceedings.

[433] *VINCENT, J. (dissenting).*—I am unable to agree with the majority of the court in affirming the decree of the Superior Court and dismissing the respondent's appeal.

The petitioner, at the time of the accident, was in the employ of the respondent company as driver of a vehicle commonly known as a hack or hackney carriage, such employment requiring him to occupy the elevated seat common thereto. On the day of the accident, while the petitioner was driving along one of the public streets, he became wholly or partially unconscious, or was seized with dizziness or vertigo, whereupon he fell from his seat to the ground, sustaining some injuries.

It is not disputed that the petitioner had, for a considerable period prior to the time of his accident, been in a condition of health which might at any moment cause him to become unconscious or dizzy to an extent which would deprive him, temporarily at least, of physical control.

The majority opinion proceeds upon the theory that there was some testimony produced in the court below, showing that the fall of the petitioner, from his seat on the hack, was occasioned by a sudden contact of the wheel with the curbstone. The testimony referred to is that of *Mrs. McKenna*, who at the time of the accident, was sitting at her window and viewed the scene across two streets. On examining her testimony, bearing in mind that the burden of proof is upon the petitioner to show that the accident arose out of the employment, I find that it amounts to nothing. She says in her direct examination: "I thought he stumbled against the curbstone; that the horses ran against the curbstone and he fell off head first." This in itself is not testimony tending to prove that the wheel of the hack came in contact

with the curbstone. It is simply the way in which the witness, viewing the situation from a distance, imagined that the fall must have been occasioned. Later, in cross-examination any doubt about her testimony is disposed of when she says, in answer to the question, "You didn't see anything happen to the hack or to the horses or anything [434] except Mr. Carroll pitch off from the hack, did you?" "That is all, that is all I noticed then." This testimony not only fails to sustain the burden of proof before mentioned, but it is not testimony from which it can be reasonably assumed or inferred that the wheel of the hack came in contact with the curbstone at all. Mrs. McKenna did not see the wheel strike the curbstone and does not claim to have seen anything of the kind. The petitioner does not claim that his wheel struck the curbstone or went into the gutter, in fact, he says he does not remember any jumping of the horses or hitting any stone or ditch. Upon this state of the testimony how can it be assumed that the proximate cause of the accident was the contact of the wheel with the curbing of the street? It is also evident that the Superior Court did not consider this evidence sufficient when it said: "That the cause of such injury was falling from the driver's seat of the hack which the petitioner was driving in the regular course of his employment, *the fall probably being due to dizziness or unconsciousness induced by a disease from which he was suffering.*"

Further than this the petitioner told Mr. Stockard, in speaking of the accident, that he felt a dizzy spell coming on. That he made such a statement to Mr. Stockard the petitioner nowhere denies, but in his direct testimony he says that he lost consciousness when he fell.

There is some testimony on the part of the petitioner that in his descent from the hack he came in contact with some portion of the outfit, presumably the whiffletree or crossbar, from which it might be argued that his realization of such an occurrence tended to show that he was not wholly unconscious at the time of the accident. It is not, however, important to ascertain the exact degree of mental power or physical control which the petitioner possessed at the time of and immediately preceding his fall. Whether he was partially or wholly unconscious or simply dizzy, without being unconscious at all, is not important in this consideration. It cannot be seriously or reasonably claimed that his [435] fall was occasioned otherwise than by a sudden seizure of some kind induced by his physical condition. The court below, in its findings of fact, reached that conclusion. Furthermore, it is not claimed that the physical condition of the petitioner was brought about or affected by his employment or that

his employment in any way operated, in connection with his diseased condition, to bring about or produce the particular attack which caused this fall.

The statute regulating the compensation of workmen provides that such compensation is only payable in cases where the injuries sustained arise out of and in the course of the employment and it is generally conceded by the authorities that the burden is upon the petitioner to show that his injuries arose both out of and in the course of his employment. There is no question in the present case but what the accident occurred in the course of the employment, but did it arise out of the employment? It is quite clear to my mind that it did not.

It seems to me to be desirable, not to say necessary, to determine first, what is the proximate cause of the accident, and second, whether or not there is any relation between such proximate cause and the employment in which the petitioner was engaged.

In the old case of *Scott v. Shepherd*, decided in 1770, and reported in 2 W. Bl. (Eng.) 892, which is more popularly known as the "Squib" case, it was held that trespass and assault will lie for originally throwing a lighted squib which after having been thrown about in self-defense by other persons at last put out the plaintiff's eye. The question there was whether the action could be maintained against the person who first threw the squib and it was held that such action could be maintained. In a recent law publication called the "Docket," under date of December, 1915, I find the following comment upon the Squib Case: "Many, many cases have been bottomed on the Squib Case, that unhappy accident seeming to have an illustrative value beyond any other instance of causal connection ever brought [436] to the attention of court or counsel. The most recent, of note, is *Salmi v. Columbia, etc. River R. Co.* 75 Ore. 200, 146 Pac. 819, L.R.A.1915D 834, and comes from Oregon, where the complainant, a woman, lived near a railroad right of way on which the railroad company exploded a 'large and unsafe blast,' so greatly frightening complainant that she swooned, and swooning, fell, and falling, injured herself, sustaining a rupture. In refuting the contention that she could not recover for injuries from fright alone, Burnett, J., in an able opinion, after referring to the analogy to the noted Squib Case, says: 'Likewise in this instance the explosion of the blast naturally produced the mental state of fright, the fright the faint, the faint the fall, the fall the fracture of the abdominal wall, upon which the plaintiff rests her cause of action.'"

The law as laid down in the Squib Case has continued to be the law in England and this country down to the present time and

it determines that a defendant who exerted the original force is responsible for the injury, such force having been transmitted to the plaintiff through a series of acts which were the direct consequence of the original act. In other words, the original act was the proximate cause of the injury to the plaintiff.

In a case of this character the proximate cause is always that cause, which, acting through a natural sequence of events causes the injury. The cases furnish a multitude of definitions of proximate cause which, while they are couched in different language, are substantially the same in substance as, for example, "The proximate cause is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss;" again, "The proximate cause is the dominant controlling one and not those which are mere incidents;" and further, "The proximate cause of an accident is a cause without which the accident would not have occurred." See 5 Words & Phrases, 5762 and cases cited.

[437] Applying this principle to the case in hand the conclusion is inevitable that the unconsciousness or dizziness of the petitioner was the proximate cause of his accident. It was the one thing without which the accident would not have happened; it was the dominant cause and the subsequent fall and contact with the ground were simply incidents or events which naturally and necessarily followed. This being so it cannot be reasonably argued, under the evidence in this case, that as between the employment and the cause of the accident there was any relation whatsoever and therefore it cannot be said that the injuries of the petitioner arose out of his employment.

The majority opinion in support of its conclusions cites ten cases. Two of the cases cited cannot be distinguished from the case before us, namely, *Wicks v. Dowell* [1905] 2 K. B. (Eng.) 225, and *Driscoll v. Cushman*, Mass. W. C. C. June 30, 1913, pp. 125, 130. The remaining eight cases cited are easily and readily distinguishable.

The case of *Fennah v. Midland, etc. Ry.* 4 B. W. C. C. (Eng.) 440, was that of an engine driver who was tightening up a nut upon his engine while his train was at the station. He was later found lying between the engine and platform and died in a few minutes. There was evidence showing that on three previous occasions when the train was at a station the deceased had fainted, but a few days prior to the time of his decease he was examined by a physician of the company and found physically fit. This case is materially different from the case at bar, there being no testimony whatever that he

suffered a fainting fit at the time of his death or that the proximate cause of the accident was anything else than the fall.

The case of *Ismay v. Williamson*, 1 B. W. C. C. (Eng.) 232, was a case in which a seaman employed as a trimmer on board ship whilst engaged in drawing ashes from the bottom of the ship's furnace had a heat stroke from which he died. In *M'Innes v. Dunsmuir*, 1 B. W. C. C. (Eng.) 226, a workman, in the course of his ordinary and usual employment, overexerted [438] himself and brought on an attack of cerebral hemorrhage. In *Clover v. Hughes*, 3 B. W. C. C. (Eng.) 275, a workman suffering from aneurysm of the aorta was doing his work in the ordinary way by tightening a nut with a spanner. This ordinary strain caused a rupture of the aneurysm, resulting in death. In *Maskery v. Lancashire Shipping Co.* [1914] Stone's W. C. & Ina. Cas. (Eng.) 290, an engineer while working in the engine room of a steamer in the Red Sea sustained a heat stroke from the effects of which he died. In *Aitken v. Finlayson* [1914] Stone's W. C. & Ina. Cas. (Eng.) 398, a workman running to the scene of an accident and thence to telephone for a doctor by his exertion brought on a fit of apoplexy.

It will readily be observed that in each of the last six cases the death or injury was brought about by influences directly proceeding from the employment as, for instance, where a man suffered a stroke from the heat of a furnace about which and in connection with which he was employed. All these last mentioned cases are decidedly different from the case at bar where there is no proof whatsoever that the impaired physical condition of the petitioner was due to or was even aroused by his employment.

In the case of *Steamship Swansea Vale v. Rice*, 4 B. W. C. C. (Eng.) 298, the chief officer of a steam vessel fell overboard during his duty on deck. Some two or three hours prior to the accident he had gone below, complaining of headache and giddiness, had taken a dose of castor oil and returned to his duty on deck. There was, however, no testimony nor any other circumstances from which it might be inferred that the officer was suffering from giddiness at the time of the accident and that case is therefore materially unlike the one which I am considering here.

The case of *Driscoll v. Cushman & Co.* Mass. W. C. C. June 30, 1913, pp. 125, 130, which follows to some extent the case of *Wicks v. Dowell* [1905] 2 K. B. (Eng.) 225, also differs from it in some respects. The board of arbitration there held that the employed was exposed to a substantially increased risk [439] owing to the position in which he had to work, meaning that as a driver of an express wagon he occupied a

more elevated position than he would have occupied in some other employment.

It is evident that the more elevated the position of the workman the more likely he is to be injured in case he falls, but that does not affect the principle. The same principle should govern whether the person suffering the accident stands in one place or another so far as the determination of the proximate cause of the accident is concerned. The degree to which he may be injured in one place, as compared with the possible extent of his injuries in another, does not in any way assist in the determination as to what was the proximate cause of the accident or whether the accident arose out of the employment. All that arises out of the employment is that the consequences of the fall are more serious, but the fall itself does not arise out of it. It is wrong to disassociate the petitioner's dizziness or unconsciousness and say that though the one was not an accident the other was.

This leads to the discussion of the case of *Wicks v. Dowell* [1905] 2 K. B. (Eng.) 225, which as before stated cannot be distinguished from the case at bar. In that case a workman, employed in unloading coal from a ship, was standing in the course of his duty by an open hatchway through which the coal was being drawn up from the hold. He was seized with an epileptic fit and fell into the hold and was seriously injured. The court held that the proximate cause of the accident was to be found in the close proximity of the workman to the hatchway and that the accident therefore arose out of his employment. As we have seen from the authorities cited, the proximate cause is that cause without which the accident would not have happened. The proximate cause is that cause which through a natural sequence of events results in the injury. There was no claim in that case that the epileptic attack was brought about or induced by the employment. But it was nevertheless the proximate cause of the accident, because without it the accident would not [440] have happened. It was the one thing operating through a natural sequence of events that led to the injury. Between such proximate cause and the employment there was absolutely no relation whatsoever and it seems to me that to follow that case is to adopt and perpetuate a patent absurdity.

The case of *Wicks v. Dowell*, supra, decided in 1905, has not always been followed by later decisions of the English courts. Thus in the case of *Butler v. Burton-on-Trent Union*, 5 B. W. C. C. (Eng.) 355 and 1912, *Gordon's W. C. Cas.* 222, decided by the Court of Appeals in 1912, it appeared a workhouse master, while on duty in the evening, was sitting smoking at the top of a flight of steps. He was suffering from tuberculosis and while seized by a fit of coughing became dizzy and

fell down the steps from which fall he sustained injuries. The court said: "It has been decided that an accident 'arising out of' means some risk reasonably incidental to the employment; that the man is more exposed to the particular risk than other persons in the community. . . . There is nothing peculiar in the employment which renders the risk greater than that to which ordinary persons are exposed. . . ."

"The place was not a dangerous place; the man was neither more nor less liable to fall because he was a workhouse master. These considerations are sufficient. The accident did not arise out of the employment in the sense that it was due to the nature of the employment or to anything to which the employment required him to expose himself.

"The provision that the accident must be an accident arising out of the employment has the meaning that the accident must arise out of some risk reasonably incidental to the employment, in the sense that the man who meets with the accident must have been exposed in the course of his employment to some risk additional to those of other members of the public. Counsel for the respondent admitted that the accident in this case might just as well have happened when the deceased was sitting in his office at his desk; and [441] applying the test I have stated it is clear that the accident in no sense arose out of the employment. There was nothing peculiar to his employment which rendered the risk of this accident happening greater than it would have been otherwise. It is not as if he was engaged in any task which was likely to render his coughing more dangerous or more frequent. In these circumstances I think the accident was brought on by the tubercular module which caused the fit of coughing. The coughing in its turn produced giddiness, and owing to the giddiness the man fell. I think we should be extending the principles of the act beyond reason, principle, or authority if we were to hold here that the accident arose out of the employment."

While the workhouse master was not compelled to sit at the head of the stairs, still he was acting in the course of his employment, and his presence at that particular place was as much in the performance of his duty as would have been the case had he been in another part of the building.

It is impossible to reconcile these two cases or to arrive at any other conclusion than that the court in the latter case has absolutely rejected the view taken in *Wicks v. Dowell & Co.*

The case of *Nash v. Rangatira, Stone's W. C. & Ins. Cas.* (Eng.) 490; [1914] 3 K. B. 978 was, as the reference indicates, decided in 1914 and was an appeal from an award under the Workmen's Compensation Act made in favor of the dependents of one Nash. *Nash*

was employed as a seaman on the steamship "Rangatira" which at the time of the accident was moored to a pier. Late one night, Nash, who had been ashore, returned to the ship apparently intoxicated. He walked on to the gangplank for the purpose of boarding the ship, lost his balance, fell off, and was killed. The trial judge found that the primary cause of the accident was the man's intoxicated condition, but that the accident would not have happened had he not been at the time mounting the gangplank, an incident in the performance of his duty in returning to the ship. Hence, he was under a special risk [442] and compensation was awarded. This case was decided on the question as to whether the accident arose out of the employment and the court said: "In one sense, whenever there is an accident to a drunken man whilst he is in the ambit of his employment it may be said that the accident arose out of the employment because, but for his being in the place where the accident occurred, the man's drunken condition would have been immaterial. Take, for instance, the case where a man's work causes him to be with machinery or in any other dangerous place; it may be said that his employment took him there, and that if he had been at home drunk he would have been able to lie on the floor till he was sober. In this way it may be said that there was an added risk; but in my opinion the accident does not arise out of the employment in such circumstances. It is not sufficient that a drunken man should meet with an accident in the ambit of his employment. In the present case the accident did not arise out of the deceased man's employment."

If it is sought to distinguish the above case from the one before us on the ground that a man intoxicated is in no condition to perform the duties for which he was employed, and hence technically he is doing nothing in the performance of his employment, it may be said that the same is true of an individual who becomes unconscious through disease. So far as the employment is concerned, drunkenness and Bright's disease, as causes of a fall, are on the same footing. The sailor was required to mount the gangplank to return to the boat and thus was in the performance of his duty. His fall, however, was caused by the drunkenness which had no relation to his employment. This case, as well as the foregoing case of *Butler v. Burton*, not only fails to follow the case of *Wicks v. Dowell*, but is distinctly at variance with the principle and theory upon which the latter is based.

In the case of *Robson v. Blakey*, 1912, Gordon's W. C. Cas. 86, a plumber engaged in laying pipes in a trench on a hot day was seized with heat apoplexy. He was required [443] to bend over his work and consequently

got his back heated. The Sheriff Substitute found an accident arising out of the employment and awarded compensation. This, however, was reversed on appeal and it was finally held that the accident did not arise out of the employment. The Lord President stated in the course of his opinion, "I admit that upon the decided cases there has been a fairly formidable argument presented in favor of saying that this is an accident arising out of the employment." Certainly in that case the position of the petitioner was much stronger than in the case of *Wicks v. Dowell*, and much stronger than that of the petitioner in the case at bar. The petitioner in *Robson v. Blakey*, by the nature of his employment, being obliged to work in a trench perhaps somewhat shielded from the normal circulation of the air and in a stooping position, exposing his back to the direct rays of the sun, might argue with far more force than the petitioner here that his difficulty arose out of his employment.

For these reasons and upon the authorities cited and discussed, I am unable to concur in the conclusion of the majority opinion which seems to me to ignore the long and well established rule for determining the proximate cause of an accident and to hold that a petitioner is entitled to compensation where as between the proximate cause and the employment there is no relation.

NOTE.

It is held in the reported case that personal injuries sustained from a fall are accidental within the meaning of a workmen's compensation act though the fall is due to dizziness caused by a pre-existing disease. The cases passing on the question whether disease, either pre-existing or superinduced, is an accident are reviewed in the note to *Vennen v. New Dells Lumber Co.* reported ante, this volume, at page 293.

STERTZ ET AL.

v.

INDUSTRIAL INSURANCE COMMISSION.

Washington Supreme Court—June 20, 1916.

91 Wash. 588; 158 Pac. 256.

Workmen's Compensation Acts — Effect — Dispensing with Judicial Controversy.

The workmen's compensation act (Laws 1911, c. 74), by omitting the words "acci-

dent" and "arising out of and in the course of employment," and substituting therefor "fortuitous event" and "injured in extra-hazardous work," departs from prevailing systems and awards compensation without judicial controversies.

Injury in Course of Employment — Absence from Plant.

Section 5 of said act providing compensation for each workman injured whether on the premises or at the plant or, he being in the course of his employment, away from the plant, the words "in the course of employment" qualify only when away from the plant.

[See Ann. Cas. 1913C 4; Ann. Cas. 1914B 498; Ann. Cas. 1916B 1293.]

What Constitutes Injury.

Section 3 providing that "injury refers only to injury resulting from fortuitous event as distinguished from contraction of disease," all injuries are intended to be compensated for unless willfully incurred, since only disease is excluded.

[See note at end of this case.]

Nature of Act — Commission Substituted for Employer.

Laws 1911, c. 74, is neither an employer's liability nor a workmen's compensation act, but an industrial insurance law, withdrawing from private controversy all phases of injury to workmen; and compensation flows from the commission, which must be sued rather than the employer, if it rejects a claim.

Injury by Act of Third Person.

Said law provides compensation to workmen injured on the premises by intervention of third persons, since it covers every fortuitous event regardless of fault.

[See Ann. Cas. 1915D 156.]

Validity of Act.

Said law does not violate the due process of law clause of the constitution by compelling compensation of workmen for injuries due to acts of third persons, against whose acts the employer should have every inducement to guard.

[See Ann. Cas. 1912B 174; Ann. Cas. 1915A 247; Ann. Cas. 1916B 1286.]

Same.

It would not be a violation of the due process of law clause of the constitution to make the master the insurer of the workman while on the premises.

Injury by Third Person.

Under said law, if the workman is injured on the premises from the act of a third person he has the absolute right of compensation from the fund provided; but, if so injured off the premises, he must elect whether to sue the third person or claim from the fund.

[See Ann. Cas. 1915D 156.]

Injury Not Arising Out of Employment.

The law does not, by providing compensation only for workmen injured in hazardous or extrahazardous employments, imply that compensation shall be made only for injuries arising out of the work.

[See Ann. Cas. 1913C 4; Ann. Cas. 1914B 498; Ann. Cas. 1916B 1293.]

Same.

Although it employs the word "accident" in administrative portions of the act, it does not thereby limit the words "fortuitous event" used in the clause granting compensation, since general intent will not control positive definitions.

Same.

Although the employer is required to report whether injury arose out of and in the course of employment of the injured person, that does not restrict compensation to injuries so arising.

Construction of Act — Depriving Court of Jurisdiction.

The legislature, in adopting Laws 1911, c. 74, as to workmen's compensation, having said positively that jurisdiction of courts in controversies over injuries to employees is ended, the courts must liberally construe such provision as well as other portions of the law.

Appeal from Superior Court, Thurston county: MITCHELL, Judge.

Claim for compensation under workmen's compensation act. Louise F. Stertz et al., plaintiffs, and Industrial Insurance Commission, defendant. Judgment for defendant. Plaintiffs appeal. The facts are stated in the opinion. REVERSED.

T. P. Fisk for appellants.

The Attorney General, John M. Wilson and Chas. E. Arney, Jr., for respondent.

[589] BAUSMAN, J.—This is a proceeding by the widow and minor children of Stertz, foreman of a logging camp, to recover through the industrial insurance commission statutory compensation for death.

This foreman had suspended for misconduct a workman named Steel but had reinstated him. Steel, discharged a few days later by the president, waylaid the logging train and, wounding one, killed others of the workmen including Stertz, who was in charge of the train as foreman. Only those were assailed with whom Steel while a workman had [590] had quarrels concerning his tasks. The present claimants are not shown to have collected or sought damages from Steel, but their claims were rejected both by the commission and the superior court. The sole argument now made to sustain their rulings is that the statute contemplates only "accident" as that term is popularly understood and also as "arising out of" the employment. These words nowhere occur in any of the definitions or granting clauses of our statute. Far stronger terms occur.

We are now brought to a point where we must explore this noble legislation to obtain a general, decisive view.

Our legislators, with three systems to imitate, chose the most sweeping. There was that of England, which least interferes with employers, a liability act removing defenses but prescribing no way in which the employer must provide for the claim. There was that of Denmark and Sweden in which the state issues policies to the employed at the master's expense. Finally there was that of Germany which ours most nearly resembles and which provides both the remedies and the fund by compulsory insurance with contribution of employers collectively. Even the German scheme was somewhat exceeded, for the private parties under our law have no participation in the management, nor, during a first period of three months, does our workman contribute something toward the loss, as he did under the German.

Our act came of a great compromise between employers and employed. Both had suffered under the old system, the employers by heavy judgments of which half was opposing lawyers' booty, the workmen through the old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in future where in the past there had been no liability at all. The servant was willing not only to give up trial by jury but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it. All agreed that the blood of the [591] workman was a cost of production, that the industry should bear the charge.

By the working class the new legislation was craved from a horror of lawyers and judicial trials. What they wanted, as this act expressly recites in its first section, was compensation not only safe but sure. To win only after litigation, to collect only after the employment of lawyers, to receive the sum only after months or years of delay, was to the comparatively indigent claimant little better than to get nothing. The workmen wanted a system entirely new. It is but fair to admit that they had become impatient with the courts of law. They knew, and both economists and progressive jurists were pointing out, what is now generally conceded, that two generations ought never to have suffered from the baleful judgments of Abinger and Shaw.

It is for us to say not whether our workmen ought to have a statute which insures them absolutely on the master's premises but whether they do have it. What they gave up for it is great, trial by jury and unlimited damages. The former was an undeniable advantage, the latter had often brought them five-fold what is afforded by this act, which gives not to exceed four thousand dollars for a life and fifteen hundred for the loss of a

limb or an eye. What laborers desired was not mere removal of the old defenses. Moreover, the English statute that had removed these had already begotten whole volumes of contests over the new words "accident" and "arising out of employment." Well may ours have used unqualified words to create an undebatable recovery when the injury should occur at the place of work, which even the common law had required the master to maintain in safety.

Those who drafted our law had before them many foreign statutes during the long and careful preparation of this, so we are at once struck by the absence of many familiar terms. In some of those the right of action springs from "accident;" in others from an injury arising "during and in the course [592] of employment." The English statute is "personal injury by accident arising out of and in the course of employment." Simple as these terms appear, they have filled volumes with discussion. Not one of them appears in any of the enabling or granting provisions of our law. Wherever a right is conferred or definition given, ours is unqualified. Indeed, our statute is in these features the least qualified that can be found. The intention to get rid of judicial controversies apparent throughout, we have already recognized:

"Aside from its humane purpose, it was adopted in order that the delay and frequent injustice incident to civil trials might be avoided." Chadwick, J., in *State v. Mountain Timber Co.* 75 Wash. 581, 583, 135 Pac. 645.

Having seen what was not inserted, let us see what was. Let us examine definitions carefully made. The first section, after stating that industrial relations in all hazardous employments are matter for police regulation, that injuries are frequent and inevitable and that controversies about them are wasteful, declares that:

"All phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra-hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided." Laws 1911, p. 345, § 1; 3 Rem. & Bal. Code, § 6604-1.

The third section, that of definitions, defines workman:

"Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer

carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer." Id. § 6604-3.

[593] We shall quote later a proviso appended to this definition and relating to injuries from third persons.

Dependent was defined as certain "relatives of a workman whose death results from any injury and who leaves surviving," etc.

The fifth section, the granting clause of compensation, is as follows:

"Each workman who shall be *injured* whether *upon the premises* or at the plant, or, he being in the course of his employment, away from the plant of his employer, or his family or dependents in case of death of the workman, *shall receive* out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, such payment *shall be* in lieu of any and all rights of action whatsoever against any person whomsoever." Id., § 6604-5.

Obviously and clearly the qualifying "in the course of employment" does not apply to "on the premises." Had that been intended, the arrangement was natural and easy. Thus, "When the workman is injured in the course of his employment either upon the premises or away from the plant." Surely we must assume a reason for the other peculiar order. Nor did that order come of chance. It is precisely repeated, we have just seen, in the definition of "workman." Even the punctuation is most carefully repeated there.

Injury too was given a definition: "The words injury or injured, as used in this act, refer only to an injury resulting from some *fortuitous event* as distinguished from the contraction of disease."

In this last we notice, first, not merely the avoidance of "accident" but of "arising out of the employment," the use of which this definition fairly invited if that were to be meant. Second, exclusion by enumeration. Disease is excluded; everything else is included. Lastly, "*fortuitous event*," the strongest term that could be used, no popular expression but one used by lawyers for positive strength, a term in truth [594] that is selected when one wishes all of "accident" and more. Black thus defines it:

"There is a difference between a fortuitous event, or inevitable accident, and irresistible force." By the former, commonly called the 'act of God,' is meant any accident produced by physical causes which are irresistible; such as a loss by lightning or storms, by the perils of the seas, by inundations and earthquakes, or by sudden death or illness.

By the latter is meant such an interposition of human agency as is, from its nature and power, absolutely uncontrollable."

Only one other kind of claim is excluded, that based on intentionally or wilfully incurred injuries. These the act itself elsewhere mentions and excludes without other language of consequence here.

We have now the provisions upon which compensation has to be granted or denied. The universally employed terms by which the injury must spring from the business are not there. Very opposite phraseology is used. The supreme court of the United States, in *Holden v. Stratton*, 198 U. S. 202, 25 S. Ct. 656, 49 U. S. (L. ed.) 1018, had occasion to consider the statute of this state which exempts the proceeds of life insurance policies from creditors. That our statute was using extreme, almost unreasonable, language being pointed out, it was argued to the court that the words must therefore be given more moderate meaning and must be interpreted in the policy of milder statutes of other states, but the supreme court said:

"The wide departure from the legislation of many of the other states, shown by the unrestricted terms of the Washington statute, instead of manifesting the intention of the legislature of that state to narrow the exemption to conform to the statutes of other states, on the contrary conclusively shows the intention of the Washington legislature to adopt a broader and more comprehensive exemption."

To resume, ours is not an employer's liability act. It is not even an ordinary compensation act. It is an industrial insurance statute. Its administrative body is entitled the industrial insurance commission. All the features of an insurance [595] act are present. Not only are all remedies between master and servant abolished, and, in the words of the statute, all phases of them withdrawn from private controversy, but the employee is no longer to look to the master even for the scheduled and mandatory compensation. He must look only to a fund fed by various employers. When the employer, for his part, pays his share into this fund, all obligation on his part to anybody is ended. Let a claim be rejected by the commission, the latter and not the employer is to be sued. Nor is the commission so much as selected by the parties. The state administers the fund. Few foreign countries had yet adopted a scheme so comprehensive. Germany alone furnished a precedent. In subsequent legislation in this country only one or two states have adopted this principle and none have pushed it so far.

To sum up, our act positively ends the "jurisdiction of the courts," on "all phases" of master and servant liability. Now it is undeniable that liability for a stranger's acts

on the premises is one of those phases, undeniable that in nearly every such case a question immediately arises whether it is not the master who may have to respond. But, it is said, we cannot hold such liability indisputable under this statute without establishing a construction that would make the master liable for such extreme things as death by lightning. Let us, therefore, review the statute again with both kinds of accident in view.

We have seen that, as the first section put an end to all civil actions appertaining to master and servant liability, so the fifth declared that the compensation "shall be in lieu of any and all rights of action whatsoever *"against any person whomsoever."*

Next, we have seen in the first section that compensation is to be paid *regardless of fault*. Thus there was to be compensation for some injuries not actionable before. For instance, let a machine which was excellently made, excellently inspected, and excellently operated cause injury by capricious [596] action contrary to all human experience, in a word let nobody be to blame, a servant under the common law could not recover for the master had not been at fault. Yet that this act means to give compensation in just such a situation can never be questioned. We start accordingly with liabilities before unknown, "a sure and certain relief for workmen regardless of questions of fault."

From the outset the creating of new liabilities was conceded. In the first debate in this court over the act an opening challenge was the new liability without fault taking away the employer's due process of law, and an illustration was given which it was thought would make the law ridiculous. Let the workman while at work be injured by a stranger's throwing something in from the street, there would be a claim for recovery; he would be injured "on the premises;" the injury would be from "fortuitous event." That such a claim would seemingly come under the act was referred to but left undecided by Justice Fullerton in his exhaustive opinion (*State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L.R.A.(N.S.) 466). He held under indisputable precedents that, notwithstanding the due process guaranty, courts had already sustained statutes imposing degrees of liability regardless of fault, and these decisions sustained ours in most of the new liabilities. As to others, if these were improper, the act by its own terms could stand without them. The apparent scope of the statute he conceded:

"It is claimed that the act allows workmen employed in such industries the benefit of the act when injured outside of the line of their duties or when engaged in the business of the concern in a capacity not affected by the pe-

culiar hazards of the business. We have quoted enough of the statute to show that it is somewhat obscure in these respects, but we are not inclined to think the point fatal to the act, even though we concede counsel's interpretation of it to be the correct one." *Id.*, pp. 196, 197.

[597] It is curious that the very illustration flung at our act to make it ridiculous has not been held ridiculous even under the narrow English statute. In *Challis v. London*, etc. R. Co. [1905] 2 K. B. (Eag.) 154, it was held that the employer was liable for the death of a locomotive engineer injured by a stone thrown from a bridge above by a mischievous boy.

Nor can we see that under the constitutional objection of due process of law the complaint of the employer is sounder when he pays for injuries caused by the meddling of a stranger on the premises than when he pays for injuries from a perfect machine. The question is one of degree and often of small degree. For, that the master should have every possible inducement to shield his workmen at their tasks from the meddling of third persons is plain, and instances are simple where his failing so to protect them must make him liable at common law. Having pronounced constitutional, then, an act which compels both employers and employed to go into a scheme of insurance, we do not hesitate to say that the difference in new or added liability by the act of a stranger on the premises is not enough to make it unconstitutional. It is but a slight extension of the common law assurance of a safe place to work. Neither would it be a violation of the due process guaranty to make the master an insurer of the workman at the shop. The supreme court of the United States in upholding the Nebraska statute making railways insurers of passengers (*Chicago, etc. R. Co. v. Zerneck*, 183 U. S. 583, 22 S. Ct. 229, 46 U. S. (L. ed.) 339), said: "Our jurisprudence affords examples of legal liability without fault, and the deprivation of property without fault being attributed to its owner."

Turning back now to the definition of workman, we may read that again with its immediate proviso:

"Workmen means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries [598] scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer: *Provided, however*, That if the injury to a workman occurring away from the plant of his employer is due to the negligence or

wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children or dependents, as the case may be, *shall elect* whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case." *Id.*, § 6604-3.

With the whole section before us we perceive that, when a workman is injured off the premises by a stranger, he must elect whom he shall sue, and that no electing is imposed on him when he is injured by a third person upon the premises. Of the latter situation nothing is said. Now from this silence one of four things must be true. Either when thus injured on the premises he has no right whatever to collect from the fund, or he has the right to collect from both the fund and the stranger, or only from one and then with waiver as to the other, or lastly only from one without waiver. The second conclusion is grossly improbable; the third would unfairly make him elect at his peril; the last, plausible, is illogical, for since he has to elect when the third person injures him off the premises, why not when injured upon them too? What possible reason for the right or necessity in one case and not in the other? Nothing answers this satisfactorily except the first conclusion, that when injured upon the premises only one defendant is possible. This conclusion is irresistibly supported, first, by the words, "in lieu of any persons whomsoever," found in the compensation section already [599] quoted; second, by the arrangement of the words "in course of employment," and lastly by the policy of this act which may well be supposed to end debate over involved situations while furnishing to the master the highest inducement to protect his workmen from inquisitive strangers, middlemen, careless co-operating employees, or dangerous persons of any sort.

In fine, this difference between the main clause and the proviso lies in the act's conceding an exclusive claim against the employer for all injuries on the premises by strangers. This last was reasonable. When an injury thus occurs, there must so often be involved the relations of the employer with that stranger or the character of the employment itself as inviting strangers, that we can see a policy of unqualified right against the fund. Suppose a visitor invited to the factory by the employer cause the

injury. Is the fund liable? If so, is it liable also when the visitor comes without invitation? Is it liable if the injury occur in a room where the stranger ought not to have come and the workman, knowing he ought not to have come, should have put him out? endless are these distinctions. Is a dray company to answer for an injury to a factory hand caused by one of its teams in a part of the factory where the owner of the factory ought not to have let it come? Is the fund to be used or the dray company? Why is the workman compelled to make the perplexing decision? Why is it not better policy that the master shall keep his premises at all times secure?

That against some third persons the workman has no suit for injuries on the premises this court has already decided. Even without considering the proviso about injuries off the premises (a portion of the statute not pressed upon the attention of the court), we held in *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, Ann. Cas. 1915D 154, L.R.A.1916A 358, that the fifth section, stating the compensation to be "in lieu of any and all rights of action whatsoever against any person whomsoever," prevents personal suit against the president [600] of a railway company for injuries in the company's operation, though to him personally the particular neglect was charged. The workman's claim must be against the fund. We made emphatic not only the words just quoted from the act itself, but also that the compensation was to cover as we expressed it ourselves, "every injury sustained by any workman while employed in any such industry, regardless of the cause of the injury or the negligence to which it might be attributed," because the statute said that the abolition of actions theretofore existing was "irrespective of the persons in favor of whom or against whom such right might have existed."

Just before this decision Judge Cushman in the Federal district court for this district had reached the same conclusion from the statute alone. *Meese v. Northern Pac. R. Co.* 206 Fed. 222. A brewery employee, he held, could not elect to sue a carrier which had injured him at the plant. His judgment was reversed by the circuit court of appeals though our *Peet* case was then before it. It distinguished that case on the ground that the company's president though personally sued must not be treated as a third person or stranger; but the Supreme Court of the United States has in turn reversed the intermediate court and has construed the *Peet* case as confirming the conclusion of Judge Cushman. *Northern Pac. R. Co. v. Meese*, 230 U. S. 614, 36 S. Ct. 223, 60 U. S. (L. ed.) 467. Judge Cushman, it

may be added, had commented on the force of the the proviso in the section we have discussed.

In *Ross v. Erickson Constr. Co.* 80 Wash. 634, 155 Pac. 153, we followed the *Peet* case, and denied the right to sue an employer's surgeon for malpractice after award accepted from the commission for the loss from the injury. The authorities and the purpose of the law were exhaustively reviewed by Justice Chadwick and the conclusion repeated that suit against third persons for injuries on the premises was abolished. The court laid emphasis on that part of the [601] statute which forever removes "all phases" of the liability during employment.

Authority accordingly is added to both policy and expression. The right of suit against third persons for injuries on the premises is taken away from the workman. To whom then does he look? Since the stranger cannot be made to pay him, the fund must. It would be intolerable to suppose that for this wrong he should have no redress at all.

To pronounce unqualified liability for injuries at the workshop grows easier the more it is considered. Shall we repulse the workman injured, say, in voluntarily fighting flames, or defending his master against assault, or the passengers on a train from a bandit? These are acts not to be discouraged and yet not paid for at common law. The workman who flees at such a time is viewed with contempt. Is he to pay himself for the burns and blows? The English courts, we may observe, have compensated "emergency" acts done in the interest of his employer: *Reese v. Thomas* [1899] 1 Q. B. (Eng.) 1015, 80 L. T. N. S. (Eng.) 578; *Harrison v. Whittaker*, 16 Times L. Rep. (Eng.) 108; *Whelan v. Moore*, 43 Ir. L. T. 205; and even his voluntary attempts to save the life of a fellow employee: *Matthews v. Bedworth*, 1 W. C. C. (Eng.) 124. If our statute aimed to cover them all it is not extraordinary. Even a few unusual causes of injury may well be charged to the fund, some of which will on reflection, it may be added, be found less unfair to the employer than at first consideration. Let us take an example. To say that the master notwithstanding the strength of "fortuitous event" might be liable if the workman was struck by lightning, seems at first preposterous. But let us look at the workman's point of view. The latter argues in effect, that if he had not been at the factory that day he would not have been struck by lightning, that it was the purpose of this act to give the workman every reason for fidelity and courage at the place of work, that part of the basis for the statute was the fact that the workman can seldom carry his own insur-

ance, and that on his sudden death [602] his widow and children are too often a charge upon the community.

The purpose to get rid of contention is the plainer when we consider in how many adjudicated cases under the other statutes the injured man is forced to argue about "arising out of the employment." Notwithstanding that noon recesses at the workshop are generally conceded to be hours of employment in those statutes, we have a workman in one decision injured while going from a higher to a lower floor at noon to receive a free lunch served by the employer. He must go to law about it. Was he or was he not in the course of employment? Again, a workman's claim was contested when during excessively hot weather he went to the roof in working hours for cooler air and fell to the street. So, a boy employed to piece together broken ends of yarn good-naturedly attempted to clean a machine and was injured. Not hired to clean machines, he was held not to have been hurt "in the course of employment." Such are the debates on which claimants really within the purpose of these laws have often had to waste their compensation in other jurisdictions.

Let it be remembered, too that the employer himself is no longer liable, that doctrines which might seem harsh were this an employer's liability act or the common law still prevailing, are now reasonable under assessment upon the industry at large. This insurance scheme is founded on contributions on both sides, the workman contributing his reduced damages, the employer getting that and conceding more liabilities.

The best argument against the construction to which we are tending would be that under it recovery would be possible for some fortuitous events that under no circumstances could spring from a fault of the employer. Yet the further we search the more difficult it is to find any such. Death by lightning, it might be said, would be an instance, death from a wanton pistol shot. As to the latter the English courts [603] have had to arrive at a conclusion. A gamekeeper was shot by a poacher. Even under the rigid English act, "accident arising out of" the employment, it was finally held that this was an accident (though the common understanding of that terms is certainly not death by assault), and that it arose out of the employment. *Anderson v. Balfour* [1910] 2 Ir. Rep. 497. Now if this be thought a conclusion none too strong, what shall be said about the case of the cashier who, while carrying his master's money, was assaulted and robbed? This was held to be an accident arising out of an employment. *Nisbet v. Rayne* [1910] 2 K. B. 689. So as to injury from lightning. Some situations during storms are more hazardous

than others. Various kinds of machines invite the electrical contact from the skies while others do not. In short, the employment or the orders of the master may have a good deal to do with the injury of the workman in an electrical storm. A case has recently been decided in Minnesota, where a driver struck by lightning was allowed judgment as from an accident: *State v. District Ct. 129 Minn. 502, 153 N. W. 119, L.R.A.1916A 344*. So in the English case of *Andrew v. Failsworth Industrial Soc. [1904] 2 K. B. 32, 90 L. T. N. S. 611*, the master was held liable for death by lightning when the workman during the storm was at work on the top of a building.

Now, if there be any occasion in which damages can be had for death from lightning, the policy of our law might be to have no debate about it in any instance, because if the workman must contend when he has not the right to recover, he will have to contend also when he has the right to recover. Let us recur to the child who was injured in oiling machinery when he was hired only to work at strands of yarn. From an economic, sociological standpoint it is waste to throw the child helpless upon society for what may have been a well-intended though mistaken act during employment. If he has to debate in a situation like that, then he [604] may have to debate when he walks from his own machine to lend a hand at a co-worker's machine on the other side of the room.

To seek authority in the decisions of other states is useless, for other statutes have no resemblance to ours. Those decisions are but painful struggles at interpretation of "arising out of," "accident," and "course of employment," which we believe were intentionally left out of our statute. Only one good is found in looking at those cases. They show what evils of litigation are escaped in our enactment. For instance, the Connecticut case of *Mann v. Glastonbury Knitting Co. 90 Conn. 116, 96 Atl. 368*. A room was heated by a pipe two feet in diameter, which brought in warm air. With the acquiescence of the employer workmen would place coffee bottles at the mouth of this pipe, but when one placing his at another opening was injured by a revolving fan, it was held that the injury did not "arise from the employment," notwithstanding it was conceded that employers were liable for injuries suffered by workmen in doing something "outside of obligatory duty permitted for mutual convenience, such as eating his dinner on the premises." These cases show the refinements to which courts are driven, the contests which workmen have to make at every turn under statutes of a qualified sort, that the new controversies over "arising out of" are but revivals of old contests over contributory neg-

ligence and assumed risk, though to get rid of these was the express announcement of the law. In our own court an instance is afforded. A workman injured by hernia resulting from a great strain in lifting at his work got his relief only after this court was reached. *Zappala v. Industrial Ins. Commission, 82 Wash. 314, 144 Pac. 54, L.R.A.1916A 295*. It is perfectly plain that there was a charge which the industry should bear, but assuming in this act the word "accident" and the phrase "arising out of the employment," contest was at once made possible and contest was [605] prolonged. Another instance of our own is *Wendt v. Industrial Ins. Commission, 80 Wash. 111, 141 Pac. 311*. A carpenter in a department store turns on an electric switch in a repair shop to start the wheel on which he would grind a tool. The electricity was not in his care or department. He was compelled to obtain the decision of our highest court before he could get his redress.

We decline to read into our act either the narrow word "accident" or the phraseology found in the English and other statutes. We prefer to leave it the force of clear and positive language designed to cure the past mischiefs of endless contention. The reports of other states already abound in contests over the new phraseology. It is for the legislature not for this court to modify, if it appear wise so to do, the plain language of our statute.

We have not overlooked an argument in the word "hazardous" and "extrahazardous." Since, it is said, the act compensates only persons in such employments, it meant to compensate them merely for injuries arising out of the work. This is fallacious. In the first place we cannot sustain that construction against plain terminology. Second, the circumstances show a difference in the intention. The workman was giving up unlimited damages and trial by jury. He could in exchange make for his class what terms he pleased, and the statute made those terms between him and his employer. That non-hazardous employments were not making terms too is of little moment.

"Accident," it is urged, does appear in sundry administrative sections of the act. Now it does not appear in any parts deliberately stating the basis of compensation, and even injury was powerfully defined as fortuitous event. "Accident" was used for brevity as a convenient substitute for "fortuitous event" in the administrative details of the act, and no court must construe a statute by general intent against positive definitions.

[606] In one section the employer, being required to make reports of accidents, is directed to state whether the accident "arose out of or in the course of the injured per-

son's employment." By no language whatever is this section made the basis of compensation or so connected with the compensatory provisions of the law as to give it other than statistical value for information to the department. Moreover, in the preceding clause it is stated that the report must be made whenever any accident or injury whatever occurs. This section, in short, makes no attempt to indicate which shall be paid.

In conclusion, even judicial decisions under the qualified statutes show that we can give full vigor to "injured on the premises" without raising a host of claims untolerated elsewhere. We have seen, in a word, the cases of lightning, of protecting a fellow employee, of the engineer killed by the boy from the bridge, of the assaulted cashier, and the assassinated gamekeeper. But since each new situation has always some difference, it is an infirmity if workmen are compelled always to argue over interpretation. Interpretation by instance is endless. The framers of this law having said positively that they wish the jurisdiction of courts ended on these controversies, it is our duty to give liberality as much to that as to other provisions of the law.

The situation indeed does not greatly differ from that which once obtained in life insurance. The early policies reserved to the company a perpetual question for any misrepresentations made to obtain them, and while this right was rarely exercised, yet it was exercised at times, and the right to exercise it was found so disquieting that the practically unqualified policy has taken the place of the other. To obtain this situation under the compensation act was undoubtedly the purpose of the workmen. It is also to our mind the language of the law.

Under our statute the workman is the soldier of organized industry accepting a kind of pension in exchange for absolute insurance on his master's premises.

[607] The judgment of the lower court is reversed and the cause remanded with instructions to enter a judgment against the commission for the amount of appellant's claim.

Morris, C. J., Main, Holcomb, and Parker, JJ., concur.

NOTE.

What Is "Injury" or "Personal Injury" within Meaning of Workmen's Compensation Act.

Introductory, 362.
Nonoccupational Disease, 362.
Occupational Disease, 366.
Under Connecticut Act, 367.
Under Washington Act, 370.

Introductory.

Some of the workmen's compensation acts give a right to compensation for an "injury" or "personal injury" received in the course of the employment, while others require that the injury shall be "accidental" or "by accident." The present note is designed to review the recent cases defining the term "injury" or "personal injury" as used in statutes of the former class. The earlier cases are collated in the note to Hurle's Case, Ann. Cas. 1915C 919.

The question whether disease is an "accident" under an act of the latter variety is considered in the notes to Brintons v. Turvey, 2 Ann. Cas. 137; Broderick v. London County Council, 15 Ann. Cas. 85; Sullivan v. Modern Brotherhood, Ann. Cas. 1913A 1116; and Venen v. New Dells Lumber Co. reported ante, this volume, at page 293.

The following recent cases while they do not determine any question within the scope of the present note contain some discussion by way of dictum of the meaning of the term "injury" or "personal injury" as used in a workmen's compensation act. *Eaves v. Blaencydach Colliery Co.* (1910) 2 B. W. C. C. (Eng.) 329; *Yates v. South Kirkby, etc. Collieries* (1910) 3 B. W. C. C. (Eng.) 418; *Glasgow Coal Co. v. Welsh* [1916] 2 A. C. (Eng.) 1, Ann. Cas. 1916E 161, 85 L. J. P. C. 130, [1916] W. C. & Ins. Rep. 79, 114 L. T. N. S. 809, 60 Sol. J. 336, 32 Times L. Rep. 539, *affirming* [1915] Sc. Ct. Sess. 1020; *Westminster Brymbo Coal, etc. Co. v. Evans* [1916] W. C. & I. Rep. (Eng.) 241; *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, 153 Pac. 24; *In re Bowers* (Ind.) 116 N. E. 842; *Robbins v. Original Gas Engine Co.* 191 Mich. 122, 157 N. W. 437; *Ramlow v. Moon Lake Ice Co.* 192 Mich. 506, 158 N. W. 1027, L.R.A.1916F 955; *Kutschmas v. Briggs Mfg. Co.* (Mich.) 163 N. W. 933; *State v. District Ct. (Minn.)* 164 N. W. 585; *Johansen v. Union Stock Yards Co.* 99 Neb. 328, 156 N. W. 511; *Shinnick v. Clover Farms Co.* 169 App. Div. 236, 154 N. Y. S. 423, *affirming* order 90 Misc. 1, 152 N. Y. S. 649; *DeVoe v. New York State Rys.* 169 App. Div. 472, 155 N. Y. S. 12; *Rist v. Larkin*, 171 App. Div. 71, 156 N. Y. S. 875; *Hiers v. Hull*, 164 N. Y. S. 767; *Fassig v. State* (Ohio) 116 N. E. 104; *Adams v. Iten Biscuit Co.* (Okla.) 162 Pac. 938; *Archibald v. Ott* (W. Va.) 87 S. E. 791.

Nonoccupational Disease.

Where a workmen's compensation act provides for compensation for "injuries" or "personal injuries" incurred in the employment without requiring that the injury shall be "accidental" or "by accident," the term

"injury" or "personal injury" is generally held to include a nonoccupational disease arising out of the course of the employment without the intervention of an accidental injury. *Hunnewell's Case*, 220 Mass. 351, 107 N. E. 934; *Sponatski's Case*, 220 Mass. 526, 108 N. E. 466, L.R.A.1916A 333; *McPhee's Case*, 222 Mass. 1, 109 N. E. 633; *Madden's Case*, 222 Mass. 487, 111 N. E. 379, L.R.A. 1916D 1000; *Crowley's Case*, 223 Mass. 288, 111 N. E. 786, 787; *McManaman's Case*, 224 Mass. 554, 113 N. E. 287; *Walsh's Case*, 227 Mass. 341, 116 N. E. 496. And see *In re McNicol*, 215 Mass. 499, 102 N. E. 697, L.R.A. 1916A 306; *Milliken's Case*, 216 Mass. 293, 103 N. E. 898; *Doherty's Case*, 222 Mass. 98, 109 N. E. 887; *Sanderson's Case*, 224 Mass. 558, 113 N. E. 355; *In re Maggelet (Mass.)* 116 N. E. 972. See also the following opinions of the solicitor of the department of labor in cases arising under the federal act relating to hazardous employments under the Panama canal commission: *In re Clark*, Op. Sol. Dept. Labor 188; *In re Clark*, 27 Op. Atty-Gen. 346, Op. Sol. Dept. Labor 204; *In re Sheeran*, 28 Op. Atty-Gen. 254, Op. Sol. Dept. Labor 207; *In re Ourand*, Op. Sol. Dept. Labor 209; *In re Powers*, Op. Sol. Dept. Labor 214; *In re Hicks*, Op. Sol. Dept. Labor 217; *In re Luttrell*, Op. Sol. Dept. Labor 219; *In re Jarvis*, Op. Sol. Dept. Labor 219; *In re Wite*, Op. Sol. Dept. Labor 221; *In re Pohl*, Op. Sol. Dept. Labor 223; *In re Bunce*, Op. Sol. Dept. Labor 224; *In re Flora*, Op. Sol. Dept. Labor 226; *In re Rodriguez*, Op. Sol. Dept. Labor 227; *In re Clements*, Op. Sol. Dept. Labor 228; *In re Walsh*, Op. Sol. Dept. Labor 231; *In re Atkinson*, Op. Sol. Dept. Labor 235; *In re Green*, Op. Sol. Dept. Labor 237; *In re Murray*, Op. Sol. Dept. Labor 239; *In re Hill*, Op. Sol. Dept. Labor 242; *In re Trammell*, Op. Sol. Dept. Labor 244; *In re Ellmore*, Op. Sol. Dept. Labor 245; *In re Lloyd*, Op. Sol. Dept. Labor 247; *In re Hewitt*, Op. Sol. Dept. Labor 248; *In re Irving*, Op. Sol. Dept. Labor 249; *In re Haley*, Op. Sol. Dept. Labor 255; *In re Edmonds*, Op. Sol. Dept. Labor 259; *In re Jule*, Op. Sol. Dept. Labor 261; *In re Arata*, Op. Sol. Dept. Labor 264; *In re Thayer*, Op. Sol. Dept. Labor 266; *In re Springer*, Op. Sol. Dept. Labor 267; *In re Clark*, Op. Sol. Dept. Labor 270; *In re Potter*, Op. Sol. Dept. Labor 272; *In re Withy*, Op. Sol. Dept. Labor 273; *In re Sargent*, Op. Sol. Dept. Labor 275; *In re Devine*, Op. Sol. Dept. Labor 277; *In re Manning*, Op. Sol. Dept. Labor 279.

Thus in *Madden's Case*, 222 Mass. 487, 111 N. E. 379, L.R.A.1916D 1000, wherein it appeared that the pre-existing heart disease of an employee was so aggravated by a strain sustained in the course of her work that she suffered an attack of angina pectoris and became incapacitated for work, the court

said: "In this connection it is to be noted that there is no explicit provision for compensation for occupational disease as such. 'Personal injury' is the only ground for compensation. The legislative principal declared by the workmen's compensation act, to the test of which all cases arising under it must be subjected, is that whatever rightly is describable as a 'personal injury,' if received 'in the course of' and 'arising out of' the employment, becomes the basis for a claim. If the harm suffered by the employee in the case at bar had been received as the result of physical endeavor in striving to resist tortious conduct by the employer, or in merely being subjected to such conduct, there would be little doubt that recovery could be had in an action at law as for a 'personal injury' in the common-law sense of those words. *Coleman v. New York, etc. R. Co.* 106 Mass. 160, 178; *Larson v. Boston El. R. Co.* 212 Mass. 262, and cases collected; *Wiemert v. Boston El. R. Co.* 216 Mass. 598. Without undertaking to define 'personal injury' or to go beyond the requirements of the facts here presented, it is enough to say that the occurrence described by the dependent when she said 'she felt something give' and felt 'something else give way' accompanied by the symptoms of angina pectoris, may have been found to be a personal injury."

However, although the Massachusetts act has been held to cover occupational disease in a case discussed in the original note, in the case of *In re Maggelet*, 116 N. E. 972, wherein a cigar maker claimed compensation for alleged "occupational neurosis," the court in holding that compensation should not have been awarded said: "There is here no foundation for a finding that the employee sustained 'personal injury' which arose out of and in the course of his employment. 'Personal injury' as used in the workmen's compensation act, has been held to be more comprehensive than the 'personal injury by accident' of the English act. The cases which have arisen heretofore under our act have been of a different character from that here presented. . . . Poisoning always has been regarded as a tortious act in the nature of a personal injury, for which damages might be recovered in an action at law if other elements of liability are present. . . . The words 'personal injury' in their connection in this statute do not naturally lend themselves to a situation such as that here disclosed. The act relates to industrial conditions. It has to do with the employment of labor. The act affords no relief against general disease. It is not a scheme for health insurance. It deals only with personal injuries following as an immediate result from the employment as its direct cause. In general it was intended as in the nature of a

substitute for actions of tort for personal injuries at common law and under the employer's liability act (Rev. Laws, c. 106) by employees against their employers. That is apparent from the provisions of part 1 of the workmen's compensation act as well as the legislative resolves and reports preceding its enactment. But, as has been pointed out, the act goes beyond those limits and includes such diseases as fairly may be termed personal injuries. The act does not mention disease or occupational disease. See St. 1913, c. 813, § 12. It awards compensation for disease when it rightly may be described as a personal injury. A disease of mind or body which arises in the course of employment, with nothing more, is not within the act. It must come from or be an injury, although that injury need not be a single definite act but may extend over a continuous period of time. Poisoning, blindness, pneumonia, or the giving way of heart muscle, all induced by the necessary exposure or exertion of the employment, fall within well recognized classes of personal injuries. On the other hand the gradual breaking down or degeneration of tissues caused by long and laborious work is not the result of a personal injury within the meaning of the act. A person may exhaust his physical or mental energies by exacting toil, and become unfit for further service, but he is not because of this entitled to compensation, for the reason that this condition cannot fairly be described as a personal injury. The disease must be, or be traceable directly to, a personal injury peculiar to the employment. A nervous condition dependent upon poor posture of the body in our opinion does not constitute a commonly known and well recognized personal injury consequent upon employment. It is difficult to establish and define a plain line of division between what is personal injury within the act on the one hand and simple disease on the other hand. But personal injury and disease are not synonymous. They are different in meaning. One does not include the other. They are classifications differing from each other in kind, although they may overlap in some instances. There is not enough in this record to show that the condition of the employee is a necessary result of his work. It arose on all the evidence from a bad posture of the body while at work. But there is nothing to show that this was a necessary incident of the employment. Scarcely anything is more difficult to control or influence than the position of the body of another. Whether one shall be erect or stooping of figure, whether the carriage of the person shall be lithe or stiff, whether the chest shall be narrow or broad and the place for the lungs correspondingly cramped or enlarged, whether breathing shall be deep

and full, or short and impaired, depend in large degree upon the habit, temperament, and appreciation of the requisites of right living on the part of the individual. Interference on these matters by the employer might be regarded as an unwarranted impairment of personal privilege. There are few employments which if pursued without regard to the laws of health, and the requirements of correct method of life, may not invite some form of disease. This record is bare of any evidence to show that it is a reasonably necessary result of the employment that those following it should have neurosis or that the including proximate cause of that condition is the employment. This court has gone further than any other, so far as we are aware, in holding that poisoning, heart lesion and kindred physical ills may be found to be personal injuries under the act. The courts of other states of the Union, in construing workmen's compensation acts more or less similar to our own, have declined to follow *In re Hurler*, 217 Mass. 223, 104 N. E. 336, L.R.A.1918A 279, Ann. Cas. 1915C 919, and the principle there established, and have held that poisoning arising out of the employment through the inhalation of gases or other substance was not a personal injury under the act. . . . Nevertheless we remain content with our decisions in this particular. But the doctrine has not been established by these decisions that every disease caught by an employee in the course of his employment is a personal injury under the act. . . . It seems clear for these reasons that the present case cannot rightly be termed a personal injury within the meaning of those words in the act."

In *Crowley's Case*, 223 Mass. 288, 111 N. E. 786, the court in affirming a decree affirming an award of compensation said: "The city contends that no causal connection between the employee's injuries and his general condition of paresis, rendering him insane and requiring his commitment to an asylum, is shown by the record, and therefore that the decree should be reversed. In *re McNicol*, 215 Mass. 497. But the material evidence before the arbitration committee submitted without the introduction of further testimony to the industrial accident board upon review, warranted the findings, that the employee had a 'pre-existing constitutional disease, known as syphilis,' which, being dormant, left his ability to perform the arduous work for which he was hired unimpaired, and that, because of the nature of the accident arising out of and in the course of employment, his nervous system suffered a shock sufficiently severe to aggravate and accelerate this condition, until general paralysis or insanity resulted depriving him of all capacity for work in the future. The statute prescribes

no standard of fitness to which the employee must conform, and compensation is not based on any implied warranty of perfect health or of immunity from latent and unknown tendencies to disease which may develop into positive ailments if incited to activity through any cause originating in the performance of the work for which he is hired. What the legislature might have said is one thing; what it has said is quite another thing; and in the application of the statute the cause of partial or total incapacity may spring from and be attributable to the injury just as much where undeveloped and dangerous physical conditions are set in motion producing such result, as where it follows directly from dislocations or dismemberments or from internal organic changes capable of being exactly located."

In Hunnewell's Case, 220 Mass. 351, 107 N. E. 934, the court said: "The physical injury to the eye of the employee in the case at bar was slight and he soon recovered from it completely so far as concerned harm to the organ itself. But the arbitration committee found that 'the injury to the eye caused a nervous upset and a neurotic condition which is purely functional.' The industrial accident board found that he was 'partially incapacitated for work by reason of a condition of hysterical blindness and neurosis, said condition having a causal relation with the personal injury.' These findings, which seem to be identical in substance, were warranted by the evidence. Apparently he did not have sufficient will power to throw off this condition and go to work as his physical capacity amply warranted him in doing. But such a condition resulting from a battery is an injury for which a tortfeasor would be liable in damages. . . . The same principle applies to injuries flowing as a proximate result from an actual physical impact received by an employee under the act in the course of and arising out of his employment."

In Sponatski's Case, 220 Mass. 526, 108 N. E. 466, L.R.A.1916A 333, it appeared that an employee while at work received an injury from a splash of molten lead and subsequently while insane threw himself from a window and was fatally injured. The court said: "The circumstances of the leap from the window as narrated by all the eyewitnesses, point rather to ungovernable lunacy than to the volition even of a diseased mind. The finding in this respect, although hanging on a rather slender thread of evidence, is not unsupported. Therefore it must stand. This decision rests upon the rule established in Daniels v. New York, etc. R. Co. [183 Mass. 393], supra. That rule applies to cases arising under the workmen's compensation act. It is that where there follows as the direct result of a physical injury an insanity of such violence as

to cause the victim to take his own life through an uncontrollable impulse or in a delirium of frenzy 'without conscious volition to produce death, having knowledge of the physical nature and consequences of the act,' then there is a direct and unbroken causal connection between the physical injury and the death. But where the resulting insanity is such as to cause suicide through a voluntary wilful choice determined by a moderately intelligent mental power which knows the purpose and the physical effect of the suicidal act even though choice is dominated and ruled by a disordered mind, then there is a new and independent agency which breaks the chain of causation arising from the injury. . . . The obligation to pay compensation under the workmen's compensation act equally is absolute when the fact is established that the injury has arisen 'out of and in the course of' the employment. Part II, sec. 1. It is of no significance whether the precise physical harm was the natural and probable or the abnormal and inconceivable consequence of the employment. The single inquiry is whether in truth it did arise out of and in the course of that employment. If death ensues, it is immaterial whether that was the reasonable and likely consequence or not; the only question is whether in fact death 'results from the injury.' Part II, sec. 6. When that is established as the cause, then the right to compensation is made out. If the connection between the injury as the cause and the death as the effect is proven, then the dependents are entitled to recover even though such a result before that time may never have been heard of and might have seemed impossible. The inquiry relates solely to the chain of causation between the injury and the death."

In Walsh's Case, 227 Mass. 341, 116 N. E. 496, the court said: "We are of the opinion that subsequent insanity does not deprive an employee of compensation due him under the provisions of the workmen's compensation act. Indeed the effect of subsequent insanity and the only effect of it is to make greater the employee's need to have that compensation which apart from the subsequent disability justice required the employer to pay him."

In McPhee's Case, 222 Mass. 1, 109 N. E. 633, the court said: "The inhalation of damp smoke and drenching with water resulting in lobar pneumonia might have been found to have been a 'personal injury' within St. 1911, c. 751, Part II, sec. 1."

In McManaman's Case, 224 Mass. 554, 113 N. E. 287, which was an appeal from an award in favor of a longshoreman who froze both hands while at work, it appeared that the award was made upon the theory that the employee's work in unloading vessels exposed him to greater danger of personal

injury by frostbite than the ordinary person or outdoor worker. The supreme court declined to disturb the award, saying: "In his argument counsel for the insurer has pointed out that the bags of fabric were not cold; that the petitioner's hands would be but little closed when he handled them; that after he had pushed the truck off the boat his hands were free while he was walking back to get another load and that he had ample opportunity to swing his arms and keep up his circulation at that time. All these were matters proper to be urged upon the board and to be considered by them in passing upon the question of fact upon which they had to pass. But they are not matters which are decisive of the question of law which we have to decide, namely, whether on the evidence as a whole the board were warranted in finding (as they did find) that the petitioner was exposed to 'materially greater danger and likelihood of getting frozen than the ordinary person or outdoor worker on the date' in question. Although the question is a close one, we are of opinion on the whole that the evidence before the board warranted the finding made by them."

Occupational Disease.

According to one recent case the term "injury" or "personal injury" as used in a workmen's compensation act does not cover occupational diseases. *Industrial Commission v. Brown*, 92 Ohio St. 309, 110 N. E. 744, L.R.A.1916A 1277, wherein, in holding that a Workmen's Compensation Law did not include lead poisoning an occupational disease, the court said: "The particular question involved in the instant case is whether the words 'personal injuries sustained in the course of employment' as used in the Workmen's Compensation Law, approved June 15, 1911 (102 O. L. 524), include lead poisoning contracted in course of employment. The defendant in error was employed in August, 1913, by the Eagle White Lead Co. of Cincinnati, such company being at the time a voluntary contributor to the state insurance fund. While thus employed Brown contracted lead poisoning of so serious a nature that he became sick and disabled from work. . . . The question is one of paramount public importance, not only to the industrial classes but to the state as well. The state has been administering this great trust for nearly four years, and during all that period the construction given the statute under consideration by the administrative body has been such as to preclude recovery for occupational disease, or any disease for that matter, incurred in the course of employment. For while the disease under consideration was clearly occupational, yet if the claim of Brown to participate in

the fund be sustained, it would at once open wide the doors to all claimants who have suffered from disease of any sort which they may have incurred while employed. The premium rates assessed and collected by the administering board during this period of time have been fixed on a basis of death and injuries by accident solely, to the entire exclusion of injury through disease. It is quite patent that any other construction would necessitate an immediate and striking horizontal elevation of all premium rates and would in all probability prove a serious menace to the law itself. Administrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative so to do. This might be said to be particularly true of laws of the nature and character of the one under consideration. The state has entered on a virgin field, not wholly without chart or compass, it is true, yet without much in the way of experience to light the way. In a large measure Ohio may be said to be the pioneer in working out and reducing to a working basis the theories of workmen's compensation. No statute enacted in these latter days has had to encounter so fierce and powerful an opposition as this particular class of legislation. The law is yet on trial. It has to justify itself for its maintenance before the bar of public opinion. To seriously cripple it by a construction that could readily be defended from a legal standpoint, and that would at the same time be held to the more humane interpretation, would in the long run work great injury to the industrial class as a whole. An injustice would likewise be done to the employers of Ohio, who alone are contributing the millions that go to make up the fund. Courts will take judicial notice of the events going to make up the history of a state as well as the transactions and objects intimately connected with it. Why, then, should this court, contrary to the general knowledge possessed by the people of Ohio, blind itself to the real situation and content itself with a mere abstract construction of what might be included in the phrase 'personal injuries,' realizing all the while that to grant the enlarged construction sought by the defendant in error would put in peril the splendid efforts that have been exerted by the public servants of Ohio, with much travail of soul, to provide compensation with promptness and certainty to the unfortunates killed or wounded in their battle for existence? This court, with much show of logic and also authority, could construe this phrase as did the courts below. It is no difficult matter to bring within the purview of the words 'personal injuries sus-

tained in the course of employment' occupational diseases incurred in course of employment. It can be further conceded that had the legislature, in enacting either the original or the present law, desired to make plain its intention to exclude occupational disease from participation in the fund, the exclusion could readily have been made by adding to the words 'personal injuries' the qualifying phrase 'by accident.' As against all this the court feels impelled to follow both the executive and legislative construction of the word 'injury' as employed in this act and to limit recovery of compensation to such as may have suffered injury otherwise than through disease, thereby giving to the legislative and executive construction the added force of judicial construction."

Under Connecticut Act.

The decisions under the Connecticut workmen's compensation act hold in effect that a "personal injury" within the meaning of the act involves both an accident and a personal injury therefrom as distinguished from a disease, but includes the effect of an accidental injury which either superinduces a disease or aggravates an existing disease. *Larke v. John Hancock Mut. L. Ins. Co.* 90 Conn. 303, 97 Atl. 320; *Miller v. American Steel, etc. Co.* 90 Conn. 349, 97 Atl. 345; *Hartz v. Hartford Faience Co.* 90 Conn. 539, 97 Atl. 1020; *Linnane v. Aetna Brewing Co.* 91 Conn. 158, 99 Atl. 509, L.R.A.1917D 77. Thus in *Hartz v. Hartford Faience Co.* supra, it appeared that a shipping clerk suffered a strain while lifting or attempting to lift a barrel. In holding that he was entitled to compensation the court said: "By the terms of our compensation act, compensation is not made to depend upon the condition of health of the employee, or upon his freedom from liability to injury through a constitutional weakness or latent tendency. It is awarded for a personal injury 'arising out of and in the course of his employment,' and for an injury which is a hazard of that employment. As Chief Justice Rugg points out in *Madden's Case*, 222 Mass. 487, 494, 111 N. E. 382, 'it is the hazard of the employment acting upon the particular employee in his condition of health and not what the hazard would be if acting upon a healthy employee or upon the average employee.' Whatever predisposing physical condition may exist, if the employment is the immediate occasion of the injury, it arises out of the employment because it develops within it. When the exertion of the employment acts upon the weakened condition of the body of the employee, or upon an employee predisposed to suffer injury, in such way that a personal injury results, the injury must be said to arise out of the employment. An employee may be suffering

from heart disease, aneurism, hernia, as was Mr. Hartz, or other ailment, and the exertion of the employment may develop his condition in such a manner that it becomes a personal injury. The employee is then entitled to recover for all consequences attributable to the injury. The acceleration or aggravation of a pre-existing ailment may therefore be a personal injury within our act: and the test may well be that suggested by Lord Loreburn in *Clover, Clayton & Co. v. Hughes, L. R.* (1910) App. Cas. 242: Did the ailment develop the injury, or did the employment develop it in any material degree? If it did, the injury arose out of the employment."

In *Larke v. John Hancock Mut. L. Ins. Co.* 90 Conn. 303, 97 Atl. 320, it appeared that an insurance solicitor and collector while engaged in his usual employment froze his nose and the tissues adjacent thereto which produced a lesion of the skin and surface tissues. The court said: "The first question for decision is whether the frostbite of the decedent was a personal injury 'arising out of and in the course of his employment.' Public Acts of 1913, chap. 138, Part B, sec. 1. The suggestion was made in argument, although not greatly pressed, that 'personal injury' under our statute refers merely to accidental injury. The case does not at this time require us to pass upon the question whether the term 'personal injury' in our act includes disease as well as accident. Upon all authority, if it refers merely to accident, it must include the consequences of accident, whether a development of the injury through derangement of the physical structure of the body, or of a disease from the accident. The finding shows that unusual exposure of the decedent to the weather, due to his employment, caused a frostbite producing lesions of the face, through which the germ erysipelas entered and the disease erysipelas developed. We think the lesion, whether produced by a frostbite or a blow, must be held to be a 'personal injury' within the act. In either case, the injury would be the result of an untoward mishap. If the term 'personal injury' be given its narrowest construction and confined to injuries of accidental origin, it must be held to include any form of bodily harm or incapacity, whether arising by direct contact, or lesion caused by external violence or physical force, or untoward mishap. . . . An attempt to frame an all-embracing definition so as to include all injuries arising in the course of one's employment, would probably prove its inadequacy under the changing conditions of time. In a general way, sufficient for this case, and perhaps helpful in the consideration of other cases, we may say that an injury to an employee is said to arise in the course of his employment when it occurs within the period of his employment, at a place where he may

reasonably be, and while he is reasonably fulfilling the duties of his employment, or engaged in doing something incidental to it. 'In the course of' points to the place and circumstances under which the accident takes place and the time when it occurred."

In *Miller v. American Steel, etc. Co.* 90 Conn. 349, 97 Atl. 345, it appeared that a workman's incapacity resulted from a gradual process of lead poisoning arising out of his employment which could not be traced to any fortuitous or unexpected event which could be located in point of time and place, and which was not the result of a lesion produced by external violence or internal strain. In holding that the term "personal injuries" did not include occupational diseases, the court said: "The record, therefore, does not present the question whether our workmen's compensation act gives compensation for death or incapacity resulting from disease caused by accidental injury. It presents the very different question whether our compensation system includes occupational diseases as well as industrial accidents. More specifically, the question is whether the words 'personal injury . . . arising out of and in the course of his employment,' in our act, were intended by the general assembly to cover disease arising out of and in the course of the employment. There is no reference whatever to disease in our act, and although the case nominally turns upon the proper construction of the single word 'injury,' the real issue is whether the important subject-matter of industrial diseases shall be introduced by judicial construction into a statute which does not mention the subject, or contain any provisions for dealing with the problems peculiar to that subject. . . . Thus, among what may be called the doubtful states, the preponderance of opinion, so far as any has yet been expressed, seems to be against importing occupational diseases into workmen's compensation acts by the process of judicial construction. Turning now to the history of our own act, the first affirmative action taken by the general assembly was the passage of a resolution in 1911 providing for the appointment of a commission 'to investigate and report to the next session of the general assembly upon the legality, advisability, and practicability of establishing a state insurance department, or other form of state insurance, as a means for providing compensation for workmen and others injured through accidents occurring in industrial occupations.' The commission appointed pursuant to this resolution presented its report, entitled 'The Report of the Connecticut State Commission on Compensation for Industrial Accidents, to the General Assembly of 1913,' and the bill recommended by the commission was limited to compensation for 'personal injuries from

any accident arising out of and in the course of his employment.' Several other bills, including one representing the views of the association of manufacturers, and another the views of the state federation of labor, were presented to the general assembly. None of them made any reference to occupational disease, and in the course of many days of committee hearings reported and filed with the state librarian, we find no reference to occupational disease and none appears in the bill as finally adopted or in the amendments of 1915. It follows that if we construe the act, as covering compensation for death or incapacity arising from occupational disease we shall introduce into it a most important subject, which, so far as we can ascertain from the public documents, was not considered by the legislature in this connection. In fact the economic importance of the inclusion of disease in an act which contains no special provisions on the subject, can hardly be estimated. In the absence of any definition of occupational disease, the act would include all diseases arising out of and in the course of the employment, and the word injury, if it includes the contraction of disease includes also the aggravation of disease. So construed, our act might almost be said to give compensation for the common fate of all who work because they must. The result would be to increase very greatly the cost of compensation insurance, and might either discourage the acceptance of the act by employers or make it difficult for any but the young and strong to obtain employment. It may be added that in Germany, and so far as we know, in other countries where a comprehensive scheme of workmen's sickness insurance is in force, the workman is required to contribute toward the cost of the insurance. We ought not to import into the act by construction a subject-matter carrying such possible consequences, unless convinced that the general assembly, notwithstanding its omission to refer to the subject, actually intended to include it. It seems more reasonable to suppose that in framing an elective system of compensation for the employer and the employee to accept or reject, the general assembly should attempt to state the essential conditions of the bargain in terms, so that the parties could understand the consequences of their election. And when we find in such a statute, and in the legislative proceedings leading to its adoption, no mention of so important a subject as industrial sickness insurance, the reasonable inference is that the general assembly probably did not intend to include the cost of such insurance in the proposition which it submitted to employers for their acceptance. This seems still more probable, because it appears from chapter 14 of the Public Acts of 1913, p. 1634,

entitled 'An Act concerning Reports of Occupational Diseases,' that the general assembly had the subject of occupational disease under consideration at the very time when the workmen's compensation act was pending before it; and the action which it took in respect of that subject was to require physicians to report cases, not to the compensation commissioner of the district, but to the commissioner of the bureau of labor statistics. This would indicate that the general assembly intended to deal separately and at some future time with the subject of occupational disease. . . . It cannot make any substantial difference in the construction of the term 'injury' as used in that context, whether the words 'by accident' are inserted or omitted. This is the crucial point in the literal interpretation of our act. The injury to be compensated is not defined except by the words 'such injury,' meaning as the context says, a personal injury arising out of and in the course of the employment in respect of which the employer is exempted from actions for damages in case of the mutual acceptance by employer and employee of Part B; and in respect of which he is to be deprived of his so-called common-law defenses unless he does accept Part B. The point is not merely a verbal one. The act is in form elective. In Part A it takes away the employer's common-law defenses, and in Part B it offers him a compensation scheme whose disadvantages are more or less nicely balanced against the alternative of facing common-law actions for damages with a crippled defense. It was quite to be expected that the compensation scheme should cover the same ground as the common-law action for damages, and the language of the act was, we think, plainly intended to accomplish that result. Since the common-law action for damages, which was founded on the master's negligence, never attempted to cover the typical case of an occupational disease caused by continual exposure to the ordinary and known risks of the employment, the inference is plain that the alternative compensation scheme was not intended to cover such diseases. As already pointed out, the act, because of its entire omission to refer to the subject, must include all diseases arising out of and in the course of the employment, or none. And if it was not intended to cover the typical occupational disease, it was clearly not intended to cover any except such as are the direct result or natural consequence of an accidental injury."

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reasonably be, and while he is reasonably fulfilling the duties of his employment, or engaged in doing something incidental to it. 'In the course of' points to the place and circumstances under which the accident takes place and the time when it occurred."

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Sergeant at Arms or House of Representatives, defendant. Judgment for defendant. Relator appeals. The facts are stated in the opinion. REVERSED.

Charles P. Spooner, Jesse O. Adkins and John C. Spooner for appellant.

D-Cady Herrick, Martin W. Littleton and Henry M. Goldfogle for appellee.

[530] WHITE, C. J.—These are the facts: A member of the House of Representatives on the floor charged the appellant, who was the [531] district attorney of the Southern District of New York, with many acts of misfeasance and nonfeasance. When this was done the grand jury in the Southern District of New York was engaged in investigating alleged illegal conduct of the member in relation to the Sherman Anti-trust Law and asserted illegal activities of an organization known as Labor's National Peace Council to which the member belonged. The investigation as to the latter subject not having been yet reported upon by the grand jury, that body found an indictment against the member for a violation of the Sherman law. Subsequently calling attention to his previous charges and stating others, the member requested that the judiciary committee be directed to inquire and report concerning the charges against the appellant in so far as they constituted impeachable offenses. After the adoption of this resolution a subcommittee was appointed which proceeded to New York to take testimony. Friction there arose between the subcommittee and the office of the district attorney based upon the assertion that the subcommittee was seeking to unlawfully penetrate the proceedings of the grand jury relating to the indictment and the investigations in question. In a daily newspaper an article appeared charging that the writer was informed that the subcommittee was endeavoring rather to investigate and frustrate the action of the grand jury than to investigate the conduct of the district attorney. When called upon by the subcommittee to disclose the name of his informant the writer declined to do so and proceedings for contempt of the House were threatened. The district attorney thereupon addressed a letter to the chairman of the subcommittee avowing that he was the informant referred to in the article, averring that the charges were true and repeating them in amplified form in language which was certainly unparliamentary and manifestly ill-tempered and which was well calculated to arouse the indignation not only of the members of the [532] subcommittee but of those of the House generally. This letter was given to the press so that it might be published contemporaneously with its receipt

by the chairman of the subcommittee. The judiciary committee reported the matter to the House and a select committee was appointed to consider the subject. The district attorney was called before that committee and re-asserted the charges made in the letter, averring that they were justified by the circumstances and stating that they would under the same conditions be made again. Thereupon the select committee made a report and stated its conclusions and recommendations to the House as follows:

"We conclude and find that the aforesaid letter written and published by said H. Snowden Marshall to Hon. C. C. Carlin, chairman of the subcommittee of the Judiciary Committee of the House of Representatives, on March 4, 1916 . . . , is as a whole and in several of the separate sentences defamatory and insulting and tends to bring the House into public contempt and ridicule, and that the said H. Snowden Marshall, by writing and publishing the same, is guilty of contempt of the House of Representatives of the United States because of the violation of its privileges, its honor and its dignity."

Upon the adoption of this report under the authority of the House a formal warrant for arrest was issued and its execution by the Sergeant-at-Arms in New York was followed by an application for discharge on *habeas corpus* and the correctness of the judgment of the court below refusing the same is the matter before us on this direct appeal.

Whether the House had power under the Constitution to deal with the conduct of the district attorney in writing the letter as a contempt of its authority and to inflict punishment upon the writer for such contempt as a matter of legislative power, that is, without subjecting him to the [533] statutory modes of trial provided for criminal offenses protected by the limitations and safeguards which the Constitution imposes as to such subject, is the question which is before us. There is unity between the parties only in one respect, that is, that the existence of constitutional power is the sole matter to be decided. As to all else there is entire discord, every premise of law or authority relied upon by the one side being challenged in some respects by the other. We consider, therefore, that the shortest way to meet and dispose of the issue is to treat the subject as one of first impression, and we proceed to do so.

Undoubtedly what went before the adoption of the Constitution may be resorted to for the purpose of throwing light on its provisions. Certain is it that authority was possessed by the House of Commons in England to punish for contempt directly, that is, without the intervention of courts, and that such power included a variety of acts and many forms of punishment including the

right to fix a prolonged term of imprisonment. Indubitable also is it, however, that this power rested upon an assumed blending of legislative and judicial authority possessed by the Parliament when the Lords and Commons were one and continued to operate after the division of the Parliament into two houses either because the interblended power was thought to continue to reside in the Commons, or by the force of routine the mere reminiscence of the commingled powers led to a continued exercise of the wide authority as to contempt formerly existing long after the foundation of judicial-legislative power upon which it rested had ceased to exist. That this exercise of the right of legislative-judicial power to exert the authority stated prevailed in England at the time of the adoption of the Constitution and for some time after has been so often recognized by the decided cases relied upon and by decisions of this court, some of which are in the [534] margin,¹ as to make it too certain for anything but statement.

Clear also is it, however, that in the state governments prior to the formation of the Constitution the incompatibility of the intermixture of the legislative and judicial power was recognized and the duty of separating the two was felt, as was manifested by provisions contained in some of the state constitutions enacted prior to the adoption of the Constitution of the United States, as illustrated by the following articles in the constitutions of Maryland and Massachusetts.

"That the House of Delegates may punish, by imprisonment, any person who shall be guilty of a contempt in their view, by any disorderly or riotous behavior, or by threats to, or abuse of their members, or by any obstruction to their proceedings. They may also punish, by imprisonment, any person who shall be guilty of a breach of privilege, by arresting on civil process, or by assaulting any of their members, during their sitting, or on their way to, or return from the House of Delegates, or by any assault of, or obstruction to their officers, in the execution of any order or process, or by assaulting or obstructing any witness, or any other person, attending on, or on their way to or from the House, or by rescuing any person committed by the House: and the Senate may exercise the same power, in similar cases." Constitution of Maryland, 1776, Article XII.

"They [the house of representatives] shall have authority to punish by imprisonment every person, not a member, who shall be guilty of disrespect to the house, by any dis-

orderly or contemptuous behavior in its presence; or who, in the town where the general court is sitting, and during the time of its sitting, shall threaten harm to the [535] body or estate of any of its members, for anything said or done in the house; or who shall assault any of them therefor; or who shall assault or arrest any witness, or other person, ordered to attend the house, in his way in going or returning; or who shall rescue any person arrested by the order of the house.

"And no member of the house of representatives shall be arrested, or held to bail on meane process, during his going unto, returning from, or his attending the general assembly.

"The senate shall have the same powers in the like cases; and the governor and council shall have the same authority to punish in like cases: *Provided*, That no imprisonment, on the warrant or order of the governor, council, senate, or house of representatives, for either of the above-described offenses, be for a term exceeding thirty days." Constitution of Massachusetts, 1780, part second, chapter 1, § 3, Articles X and XI.

The similarity of the provisions points to the identity of the evil which they were intended to reach. Clearly they operate to destroy the admixture of judicial and legislative power as prevailing in the House of Commons since the provisions in both the state constitutions and the limitations accompanying them are wholly incompatible with judicial authority. Moreover, as under state constitutions all governmental power not denied is possessed, the provisions were clearly not intended to give legislative power as such, for full legislative power to deal with the enumerated acts as criminal offenses and provide for their punishment accordingly already obtained. The object, therefore, of the provisions could only have been to recognize the right of the legislative power to deal with the particular acts without reference to their violation of the criminal law and their susceptibility of being punished under that law because of the necessity of such a legislative authority to prevent or punish the acts independently [536] because of the destruction of legislative power which would arise from such acts if such authority was not possessed.

How dominant these views were can be measured by the fact that in various other States almost contemporaneously with the adoption of the Constitution similar provisions were written into their constitutions and continued to be adopted until it is true

¹ Crosby's Case, 3 Wils. C. Pl. (Eng.) 188; Burdett v. Abbot, 14 East (Eng.) 1; Stockdale v. Hansard, 9 Ad. & El. 1, 36 E. C. L.

13; Anderson v. Dunn, 6 Wheat. 204, 5 U. S. (L. ed.) 242; Kilbourn v. Thompson, 103 U. S. 168, 26 U. S. (L. ed.) 377.

to say that they became if not universal, certainly largely predominant in the States.*

No power was expressly conferred by the Constitution of the United States on the subject except that given to the House to deal with contempt committed by its own members. Article I, § 5, 8 Fed. St. Ann. 326. As the rule concerning the Constitution of the United States is that powers not delegated were reserved to the people or the States, it follows that no other express authority to deal with contempt can be conceived of. It comes then to this, was such an authority implied from the powers granted? As it is unthinkable that in any case from a power expressly granted there can be implied the authority to destroy the grant made, and as the possession by Congress of the commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive and judicial authority which is interwoven in the very fabric of the Constitution and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any implication as to such a power may be deduced from any grant of authority made to Congress by the Constitution. This conclusion has long since been [537] authoritatively settled and is not open to be disputed. *Anderson v. Dunn*, 6 Wheat. 204, 5 U. S. (L. ed.) 242; *Kilbourn v. Thompson*, 103 U. S. 168, 26 U. S. (L. ed.) 377. Whether the right to deal with contempt in the limited way provided in the state constitutions may be implied in Congress as the result of the legislative power granted, must depend upon how far such limited power is ancillary or incidental to the power granted to Congress,—a subject which we shall hereafter approach.

The rule of constitutional interpretation announced in *McCulloch v. Maryland*, 4 Wheat. 316, 4 U. S. (L. ed.) 579, that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it. And as there is nothing in the inherent nature of the power to deal with contempt which causes it to be an exception to such rule, there can be no reason for refusing to apply it to that subject.

Thus in *Anderson v. Dunn*, supra, which was an action for false imprisonment against the Sergeant-at-Arms of the House for having executed a warrant for arrest issued by that body in a contempt proceeding, after holding

as we have already said, that the power possessed by the House of Commons was incompatible with the Constitution and could not be exerted by the House, it was yet explicitly decided that from the power to legislate given by the Constitution to Congress there was to be implied the right of Congress to preserve itself, that is, to deal by way of contempt with direct obstructions to its legislative duties. In *Kilbourn v. Thompson*, supra, which was also a case of false imprisonment for arrest under a warrant issued by order of the House in a contempt proceeding, although the want of right of the House of Representatives to exert the judicial-legislative power possessed by the House of Commons was expressly reiterated, the question was reserved as to the right to imply an authority in the House of Representatives to deal with contempt as to a [538] subject-matter within its jurisdiction, the particular case having been decided on the ground that the subject with which the contempt proceedings were considered was totally beyond the jurisdiction of the House to investigate. But in *In re Chapman*, 166 U. S. 661, 17 S. Ct. 677, 41 U. S. (L. ed.) 1154, the principle of the existence of an implied legislative authority under certain conditions to deal with contempt was again considered and upheld. The case was this: *Chapman* had refused to testify in a Senate proceeding and was indicted under § 102 of the Revised Statutes [2 Fed. St. Ann. (2d ed.) 532] making such refusal criminal. He sued out a *habeas corpus* on the ground that the subject of the refusal was exclusively cognizable by the Senate and that therefore the statute was unconstitutional as a wrongful delegation by the Senate of its authority and because to subject him to prosecution under the statute might submit him to double jeopardy, that is, leave him after punishment under the statute to be dealt with by the Senate as for contempt. After demonstrating the want of merit in the argument as to delegation of authority, the proposition was held to be unsound and the contention as to double jeopardy was also adversely disposed of on the ground of the distinction between the implied right to punish for contempt and the authority to provide by statute for punishment for wrongful acts and to prosecute under the same for a failure to testify, the court saying that "the two being *diverso intuitu* and capable of standing together," they were susceptible of being separately exercised. And light is thrown upon the right to imply legislative power to deal directly by way

* 1790, South Carolina, Article I, § 13; 1792, New Hampshire, Part second, §§ 22 and 23; 1796, Tennessee, Article I, § 11; 1798, Georgia, Article I, § 13; 1802, Ohio, Article I, § 14; 1816, Indiana, Article III,

§ 14; 1817, Mississippi, Article III, § 20; 1818, Illinois, Article II, § 13; 1820, Maine, Article IV, Part third, § 6; 1820, Missouri, Article III, § 19.

of contempt without criminal prosecution with acts the prevention of which is necessary to preserve legislative authority, by the decision of the Privy Council in *Kielley v. Carson*, 4 Moo. P. C. (Eng.) 63, which was fully stated in *Kilbourn v. Thompson*; supra, but which we again state. The case was this: *Kielley* was adjudged by the House of Assembly of Newfoundland, [539] guilty of contempt for having reproached a member "in coarse and threatening language" for words spoken in debate in the House. A warrant was issued and *Kielley* was arrested. When brought before the House he refused to apologize indulged in further violent language toward the member and was committed. Having been discharged on *habeas corpus* proceedings, he brought an action for false imprisonment against the Speaker and other members of the House. As a justification the defendants pleaded that they had acted under the authority of the House. A demurrer to the plea was overruled and there was a judgment for the defendants. The appeal was twice heard by the Privy Council, the court on the second argument having been composed of the Lord Chancellor (Lyndhurst), Lords Brougham, Denman, Abinger, Cottenham and Campbell, the Vice Chancellor (Shadwell), the Lord Chief Justice of the Common Pleas (Tindal), Mr. Justice Erskine, Lushington and Baron Parke.

The opinion on reversal was written by Parke, B., who said:

"The main question raised by the pleadings, . . . was whether the House of Assembly had the power to arrest and bring before them, with a view to punishment, a person charged by one of its Members with having used insolent language to him out of the doors of the House, in reference to his conduct as a Member of the Assembly—in other words, whether the House had the power, such as is possessed by both Houses of Parliament in England, to adjudicate upon a complaint of contempt or breach of privilege."

After pointing out that the power was not expressly granted to the local legislature by the Crown, it was said the question was "whether by law, the power of committing for a contempt, not in the presence of the Assembly, is incident to every local Legislature."

"The Statute Law on this subject being silent, the [540] Common Law is to govern it; and what is the Common Law, depends upon principle and precedent.

"Their Lordships see no reason to think, that in the principle of the Common Law, any other powers are given them, than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its

establishment, an act which on both sides, it is admitted, it was competent for the Crown to perform. This is the principle which governs all legal incidents." And after quoting the aphorism of the Roman law to the effect that the conferring of a given power carried with it by implication the right to do those things which were necessary to the carrying out of the power given, the opinion proceeded: "In conformity to this principle we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their Legislative functions, they are justified in acting by the principle of the Common Law. But the power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local Legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions."

There can be no doubt that the ruling in the case just stated upheld the existence of the implied power to punish for contempt as distinct from legislative authority and yet flowing from it. It thus becomes apparent that from a [541] doctrinal point of view the English rule concerning legislative bodies generally came to be in exact accord with that which was recognized in *Anderson v. Dunn*, supra, as belonging to Congress, that is, that in virtue of the grant of legislative authority there would be a power implied to deal with contempt in so far as that authority was necessary to preserve and carry out the legislative authority given. While the doctrine of *Kielley v. Carson* was thus in substantive principle the same as that announced in *Anderson v. Dunn*, we must not be understood as accepting the application which was made of the rule to the particular case there in question since, as we shall hereafter have occasion to show, we think that the application was not consistent with the rule which the case announced and would, if applied, unwarrantedly limit the implied power of Congress to deal with contempt.

What does this implied power embrace? is thus the question. In answering, it must be borne in mind that the power rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred. The power is

therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end and not the end itself. Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted.

These principles are plainly the result of what was decided in *Anderson v. Dunn*, supra, since in that case in answering the question what was the rule by which the extent of the implied power of legislative assemblies to deal with contempt was controlled, it was declared to be "*the least possible power adequate to the end proposed*" (*Anderson v. Dunn*, 6 Wheat 231), which was but a form of stating that as it resulted from implication and not from legislative will, the legislative will was powerless to extend it further [542] than implication would justify. The concrete application of the definition and the principle upon which it rests were aptly illustrated in *In re Chapman*, supra, where, because of the distinction existing between the two which was drawn, the implied power was decided not to come under the operation of a constitutional limitation applicable to a case resting upon the exercise of substantive legislative power.

Without undertaking to inclusively mention the subjects embraced in the implied power, we think from the very nature of that power it is clear that it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation, that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed. And the essential nature of the power also makes clear the cogency and application of the two limitations which were expressly pointed out in *Anderson v. Dunn*, supra, that is, that the power even when applied to subjects which justified its exercise is limited to imprisonment and such imprisonment may not be extended beyond the session of the body in which the contempt occurred. Not only the adjudged cases but congressional action in enacting legislation as well as in exerting the implied power conclusively sustain the views just stated. Take for instance the statute referred to in *In re Chapman* where, not at all interfering with

the implied congressional power to deal with the refusal to give testimony in a matter where there was a right to exact it, the substantive power had been exerted to make such refusal a crime, the two being distinct the one from the other. So also when the difference between the judicial and legislative powers are considered and the divergent elements which in the nature of things enter into the determination of [543] what is self-preservation in the two cases, the same result is established by the statutory provisions dealing with the judicial authority to summarily punish for contempt, that is, without resorting to the modes of trial required by constitutional limitations or otherwise for substantive offenses under the criminal law. Act of March 2, 1831, 4 Stat. 487. The legislative history of the exertion of the implied power to deal with contempt by the Senate or House of Representatives when viewed comprehensively from the beginning points to the distinction upon which the power rests and sustains the limitations inhering in it which we have stated. The principal instances are mentioned in the margin* and they all except two or three deal with either physical obstruction of the legislative body in the discharge of its duties, or physical assault upon its members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of members from attending so that their duties might be performed, or finally with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel. In the two or three instances not embraced in the classes we think it plainly appears that for the moment the distinction was overlooked which existed between the legislative power to make criminal every form of act which can constitute a contempt to be punished [544] according to the orderly process of law and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority. And in the debates which ensued when the various cases were under consideration it would seem that the difference between the legislative and the judicial power was also sometimes forgotten, that is to say, the legislative right to exercise discretion

* 1795, attempt to bribe members of the House; 1800, publication of criticism of the Senate; 1809, assault on a member of the House; 1818, attempt to bribe a member of the House; 1828, assault on the Secretary to the President in the Capitol; 1832, assault on a member of the House; 1835, assault on a member of the House; 1842, contumacious witness; 1857, contumacious witness; 1858,

contumacious witness; 1859, contumacious witness; 1865, assault on a member of the House; 1866, assault on a clerk of a committee of the House; 1870, assault on a member of the House; 1871, contumacious witness; 1874, contumacious witness; 1876, contumacious witness; 1894, contumacious witness; 1913, assault on a member of the House.

was confounded with the want of judicial power to interfere with the legislative discretion when lawfully exerted. But these considerations are accidental and do not change the concrete result manifested by considering the subject from the beginning. Thus we have been able to discover no single instance where in the exertion of the power to compel testimony restraint was ever made to extend beyond the time when the witness should signify his willingness to testify, the penalty or punishment for the refusal remaining controlled by the general criminal law. So again we have been able to discover no instance, except the two or three above referred to, where acts of physical interference were treated as within the implied power unless they possessed the obstructive or preventive characteristics which we have stated, or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration. And this latter statement causes us to say, referring to *Kielley v. Carson*, supra, that where a particular act because of its interference with the right of self-preservation comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions and therefore without resort to judicial proceedings under the general criminal law, we are of opinion that authority does not cease to exist because the act complained of had been committed [545] when the authority was exerted, for to so hold would be to admit the authority and at the same time to deny it. On the contrary when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject and therefore there necessarily results from this power the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence, that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. And of course in such case as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference.

It remains only to consider whether the acts which were dealt with in the case in hand were of such a character as to bring them within the implied power to deal with contempt, that is, the accessory power possessed to prevent the right to exert the powers given from being obstructed and virtually

destroyed. That they were not, would seem to be demonstrated by the fact that the contentions relied upon in the elaborate arguments at bar to sustain the authority were principally rested not upon such assumption, but upon the application and controlling force of the rule governing in the House of Commons. But aside from this, coming to test the question by a consideration of the conclusion upon which the contempt proceedings were based as expressed in the report of the select committee which we have previously quoted and the action of the House of Representatives based on it, there is room only for the conclusion that the contempt was deemed to result from the writing of the letter not because of any obstruction to the performance of legislative [546] duty resulting from the letter or because the preservation of the power of the House to carry out its legislative authority was endangered by its writing, but because of the effect and operation which the irritating and ill-tempered statements made in the letter would produce upon the public mind or because of the sense of indignation which it may be assumed was produced by the letter upon the members of the committee and of the House generally. But to state this situation is to demonstrate that the contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties, but was extrinsic to the discharge of such duties and related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee on the subject. But these considerations plainly serve to mark the broad boundary line which separates the limited implied power to deal with classes of acts as contempts for self-preservation and the comprehensive legislative power to provide by law for punishment for wrongful acts.

The conclusions which we have stated bring about a concordant operation of all the powers of the legislative and judicial departments of the Government, express or implied, as contemplated by the Constitution. And as this is considered, the reverent thought may not be repressed that the result is due to the wise foresight of the fathers manifested in state constitutions even before the adoption of the Constitution of the United States by which they substituted for the intermingling of the legislative and judicial power to deal with contempt as it existed in the House of Commons a system permitting the dealing with that subject in such a way as to prevent the obstruction of the legislative powers granted and secure their free exertion and yet at the same time not substantially interfere with the great guarantees and limitations concerning [547] the exertion of the

power to criminally punish,—a beneficent result which additionally arises from the golden silence by which the framers of the Constitution left the subject to be controlled by the implication of authority resulting from the powers granted.

It is suggested in argument that whatever be the general rule, it is here not applicable because the House was considering and its committee contemplating impeachment proceedings. The argument is irrelevant because we are of opinion that the premise upon which it rests is unfounded. But indulging in the assumption to the contrary we think it is wholly without merit as we see no reason for holding that if the situation suggested be assumed it authorized a disregard of the plain purposes and objects of the Constitution as we have stated them. Besides it must be apparent that the suggestion could not be accepted without the conclusion that under the hypothesis stated the implied power to deal with contempt as ancillary to the legislative power had been transformed into judicial authority and become subject to all the restrictions and limitations imposed by the Constitution upon that authority,—a conclusion which would frustrate and destroy the very purpose which the proposition is advanced to accomplish and would create a worse evil than that which the wisdom of the fathers corrected before the Constitution of the United States was adopted. How can this be escaped, since it is manifest that if the argument were to be sustained those things which, as pointed out in *In re Chapman*, supra, were distinct and did not therefore the one frustrate the other—the implied legislative authority to compel the giving of testimony and the right criminally to punish for failure to do so—would become one and the same and the exercise of one would therefore be the exertion of, and the exhausting of the right to resort to, the other. Again, accepting the proposition, by what process of reasoning could the [548] conclusion be escaped that the right to exert implied authority by way of contempt proceedings in so far as essential to preserve legislative power would become itself an exertion of legislative power and thus at once be subject to the limitations as to modes of trial exacted by the guarantee of the Constitution on that subject. We repeat, out of abundance of precaution, we are called upon to consider not the legislative power of Congress to provide for punishment and prosecution under the criminal laws in the amplest degree for any and every wrongful act, since we are alone called upon to determine the limits and extent of an ancillary and implied authority essential to preserve the fullest legislative power, which would necessarily perish by operation of the Constitution if not confined to the particular ancil-

lary atmosphere from which alone the power arises and upon which its existence depends.

It follows from what we have said that the court below erred in refusing to grant the writ of *habeas corpus* and its action must be and it is, therefore, reversed, and the case remanded with directions to discharge the relator from custody.

And it is so ordered.

NOTE.

Power of Legislature to Punish Person Other than Witness for Contempt.

In a considerable number of cases involving the punishment of witnesses for contempt of the legislature the courts have asserted by way of dictum that the English Parliament has inherent power to punish for contempt and have doubted whether a like power was possessed by the Congress of the United States or the legislatures of the several states. See the notes to *Ex p. Parker*, 7 Ann. Cas. 874; *Sullivan v. Hill*, Ann. Cas. 1916B 1115.

The reported case appears to be the only decision in the United States passing directly on the power of a legislature to punish a person other than a witness, for contempt. In holding that the House of Representatives has no inherent power so to punish, the Supreme Court takes the view that the legislative branch of the American government is not vested with judicial powers, such as characterize the Parliament of England, saying that so to construe the powers expressed in the Constitution would be to destroy the distinction between the judicial and the legislative departments. It is held, however, that the house has the power to punish for contempt, when such action is necessary to preserve the legislative authority expressly granted. This holding of course excludes any question of judicial power.

The question of the power of a legislature to punish for contempt arose in *Kielley v. Carson*, 4 Moo. P. C. (Eng.) 63. In that case *Kielley* was found guilty of contempt for using insulting and threatening language to a member of the Newfoundland assembly, outside the house. On appeal the decision was reversed on the ground that the legislature had no implied power to punish for contempt, nor had the House of Commons of England expressly conferred such power. The court speaking through Mr. Baron Parke said: "It is said, however, that this power belongs to the House of Commons in England; and thus, it is contended, affords an authority for holding that it belongs as a legal incident, by the common law, to an assembly with analogous functions. But the reason

why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo Parliamenti*, which forms a part of the common law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one. And, besides, this argument from analogy would prove too much, since it would be equally available in favor of the assumption by the council of the island, of the power of commitment exercised by the House of Lords, as well as in support of the right of impeachment by the assembly—a claim for which there is not any color of foundation. Nor can the power be said to be incident to the legislative assembly by analogy to the English courts of record which possess it. This assembly is no court of record, nor has it any judicial functions whatever; and it is to be remarked, that all those bodies which possess the power of adjudication upon, and punishing in a summary manner, contempts of their authority, have judicial functions, and exercise this as incident to those which they possess, except only the House of Commons, whose authority, in this respect, rests upon ancient usage. Their lordships, therefore, are of opinion, that the principle of the common law, that things necessary, pass as incident, does not give the power contended for by the respondents as an incident to, and included in, the grant of a subordinate legislature.”

JAMIESON

v.

CITY OF EDMONTON.

Canada Supreme Court—December 11, 1916.

54 Can. Sup. Ct. 443.

Streets and Highways — Injury from Defect — Liability of Municipality — Notice of Defect.

A municipality charged by its charter with the duty of keeping sidewalks in repair is liable for an injury to a pedestrian from a defect in a sidewalk produced by a long continued practice of driving wagons over the walk at that place, though the municipality had no actual notice of the defect.

[See note at end of this case.]

[444] Appeal from the judgment of the Appellate Division of the Supreme Court of Alberta, 9 West. W. R. 1287; 33 West. L. R. 851, which reversed the judgment of McCarthy J. at the trial, and dismissed the plaintiff's action with costs.

The material circumstances of the case are stated in the head-note and the questions in issue on the present appeal will appear from the judgments now reported.

Chrysler K. C. for appellant.

Lasfleur K. C. for respondent.

A. G. Mackay & Co., solicitors for appellant.

J. C. Bown, solicitor for respondent.

THE CHIEF JUSTICE.—This is an action brought by the appellant to recover damages for injuries caused by the defective condition of a sidewalk built by the corporation respondent for the use of the public.

The charter of the City of Edmonton (sec. 507) in express terms imposes upon the corporation the legal duty to keep the sidewalk in a reasonable state of repair and at the same time gives it authority to take all necessary measures to prevent the sidewalk becoming a danger to the public making use of it in the exercise of their right (sec. 237).

It is not disputed that the sidewalk was out of repair, that the appellant was making a proper use of it under the belief that it was in good condition and that as a result he was injured as alleged in his statement of claim.

There is in consequence no doubt that the appellant [445] had a civil action against the respondent to recover compensation in damages for his injuries unless we are prepared to overrule the decision of this court in *Vancouver v. McPhalen*, 45 Can. Sup. Ct. 194.

An action is given for breach of a statutory duty irrespective of whether the act done would be a wrong apart from the statute.

In *Dawson v. Bingley Urban Dist. Council* [1911] 2 K. B. (Eng.) 149, Farwell and Kennedy, L. JJ. put the matter in this way: That where a person is one of a class for whose benefit a statutory duty is imposed, he is on breach of that duty entitled to maintain an action for damages occasioned to him by the breach unless the statute has indicated an intention to exclude that remedy.

In the case of *Maguire v. Liverpool* [1905] 1 K. B. (Eng.) 767, Vaughan-Williams, L. J. asserts the same general rule as do Farwell and Kennedy L. JJ. in the Bingley Case, and treats the immunity of the authority in respect to the non-repair of highways as an exception due to the particular history of the highways. But in *Vancouver v. McPhalen*, the distinction is very clearly made between those English cases in which the duty imposed is, as Sir Louis Davies says, one trans-

ferred from a body or authority on or with whom it previously rested and which body or authority was not itself liable in civil actions for nonfeasance (page 196) and cases in which the duty is created and imposed in the charter calling the corporation into existence. The general rule is that every public duty presumably gives rise to a private action in favour of a person injured by its breach and I know of nothing in the history of the highways in Edmonton [446] which would justify creating an exception to that general rule in the case of breach by nonfeasance in respect to their repair.

But it is said that there is no proof of notice to the City of Edmonton of the existence of the hole in the sidewalk which caused the appellant's injury and that in consequence no liability attached. In *Vancouver v. Cummings*, 46 Can. Sup. Ct. 457, Ann. Cas. 1913A 685, Mr. Justice Idington speaking for the majority of this court said (p. 466):—

"I am, despite dicta to the contrary, prepared to hold that, unless in some such case as I have suggested, the question of notice or knowledge does not arise, and that in all cases where the accident has arisen from the mere wearing out or apparent wearing out, or imperfect repair of the road, there arises upon evidence of accident caused thereby, a presumption without evidence of notice that the duty relative to repair has been neglected."

My brother Anglin describes the circumstances under which the sidewalk became dangerous to the public using it and it is unnecessary for me to add anything to what he says beyond this. As a necessary consequence of the improper use to which it was put, to the knowledge of the corporation, the sidewalk became out of repair and a danger to those obliged to pass over it. The hole actually made in the sidewalk as a result of that improper use and which was the direct cause of the accident was allowed to remain unrepai red for over twenty-four hours, and the city police whose duty it was to report such conditions passed the place frequently. In these circumstances I am bound to hold, in view of the opinion expressed in *Vancouver v. Cummings*, that there arises a presumption without proof of notice that the duty relative to repair has been neglected. On the authority of *Mersey Docks, etc. v. Gibbs*, L. R. 1 H. L. (Eng.) 93, at p. 121, I would add, [447] it must be taken as an established fact that the respondent had, by its servants, the means of knowing the dangerous state of the sidewalk, but was negligently ignorant of it. If the knowledge of the defect would make it responsible for the consequence of not having it repaired, it must be equally responsible if it was only through its culpable neg-

ligence that its existence was not known to them.

The appeal should be allowed with costs.

DAVIES, J. (*dissenting*).—After much consideration of the facts in this case I have reached the conclusion that the judgment of the Supreme Court of Alberta was right and that this appeal should be dismissed.

I am satisfied with the statement of the facts and of the law as applicable to them made by the learned judges who formed the majority in the court below.

All the judges in that court held that as the city had not any actual notice of the break in the sidewalk which led to plaintiff's injuries sufficient time had not elapsed between such breakage and the accident to impute notice to them.

The evidence shews beyond doubt that the city had kept the sidewalk, which was for pedestrians only, in suitable repair for the purposes intended.

I do not think there was any obligation upon the city to make the sidewalk stronger in order to accommodate trespassers who desired to cross it with loaded trucks or drays. Nor can I find any obligation existing on the part of the city to make a crossing at the place in question.

The liability of the city must therefore depend on their alleged negligence in enforcing the by-law, and it seems to me that the limit of the city's obligation [448] in that regard was to prevent trespasses by prosecuting offenders.

Before liability can attach to the city for nonenforcement of a by-law an existing nuisance must be shewn to exist of which it had notice or be held to have had notice in law. Nothing of the kind existed here.

Mr. Justice Beck sets out in his judgment the provisions of the by-law relied on as casting a duty upon the city and shews that they do not support the statement of the trial judge that the city could require an owner to put and keep a sidewalk abutting on his property in repair but merely prohibits him or any one else from crossing the sidewalk without taking steps to avoid injuring it. The learned judge adds that the most that might be expected of the city in the present case was that they should have prosecuted under the provisions of the by-law and he concludes (citing as authorities 14 Cyc. title "Municipal Corporations," p. 1356, under the sub-title "Failure to prevent improper use of streets" and *Dillon on Municipal Corporations*, vol. 4, p. 1627) that no action can lie against the city for failure to enforce such by-law except in cases amounting to a public nuisance.

In this opinion I agree and would dismiss the appeal.

DINERON, J.—The appellant recovered judgment against the respondent, a municipal corporation, for damages suffered by reason of his leg getting broken in consequence of the negligence of the respondent in failing to keep in a reasonable state of repair its sidewalk whereon he was walking.

The court of appeal for Alberta reversed that judgment and hence this appeal.

The duty of the respondent in the premises is defined [449] by section 507 of its charter, which is as follows:—

"507. The city shall keep every highway, including all crossings, sewers, culverts and approaches, grades, sidewalks and other works made or done therein or thereon by the city or by any person with the permission of the city, in a reasonable state of repair, having regard to the character of the highway and the locality in which the same is situated or through which it passes."

The respondent had constructed the sidewalk, some six or seven years before the accident in question, of spruce planks, laid, I infer from the evidence, transversely to the line of the street, and supported by light scantling fit only to support pedestrian travel.

At the place in question there was a lane running at right angles to the sidewalk to serve the houses abutting thereon.

It turned out that teamsters who might have entered at the other end of this lane, with loads of any kind, got into the habit of using for their entrance or exit the end of the lane fronting on the sidewalk in question.

If the respondent had either protected the end of the lane next the sidewalk from any entrance, or built or caused to be built a proper crossing, by usual structure for such use, the sidewalk would have been in no danger of being broken as it was, and thus producing such accidents as this.

Instead of doing so the respondent tolerated the use that was made continuously, for at least a year or more, next preceding the accident, of that means of entrance into the lane in question and thereby endangered the maintenance of the sidewalk, and consequently the safety of pedestrians.

Indeed earth excavation, resulting from the execution of other work on the street at that point, was left lying as thrown there, while doing the work, long [450] after such work was completed, and till some neighbour levelled it off and piled some of it up against the sidewalk so as to give it the appearance of a proper entrance to the lane and thereby invite just such traffic across the sidewalk as was sure to destroy it, and did destroy it twenty-eight hours before the accident in question.

Planks of the sidewalk had been worn out or destroyed by such use and the want of re-

pair thus created was attended to more than once by the respondent's servants.

Even when repaired there remained a breaking or chipping off of the ends of the planks in the sidewalk, so apparent to everyone, that no man, qualified for his job, when looking after the sidewalks could fail to recognize the notorious fact that this crossing use was being made of it, and was liable any day to break planks never intended to bear such traffic, and hence unfitted to meet the needs of pedestrian travel which demands safety.

That open and notorious use of the sidewalk and condition of things resultant therefrom, having existed by the negligence of the respondent for a year or more, it has the temerity to suggest that this case falls within that class of cases where courts have had to consider whether or not when an unavoidable, unexpected and improbable accident has put the highway out of repair, or wrong done by others had obstructed its use in a way of which the municipal authorities had no knowledge or notice, should be held to constitute negligence.

No court could properly find on the facts in question, in most of these cases, where the municipality was excused that there was negligence. Some of them may be very questionable.

[451] The usual statute in question in each of such cases made no provision for actual notice, indeed notice of any kind, but has been so interpreted as to render the question merely one of negligence in the discharge of a statutory duty, and in short the application of common sense.

In defining the law in such cases the term "want of notice" has been used sometimes when it was only intended to signify that the defendant might or might not, or should or should not have known, if all reasonable means had been taken to observe and discharge the duty which the statute had imposed.

The short method of expressing the duty has led some people to imagine and loosely to assert that notice is actually necessary.

It has been time and again explained that the same degree of vigilance and the same condition of repair or maintenance could not be reasonably insisted upon in every case.

The highway that only serves a remote and sparsely settled district would not be tolerated in the centre of a large city, or serve its needs. The inspection demanded in the latter could not reasonably be required in the former. It comes to this that the section of respondent's charter quoted above expressly provides by the word "reasonably" what the law had already been determined by the courts to mean in cases where the statute merely imposed the duty of keeping in repair.

If a municipality persists in using a mode of construction and material fit only for pedestrian traffic, when its officers know that it is used also for loaded teams to cross, it has not discharged its obligations but laid a trap for its citizens getting their legs broken.

[452] All that has been urged about liability for nonobservance of its own by-laws is quite beside the question involved.

It matters not whether there was a by-law enacted or not, or enacted only to be broken. No man could seriously consider the sidewalk as constructed at the point in question as fit for the use that it was being put to or a safe place over which to induce daily travel by pedestrians in a thickly inhabited part of the city. As well invite men to rely for crossing, by night and by day, a brook, upon a bridge which everyone concerned to know should, if thinking for an instant, realize will be swept away by the first storm that comes that way.

It is idle to point to the by-law forbidding such use when the breach thereof from week to week is tolerated. As well pass a by-law against storms in the illustration I put.

It is the maintenance of an insufficient sidewalk in a place notoriously needing something more substantial, or more rigorous means of warding off its destruction, than merely passing a by-law which nobody but its authors ever reads.

The powers the respondent had for enforcing the construction of a proper crossing at the point in question at the expense of those concerned in its use render the negligence of the respondent the less excusable.

The appeal should be allowed with costs here and in the court below and the judgment of the learned trial judge be restored.

DUFF, J.—The appellant one evening in November, 1914, after dark, stepped into a hole in a wooden sidewalk on Fifth Avenue, a street in Edmonton, with the result that his leg was broken. He sued the municipality for damages, basing his claim upon section [453] 507 of the Edmonton City Charter, which is in the following words:—

"The city shall keep every highway, including all crossings, sewers, culverts and approaches, grades, sidewalks and other works made or done therein or thereon by the city or by any person with the permission of the city, in a reasonable state of repair, having regard to the character of the highway and the locality in which the same is situate or through which it passes."

At the trial before Mr. Justice McCarthy he succeeded; but the judgment given in his favour at the trial was reversed on appeal with the dissent of Mr. Justice Stuart.

In the immediate neighbourhood of the place where the accident happened there were

some residences which had a lane or back area in the rear and for many months before the accident—at least a year—it was the practice for delivery vehicles entering this lane to pass over the place where the plaintiff met his injury; and the day before the date of the accident the sidewalk had collapsed under the weight of one of these vehicles.

Some facts are admitted or so clear as not to be open to dispute. The sidewalk was not of sufficient strength to support traffic of the kind to which it was thus subjected. For the convenience of vehicles passing over this sidewalk an approach had been made by banking with earth the street side of the sidewalk opposite the lane and the sidewalk itself there shewed unmistakable evidence of the passage of wheels—unmistakable, that is to say, to competent persons performing the duty of observing the condition of the sidewalk.

It was not disputed, I think, that in the condition in which the sidewalk was when the accident occurred the street was not in a "reasonable state of repair" having regard to "the character of the streets and the locality in which it was situated" within the meaning of section [454] 507; and I have no difficulty in holding that if due diligence had been used by the municipality and those entrusted by the municipality with the care of the streets, that is to say, if diligence had been exercised of such a degree as to bring it into conformity with the standard supplied by the ordinary notions of sensible people, the sidewalk would not have been allowed to fall into that condition. Proper diligence would have led to the knowledge, by the persons responsible, of the fact that this sidewalk was being subjected to the burden of an extraordinary traffic—a usage under which it was certain eventually to collapse; actuated by a reasonable respect for their duty, such persons on discovering the state of affairs, would have addressed themselves to finding means for the prevention of that which might be expected to happen in the absence of precautions, and which did in fact happen. They could have attained this object by stopping the traffic; or they could have attained it by strengthening the sidewalk.

The question to be decided on this appeal is whether in the circumstances the municipality is responsible in damages for the consequences of the neglect to take proper measures to prevent this sidewalk, under the effects of this traffic, falling into such condition as to amount to a nuisance. Section 507 is capable of being read as creating an absolute duty to prevent the highways of the city falling into a state of disrepair. There is, however, much to be said and there is a long line of authorities beginning with *Hammond v. Vestry of St. Pancras*, L. R. 9 C. P. (Kng.) 316, in support of the view that where duties of maintenance are, by enactments similar to

section 507, cast upon a municipal body, the responsibility is not an absolute responsibility making the municipality in [455] all circumstances answerable in damages for the existence of a state of things which the statute aims to prevent, *e. g.*, a nuisance arising from the disrepair of a sewer; but that the public authority charged with such responsibility is not answerable if the state of things out of which the complaint arises is one which could not have been prevented or made innocuous by the observance on its part, and on the part of such agencies as it employed, or ought to have employed, of proper care and diligence. A highway may become a dangerous nuisance through a sudden operation of nature not reasonably foreseeable, or from the mischievous act of some person for whom the authority charged with the care of the highway is not responsible and which it could not reasonably be held to be negligent or incompetent in not anticipating. In such cases and generally speaking in cases in which the state of things complained of can be shewn to have been something which the public authority could not reasonably have been expected to know or to provide against, it has been held that there is a good answer to any claim for reparation: *Bateman v. Poplar Dist. Board of Works*, 37 Ch. D. (Eng.) 272; *Brown v. Sargent*, 1 F. & F. (Eng.) 112; *Blyth v. Birmingham Waterworks*, 11 Exch. (Eng.) 781; *Whitehouse v. Birmingham Canal Co.* 27 L. J. Exch. (Eng.) 25. Under an enactment in the "Ontario Municipal Act," to much the same effect as section 507, municipalities have uniformly been held to be exonerated in the absence of negligence. It may properly be assumed that section 507 was not enacted without reference to this course of decision and therefore, in construing that section, one is not without weighty sanction when giving effect to the considerations upon which these decisions rest.

[456] Strictly no question of burden of proof is here material. By the pleadings the onus of establishing an actionable breach of duty, is of course, on the plaintiff in the first instance. I express no opinion upon the question whether the effect of the statute itself is that where a nuisance is shewn to have existed in fact the onus is thereby cast upon the municipality to establish that the nuisance was not due to any cause for which it is responsible; in other words, whether or not there is a presumption of law arising from the existence of a nuisance—in the condition of a highway—that the municipality is responsible for it; a presumption that the municipality can only meet by establishing the negative of the issue. It is also strictly unnecessary to pass upon the question whether or not the plaintiff by proving the existence of the nuisance thereby establishes a *prima*

facie case; although, as it is quite evident that the legislature in passing the enactment has assumed that in the ordinary course highways can be kept in a reasonable state of repair by the exercise of such diligence as may properly be expected from the municipality, there seems to be sufficient ground for holding that proof of the existence of a nuisance does in itself constitute a *prima facie* case throwing upon the municipality the burden at least of going forward with evidence. (See *Blamires v. Lancashire, etc. R. Co.* L. R. 8 Exch. (Eng.) 283.)

The evidence before us in this case is quite sufficient, as I have already indicated, to shew failure to discharge the duty arising under section 507 for which the municipality is responsible.

It is argued that the municipality cannot be held responsible for the nonenforcement of its by-laws. [457] In truth the municipality in the view expressed above is held responsible for allowing a nuisance to come into existence which could and ought to have been prevented. It was incumbent upon the municipality to use its powers of control on the highway to that end; and if the enforcement of the by-law had been its only means of effectively executing its duty, the municipality was bound to resort to that means. There is a passage in Lord Blackburn's judgment in *Geddis v. Bann Reservoir*, 3 App. Cas. (Eng.) 430, at page 456, that may be usefully quoted. It gives the principle which affords another answer to this argument:—

"And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers."

ANGLIN, J.—The plaintiff was injured through stepping into a hole in a sidewalk constructed by the defendant corporation on a city street where the traffic was considerable. The accident occurred at half-past seven o'clock on a November evening. The sidewalk had been broken down by a heavy load of coal driven over it on the afternoon of the previous day about four o'clock. The evidence shewed that the sidewalk had been constructed as an ordinary plank walk intended for use by pedestrians only, and that no provision had been made for the crossing of it by vehicular traffic at the point in question. A by-law of the city prohibited the crossing of sidewalks by horses and vehicles where protective timbering had not been provided for that purpose. Notwithstanding this by-law the place in question had been used throughout the whole of the year preceding the accident without [458] any such protection as a crossing to a yard or private lane.

The user had been of such a character and to such an extent that the learned judge found, properly in my opinion, that the city had notice of it. No charge of contributory negligence is pressed against the plaintiff. At the trial before McCarthy, J. the city was held liable on the ground that there had been a breach on its part of a duty "to have put and kept the crossing in a state of repair or to have required that the private owners of the property adjoining who used the crossing should put the same in a proper state of repair."

The Appellate Division of the Supreme Court reversed this judgment, holding that there was no obligation on the part of the city to provide a crossing, that its only duty in respect of the sidewalk was to repair it within a reasonable time after notice that it was out of repair and that notice actual or imputed of the existence of disrepair was not established. Mr. Justice Stuart, dissenting, held that because the municipal corporation knew that the sidewalk was being crossed continually by vehicles the place in question had the combined character of a sidewalk and crossing of a highway and should have been kept in a state of repair suitable to that character. He found that such a state of repair was not maintained. He also held that, having regard to such user and the character of the construction of the sidewalk, the city was called upon, if it did not desire to reconstruct so as to make the place suitable for a crossing for vehicles, to exercise greater vigilance in discovering breakages.

By its charter (sec. 507) the City of Edmonton is required to keep sidewalks constructed by it in a reasonable state of repair having regard to the character of the highway and the locality. This duty is imposed to ensure the safety of persons lawfully using the sidewalk [459] and a breach of it entails liability in damages to such persons when injured in consequence: *Vancouver v. McPhalen*, 45 Can. Sup. Ct. 194. It must have been obvious to anybody giving the matter a moment's consideration that the user of a crossing over a sidewalk constructed as was that in question might result in its breaking down at any time. The user was certain sooner or later to put the sidewalk into a state of disrepair. I think it is not imposing upon the municipality an obligation greater than the legislature intended to hold that the duty to keep in a reasonable state of repair involves the duty to prevent, as far as reasonably possible, the continuance of known conditions which will bring about a state of disrepair, and, if the continued existence of such conditions is not prevented, to take precautions in the nature of extra inspection commensurate with the likelihood of a dangerous state of disrepair arising. Probably the safest

and least expensive method of discharging its duty to keep in repair would have been to construct a proper crossing at the place in question. But, without holding that the municipality was under an obligation to construct such a crossing, or that failure to institute prosecutions for breaches of its by-law forbidding the crossing of unprotected sidewalks rendered it liable for damages, having knowingly permitted the continuance of forbidden and dangerous vehicular traffic involving risk of a break in the sidewalk at any moment, I think it cannot escape liability for injury sustained in consequence of a break occasioned by such traffic, after it had been allowed to remain unrepaired for more than a day. Whether such liability would arise in the case of an accident happening immediately, or very shortly, after the occurrence of a [460] break it is necessary now to determine. It may be said that this implies an obligation of at least daily inspection of a place such as that in question which would be too onerous to impose upon the municipality. But the necessity for such an inspection could have been so easily avoided, either by putting in a comparatively cheap crossing, which the city might have done on its own initiative, or by taking steps to prevent vehicular traffic crossing the sidewalk, which need have entailed no great trouble or expense, that the municipality can scarcely be heard to complain of the burden so imposed. Because, in my opinion, under the special circumstances in evidence it failed to take adequate measures for the fulfilment of its statutory duty to keep the sidewalk in a reasonable state of repair as a sidewalk, I would hold the defendant corporation liable.

The appeal should be allowed with costs in this court and in the court appealed from and the judgment of the learned trial judge should be restored.

Appeal allowed with costs.

NOTE.

It appeared in the reported case that teamsters were in the habit of driving across a wooden sidewalk at a certain place, and that this practice had continued for over a year. As a result thereof the sidewalk became broken and was in a dangerous condition, whereby a pedestrian was injured. The dangerous condition existed but a few hours prior to the injury and the municipality had no actual notice thereof. It is held that since the municipality was expressly charged by its charter with the duty of keeping the sidewalk in repair it was liable for the injury. The liability of a municipality for a defect in a street or highway as dependent on notice or knowledge, where a statute makes the muni-

city liable for a failure to repair, is discussed in the note to *Vancouver v. Cummings*, Ann. Cas. 1913A 685, that case being cited and followed in the reported case. See also the following more recent cases reported in this series: *Louisville v. Lenehan*, Ann. Cas. 1914B 164; *Ashland v. Boggs*, Ann. Cas. 1916B 1005.

PEOPLE

v.

DIXON.

Michigan Supreme Court—September 29, 1915.

188 Mich. 307; 154 N. W. 1.

Unlawful Assembly — What Constitutes — Audience at Sunday Moving Picture Show.

Defendant, who ran a moving picture show on Sunday, in assumed violation of Comp. Laws 1897, § 5912, forbidding the opening of shops or any business or work or presence at any public show or entertainment on Sunday under a fine of not more than \$10, can only be prosecuted under such provision, and, in the absence of any overt act or violence or disorder, cannot be summarily arrested under section 11334 et seq., authorizing the arrest of persons unlawfully assembled who refuse to disperse on command of the mayor, etc.

[See note at end of this case.]

Exceptions from Circuit Court, Ionia county: DAVIS, Judge.

Criminal action. Charles Dixon convicted of running moving picture show on Sunday and alleges exceptions. The facts are stated in the opinion. REVERSED.

Herbert C. Hall and Alfred R. Locke for People.

John Nichol and R. A. Colwell for respondent.

[308] BROOKE, J.—Respondent stands convicted under the following information:

"Alfred R. Locke, prosecuting attorney in and for the county of Ionia aforesaid, for and in behalf of the people of the State of Michigan, comes into said court, in the November term thereof, in the year one thousand nine hundred and fourteen, and gives the court here to understand and be informed that one Charles Dixon and Guy Alexander together, with thirty and more persons whose names are to this complainant unknown, late of the Ann. Cas. 1916B.—25.

city of Belding, in the county of Ionia, and State of Michigan, heretofore, to wit, on the 11th day of October, A. D. 1914, the same being the first day of the week, commonly called Sunday, at a certain theater and show building in the city of Belding at the city of Belding, in the county of Ionia aforesaid, unlawfully did assemble and meet together to disturb the peace and to listen to, to see, and to conduct a certain show and entertainment and public exhibition in said theater and show building, and while so unlawfully assembled and meeting together in violation of law, one Lucius Stoddard, then and there a deputy sheriff of the county of Ionia, did go among them, the said Charles Dixon and Guy Alexander, and [309] the said thirty and more persons, and did then and there command the said Charles Dixon and Guy Alexander and all the said persons therein in said theater and show building assembled, immediately and peaceably to disperse, and that he, the said Charles Dixon, and Guy Alexander, being so commanded, and being then and there unlawfully assembled as aforesaid with the said thirty or more other persons, did wilfully, maliciously, and unlawfully refuse and neglect immediately and peaceably to disperse and leave the said theater and show building and unlawful assembly, and did then and there, contrary to the order and command of the said officer, wilfully, wickedly, and unlawfully refuse to obey the said order, and in defiance of said order and command did remain at said unlawful assembly, and did continue to conduct said show and theater and place of amusement and cause said unlawful assembly to continue, and, being so assembled and gathered together, the said Charles Dixon and said Guy Alexander and the said other persons did then and there unlawfully remain and continue in operating said show and theater, and did continue said unlawful assembly, thereby committing great grievances and a breach of the peace, and thereby disturbing and annoying the good and peaceable people in said city and for a great distance in said city and about the vicinity of said theater and show building, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan."

The facts are not in dispute and are sufficiently disclosed by the information. It was the theory of the people that respondent should be held guilty not only under section 5912, 2 Comp. Laws (2 How. Stat. [2d ed.] § 5261), which provides:

"No person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, or be present at any dancing, or at any public diversion,

show, or entertainment, or take part in any sport, game, or play on the first day of the week. The foregoing provisions shall not apply to works of necessity and charity, nor to the making of mutual promises [310] of marriage, nor to the solemnization of marriages. And every person so offending shall be punished by fine not exceeding ten dollars for each offense"—but likewise under section 11334, 3 Comp. Laws (5 How. Stat. [2d ed.] § 14750), which reads as follows:

"If any persons, to the number of twelve or more, being armed with clubs, or other dangerous weapons, or if any persons, to the number of thirty or more, whether armed or not, shall be unlawfully, riotously, or tumultuously assembled in any city, township, or village, it shall be the duty of the mayor and each of the aldermen of such city, the supervisor of such township, the president and each of the trustees or members of the common council of such village, and of every justice of the peace, living in such city, township or village, and also of the sheriff of the county and his deputies, to go among the persons so assembled, or as near to them as may be with safety, and in the name of the people of this State, to command all the persons so assembled immediately and peaceably to disperse."

Assuming that the running of a moving picture show on Sunday is unlawful under section 5912, *supra*, which we do not determine (*People v. Finn*, 57 Misc. 659, 110 N. Y. S. 22; *People v. Hemleb*, 127 App. Div. 356, 111 N. Y. S. 690; *William Fox Amusement Co. v. McClellan*, 62 Misc. 100, 114 N. Y. S. 594; *Edwards v. McClellan*, 118 N. Y. S. 181; *State v. Chamberlain*, 112 Minn. 52, 127 N. W. 444, 30 L.R.A. (N.S.) 335, 21 Ann. Cas. 679; *State v. Penny*, 42 Mont. 118, 111 Pac. 727, 31 L.R.A. (N.S.) 1155; and *Rex v. Charron*, 15 Can. Crim. Cas. 241), we are of opinion that the judgment in the case at bar must be reversed, in harmony with the reasoning of Justice Hooker in *Yerkes v. Smith*, 157 Mich. 557, 122 N. W. 223. We there said:

"The playing of baseball on Sunday is an act prohibited and punishable by law; the penalty being a fine of \$10. It does not amount to a misdemeanor and cannot be prosecuted by indictment; the only remedy being [311] a civil action. See 3 Comp. Laws, § 9797 et seq.; *Pettinger v. People*, 20 Mich. 336. The action sought to be enforced by this proceeding is primarily the prevention of a game of baseball, advertised for August 30th last, and of games that are said to have been contemplated on Sundays of later dates. We suppose that relator expects such games to be prevented by arrest of those engaged in them. The law has prescribed another

method for preventing infractions of this law, viz., a penalty to be collected through judicial proceedings; and a summary arrest, even after a violation of the law, is not contemplated, and is not authorized by law, as a means of preventing the violation of this statute. 2-Comp. Laws, § 5912. See authorities above cited.

"We understand that counsel does not contend otherwise, and that he rests his right to a writ upon the claim that under 3 Comp. Laws, § 11334, and succeeding sections, a game of baseball played in the presence of 30 or more persons is *per se*, and necessarily, a breach of the peace, and an assemblage of persons to the number of 30 or more, for the purpose of playing and witnessing such a game in Detroit on Sunday, is such an 'unlawful tumultuous, or riotous assemblage' as to make it the duty of this respondent to be present in person, or by policemen under his control, and prevent the game and the alleged consequent breach of the peace, by commanding said assemblage to immediately and peaceably disperse, enforcing such command by the arrest of all such persons as may fail to obey. Before the respondent could be required to arrest any one there must have been either a breach of the peace already committed or a failure to comply with a lawful order to disperse. Taking the answer as true, we must assume a willingness on the part of this respondent to cause warrants to issue for the arrest of all persons violating section 5912, and, acting through his subordinates, summarily to arrest all persons who should be guilty of a breach of the peace, but that he refused to assume that all baseball games played on Sunday required his personal attendance or would justify a command by him to disperse and subsequent arrest under the statute cited, if such command should not be obeyed.

[312] "We have said that the mere playing of a game of baseball upon Sunday is not of itself and necessarily a breach of the peace, justifying arrest and indictment. In a sense, a game of baseball on Sunday may often be a breach of the peace, perhaps usually is, but it cannot be said that it is necessarily so, and before a summary arrest can be made for a breach of the peace, not only must overt acts be committed in the presence of the officer, but they must be violent and dangerous acts of some sort. . . .

"It is clear that a mere assembling of persons to play and witness any Sunday game is not sufficient, without overt acts of violence or disorder, to authorize an officer to make a summary arrest. This being so, relator's claims must be left to rest upon the statute (section 11334) which has been held to be applicable, where a game of baseball

on Sunday in a public place was attended by several hundred assembled, unlawfully and tumultuously, to witness it. *Scougale v. Sweet*, 124 Mich. 315, 82 N. W. 1061. Before an arrest can be required under this statute, there must be:

"(1) A condition of things justifying a command to disperse by the proper officer designated by law.

"(2) Disobedience of the command.

"This statute is apparently based upon the common-law duty of sheriffs and others to read the riot act and command a dispersal of persons at a time of riot. This statute may perhaps be said to have enlarged the common-law rule. It has certainly made it an offense to disobey a lawful command. But before one can be convicted of such an offense, there must have been:

"(1) An occasion for such a command;

"(2) the command must have been made by one of the statutory officers;

"(3) the command must have been disobeyed."

While the foregoing statement was not necessary to the decision in the case there considered, we are of opinion that it correctly states the law applicable to the instant case, and that the remedy against the respondent, in the absence of any overt acts of violence or disorder, must be confined to that provided under section 5912, 2 Comp. Laws.

[313] The judgment is reversed, and the respondents are discharged.

Kuhn, Stone, Ostrander, Bird, and Steere, JJ., concurred. Moore, J., did not sit.

The late Justice McAlvay took no part in this decision.

NOTE.

Engaging in Labor or Amusement on Sunday as Offense at Common Law or under Statute Other than Sunday Law.

Whether the act of one engaging in labor or amusement on Sunday is an offense at common law is a question which the courts seem rarely to have been called on to decide. The reason for this scarcity of decided cases on the subject probably is that from time immemorial comprehensive legislation, commonly referred to as "Sunday laws," has been in force in England (4 Blackstone Com. 63) and in this country since the organization of the colonies.

However, the rule apparently is well settled at common law that, with possibly the exception of judicial acts, anything may be done on Sunday which may be performed on any other day of the week. For a discussion of the legality under the common law of judicial and official acts performed on Sunday,

see the note to *Moss v. State*, Ann. Cas. 1916B 1.

In the absence of statute, therefore, any innocent amusement participated in or enjoyed, or any act of labor performed, on Sunday is not prohibited and consequently does not constitute an offense. *Rex v. Brotherton*, 2 Stra. (Eng.) 702; *Eden v. People*, 161 Ill. 296, 43 N. E. 1108, 52 Am. St. Rep. 365, 32 L.R.A. 659; *State v. Williams*, 26 N. C. 400; *State v. Brooksbank*, 28 N. C. 73. See also *Reid v. State*, 53 Ala. 402, 25 Am. Rep. 627.

Thus, in *Rex v. Brotherton*, 2 Stra. (Eng.) 702, the court sustained a demurrer to an indictment for exercising the trade of a butcher on Sunday, the grounds of the demurrer being that the indictment was not laid as being against the form of the statute and the act complained of was no offense at common law.

In *Eden v. People*, 161 Ill. 296, 43 N. E. 1108, 52 Am. St. Rep. 365, 32 L.R.A. 659, it was said: "The common law of England, as adopted in this state as a part of our jurisprudence, does not prohibit the citizen from pursuing his ordinary labor on Sunday.

Under the law of this state as it existed prior to the passage of the act [Sunday law], in question, each and every citizen of the state was left perfectly free to labor and transact business on Sunday or refrain from labor and business, as he might choose, so long as he did not disturb the peace and good order of society."

In *State v. Williams*, 26 N. C. 400, the court said: "The indictment is for compelling certain slaves, belonging to the defendant, to work on several Sundays in the ordinary calling of the defendant on his farm. It lays those acts to be to the common nuisance and concludes at common law. We do not find it anywhere stated, that doing secular work on Sunday is per se an offense at common law. There is, indeed, in the Crown Circuit Companion a precedent (which is also adopted in 2 Chitty Cr. L. 20) of an indictment against a butcher as a common Sabbath breaker and profaner of Sunday, for having, within certain times, kept a common public and open shop in a town on Sunday and sold therein meat to divers persons. Mr. East also, speaking of offenses against God and religion, remarks, that the profanation of Sunday is by a variety of statutes punishable in particular instances by summary process before magistrates; and then adds, that 'it is also said to be indictable at the common law.' And he cites the precedent just mentioned. In the precedent the act is laid as a nuisance; as it is in the indictment before us."

In *Reid v. State*, 53 Ala. 402, 25 Am. Rep. 627, the court said obiter: "But it seems

that the Sunday prohibitions of the common law reached only the courts. Its injunctions were all embraced in the maxim: *Dies Dominicus non est juridicus*. The Lord's day is not a court day. Judicial acts were held void, but not ministerial acts."

The reported case appears to be the only case in which a prosecution for the commission or omission of an act on Sunday has been attempted under a statute other than a "Sunday law," such act or omission being alleged to be an offense only because of its occurrence on a Sunday. In that case, the Sunday law prescribed a penalty in the nature of a fine for its violation. It was contended that the act of the defendant of keeping open a moving picture theater on Sunday was a violation not only of the Sunday law, but also of another statute under which the prosecution was also brought, and which provided, as follows: "If any persons, to the number of twelve or more . . . whether armed or not, shall be unlawfully . . . assembled . . .," etc. The court refuses to determine whether the keeping open for business on Sunday of the moving picture theater was a violation of the Sunday law but assuming its illegality holds that the audience so assembled did not constitute an unlawful assembly within the enactment quoted.

SAWYER

v.

CONNER.

Mississippi Supreme Court—April 30, 1917.

114 Miss. 363; 75 So. 181.

Banks — Deposits — Special Deposit — What Constitutes.

Where owner of savings account informed cashier that draft deposited was for purpose of paying contractor for building house and refused to let it be credited to her account, whereupon the cashier gave her a special receipt bearing the words, "Sp. Dept.," the deposit is a special deposit, and the money was charged with a trust in favor of the contractor, and the bank does not take title to the proceeds of the draft.

[See note at end of this case.]

Rights as to Special Deposit — Priority.

In such case, the depositor is entitled to a preference against the receiver of the bank for the special deposit.

Appeal from Chancery Court, Adams county: CUTLER, Chancellor.

Action by Mary Sawyer, plaintiff, against L. P. Conner, receiver, defendant. Judgment for defendant. Plaintiff appeals. REVERSED.

[364] Appellant, Mrs. Sawyer, a resident of Natchez, Miss., was the owner of a house covered by a policy of fire insurance in the Caledonia Insurance Company. There was damage by fire, the loss was adjusted, and appellant received a check from the insurance company for the sum of five hundred and fifty dollars in settlement of the loss. She awarded a contract to one McClutchie for the said sum of five hundred and fifty dollars to repair the house. The check from the insurance company was received before the contractor had completed his contract to restore the building. Mrs. Sawyer has an adult daughter, Miss Margaret H. Sawyer, who carried the check of the insurance company to the First Natchez Bank and explained to the assistant cashier that her mother desired the check to be collected and the proceeds placed in the bank for the special purpose of paying Mr. McClutchie, the contractor. At that time, Mrs. Sawyer had an account in the savings department of the First Natchez Bank and a credit to her savings account of about one hundred and thirty-five dollars. Miss Margaret Sawyer also had two accounts at the bank, one a checking account and the other a savings account. When she presented the check to the officer of the institution, something was said about whether the proceeds of the check should be credited on her mother's passbook or upon either of Miss Sawyer's accounts, and, in response to this inquiry from the bank officer, Miss Sawyer declined to permit any entry of the check to be made either upon her mother's savings account or upon Miss Sawyer's account. Thereupon the officer of the bank executed upon a blank form the following receipt:

"First Natchez Bank, Natchez, Miss., Oct. 11, 1913. Mr. E. Sawyer: Yours ——— received. We credit your account: Sp. Dept. \$550.00. All items credited subject to payment. Respectfully, G. S. Pintard, Cashier. (For the collection of all items payable outside of [365] this city, the First Natchez Bank will observe due diligence in its endeavor to select responsible agents, but will not be liable in case of their failure or negligence, or for loss of items in the mail.)"

The greater portion of the language of this receipt appears in printed form, but the words "Sp. Dept." were written, and the undisputed testimony shows that this was written for "special deposit." The deposit as shown by the receipt was made October 11th, and the bank failed October 29th thereafter. On the day the bank failed, Miss Margaret Sawyer went to the bank and made a deposit of fifteen dollars on her mother's savings account

and had the same entered upon the passbook. The testimony shows that at that time she again called the bank's attention to the fact that Mr. McClutchie, the contractor, would complete his job in a few days, when she would come around and withdraw the deposit for the purpose of paying him. Her testimony is to the effect that the assistant cashier again assented to this special arrangement, and that neither she nor her mother knew that the bank was insolvent. It is shown that, at the time the deposit was made, the bank was hopelessly insolvent and that the officers of the bank had knowledge of this fact. The check from the insurance company was forwarded to the Seaboard National Bank of New York for collection, it being then one of the correspondents of the First Natchez Bank, and the proceeds of the check were credited to the account of the First Natchez Bank on the books of the Seaboard National Bank. When the First Natchez Bank closed its doors, there was a balance to its credit in the Seaboard National Bank of four thousand five hundred and twenty-one dollars and thirty-nine cents, which amount was collected by the receiver. After the receiver was appointed, notice was given to all creditors to appear and probate their accounts, and Mrs. Sawyer probated her account, not only for the \$550 special deposit, but for the balance due her in the savings department, [366] and at the time this controversy was tried to the chancellor she had received a ten per cent dividend, paid to all depositors whose accounts had been duly probated. She presented an ancillary petition to the court seeking a preference for the said sum of five hundred and fifty dollars upon the ground that it was a special deposit and also upon the further ground that it was fraudulently obtained from her by the officer of the bank with full knowledge of the bank's insolvency. The petition was answered, evidence both for petitioner and the receiver introduced, and a decree was entered by the chancellor dismissing the petition and declining to award appellant a preference. From this decree she prosecutes this appeal.

Truly & Truly for appellant.
L. T. Kennedy for appellee.

[370] STEVENS, J. (*after stating the facts*).—While the deposit made by Mrs. Sawyer may not come within the literal meaning of the term "special deposit," it does, in our judgment, constitute a deposit for a special purpose and is frequently referred to or known as a "special [371] deposit." This particular class of deposits is referred to by the author on Banks and Banking in *Corpus Juris*. "as a distinct class." It is stated on page 632, vol. 6, C. J., that:

"In using deposits made for the purpose of having them apply to a particular purpose, the bank acts as an agent of the depositor, and if it should fail to apply it at all, or should misapply it, it can be recovered as a trust deposit."

In the case at bar, the evidence shows that the depositor absolutely refused to permit the proceeds of the check in question to be deposited either to her checking account or her savings account. It was explained to the official of the bank receiving the check that the proceeds were intended to pay and must pay the contractor who was repairing the damage to the house which this very check was designed to cover and satisfy. Miss Sawyer testifies that, if she had known the bank was insolvent, she would not have placed the money in the bank at all. The fair inference from all her testimony is that she would not have deposited the funds at all, if she had known that they would not safely reach the contractor. She regarded the funds as equitably the money of the contractor, and the sole purpose of depositing the check was to have the same forwarded for collection and the proceeds safely remitted and safely kept for Mr. McClutchie. The bank had notice that Mr. McClutchie had an interest in the funds and, with full knowledge of the facts, accepted the money as a deposit for a special purpose. Under such circumstances, good faith on the part of the bank required it safely to keep the funds to be applied as directed. Under such circumstances, the bank, we think, did not take title to the proceeds of the draft, and it was never intended by the parties that the fund should be commingled with the general assets of the bank. It is contended by counsel for appellee that the proof does not show the bank was to deliver the proceeds to the contractor, but, on the contrary, [372] that Miss Sawyer was to return and execute a check to the contractor after his contract was completed. This, we think, is not a controlling factor in the case. The contractor could not be paid, of course, until his work had been done according to the contract, and it was a mere detail as to whether the bank would directly turn the funds over to McClutchie or whether Miss Sawyer would return and herself draw a check in his favor. The essential feature of this agreement was that the money belonged to the contractor the moment his contract was completed. The draft from the insurance company was upon a foreign bank and would in any event have to be forwarded for collection. This was not a deposit for collection in the usual sense of that term. There would have been no deposit for collection without the special agreement mentioned. The money at all times was charged with the trust in favor of the contractor, and at no time could the bank have charged the proceeds

against any indebtedness due by Mrs. Sawyer to the bank. The principle here announced was one of the principles contended for and fully recognized by our court in *Armour-Cudahy Packing Co. v. Greenville First Nat. Bank*, 69 Miss. 700, 11 So. 28. It is said by Mr. Michie, in his work on *Banks & Banking* (volume 2, p. 1291):

"A special deposit exists when money or property is given to a bank for some specific and particular purpose, as a note for collection, money to pay a particular note, or property for some specific purpose. . . . A deposit of the purchase price of property to be paid to the vendor upon the compliance with certain conditions is special"—citing in the footnotes cases in point, among which we regard *Kimmel v. Dickson*, 5 S. D. 221, 58 N. W. 561, 25 L.R.A. 309, 49 Am. St. Rep. 869, and *Shopt v. Indiana Nat. Bank*, 41 Ind. App. 474, 83 N. E. 515, as embodying the same principle here contended for.

A case very similar to the instant case is that of *Carlson v. Kies*, 75 Wash. 171, 134 Pac. 808, 47 L.R.A. (N.S.) [373] 317. In that case money was directed to a bank by an administrator and attorney in fact for certain heirs, the funds to be held until receipts could be secured from the heirs, when it was to be forwarded to the holder by bank draft. The court held this to be a special deposit and entitled to a preference, although the bank commingled the money with its general funds. The court, by Gose, J., among other things, says:

"When a bank accepts a special deposit, it becomes a trustee of the depositor, and holds the money subject to the trust. The receipt itself affords strong, if not conclusive evidence of a special deposit. It shows that the money was placed in the bank for a special purpose. Fortified by the evidence of the depositor and the admitted circumstances here present, it is obvious that both parties to the transaction intended to make a special, and not a general deposit. It follows therefore that the bank holds the money, not as a general debtor, but in a fiduciary capacity"—citing many authorities.

The court also responded to the suggestion that the identical money was not traced into the hands of the receiver:

"That is true, but the old rule requiring an identification of the specific fund or its avails in the hands of a receiver has been relaxed in the later cases. The doctrine of the modern authorities, and what we consider the sounder view, is that the trust fund is recoverable where an equal amount in cash remained continuously in the bank until its suspension, and passed to the receiver"—citing also on this point several cases, including the very strong case of *Fogg v. Tyler*, 109 Me 109, 82 Atl. 1008, 39 L.R.A. (N.S.) 847, Ann. Cas. 1913E 41.

In *Peak v. Ellicott*, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90, the bank received money from the maker of a note with instructions to pay the sum to the holder of the note and return the canceled note, but the bank appropriated the money and failed to execute the directions of the depositor. The court expressly held that:

[374] The money "was not deposited to be checked out or to be loaned, or otherwise used by the bank; in law the bank held it as a trust fund, and not as the assets of the bank."

And again:

"Wherever a fiduciary relationship exists, and money coming from the trust lies in the hands of the person standing in that relationship, it can be followed by the principal and separated from any money of the wrongdoer."

A strong case and one squarely in point is that of *Smith v. Sanborn State Bank*, 147 Ia. 640, 126 N. W. 779, 30 L.R.A. (N.S.) 517, 140 Am. St. Rep. 336. It expressly answers the contention here made that the bank was not authorized to deliver the funds to the contractor, but that Mrs. Sawyer was to draw a check and herself attend to the payment. In the *Smith Case*, the bank accepted a deposit of money which the depositor needed for a special purpose, and that purpose was to pay certain debts specifically named, and then the remainder to be repaid to the plaintiff for the specific purpose of enabling him to take his sick wife to a hospital for treatment. The bank attempted to appropriate a portion of the funds to satisfy an indebtedness claimed by the bank against the depositor. The court says:

"The evidence shows without dispute that the check for \$200 was placed with the defendant upon the express agreement and understanding that, after paying certain specifically named debts, the remainder would be repaid to the plaintiff on the following day, or whenever called for to enable him to take his wife to the hospital for needed treatment. Upon money so received, no lien attached in favor of the bank, and its attempt to appropriate the same was wholly without right or authority. Upon such a record plaintiff was clearly entitled to recover."

[375] In the case of *Dolph v. Cross*, 153 Ia. 289, 133 N. W. 669, a depositor made a deposit for the special purpose of meeting checks which he had already issued.

The special conditions were explained to the bank at the time the deposit was made. The court held that this special arrangement did not create the relation of debtor and creditor, but "that the right of the check holders, for whose benefit it was deposited, was superior to that of the garnishing creditor." See also *Hutchinson v. National Bank of Commerce*, 145 Ala. 196, 41 So. 143; *Montagu v. Pacific Bank*, 81 Fed. 602; *Covey v. Cannon*,

104 Ark. 550, 149 S. W. 514; Fort v. Batesburg First Nat. Bank, 82 S. C. 427, 64 S. E. 405; Lyman v. Belfast Nat. Bank, 98 Me. 448, 57 Atl. 799; Wagner v. Citizens' Bank, etc. Co. 122 Tenn. 164, 122 S. W. 245, 28 L.R.A. (N.S.) 484, 135 Am. St. Rep. 869, 19 Ann. Cas. 483; McBride v. American R. etc. Co. 60 Tex. Civ. App. 226, 127 S. W. 229.

We are of the opinion that appellant's claim should be treated as a trust fund, and that she should have been awarded a preference. The question here presented will not be so important to depositors secured under the new bank guaranty act.

Reversed and remanded.

NOTE.

In the reported case it appeared that the depositor of a check informed an officer of the bank that the deposit was for the specific purpose of paying a certain claim, and refused to allow it to be credited on either of her two regular deposit accounts. A receipt was given for the deposit, designating it as "Sp. Dept." It is held that the deposit was a special one, so that title thereto did not pass to the bank. The distinction between a general and a special deposit is discussed in the note to Fogg v. Tyler, Ann. Cas. 1913E 41.

PEOPLE

v.

ELLIOTT ET AL.

Illinois Supreme Court—April 20, 1916.

272 Ill. 592; 112 N. E. 300.

Trial — Objection to Evidence — General Objection — Sufficiency.

A general objection to an offer of the record of the election in the town on the proposition of it becoming anti-saloon territory is insufficient.

Intoxicating Liquors — Local Option Election — Proof of Result — Record Book.

Under Anti-Saloon Territory Act (Laws 1907, p. 297), § 7, providing that the clerk shall record in a well-bound book, to be kept in his office by himself and his successor, the result of the vote on the proposition of the political subdivision becoming anti-saloon territory, and such result may be proved by such record or by the official certificate of the clerk, and, where it shows that a majority of the votes were "yes," it shall be prima facie evidence that the political subdivision

has become anti-saloon territory, it is not necessary to make such record proof that it be shown that it was in the exclusive possession of the clerk.

Criminal Law — Proof of Venue — Sufficiency.

The venue is proved on a prosecution for selling liquor in the town of D., anti-saloon territory, by testimony that witness knew defendant E. and his place of business, a certain number on a certain street, and that it is in said town; all the testimony relating to sales by defendants and their bartenders in that place of business.

Witnesses — Examination — Stopping Irrelevant Cross-examination.

Further cross-examination about the height of the fence is properly stopped; witness having testified that he saw the deliveries of beer at defendants' place of business through a gap in the fence.

Same.

Cross-examination, which has gone beyond reasonable limits, of a witness, who has testified to seeing cases of beer delivered at defendants' place of business, and the name "Leisy Beer" on the cases, is properly curtailed when an effort is made to ascertain the extent of his education, by asking him to spell "Leisy."

Appeal and Error — Matters Not Shown by Record.

Alleged errors in rulings on evidence may be disregarded; the rulings and objections not being shown by the abstract.

Evidence — Identification of Person — Pointing Out Person Referred to.

Witnesses testifying to sales of liquor, but not knowing the name of the person selling, may be allowed to point to the one or the other of defendants as the person.

Witnesses — Examination — Leading Questions.

Questions asking witnesses on prosecution for illegal sales of liquor, whether they ever had occasion to visit defendants' place of business, and if they saw defendants there, merely directing their attention to the matter being tried, are not suggestive or leading in any proper sense.

Intoxicating Liquors — Prosecution — Evidence — Sales by Bartender.

Testimony of sales at the bar by persons other than defendants, who had charge of the premises and managed the business, such other persons acting as bartenders, is competent; all being guilty as principals.

Trial — Reception of Evidence — Refusal to Allow Offer of Proof.

For the court, when defendants' counsel made an offer of proof, to suggest to him that the proper way was to ask questions and let the court rule on them is right and proper, and not an act of partiality or unfairness.

Intoxicating Liquors — Instructions — Held Applicable.

Instructions as to giving away liquor, or other shift or devise to evade the liquor law,

and sales by servant, are held under the evidence applicable to the case.

Evidence of Illegal Sale — Sufficiency.

Evidence, on a prosecution for sale of liquor in anti-saloon territory, is held to be sufficient to support the conviction.

Sentence and Punishment — Cruel and Unusual Punishment.

The provision of Const. U. S. Amend. 8, against imposition of excessive fines, and infliction of cruel and unusual punishment, does not apply to state legislation, but is restricted exclusively to the federal government, its courts and officers.

[See note at end of this case.]

Same.

The provision of the state's Bill of Rights, § 11, that "all penalties shall be proportioned to the nature of the offense"—that is, that the penalty prescribed for an offense shall be in proportion to the nature of the offense—is directed to the lawmaking power.

[See note at end of this case.]

Same.

There must be a clear violation of the provision of the state's Bill of Rights, § 11, that "all penalties shall be proportioned to the nature of the offense," to warrant holding a statute invalid as contravening it.

[See note at end of this case.]

Same.

That sentences are for both fine and imprisonment, as authorized by statute, is a matter in the court's discretion.

[See note at end of this case.]

Same.

It is the penalty prescribed by a statute for a single offense, and not the aggregate of punishments inflicted for several offenses of the same character joined in one indictment, on all of which there was a conviction, which bears on the question of the penalty being proportioned to the nature of the offense.

[See note at end of this case.]

Same.

A punishment authorized by statute is never held cruel or unusual or not proportioned to the nature of the offense unless it is a barbarous one unknown to the law, or so wholly disproportionate to the nature of the offense as to shock the moral sense of the community.

[See note at end of this case.]

Same.

If the penalty prescribed by statute is not proportionate to the offense, the law is void; and the evil cannot be cured by a mere modification on appeal of the sentence.

[See note at end of this case.]

Same.

The penalty prescribed by Anti-Saloon Territory Act (Laws 1907, p. 297) for sale of liquors in anti-saloon territory, a fine of not less than \$20 nor more than \$100, or imprisonment for not less than ten days nor more than thirty days, or both, is clearly not disproportioned to the nature of the offense.

[See note at end of this case.]

Same.

The statute prescribing as a penalty for sale in anti-saloon territory a fine of from \$20 to \$100, or imprisonment from ten to thirty days, or both, being valid, sentences for the minimum fine and imprisonment on each of seventy-one counts are not invalid as imposing cruel and unusual punishment because of the aggregate.

[See note at end of this case.]

Review of Sentence.

Sentences on a number of counts being within the terms of a valid statute, the judgment cannot be reversed because the appellate court would have imposed less severe sentences, and considers them unnecessarily severe for the accomplishment of the purposes of the statute.

Form of Sentence — Conviction on Several Counts.

The correct method for sentencing one on several counts is not for a total time of imprisonment in gross, but for a specified time under each, the time under the second to commence when the first ends, and so on to the last; and it is not enough to state that the sentences shall run consecutively or successively.

Criminal Law — Review — Error in Sentence — Remand for Sentence.

There being no error, except in the imposition of the sentences, the case will be remanded for proper sentences.

[See 3 Ann. Cas. 1024.]

Error to Appellate Court, Third District.

Criminal action. Michael Elliott et al., indicted for unlawfully selling intoxicating liquor. Defendants convicted in Circuit Court, Macon county: WHITFIELD, Judge. Judgment affirmed by Appellate Court. Defendants bring error. The facts are stated in the opinion. **REVERSED.**

J. C. Lee and Fred Hamilton for plaintiffs in error.

P. J. Lucey, Jesse L. Deck, George P. Ramsey and Charles F. Evans for defendant in error.

[594] CARTWRIGHT, J.—Michael Elliott and Otho Jennings, plaintiffs in error, and James Howe and Richard Smith, were indicted in the circuit court of Macon county for selling intoxicating liquor in the town of Decatur, alleged to be anti-saloon territory. There were seventy-one counts in the indictment, the first seventy being for the unlawful sale of intoxicating liquor and the seventy-first for keeping a place where intoxicating liquor was unlawfully sold. James Howe and Richard Smith were not apprehended, but Michael Elliott and Otho Jennings, the plaintiffs in error, were tried and found guilty on each of the seventy-one counts. Judgment was

entered by the court on the verdict, sentencing each of the plaintiffs in error to pay a fine and to imprisonment in the county jail under each count. The record was removed to the Appellate Court for the Third District by a writ of error, and the judgment having been affirmed, the record has been brought to this court by writ of error.

Taking up the questions raised by counsel for plaintiffs in error, not in the order of their argument but in the order of the events occurring on the trial, the first alleged error to be noticed is that there was no proper proof that the town of Decatur was anti-saloon territory. A witness testified that he was town clerk of the town of Decatur; that [595] he had in his office the record of the election in the town upon the proposition "shall this town become anti-saloon territory;" that the result of the election was found on certain pages of said record, which was then produced; that the record was a well-bound book and the entry the original record, and the signature at the bottom of the page where the result was recorded was the genuine signature of the town clerk. The record showed a majority of 1745 for the proposition, and being offered in evidence it was objected to and the objection overruled. The abstract shows merely a general objection, without specifying its nature, but counsel say in argument that the objection was a lack of proof that the record was in the exclusive possession of the town clerk. The general objection was without force, and if the objection had been as now stated in the argument there was no error in overruling it, since the proof was full and sufficient under the requirements of section 7 of the act in reference to anti-saloon territory. (Laws of 1903, p. 164.) The town of Decatur became anti-saloon territory on May 7, 1914, and the indictment was returned on October 12, 1914.

The next alleged error is that the venue was not proved. On that question the abstract shows the testimony of a witness who said that he knew the defendant Michael Elliott and his place of business at No. 245 East Main street, and as to its location he testified as follows: "It is in the town of Decatur, county of Macon, State of Illinois." All the testimony related to sales by defendants and their bartenders in that place of business. The venue was proved.

It is alleged that the court made several erroneous rulings in the introduction of evidence. A witness whose place of business was near the premises of the defendants testified that, with the exception of two or three weeks when Elliott was away, there was hardly a day when there were not twenty or thirty cases of beer hauled to the back door of the defendants' place of business and taken inside. [596] During a prolonged cross-exami-

nation, covering twenty-five pages of the record, it appeared that there was a division fence about six feet high between the place of business of the witness and the defendants' premises, in which there was an opening about eight feet wide. The court stopped further cross-examination about the height of the fence because the witness had said that he saw through the gap in the fence. The same witness said that he saw the name "Leisy Beer" on the cases, and the court sustained an objection when the witness was asked to spell the name Leisy. The cross-examination went beyond all reasonable limits, and the court did not err in curtailing it when an effort was made to ascertain the extent of the witness' education. These objections and rulings are not shown by the abstract and the alleged errors might have been disregarded for that reason, but we have taken the statement of counsel as to what occurred. Some witnesses testified to sales but did not know the name of the person selling the liquor. The court allowed such witnesses to point out the person making the sale, and they pointed to one or the other of the defendants, which counsel say was an error of the court. They give no reason for their claim and we do not think of any. It is further contended that error was committed in allowing leading questions to be put to the witnesses. The questions were of this nature: Witnesses were asked whether they ever had occasion to visit the place of business of the defendants and if they saw the defendants in that place. The questions merely directed the attention of the witnesses to the matter being tried and they were not suggestive or leading in any proper sense. It is contended that the court erred in admitting testimony of sales made at the bar by persons other than the two defendants on trial. The defendants had charge of the premises and managed the business and the other persons were acting as bartenders. All were guilty as principals. (Stevens v. People, 67 Ill. 587; Johnson v. People, 83 Ill. 431.) The proof [597] that the defendants were assisted by others in selling the liquor was competent. There was no error in any ruling on the evidence.

In the argument counsel denounce the trial as a farce and criticise the trial judge as partial and unfair. Counsel have a right to make any fair criticism of a judge concerning matters shown by the record but they have no right to make unjust accusations not borne out by the record and when made they do not tend to advance the cause which they are intended to serve. The rulings on the trial were fair and impartial. A fair sample of matter complained of is, that when the counsel for the defendants made an offer of proof the judge suggested to him that the proper

way was to ask questions and let the court rule on them. The court was right.

It is urged that the court erred in giving instructions to the jury, and the material objection is that the instructions stated the statutes relating to the sale of intoxicating liquors, including the giving away or delivering liquor or other shift or devise for the purpose of evading the law, sales by a clerk or servant, and the provision of the criminal code as to accessories. The objection is that many of these provisions were not applicable to any evidence. The defendants had bartenders who made sales as clerks or servants of the defendants. One witness called for ginger ale and was served with whisky, (which is a favorite shift or device,) and one witness who did not buy liquor but helped to unload liquor was given a glass of whisky in exchange for his labor. The instructions were applicable to the case and stated the law in the language of the statutes. There was no error in ruling on the instructions.

It is contended that the evidence did not support the verdict, but that is not so. The evidence introduced by the People was uncontradicted. The defendants occupied premises at No. 245 East Main street, in the city of Decatur. Near the front of the room there was a cigar case, back [598] of which the bar extended. The back part was partitioned off, and there was a door to the saloon which was kept locked. The defendant Elliott was usually at the cigar case and when customers came they would knock on the door. Elliott looked them over, and if he thought it safe to admit them he pulled a string, which unlocked the door and admitted them to the bar, where both defendants and the bar-tenders served them with beer or whisky. If some person came to the door who was not regarded as a safe customer Elliott would tell him to get out,—that there was "nothing doing;" and if an undesirable person got into the bar-room and was detected or one was doubted he was not permitted to have any liquor. Whenever one came to the door, either Elliott at the cigar case or some person who came from behind the bar would inspect him and admit him or not, as it was considered safe or unsafe. More than one hundred sales of intoxicating liquors were directly proved, and witnesses who bought liquor testified that there were large numbers of persons lined up at the bar, drinking or standing there and talking, and one witness said he had seen fifty or sixty people drinking there at different times. Elliott would not sell to one witness, saying he would not take any more chances on him, and there is neither any question about the guilt of the defendants nor that they were convicted on only a portion of the offenses committed against the law.

It is argued that the punishment inflicted upon the defendants was cruel, unusual and

excessive, in violation of the constitution of the State of Illinois and the constitution of the United States. The constitution of the United States provides that excessive bail shall not be required nor excessive fines imposed nor cruel nor unusual punishments inflicted. But that provision does not apply to legislation by the States. It is restricted exclusively to the Federal government, its courts and officers. (*Barron v. Baltimore*, 7 Pet. 243, 8 U. S. (L. ed.) 672; *Spies v. Illinois*, 123 U. S. 166, 8 S. Ct. 21, 22, 31 U. S. (L. ed.) 80; *In re Kemmler*, [599] 136 U. S. 436, 10 S. Ct. 930, 34 U. S. (L. ed.) 519; *McDonald v. Com.* 173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293; 12 Cyc. 963; 6 Am. & Eng. Enc. of Law (2d ed.) 961.) Our constitution does not contain that provision, but the provision of our bill of rights is, "all penalties shall be proportioned to the nature of the offense." The provision is directed to the law-making power, which alone can determine what act shall be regarded as criminal and how they shall be punished. The provision requires that the penalty prescribed for a criminal offense shall be in proportion to the nature of the offense, and while it is incumbent upon the courts to maintain and give effect to the constitutional requirement, there must be a clear violation of the provision to justify holding an act invalid. An act was held in violation of the constitutional provision which provided for forfeiture of franchises of a railroad company on account of discrimination on its part. (*Chicago, etc. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599.) On the other hand, laws and ordinances imposing penalties quite severe in their nature have been held not to violate the constitutional requirement. (*Chicago, Pac. R. Co. v. People*, 217 Ill. 164, 76 N. E. 368; *People v. Baltimore, etc. R. Co.* 246 Ill. 474, 92 N. E. 934.) In the case of *Arcola v. Wilkinson*, 233 Ill. 250, 84 N. E. 264, the city of Arcola by ordinance imposed a penalty of \$200 for each offense of selling intoxicating liquor, and it was held the penalty was not disproportionate to the nature of the offense. The Criminal Code prescribes imprisonment in the penitentiary for a term of not less than five years nor more than twenty years for the crime of burglary. The legislature enacted a statute providing for an indeterminate sentence, which should be a sentence for the maximum term in every instance, and this court held that such a sentence was not disproportionate to the offense. (*People v. Illinois State Reformatory*, 148 Ill. 413, 36 N. E. 76, 23 L.R.A. 139.) The penalty prescribed by the legislature for the sale of liquor in anti-saloon territory is a fine of not less than \$20 nor more than \$100, or imprisonment in the [600] county jail for not less than ten days nor more than thirty days, or both, in the discretion of the court. The

sentences against the defendants were for both fines and imprisonment on each count, which was a matter resting within the discretion of the court and authorized by the law. If the statute was valid the punishment was not disproportionate to the nature of the offense. There was no reason whatever for any leniency toward the defendants, who were knowing and willful violators of the law. The only reason that the fines aggregate a large sum and the imprisonment is for a long period is because there were so many violations of the law prosecuted under one indictment, but the punishment under each count must be considered by itself. The State may join misdemeanors of the same character in the same indictment and the court may fix separate punishment upon each count on which there is a conviction. (*Borschenious v. People*, 41 Ill. 236; *Kroer v. People*, 78 Ill. 294.) This practice has been approved by this court rather than to require separate indictments for each offense. The constitutional provision does not apply in any manner to the aggregate of the punishments inflicted for different offenses. In the case of *State v. O'Neil*, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557, the defendant was found guilty of 307 offenses of selling liquor. The punishment was \$6140, made of \$20 for each offense, and one month's imprisonment. It was contended that the sentence violated a constitutional inhibition of cruel and unusual punishment and excessive fines. The court said that if the defendant had subjected himself to severe punishment it was because he had committed a great many offenses; that it would scarcely be competent for a person to assail the constitutionality of a statute prescribing a punishment for burglary on the ground that he had committed so many burglaries that if punishment were inflicted for each he might be kept in prison for life, and that the mere fact that cumulative punishments may be imposed for different offenses in the same prosecution was not material.

[601] If section 11 of the bill of rights, requiring that penalties shall be proportionate to the offense, is equivalent to a prohibition against cruel or unusual punishments, courts have never held a punishment authorized by the legislature to be either cruel or unusual or not proportioned to the nature of the offense unless it was a barbarous punishment not known to the law or so wholly disproportionate to the nature of the offense as to shock the moral sense of the community. It was held in *People v. Whitney*, 105 Mich. 622, 63 N. W. 765, that the statute providing a fine of not less than \$50 nor more than \$200, or imprisonment in the county jail not less than twenty days nor more than six months, for the first offense of an illegal sale of liquor, and for every subsequent offense a

fine of not less than \$100 nor more than \$500 and imprisonment in the State's prison for not less than six months nor more than two years, did not impose excessive fines nor cruel and unusual punishments. Punishment for violation of the Local Option law of Missouri by a fine of \$300 and imprisonment for 365 days is not cruel and unusual. (*Ex p. Swann*, 96 Mo. 44, 9 S. W. 10.) A fine and costs amounting to \$4000, which would cause imprisonment for twelve years for non-payment, is not a cruel and unusual punishment. (*Ex p. Brady*, 70 Ark. 376, 68 S. W. 34.) Also in the following cases the punishment was held not cruel and unusual: Two years in the county jail. (*State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002.) A fine of not less than \$100 nor more than \$500, or imprisonment in the county jail not less than ninety days nor more than one year, or both, for an illegal sale by a druggist. (*Luton v. Palmer*, 69 Mich. 610, 37 N. W. 701.) A fine of not less than \$100 nor more than \$500, and imprisonment in the county jail not less than sixty days nor more than six months, for an illegal sale. (*State v. Becker*, 3 S. D. 29, 51 N. W. 1018.) A maximum term of imprisonment for one year and a fine of \$300, and on failure to pay the fine, imprisonment not to exceed three years. (*State v. Hodgson*, 66 Vt. 134, 28 Atl. 1089.) A fine of \$300 and ninety days [602] in the county jail for an illegal sale. (*State v. Barnes*, 3 N. D. 319, 55 N. W. 883.) A fine of not less than \$50 nor more than \$250, and imprisonment in the county jail for not less than six nor more than twelve months, for entering a place where liquor is sold, except a drug store. (*State v. Woodard*, 68 W. Va. 63, 69 S. E. 385, 30 L.R.A. (N.S.) 1004.) A fine of \$500 and a sentence to work on the streets for thirty days. *Loeb v. Jennings*, 133 Ga. 796, 18 Ann. Cas. 376, 67 S. E. 101.

If the punishment prescribed by the legislature for the illegal sale of liquor is not proportionate to the offense the law itself is void because prohibited by the bill of rights and no punishment at all can be inflicted for the offense. In such a case the vice is in the law itself, and the law being void, the sentence cannot be modified on appeal so as to remove the objection or make the law valid. (*Weems v. U. S.* 217 U. S. 349, 19 Ann. Cas. 705, 30 S. Ct. 544, 54 U. S. (L. ed.) 793.) In view of the decisions of other courts, and especially of the decisions of this court in *Arcole v. Wilkinson*, supra, that a penalty of \$200 for each unlawful sale is not disproportionate to the nature of that offense, and in *People v. Illinois State Reformatory*, supra, that a sentence for the maximum term of imprisonment for any offense is not disproportionate to the nature of the offense, it is clear that the statute under which the defend-

ants were sentenced does not infringe the constitutional provision. The statute prescribing a penalty for unlawful sales of liquor is valid, and the validity of the sentences is not affected by the fact that there were numerous violations and cumulative penalties. The statute being valid and the sentences within its terms, the judgment cannot be reversed on the ground that this court would have imposed less severe sentences, but we regard the sentences as unnecessarily severe for the accomplishment of the purposes of the law.

So far as the fines are concerned, the sentences were correct under the rule of *Borschenious v. People*, supra, where it was held that such a judgment is a several judgment upon [603] each count of the indictment. Objection is made to the sentences on the ground that the term of imprisonment on each count should have been so fixed that the imprisonment on the several counts should commence at the expiration of each succeeding term. The sentence as to imprisonment of each defendant was, that he should be confined in the county jail of Macon county for a period of ten days on each of the first seventy counts and a period of twenty days on the last or seventy-first count and that the jail sentences should run consecutively, making a total of 720 days in jail. The rule established by this court is, that where a defendant is sentenced upon different indictments or different counts of the same indictment, the correct method of entering judgment is not for the total time in gross but for a specified time under each count, the time under the second to commence when the first ends, and so on to the last. (*Mullinix v. People*, 76 Ill. 211; *Stack v. People*, 80 Ill. 32; *Fletcher v. People*, 81 Ill. 116.) No particular form is required to constitute a judgment. (*Wells v. Hogan*, Breeze, Ill. 337; *Foster v. Jared*, 12 Ill. 451; *Minkhart v. Hankler*, 19 Ill. 47.) The provision that the sentences shall run consecutively is equivalent to providing that they shall run successively, but the rule heretofore stated is, that it shall be expressly stated in the sentence that one shall begin at the expiration of the previous one. There was no error in the record up to the imposition of the sentence, and it is beyond question that the court intended to sentence each of the defendants to imprisonment in the county jail for separate terms of ten days on each of the first seventy counts and twenty days on the seventy-first count. As there was no error except in the imposition of the sentence, the cause should be remanded for a proper sentence, as was done in *Johnson v. People*, supra. In that case there was an indictment containing twenty-four counts for selling liquor to minors and there was a verdict of guilty on

twenty-two counts. The court, in sentencing the defendant, fixed the day and hour when [604] the imprisonment should commence upon each count upon which the defendant was found guilty. The court said that contingencies might arise which would render it impracticable to carry such a judgment into effect, and one had actually arisen in that case by granting a *supersedeas*. The court stated the correct method of entering the judgment, and having found no error up to the time the sentence was pronounced, reversed the judgment and remanded the cause, with a direction that the court enter a proper judgment on the verdict.

The judgments of the Appellate Court and circuit court are reversed and the cause is remanded to the circuit court, with leave to the State's attorney to move for, and direction to the court to enter, a judgment in accordance with the rule established by this court as above stated.

Reversed and remanded, with directions.

— NOTE.

What Is Cruel and Unusual Punishment.

Introductory, 396.

General Rules, 396.

Application of Rules:

Mode of Punishment, 398.

Amount of Punishment, 398.

Introductory.

The earlier cases dealing with the question what is cruel and unusual punishment are collected in the notes to *Weems v. U. S.* 19 Ann. Cas. 705, 725, and *In re Miller*, 64 Am. St. Rep. 376. It is the purpose of this note to review the recent decisions passing on the question.

General Rules.

The reported case is in accord with the earlier authorities in holding that the term cruel or unusual punishment as used in a constitution means only a mode of punishment which is not known at law, or is of such a cruel or barbarous character as to shock the moral sense of the community. Thus, in *Davis v. Berry*, 216 Fed. 413, it was held that to subject a prisoner to an operation of vasectomy was cruel and unusual punishment. The court said: "The sole purpose of the operation is to destroy the power of procreation. The operation as originally performed was that of castration. In the twelfth century Henry II declared it treason for any person to bring over any mandate from the

Pope or anyone in authority in church affairs. This he made punishable as to secular clergymen by the loss of their eyes and by castration. . . . There is a difference between the operation of castration and vasectomy: castration being physically more severe than the other. But vasectomy in its results is much the coarser and more vulgar. But the purpose and result of the two operations are one and the same. When Blackstone wrote his Commentaries he did not mention castration as one of the cruel punishments, quite likely for the reason that with the advance of civilization the operation was looked upon as too cruel, and was no longer performed. But each operation is to destroy the power of procreation. It is, of course, to follow the man during the balance of his life. The physical suffering may not be so great, but that is not the only test of cruel punishment; the humiliation, the degradation, the mental suffering are always present and known by all the public, and will follow him wheresoever he may go. This belongs to the Dark Ages. . . . It is somewhat difficult to define with precision what is cruel and unusual punishment in the constitutional sense. . . . No doubt delegates to the conventions, in providing against cruel punishment, had largely in mind what Blackstone had then recently written, in volume 4, page 376, such as being drawn or dragged to the place of execution, embowelling alive, cutting off the hands or ears, branding on the face or hand, slitting the nostrils, placing the prisoner in the pillory, the ducking, the rack, and the torture, and, as in Spanish countries, crucifying. In a very few states of the Union the whipping post has been retained as a constitutional mode of punishment. But it will be found that the courts in those states have construed the statute thus imposing such punishment in the light of their history, and what has been done and was being done at the time of the adoption of their constitution. No one can doubt but that under our present civilization if castration were to be adopted as a mode of punishment for any crime, all minds would so revolt that all courts without hesitation would declare it to be a cruel and unusual punishment. As we understand it, castration was never inflicted after the revolution of 1688. So that if, as some now contend, it is now competent for a legislature to impose such punishment as existed by the common law, the validity of the statute providing for castration could not be upheld because that punishment was one imposed back of the time of the common law as, generally speaking, it comes down to us. . . . While it is true that there are differences between the two operations of castration and vasectomy, and while it is true that the effect upon the man would be different in several respects, yet the fact

remains that the purpose and the same shame and humiliation and degradation and mental torture are the same in one case as in the other. And our conclusion is that the infliction of this penalty is in violation of the constitution which provides that cruel and unusual punishment shall not be inflicted." Compare *State v. Feilen*, 70 Wash. 65, Ann. Cas. 1914B 512, 126 Pac. 75, 41 L.R.A. (N.S.) 418.

In *State v. Longino*, 109 Miss. 125, 67 So. 902, it was held that to subject a person to imprisonment for receiving money on deposit while in an insolvent condition, when such act had been declared not in violation of the code in a previous case, was cruel and unusual punishment within the constitutional sense even though the decision in the original case had been subsequently reversed. The court said: "It occurs to us that the punishment of an act declared by the highest court of the state to be innocent, because the same court had seen fit to reverse its interpretation of a statute, would be the very refinement of cruelty; it is certainly unusual because no precedent can be found for its infliction; that it is unjust is perfectly obvious."

A statute which fixes a minimum but no maximum punishment is not invalid as imposing cruel or unusual punishment, because no maximum punishment is prescribed *State v. Blake*, 157 N. C. 608, 72 S. E. 1080; *Franklin v. Brown*, 73 W. Va. 727, 81 S. E. 405, L.R.A.1915C 558. So in *Hamilton v. State*, 68 Tex. Crim. 363, 153 S. W. 134, it was held that a provision in the penal code that "any person who shall wilfully injure any railroad, locomotive engine, or tender, or baggage, passenger or freight car of any railroad in this state, so as to prevent the use of same, shall be punished by fine in any sum not less than one hundred dollars, and imprisoned in the county jail not less than three nor more than twelve months," was not unconstitutional because it provided no maximum punishment, the court saying: "The said article is not unconstitutional on either ground of appellant's contention. When we contemplate the great destruction of property and of human life that may be caused by such acts as are denounced by said article of our code, we can well understand why the legislature made no limit of the maximum of the fine that may be imposed in such a case."

Where the trial judge imposes a sentence within the limits fixed by law it is not properly subject to review on the ground that it is extreme or oppressive. *Rogers v. State*, 11 Ga. App. 814, 76 S. E. 366; *Harper v. State*, 14 Ga. App. 603, 81 S. E. 817. See also *State v. Schaft*, 166 N. C. 407, Ann. Cas. 1916C 627, 81 S. E. 932; *Thacker v. State*, 62 Tex. Crim. 294, 136 S. W. 1095.

Application of Rules.

MODE OF PUNISHMENT.

The death penalty is not per se a cruel and unusual punishment. *Dutton v. State*, 123 Md. 373, Ann. Cas. 1916C 89, 91 Atl. 417 (for rape). Nor does the imposition of a fine in addition to the death penalty constitute crime and unusual punishment. *Jenkins v. State*, 22 Wyo. 34, 134 Pac. 260, 135 Pac. 749.

Vasectomy has been held to be a cruel and unusual punishment. *Davis v. Berry*, 216 Fed. 413, quoted in the preceding subdivision of this note. See the note to *State v. Feilen*, Ann. Cas. 1914B 512.

Transferring an inmate of a reformatory to a state prison to serve the remainder of his term therein is not cruel or unusual punishment where an act relating to the management of a reformatory permits such transfers to be made for disciplinary purposes. *Stagway v. Riker*, 84 N. J. L. 201, 86 Atl. 440, wherein the court said: "Whether under such circumstances continuance of the comparatively mild restraint of the reformatory, or a ticket of leave upon parole, or confinement in a hospital for the sick, or in an asylum for the insane, or in the state prison, as in the case at bar, shall be the disciplinary means to be adopted in aid of the discipline which is intended to reform the criminal tendency, are questions, the consideration of which the legislature has reposed in a duly organized commission, intrusted with this beneficent public work. We cannot say, therefore, from an inspection of the mere record here, that what these commissions have ordered done was of such an unusual character in its application to this prosecutor, as to be subject to the charge of cruel and unusual punishment."

AMOUNT OF PUNISHMENT.

Assault.—In *Robinson v. State*, 66 Tex. Crim. 138, 145 S. W. 345, it was held that a jail sentence of ninety days and a fine of \$50 for an assault on a woman was not cruel or unusual punishment where the facts disclosed that appellant, with others, had taken the woman from her bed at night, stripped her, and administered a whipping. In *Jobe v. State*, 76 Tex. Crim. 216, 173 S. W. 1025, a penalty of two years imprisonment and a fine of \$500 for wife beating was sustained. In *Kinkaid v. Jackson*, 66 Fla. 378, 63 So. 706, it was held that an act of the legislature imposing imprisonment not exceeding six months or a fine not exceeding \$500, on one who commits an assault and battery, is not such cruel or unusual punishment as to violate the constitutional provision.

Burglary.—A sentence of not less than fifteen years or more than thirty years upon one found guilty of burglary is not cruel or unusual punishment. *People v. Mire*, 173 Mich. 357, 138 N. W. 1066, wherein the court said: "The punishment prescribed in the act in question is imprisonment, a most common or usual method of punishment the world over. The claim that it is cruel and unusual must of necessity be directed, not to its nature, but to its limits of time, 'not less than fifteen years nor more than thirty.' That class of cruel and now unusual punishments at one time sanctioned and prevalent under the common law of England, such as burning at the stake, drawing and quartering, mutilation, starvation, and lesser forms of physical torture, to which the constitutional prohibitions were primarily directed, is not involved here. Approaching the dividing line, the inquiry as to what does in any particular case constitute cruel and unusual punishment under the constitutional provisions turns, not only upon the facts, circumstances, and kind of punishment itself, but upon the nature of the act which is to be punished."

Contempt of Court.—A fine of \$500 for contempt of court and an order remanding the prisoner to the custody of a United States marshal until paid is not so excessive as to constitute cruel and unusual punishment. In *re Maury*, 205 Fed. 626, 123 C. C. A. 642. But in *Ex p. Karlson*, 160 Cal. 378, Ann. Cas. 1912D 1334, 117 Pac. 447, and in *Brannon v. Com.* 162 Ky. 350, 172 S. W. 703, L.R.A.1915D 569, it was apparently considered that an unlimited imprisonment for failure to pay a fine imposed for contempt would violate the constitutional provision in question. In *People v. Seymour*, 272 Ill. 295, 111 N. E. 1008, *affirming judgment* 191 Ill. App. 381, it was held that a fine of \$50 against an attorney for contempt of court was not cruel and unusual punishment.

Homicide.—To impose a fine in addition to a sentence of death for murder in the first degree is not cruel or unusual punishment. *Jenkins v. State*, 22 Wyo. 34, 134 Pac. 260, 135 Pac. 749, wherein the court said: "It was suggested in the brief that the judgment provided cruel and unusual punishment. The statute applies uniformly throughout the state to all in like condition as the defendant, and the punishment provided does not fall within any class forbidden by the constitution as cruel or unusual but as commensurate with the crime of which defendant was found guilty. The legal punishment consists of two separate and distinct things, and the imposition of the fine in addition to the death penalty was not cruel nor unusual."

Imprisonment for Debt.—Imprisonment in the county jail for nonpayment of a debt, un-

til the debt is paid, is not cruel or unusual punishment, where the statute provides that, imprisonment for such an offense is not to exceed two years, the convict being able to secure his release at the expiration of the term whether the debt is paid or not. *Ex p. McInnis*, 98 Miss. 773, 54 So. 260. See also *Tatlow v. Bacon*, 101 Kan. 26, 165 Pac. 835.

Keeping Disorderly House.—A provision in the Crimes Act of New Jersey that the penalty for keeping a disorderly house shall be a fine of not less than \$1000 or more than \$5000 and imprisonment for not less than one year or more than five years has been held not to be unconstitutional as imposing cruel and unusual punishment. *State v. Griffin*, 84 N. J. L. 429, 87 Atl. 138, affirmed 85 N. J. L. 613, 90 Atl. 259, wherein the court said: "Counsel further contends that the sixty-fifth section of the Crimes Act is unconstitutional because it provides a cruel and unusual punishment. He contents himself merely with the assertion, making no attempt to show us that it rests on any solid foundation. He can hardly mean that punishment by fine and imprisonment for the commission of a crime is either cruel or unusual within the meaning of the constitution, for almost every violation of the criminal law may be so punished under our criminal code except treason and murder in the first degree, and in fact is a kind of punishment common in all civilized countries. If he means that the amount of the fine or the length of the term of imprisonment makes the punishment cruel and unusual, the answer is that the power to declare what shall and what shall not be deemed to be a crime, to determine the maximum and minimum of the fine or of the term of imprisonment to be imposed as a punishment for a crime so declared, is one which is committed by the people of the state to the legislative, and not the judicial, branch of the government. The fact that the legislature provides a punishment for a given crime more severe than the courts approve affords no ground for judicial interference; for such interference would be nothing more nor less than an attempted usurpation of legislative power by the judiciary. It is the character and not the extent of the punishment inflicted as a penalty for the commission of crime which is struck at by the constitutional provision appealed to." See also *Palmer v. Lenovitz*, 35 App. Cas. (D. C.) 303 (fine not exceeding \$1000 or imprisonment not exceeding five years or both); *State v. Gilbert*, 126 Minn. 85, 147 N. W. 953 (abatement law providing for closing of building).

Larceny.—A provision that a person shall be sentenced from one to five years for the theft of poultry of the value of two dollars or upwards does not impose cruel and unusu-

al punishment. *Fry v. Com.* 166 Ky. 670, 179 S. W. 604, wherein the court said: "Appellants devote a considerable portion of their brief to a comparison of the punishments prescribed by statute for other offenses, with that prescribed for the offense of stealing fowls of the value of two dollars or more; but, as we view it, but little profit is derived from a consideration of the matter of punishments upon that basis. Penal statutes are enacted in an effort to discourage the perpetration of the offenses denounced therein. The punishment that will tend to deter, in respect of one crime, must necessarily differ from that which will deter in respect of another. The offenses of perjury, false swearing, subornation of perjury, grand larceny, and feloniously breaking into a warehouse and others denounced by statute may be considered of higher grade than that of the stealing of fowls of the value of two dollars or more, but that does not constitute good reason why the penalty for the latter should not be equal to the penalty for the other offenses mentioned, if such a penalty is found to be necessary to deter persons from the commission of the offense of stealing fowls. The punishment may have the appearance of being severe, but we are not inclined to say that it is clearly or manifestly cruel or in contravention of the constitutional guaranty relied upon and asserted by appellants." In *Daugherty v. State* (Ark.) 197 S. W. 576, a punishment of ten years in the state penitentiary for the larceny of a buggy, harness and horse was held not to be cruel or unusual punishment under a statute providing a maximum penalty of fifteen years imprisonment for the larceny of a horse, though the penalty for grand larceny under the general statutes was not less than one year or more than five years. See also *People v. Clancy*, 163 App. Div. 614, 148 N. Y. S. 977.

Nonsupport of Wife.—A sentence to hard labor in a penitentiary or reformatory not exceeding two years together with a provision for the appropriation of the wages of the convict to the support of his wife is not such excessive punishment for nonsupport as to be termed cruel or unusual. *State v. Gillmore*, 88 Kan. 835, 129 Pac. 1123, 47 L.R.A. (N.S.) 217.

Rape.—The penalty of death for the crime of rape is not cruel or unusual punishment. *Dutton v. State*, 123 Md. 373, Ann. Cas. 1916C 89, 91 Atl. 417, wherein the court said: "It is also alleged that the judgment and sentence in this case impose a cruel and unusual punishment, and also that the sentence imposed is out of proportion to the crime charged in the indictment, and too severe a penalty for said crime. The facts proven in the case are not presented by the record, but we cannot hold that the penalty authorized by

the statute to be imposed for such a crime is in violation of the constitutional provisions. Article 16 of the Declaration of Rights of our present constitution declares that 'No law to inflict cruel and unusual pains and penalties ought to be made in any case or at any time hereafter,' and Article 25 is, 'That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted by the courts of law.' It would hardly be contended that the punishment provided by our statute for the crime of rape—death or confinement in the penitentiary for not less than eighteen months, or more than twenty-one years—is in conflict with those provisions, and when the legislature changed the penalty, for an attempt to commit the crime, to death or confinement in the penitentiary, in the discretion of the court, it is probable that it took into consideration the fact that it is often difficult to prove whether the crime of rape was actually consummated. Under some circumstances the outrage upon the particular woman and upon society can scarcely be said to be less because the prisoner did not succeed in accomplishing his purpose than if he had. If a revolting crime of this nature is so frequently repeated as in the judgment of the legislature to call for such punishment, we cannot declare it to be contrary to such provisions of the constitution." See *State v. Feilen*, 70 Wash. 65, 126 Pac. 75, 41 L.R.A. (N.S.) 418, and note to case as reported in Ann. Cas. 1914B 512 as to asexualization for rape.

Robbery.—Imprisonment in the state penitentiary for life, for the crime of robbery, where the minimum punishment is fixed at five years and there is no maximum punishment prescribed, is not cruel or unusual. *Franklin v. Brown*, 73 W. Va. 727, 81 S. E. 405, L.R.A.1915C 558, wherein the court said: "The main ground, indeed the only ground, on which petitioners rely to obtain their discharge, is that our statute, which prescribes only minimum penalties, and leaves it within the power of the court to pronounce judgment of imprisonment for life, a 'cruel and unusual punishment,' is void, contravening section 5, of article 3, of our Constitution, providing among other things against 'cruel and unusual punishment,' and that 'penalties shall be proportioned to the character and degree of the offense.' We deem it quite unnecessary to enter upon any extended discussion as to what is meant by 'cruel and unusual punishment,' interdicted by the Constitution; and by that other clause thereof respecting what penalties may be imposed. These questions were elaborately and ably gone into by Judge Brannon in *State v. Woodward*, 68 W. Va. 66. As said in that case, the clause, cruel and unusual punishment, originally occurring in the Bill of Rights of

1688, was there inserted as a provision against cruel judgments like those inflicted in the days of the tyrant Stuarts, and which found its way naturally into our Constitution, and into the constitutions of most of the states. But Judge Brannon says it refers only to punishments of such cruel character as he there describes, and was not intended as a limitation on the general powers of the legislature to say what are offenses and to prescribe punishments therefor. Robbery, from the earliest times, has always been regarded a crime of the gravest character. At common law the punishment for robbery was death, with or without benefit of clergy, according to varying statutes. 4 Sharswood's Blackstone, 243. Now by statute the punishment for robbery in England is penal servitude for life. 9 Laws of England (Earl of Halsbury) 664, section 1333. While the punishment inflicted on petitioners in this case is the same as prescribed in the English statute, the extreme limit under our statute, our law allows a lesser punishment and down to the minimum punishment prescribed. The statutes of the different states vary greatly in regard to the punishment prescribed for robbery. In Virginia the statute prescribes death if accomplished with violence in certain ways, or, in the discretion of the jury, not less than eight nor more than eighteen years; if committed in any other mode, a maximum and minimum imprisonment is prescribed, not less than five nor more than ten years. The indictment does not charge petitioners with having committed the offense 'being armed with a dangerous weapon;' but we do not know what aggravating circumstances, if any, may have been shown on the trial, justifying imprisonment for life. . . . As said, however, the evidence is not before us, and we have no means of knowing the aggravating facts and circumstances, if any, justifying the punishment. However, as the statute prescribes only minimum penalties for both forms, leaving it to the court to say what the punishment shall be, we cannot say, in view of the law and facts presented, that the judgment is violative of the constitution and void." See also *State v. Lee*, 166 N. C. 250, 80 S. E. 977 (nine years and six months labor on the county roads).

Sale of Lottery Tickets.—A statute fixing the punishment for selling lottery tickets at imprisonment for not less than two years and a fine of not less than \$500 or more than \$1000 is not in violation of either the state or federal constitutions. *Schroufe v. Com.* 141 Ky. 554, 133 S. W. 206.

Taking Usury.—A statutory provision that any person who shall loan money at a greater rate of interest than fifteen per cent per annum shall be imprisoned for not more than six months or fined not more than \$1000

or both is not unconstitutional. *State v. Griffith*, 83 Conn. 1, 74 Atl. 1068.

Use of Mails for Fraudulent Purpose.—Imposing a fine of \$1000 for each letter sent through the mail for fraudulent purposes in addition to a five years' sentence of imprisonment is not cruel or unusual punishment. *Badders v. U. S.* 240 U. S. 391, 36 S. Ct. 367, 60 U. S. (L. ed.) 706. See also *Mounday v. U. S.* 225 Fed. 965, 140 C. C. A. 93.

Violation of Fish or Game Law.—In *State v. Blake*, 157 N. C. 608, 72 S. E. 1080, it was held that a provision in the Public Laws prescribing a minimum but no maximum punishment for permitting pointer dogs to run at large during the closed season for quail, was not in violation of the provision in the North Carolina constitution forbidding cruel and unusual punishments. And in *People v. Anderson*, 30 Cal. App. 542, 159 Pac. 211, it was held that a fine of \$500 for illegal fishing was not cruel or unusual punishment.

Violation of Liquor Law.—A statute imposing a fine of not less than \$150 or more than \$400 for soliciting orders for intoxicants in dry territory is not in violation of the constitutional provision forbidding excessive fines or cruel and unusual punishments. *Hayner v. State*, 83 Ohio St. 178, 93 N. E. 900. An act of the legislature imposing a tax on operators of a cold storage plant, where intoxicating liquors are stored, in prohibition territory, does not violate the constitutional provision against cruel and unusual punishment when the tax so imposed is double the amount required of operators in license territory. *Ex p. Flake*, 67 Tex. Crim. 216, 149 S. W. 146. A fine of \$200 imposed on the holder of a wholesale liquor license for failure to submit samples of certain liquors to the secretary of state for inspection is not cruel or unusual punishment. *State v. Burlington Drug Co.* 84 Vt. 243, 78 Atl. 882. A provision that any person who drinks intoxicating liquors on a train shall be fined not less than twenty-five or more than one hundred dollars or imprisoned in the county jail for not less than thirty or more than one hundred days, or both, is not such a fine or imprisonment as to amount to cruel and unusual punishment within the constitutional provision. *Tarantine v. Louisville*, etc. R. Co. 254 Ill. 624, Ann. Cas. 1913B 1058, 98 N. E. 999. A fine of \$150 for each offense of selling without a license is not unusual or excessive. *Russell v. State*, 19 Wyo. 272, 116 Pac. 451. And see the reported case. In *Bracy v. Com.* 119 Va. 867, 89 S. E. 144, it was held that a jail sentence of thirty days for selling intoxicating liquors without a license was not cruel or unusual punishment.

In *Brinkley v. State*, 125 Tenn. 371, 143 S. W. 1120, a statute providing that the

holder of a federal license in prohibition territory should be punished for each day that he was unlawfully in possession of it was held not to be valid, the court saying: "Plaintiff in error, in taking out the federal license authorizing him to retail malt liquor, was not seeking to redress any wrong done him in his person or property, nor was it in furtherance of his right to pursue an occupation guaranteed him under the law. The license was taken with full knowledge upon his part that the act of paying the fees, or being in possession of the stamp, would raise a presumption sufficient to support a conviction of crime under the laws of this state. While the license would protect him against the federal government in the pursuit of the occupation authorized by it under the laws of that government, it at the same time brought him into direct conflict with the laws of this state, and created a presumption that he was violating the law against the sale of intoxicants. The mere fact that he might be indicted, fined, and punished for each day that he was in possession of the license does not make the fines excessive, or the punishment cruel and unusual. The conditions which produce the fines and punishments are created by his act alone. A fine and imprisonment for a single offense under this statute is not claimed to be excessive, or cruel and unusual. Whether there should be other fines and imprisonments is wholly within the power of plaintiff in error. Therefore, if the continued violation of this law should result in excessive fines and cruel and unusual punishments, it is not the act of the government, but is the voluntary act of plaintiff in error."

Miscellaneous.—A provision imposing a fine of not less than \$100 or more than \$5000 on a corporation for violation of the banking act of Alabama is not so cruel or unusual as to violate the provisions of the constitutions of the United States or the state of Alabama. *Standard Home Co. v. Davis*, 217 Fed. 904. Imprisonment for failure to give a bond for good behavior is not an infliction of cruel or unusual punishment within the meaning of the constitutional provision. *Ex p. Glass* (W. Va.) 93 S. E. 1036. A statute providing that those operating motor vehicles not their own in a reckless and negligent manner shall be subject to a penalty of from two to five years imprisonment does not authorize cruel or unusual punishment. *Singleton v. Com.* 164 Ky. 243, 175 S. W. 372. In *Ontai v. U. S.* 188 Fed. 310, 110 C. C. A. 288, it was held that a maximum punishment of imprisonment for two years and a fine of \$500, for one who knowingly purchased property from a soldier is not a cruel or unusual punishment. In *State v. Shaft*, 166

N. C. 407, Ann. Cas. 1916C 627, 81 S. E. 932, it was held that a fine of one thousand dollars and imprisonment for three years for inducing a woman to take a drug to procure a miscarriage was not in violation of the constitutional inhibition, the court saying: "The defendant excepts to the judgment of the court on the ground that it imposed a cruel and an unusual punishment, and relies upon the case of *State v. Lee*, 166 N. C. 250, 80 S. E. 977. That case is no authority in support of the defendant's contention. The statute in this case prescribes the punishment to not less than one year nor more than ten years, and a fine in the discretion of the court. The sentence in this case is much below the limitation prescribed by law."

The infliction of a severer punishment on one twice convicted of crime than for a first offense, is not cruel or unusual punishment or in violation of the constitutional provision. *Graham v. West Virginia*, 224 U. S. 616, 32 S. Ct. 583, 56 U. S. (L. ed.) 917.

WESSELL

v.

TIMBERLAKE.

Ohio Supreme Court—November 21, 1916.

95 Ohio St. 21; 116 N. E. 43.

Loan Brokers — Chattel Loans — Validity of Regulation.

Chattel loans on mortgage security or otherwise, the rate of interest on such loans, and the ways and means of assigning wages, are proper subjects for the exercise of the police power by the general assembly of the state.

[See note at end of this case.]

Same.

Section 6346—1 et seq., General Code (106 Ohio Laws, p. 281), is a constitutional exercise of police power by the general assembly of Ohio. The provision in section 6346—2 of said act, in so far as it relates to the revocation of a license issued pursuant to the act, is reserved for future consideration in cases in which such question may properly be raised.

[See note at end of this case.]

Constitutional Law — Nature and Scope of Police Power.

The "police power" in effect sums up the whole power of government, and all other powers are only incidental and ancillary to the execution of the police power; it is that full, final power involved in the administra-

tion of law as the means to the administration of practical justice.

Error to Court of Appeals, Hamilton county.

Habeas corpus proceeding. Herman Wessell, relator, and Charles L. Timberlake, defendant Judgment for defendant in Common Pleas Court. Judgment affirmed by Court of Appeals. Plaintiff brings error. **AFFIRMED.**

[21] On September 17, 1915, plaintiff in error, Herman Wessell, was arrested by a constable. Charles L. Timberlake, charged with violation of Section 6346-1, General Code (106 O. L., 281) in that said Wessell "did on or about the 17th day of September, 1915, in the county of Hamilton and state of Ohio, unlawfully" etc., engage and continue in the business of making loans on plain notes [22] at a charge or rate of interest in excess of eight per cent per annum, without a license.

On the same date Wessell was brought before the common pleas court of Hamilton county on a writ of habeas corpus, and the sole ground upon which it was sought to have him released was the alleged unconstitutionality of the law under which he was arrested.

On April 28, 1916, the common pleas court, by its judgment entry, declared this law valid, and on May 3, 1916, the judgment of the common pleas court was duly affirmed by the court of appeals. Proper exceptions were taken by plaintiff in error to the judgments rendered.

The only questions to be discussed are those which pertain to the validity of the provisions of the act known as the "Loan Law," which act is as follows:

"Sec. 6346-1. It shall be unlawful for any person, firm, partnership, association or corporation, to engage, or continue, in the business of making loans, on plain, endorsed, or guaranteed notes, or due bills, or otherwise, or upon the mortgage or pledge of chattels or personal property of any kind, or of purchasing or making loans on salaries or wage earnings, or of furnishing guarantee or security in connection with any loan or purchase, as aforesaid, at a charge or rate of interest in excess of eight per centum per annum, including all charges, without first having obtained a license so to do from the superintendent of banks and otherwise complying with the provisions of this act.

[23] "Sec. 6346-2. Any person, firm, partnership, corporation or association desiring to obtain a license, shall apply therefor, under oath, on forms prescribed by the superintendent of banks; and by paying annu-

ally to the superintendent of banks, a license fee in the sum of one hundred dollars, shall be entitled to obtain a license, which license fee shall include the entire cost of inspections, for a period of one year. The said license shall be issued by the superintendent of banks, and shall expire the first day of March, next following the date of its issuance, except that the fee of one hundred dollars herein provided shall be apportioned for that part of the year 1915 remaining after the date when this act shall become law, but thereafter no abatement of said charge shall be made if licensees are issued for less than one year, and no other or further license fee shall be required from any such licensee, by the state or any municipality nor shall any fees or charges be collected under section 736 of the General Code. Every such license and bond hereinafter provided for shall be renewed annually on the first day of March in each year. No license shall be granted to any person, firm, partnership, corporation or association unless, and until, such applicant shall, in writing, and in due form, to be first approved by and filed with the superintendent of banks, appoint an agent, a resident of the state of Ohio, and county where his office is to be located, upon whom all judicial and other process, or legal notice, directed to such applicant may be served; and in case of the death, removal from the state, or any legal disability or disqualification of any such [24] agent, service of such process or notice may be made upon the superintendent of banks. The said superintendent of banks may revoke any license, if the licensee, his officers, agents, or employees shall violate any of the provisions of this act. Whenever, for any cause, such license is revoked, said superintendent of banks shall not issue another to said licensee until the expiration of at least one year from the date of revocation of such license. Every such applicant shall execute and file a bond to the state of Ohio in the penal sum of two thousand dollars with the superintendent of banks, to be approved by him, for the faithful observance of all provisions of this act. Any person claiming to be injured by a violation of this act by a licensee may maintain an action on said bond.

"Sec. 6346-3. Application for a license shall state fully the name or names, and address, of the person or corporation, and of every member of the firm, partnership, or association authorized to do business thereunder, and the location of the office or place of business in which the business is conducted; and in the case of a corporation, shall also state the date and place of its incorporation, the name and address of its manager for the period for which the license is issued, and the names and addresses of its directors for the period

for which the license is issued, and the name and address of the agent as provided in section 6346-2 of this act. Such license shall be kept posted in a conspicuous place in the office where the business is transacted. No person, firm, partnership, corporation or association so licensed, shall transact or solicit business under any [25] other name. Not more than one office or place of business shall be maintained under the same license. But in case of removal, the superintendent of banks, may, on application, endorse thereon a transfer to the new place of business, with the date of transfer, and from the time of such endorsement, the new place so designated shall be deemed the place designated in the license.

"Sec. 6346-4. The superintendent of banks shall, either personally, or by such person or persons as he may appoint for the purpose, at least once a year, and oftener, if he deems it advisable, investigate the business and affairs of every such licensee, and for that purpose shall have free access to the vaults, books and papers thereof, and other sources of information with regard to the business of such licensee and whether it has been transacted in accordance with this act. Said superintendent of banks, and every examiner appointed by him, shall have authority to examine, under oath or affirmation, any person whose testimony may relate to the business of any such licensee or alleged violation herein.

"Sec. 6346-5. No such licensee or licensees shall make a loan or purchase or furnish guaranty, or security, as hereinbefore provided at a greater total charge, including interest, than three per cent per month; except that on loans that do not exceed fifty dollars in amount, in whatever manner made payable, an inspection fee of not to exceed one dollar may be collected at the time the loan is made, when such loan is made for a period of not less than four months; and such inspection fee shall not [26] be imposed upon the same borrower for any new or additional loan made within four months after such charge has been imposed. Said three per cent per month shall not be paid in advance and shall be computed on unpaid monthly balances, without compounding interest or charges. No bonus, fees, expenses, or demands of any nature whatsoever, other than said inspection fee and said total charge of three per cent per month (which shall include interest) as hereinbefore provided, shall be made, paid, or received, directly or indirectly, for such loans, purchases or furnishing guaranty or security, wage assignments or advancements except court costs upon the actual foreclosure of the security or upon the entry of judgment. Nothing in this act shall apply to pawn brokers who

obtain a municipal license as provided in sections 6337 to 6346, inclusive, of the General Code or to national banks or to state banks or any person, partnership, association or corporation whose business now comes under the supervision of the superintendent of banks. No charge or fee shall be made unless the loan is actually made. A copy of this section shall be furnished each borrower at the time the loan is made.

"Sec. 6346-6. Every person, firm, partnership, corporation or association licensed as herein provided, shall give to the assignor, borrower, or pledger, a statement upon which shall be written in ink, typewritten or printed, the name of the licensee making such loan or purchase, name of the assignor, borrower or pledger, the amount of the loan, the rate or amount of interest charged, the [27] date when the loan is made, and the date when payable; and shall also give the assignor, borrower, or pledger, a receipt for each payment of principal or interest.

"Sec. 6346-7. No assignment of any salary, wages or earnings, or any part thereof given to secure a loan shall be valid unless the same shall be in writing, signed in person by the person making the same; and if such person is married and living with husband or wife, signed also by the husband or wife of such person, as the case may be. Nor shall any such assignment be valid unless the same shall be in writing and made to secure a debt contracted simultaneously with the execution of such assignment, with all blank spaces therein filled in with ink or typewriting, together with the date, names of the assignor and assignee, the amount for which such assignment is made, together with the rate of interest charged.

"The term assignment as used in this section shall include every instrument purporting to transfer an interest in or any authority to collect the wages, salary or earnings of such person. Any assignment of wages, salary or earnings, made in accordance with the provisions of this section shall bind the wages, salary or earnings earned or to be earned by the assignor until the loan secured by such assignment and interest thereon is fully paid, but no assignment or conveyance of wages, salary or earnings to be earned in the future given to secure a loan shall be binding for a sum in excess of fifty per cent of the amount due or to become due the person making such assignment.

[28] "In order to obtain a priority of any such assignment over any other assignment, the holder thereof, shall deposit a true copy with the recorder of the county where the person making such assignment, if a resident of the state, resides, or if not a resident of the state, then with the recorder of the county where such assignment is made, together with a sworn statement by the holder,

his agent, or attorney, of the amount due, and the rate of interest charged. All such assignments shall be filed and preserved by the recorder as provided in section 8562 of the General Code. When so deposited, any such assignment shall have priority over any other assignment subsequently deposited as herein provided.

"Every such assignment so filed shall be void as against other assignments to creditors of the person making it after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of said period of one year a true copy thereof, together with a sworn statement by the holder thereof, his agent or attorney, of the amount then due and rate of interest charged is refiled with the county recorder as herein provided.

"A sworn copy of such assignment so filed together with a statement of the amount due filed with any employer of the assignor shall bind not exceeding fifty per cent of any salary, wages or earnings due or to become due such assignor from the time the same is filed with such employer until any such loan and interest is fully paid and discharged.

[29] "Sec. 6346-8. Any person, firm, partnership, corporation or association, and any agent, officer or employee thereof, violating any provision of this act, shall for the first offense be fined not less than fifty dollars nor more than two hundred dollars and for a second offense not less than two hundred nor more than five hundred dollars, and imprisoned for not more than six months. The superintendent of banks upon such second conviction shall revoke any license theretofore issued to such person, firm, partnership, corporation or association. Any instruments taken in connection with the transaction upon which the conviction is made, shall be illegal, void and of no effect, and it shall then be the duty of the superintendent of banks to so notify the borrower in writing. Any charge of interest paid in excess of that provided herein may be recovered by the payor in an action at law.

"Sec. 6349-9. The superintendent of banks shall enforce the provisions of this act, make all reasonable effort to discover alleged violators, notify the proper prosecuting officer whenever he has reasonable grounds to believe that a violation has occurred, act as complainant in the prosecution thereof, aid such officers to the best of his ability in such prosecution, and make a separate report to the governor at the end of each fiscal year. The superintendent of banks shall employ the assistant or assistants necessary, in his judgment, to make the investigation and inspection provided for in this act.

[30] "Sec. 6346-10. Any licensee, or licensees, who holds a license under the provisions of sections 6346-1, 6346-2, 6346-3,

6346-4, 6346-5, 6346-6 and 6346-7, of the General Code, inclusive, which has not yet expired, and who shall present his license for cancellation to the superintendent of banks herein, shall receive therefor a credit in the amount of ten dollars, and the superintendent of banks shall credit the same upon the license herein.

"Section 2. Should any section or provision of this act be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the act as a whole or any part thereof, other than the part so decided to be unconstitutional.

"Section 3. That original sections 6346-1, 6346-2, 6346-3, 6346-4, 6346-5, 6346-6 and 6346-7 of the General Code, inclusive, and all other acts or parts of acts inconsistent with this act be, and the same are hereby repealed."

Miller & Foster for plaintiff in error.

Edward C. Turner, Hanby R. Jones, George B. Okey, Hugh Huntington, E. G. Lloyd, John J. Chester and Albert M. Calland for defendant in error.

WANAMAKER, J.—It is claimed that the foregoing statute, known as the "Loan Law," violates the following provisions of the Constitution of Ohio:

Section 1, Article I. "All men . . . have certain inalienable rights, among which are those [31] of enjoying and defending life and liberty, acquiring, possessing, and protecting property."

Section 16, Article I. "All courts shall be open and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law."

It is further claimed that this act violates the provisions of Section 1 of the 14th Amendment to the Federal Constitution, which reads in part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Plaintiff in error in his brief gives the following bill of particulars as a basis for the claim of unconstitutionality:

(a) "It gives authority to the superintendent of banks to revoke a license if the licensee violates any of the provisions of this act."

(b) "The superintendent of banks is made the sole and final judge as to whether or not any violation has taken place. There is no provision for an appeal to the courts or otherwise."

(c) "There is nothing to prevent the bank superintendent from holding an unfair and *ex parte* hearing, and in fact, he would not have to hold any hearing at all, but could arbitrarily revoke the license."

(d) That the exemptions and classifications provided for in such statute are arbitrary and unreasonable, [32] and therefore deny due process of law and the equal protection of the laws.

The chief case relied upon by plaintiff in error to sustain his contentions is *Geiger-Jones Co. v. Turner*, as found in a lengthy opinion of the United States district court, reported in the Ohio Law Reporter under date of April 17, 1916, 14 Ohio L. Rep. 135, 230 Fed. 233.

It must be conceded that if that judgment and opinion correctly interpreted the various constitutional provisions involved, and correctly applied them to the statute in question that judgment and the reason therefor would apply in the case at bar and demand a reversal of the judgments below; for, in the main, the alleged grievances in the so-called "Blue Sky Law" are substantially the same as the alleged grievances in the "Loan Law."

Since the submission of this case to this court, and prior to the preparation of this opinion, the United States supreme court has reviewed the decision in the *Geiger-Jones* case and, with but one judge dissenting, has reversed said judgment. *Hall v. Geiger-Jones Co.* 242 U. S. 539, Ann. Cas. 1917C 643, 37 S. Ct. 217. The reversal is clear and comprehensive on practically all the various grounds set forth in the opinion of the United States district court.

The opinion of the supreme court of the United States is very illuminating upon many of the questions involved in this case.

If the loan-act statute be a constitutional exercise of governmental power, it is conceded that it is so [33] by virtue of what is known as the police power of the state.

Definitions of police power, giving with precision its latitude and longitude with exactness, have not been attempted by any courts. It is wise that it is so, because this, like many of the subject-matters of the law, is constantly in the process of evolution and development, and must be adapted to the social, industrial and commercial conditions of the times.

The police power in effect sums up the whole power of government. All other powers are only incidental and ancillary to the execution of the police power. It is that full, final power that is involved in the administration of law as a means to the administration of practical justice.

Mr. Justice Day in a well-considered opinion has discussed the police power at some length. His views are helpful in this case.

In *Sligh v. Kirkwood*, 237 U. S. 52, 35 S. Ct. 501, 59 U. S. (L. ed.) 835, at page 58, he discusses the nature and scope of this power in the following language:

"The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the state, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within [34] the state. *New York v. Miln*, 11 Pet. 102, 139 [9 U. S. (L. ed.) 648]. The police power, in its broadest sense, includes all legislation and almost every function of civil government. *Barbier v. Connolly*, 113 U. S. 27 [5 S. Ct. 357, 28 U. S. (L. ed.) 923]. It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. *Camfield v. U. S.* 167 U. S. 518, 524 [17 S. Ct. 864, 42 U. S. (L. ed.) 260]. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. *Chicago, etc. R. Co. v. Illinois*, 200 U. S. 561, 592 [4 Ann. Cas. 1175, 26 S. Ct. 341, 50 U. S. (L. ed.) 596]. In one of the latest utterances of this court upon the subject, it was said: 'Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. . . . And further, "It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government."' *Eubank v. Richmond*, 226 U. S. 137, 142 [Ann. Cas. 1914B 192, 33 S. Ct. 76, 57 U. S. (L. ed.) 156, 42 L.R.A. (N.S.) 1123]."

The title of the original loan act is as follows:

"To regulate and license the loaning of money upon chattels or personal property of any kind and of purchasing or making loans upon salaries or wage earnings." (102 O. L., 469.)

[35] In the main, so far as it applies to the case before us, it is an act to prevent usury.

The right to regulate the rate of interest by law is as old as government itself.

"The taking of interest for the loan of money, or at least taking excessive interest,

has been regarded with abhorrence from the earliest times. We are told that such usury was prohibited by the early laws of the Chinese and Hindus, and by the Koran." 39 Cyc. 889.

Moses announces it as follows:

"If thou lend money to *any* of my people *that is poor* by thee, thou shalt not be to him as an usurer, neither shalt thou lay upon him usury." Exodus XXII, 25.

Originally the word "usury" applied to all rates of interest. Later it was applied only to illegal or excessive rates of interest.

It is significant that Abraham Lincoln in 1832, when he was but twenty-three years of age, in a campaign for the general assembly of Illinois, declared in an open circular to the people of his county that usury was then an obnoxious practice in the state of Illinois and that he stood for a law against it.

Legislation against usury has been recognized by all the leading nations of the world from time almost immemorial. Excessive or usurious rates of interest assessed or charged against the poor and needy, against those whose small incomes are too often wiped away by illness, enforced idleness or financial reverses, have been vigilantly denounced by the laws of all lands.

[36] It would seem now too late to challenge the constitutionality of such legislation upon the ground that it is a denial of the right of property or liberty of contract.

The right of property, or liberty of contract with reference to property, is by our own constitution made "subservient to the public welfare." Where, therefore, a statute seeks to accomplish such purpose as prevention of usury, such statute is clearly within the police power of the state of Ohio under the provisions of both the state and federal constitutions, unless some part of the machinery for its administration may violate some provision of state or federal constitution.

It is, however, suggested, from the title of the act, that the statute and the various sections thereof do not constitute a regulation of interest rates, but really undertake to regulate business, indeed to prohibit the same, and as such are a denial of the right of property—the taking of property without due process of law.

While the right of a state to regulate business, trade or occupation is of much later recognition and development than the right to regulate the rate of interest, it nevertheless is equally well settled to-day, that, in the interest of the public welfare, business, trades and occupations may be so regulated as to prevent extortion, fraud, restraint, monopolistic control of products or prices, and so on.

Whether or not the business of chattel loans is fairly within the police power of the state is no longer an open question in Ohio. This court in [37] *Sanning v. Cincinnati*, 81

Ohio St. 142, 90 N. E. 125, 25 L.R.A. (N.S.) 686, in the first paragraph of the syllabus in that case, has stated the generally accepted doctrine:

"The state may, in the exercise of the police power, license and regulate chattel mortgage and salary loan brokers; and it may delegate authority to do so to municipal corporations."

So it matters not whether the purpose of the statute be the regulation of a business or the denouncement of usury; in either event the paramount purpose of the statute is within the legal exercise of the police power of the state.

We come now to consider the second question as to whether or not the plans and provisions of the statute for the promotion of such purposes are a legal exercise of such police power.

The legal machinery provided by the statute for the enforcement of its provisions obviously must be operated by some officer or board. The statute designates the superintendent of banks as such officer. He grants the license provided for by the act, and agreeable to the act *may* revoke a license. He is merely the executive of the state for the enforcement of the statute, and the presumption surely is that he would exercise his discretion fairly and justly in accordance with the purpose, terms and spirit of the act.

No serious claim is made that the provisions of the statute relating to the granting of licenses are in any wise unconstitutional, particularly because of any broad discretion or arbitrary power lodged in such superintendent of banks touching the issuing of licenses. The statute in this respect practically [38] deprives him of the exercise of any discretion and recognizes him only as a ministerial officer.

Section 6346-2 provides for the application for such license, the payment of the fee of \$100 therefor, and the term of such license. No complaint is made that the license fee is unreasonable, or that any of the provisions expressed in the statute for the issuing of the license are arbitrary or unreasonable.

But it is claimed that the classifications and exemptions made by the statute, as to those required and not required to obtain licenses, render the statute null and void; because, it is claimed, such do not give the petitioner the "equal protection of the laws."

Naturally questions of this character are more frequently before the United States supreme court, under the due-process and equal-protection-of-the-laws clauses of the 14th Amendment, than in any other court of last resort. That court has passed upon these questions very frequently and very recently in a number of celebrated and well-considered cases. One of the most recent

cases is that of *Rast v. Van Deman, etc. Co.* 240 U. S. 342, Ann. Cas. 1917A 421, 36 S. Ct. 370, 60 U. S. (L. ed.) 679, L.R.A.1917A 421, known as the Trading Stamp case.

Mr. Justice McKenna in his opinion in that case lays down the correct doctrine that has been generally followed by the United States supreme court, and most of the state courts. The lower courts in the trading stamp cases had held that the use of coupons, or trading stamps, was only a mode of legitimate advertising, and that no distinction [39] could be made as between business men who used such trading stamps and the business men who did not use such trading stamps.

Mr. Justice McKenna upon that point, at page 357, uses this language:

"The difference between a business where coupons are used, even regarding their use as a means of advertising, and a business where they are not used, is pronounced. Complainants are at pains to display it. The legislation which regards the difference is not arbitrary within the rulings of the cases. It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61, 78, Ann. Cas. 1912C 160, 31 S. Ct. 337, 55 U. S. (L. ed.) 369. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. *Chicago, etc. R. Co. v. McGuire*, 219 U. S. 549 [31 S. Ct. 259, 55 U. S. (L. ed.) 328]; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 380, 413, 414, 34 S. Ct. 612, 58 U. S. (L. ed.) 1011, L.R.A.1915C 1189; *Price v. Illinois*, 238 U. S. 446, 452, 35 S. Ct. 892, 59 U. S. (L. ed.) 1400.

"It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury but obstacles to a greater public welfare. *Eubank v. Richmond*, 226 U. S. 137, 142 [Ann. Cas. 1914B 192, 33 S. Ct. 76, 57 U. S. (L. ed.) 156, 42 L.R.A.(N.S.) 1123]; *Sligh v. Kirkwood*, 237 U. S. 52, 59, 35 S. Ct 501, 59 U. S. (L. ed.) 835. And, we repeat, 'it may make discriminations if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary.' *Quong Wing [40] v. Kirkendall*, 223 U. S. 59, 62 [32 S. Ct. 192, 56 U. S. (L. ed.) 350], and the cases cited above."

This same doctrine as to classifications and exemptions is reviewed and reaffirmed by Justice McKenna in the *Geiger-Jones* case, *supra*, where he quotes from the briefs of counsel for the *Geiger-Jones Company*, specifying a large number of discriminations urged

against the statute wherein the statute undertakes to classify those who are within the statute and those who are exempt from the statute. Upon this question Justice McKenna says in 242 U. S. 556:

"We cannot give separate attention to the asserted discriminations. It is enough to say that they are within the power of classification which a State has. A State 'may direct its law against what it deems an evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. . . . If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law.' *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 160 [33 S. Ct. 66, 57 U. S. (L. ed.) 164]. The cases were cited from which those propositions were deduced. To the same effect is *Armour v. North Dakota*, 240 U. S. 510, 517 [Ann. Cas. 1916D 548, 36 S. Ct. 440, 60 U. S. (L. ed.) 771]."

This same doctrine is decisive of the case at bar [41] upon the matter of classifications and exemptions in the Loan Law act.

The chief objection to the act, and the most serious one, is that touching the revocation of the license. Section 6346-2 provides:

"The said superintendent of banks may revoke any license, if the licensee, his officers, agents, or employees shall violate any of the provisions of this act."

No provision is expressly made for any hearing before the superintendent of banks, or for any notice to the licensee as to such hearing, nor is any provision made for attendance of witnesses. Neither is there any provision made for any appeal or review of the action of the superintendent of banks touching any revocation of a license. Manifestly, if any licensee were found guilty of violating any of the provisions of this act in a proper proceeding before a court of competent jurisdiction, such adjudicated violation would doubtless warrant the revocation of a license. But whether or not, independent of any such adjudication, the superintendent of banks is constitutionally authorized to revoke such license upon his own discretion, it is unnecessary here to determine. That question cannot be raised in this case.

Plaintiff in error has refused to apply for a license. He has ignored the act as a whole and refuses to recognize its force and effect as a whole. The question of the constitutional revocation of a license cannot be raised until a license has been first granted under the provisions of this act. Upon presentation of such case it will then be [42] proper for this court to consider and determine that question.

In so far as the act in question is involved in this case the same is held to be a valid act within the police power of the state and not prohibited by any provision of the Constitution of the United States.

Judgment affirmed.

Nichols, C.J., Johnson, Donahue, Newman, Jones and Matthias, JJ., concur.

NOTE.

A statute licensing and regulating persons engaged in making loans on chattel security is sustained in the reported case, the business being held to be one subject to the exercise of the police power. The earlier cases passing on state or municipal regulation of personal property loan brokers are reviewed in the note to *Matter of Stephan*, Ann. Cas. 1916E 617.

FROEMING ET AL.

v.

STOCKTON ELECTRIC RAILROAD COMPANY.

California Supreme Court—December 7, 1915.

171 Cal. 401; 153 Pac. 712.

Negligence — Pleading — Several Inconsistent Charges of Negligence.

In an action for wrongful death of a street car passenger, it is proper to plead the negligence of the company as occurring in several inconsistent ways, in separate counts, and, if any are sustained by evidence, plaintiff can recover.

Carriers of Passengers — Action for Injury — Construction of Pleading.

In an action for wrongful death of a street car passenger, where the petition alleges that the decedent was injured "by starting the car while she was attempting to alight therefrom," the allegation is not an admission that decedent negligently alighted from a moving car, but only that she was ready to alight.

Contributory Negligence — Preparation for Alighting — Moving Car.

That a passenger on a street car went upon the platform or steps of the moving car preparatory to alighting does not alone show contributory negligence.

Guardians ad Litem — Allegation of Appointment.

In an action for wrongful death of a street car passenger by the guardian ad litem of minors, an allegation that the guardian was appointed guardian ad litem and was authorized to commence and prosecute the action, and that he accepted the appointment, though

inartistic, was not bad as pleading a conclusion.

Same.

Where the petition in an action for the death of a street car passenger in setting forth the appointment of a guardian ad litem was defective, but the facts as to the appointment were fully shown, the error in overruling a demurrer to the petition is harmless.

Witnesses — Cross-examination Outside Scope of Direct Examination — Effect.

In an action for death of a street car passenger, where the plaintiff called defendant's conductor only to show that decedent was on the car at the time of the injury, and defendant in cross-examining him attempted to show contributory negligence, the plaintiff is not bound by such evidence, nor can his other evidence then be discarded, since by cross-examining the witness outside his direct testimony defendant made him his own witness and not plaintiff's.

Same.

On conflicting evidence, in an action for the death of a street car passenger, the question of recovery is for the jury, and must be submitted, although one of plaintiff's witnesses on cross-examination testified adversely to him on matters outside the direct examination.

Carriers of Passengers — Personal Injury — Evidence Sufficient.

Evidence in an action for the death of a street car passenger is held to be sufficient to sustain a verdict for the plaintiff.

Evidence — Res Gestae — Declaration of Street Railway Employee.

The self-serving explanation of a street car conductor as to how an accident happened, made after it occurred, is not res gestae and is inadmissible in an action for the death of a passenger.

[See 3 Ann. Cas. 624; 13 Ann. Cas. 859; Ann. Cas. 1915A 1040; 131 Am. St. Rep. 302.]

Trial — Remark by Judge.

In an action for the death of a street car passenger, it is not error for the court to advise defendant's attorney, in repeating a witness's statement, to give the witness an opportunity to say whether he so testified.

Guardians ad Litem — Order of Appointment — Admission in Evidence.

In an action for the death of a street car passenger, it is not error for the court to admit the order appointing a guardian ad litem on the fact of appointment but not on the truth of the matter alleged in the petition.

Judicial Notice — Mortality Tables.

It is not error to admit, without foundation, a standard table of life expectancy, in an action for the wrongful death of a street car passenger, since courts will take judicial notice of such a table.

[See note at end of this case.]

Witnesses — Impeachment — Prior Conflicting Statement — Necessity of Foundation.

Where, on cross-examining witnesses, their signed statements were produced and read to them with the design of impeachment, but with no preliminary foundation and without introducing the statements in evidence, the testimony so elicited is inadmissible, as is that of another witness who took the statements, since impeachment by prior conflicting statements of witnesses requires that a foundation be laid before admitting them.

Same.

Where, on proper foundation, testimony of a witness given at a coroner's inquest is read to him, and he denies its correctness, but no further effort is made to impeach him, the admission of the testimony read is not error.

Carriers of Passengers — Action for Injury — Instruction — Right of Passenger on Car Step.

In an action for death of a street car passenger, an instruction that, if a passenger is injured without fault on his part while on the steps of a moving car, the burden is on the company to show absence of negligence, is not erroneous for declaring that a passenger has a right to be on the steps of a moving car, since that is his right in entering and preparatory to leaving the car.

Presumption of Negligence from Injury.

An instruction that injury from the operation of a car raises a presumption of negligence on the part of the company, and that the burden is on the company to prove itself free from negligence and to show contributory negligence of the passenger, is correct.

Instructions — Negligence in Alighting from Moving Car.

An instruction that it is not, as a matter of law, contributory negligence for a passenger to start to leave a car before it stops, but that that is a question for the jury, is not misleading when the instructions read as a whole are correct.

Negligence — Instructions — Burden of Proof.

Under the rule that, where plaintiff's evidence establishes his contributory negligence, the burden of proving it is removed from defendant, an instruction merely that if the jury found "from the evidence" that plaintiff was contributorily negligent sufficiently indicates that all evidence, plaintiff's as well as defendant's, should be examined on that question.

Death by Wrongful Act — Damages — Excessiveness.

A verdict for \$18,000 for the wrongful death of a street car passenger, who was married and left three girls of tender age, and a husband, and who was an accountant and aided her husband in figuring on contracts in his business, and was working to help maintain the home, is not excessive.

[See 18 Ann. Cas. 1209; Ann. Cas. 1915C 449.]

Appeal from Superior Court, San Joaquin county: PLUMMER, Judge.

Action by August Froeming et al., plaintiffs, against Stockton Electric Railroad Company, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Arthur L. Levinsky for appellant.
D. M. Young for respondents.

[403] HENSHAW, J.—Eva Froeming, traveling at night upon an electric street railway car of the defendant corporation in the city of Stockton, stepped, fell, or was thrown from the car, sustaining injuries which caused her death. Her husband and her minor children, through their father as guardian *ad litem*, brought their action to recover damages for that death. The verdict of the jury was in plaintiffs' favor. The judgment followed the verdict, and from that judgment and from the order denying its motion for a new trial defendant appeals.

Saving the conductor of the car, whose testimony is disputed, there was no eye-witness to the manner in which the deceased sustained her injuries. There was no doubt but that the deceased had signaled to the conductor to stop the car for the purpose of allowing her to alight. The place of stoppage would be at or upon the next street which the car was approaching—Eighth Street. There is no doubt either but that the motor-man of the car, under the conductor's signal, slowed his car for the purpose of making this stop. There is also no doubt but that the deceased arose from her seat, which was upon the open rear end of the car, and stood either upon the platform or upon one of the steps, in readiness to alight. But whether the car actually came to a stop and then suddenly, and without giving the deceased time to alight, lunged forward with a jerk, or whether after slowing down and coming almost to a stop it did this same thing, without actually stopping, plaintiffs' witnesses were in doubt. Wherefore plaintiffs charged in separate counts, one count alleging that the [404] car after stopping, suddenly started, the other count averring that after the car had slowed down and arrived near or at the place where it usually stopped to allow passengers to debark, and while the deceased was attempting to alight therefrom, the defendant's agents and servants negligently caused the car to be suddenly and violently jerked and started forward.

Appellant's attorney complains bitterly of the fact that the court overruled his demurrer to this complaint, but no more bitterly than he complains of every ruling, act, and happening at the trial. He complains that

the counts are inconsistent, meaning by this that it could not be true that the deceased could both have been thrown from the car by a sudden jerk before it stopped and thrown from the car by a sudden jerk after it stopped. This is quite true. He supports his argument that the demurrer should have been sustained by showing that after the evidence of plaintiff had been taken at the trial the court granted his motion for a nonsuit as to the count charging upon the stoppage of the car. Therefore, he argues, if his demurrer had been sustained and plaintiffs had been put to their election, and had elected to stand upon the count charging that the car had been stopped, defendant would have prevailed in the action. But underlying this most specious argument is found the very reason why inconsistent counts are permitted. (Stockton Combined Harvester, etc. Works v. Glen Falls Ins. Co. 121 Cal. 167, 53 Pac. 565.) The result of appellant's success in having the demurrer sustained and the plaintiffs' unfortunate choice of counts in the election thus forced on them would have meant that it prevail in the action, but it would also have meant that the plaintiffs would have lost a meritorious cause of action and right of recovery through some over-refined principle of pleading. However, suffices it to say, that the principle which appellant invokes as existing does not exist. This was a single action for a recovery growing out of injuries negligently inflicted by defendant upon deceased. It was open to plaintiffs to charge this negligence in separate counts, as occurring in as many ways as they believed their evidence would show, and plaintiffs are entitled to recover if any one well-pleaded count was supported by sufficient evidence. (Jenson v. Dorr, 169 Cal. 742, 116 Pac. 553.) Again, appellant would have this court construe the language of one of the counts which is as follows, [405] "while the said Eva Froeming was attempting to alight therefrom," as containing an admission that Eva Froeming was actually and negligently in the act of alighting from a moving car. Such, however, is not the just import of the allegation, which means, fairly construed, that the car had slowed down and was approaching the place where it usually stopped, and that Eva Froeming had made her preparations to alight, and was in readiness to alight, when and if it stopped. The fact that she had gone upon the platform for this purpose, or even upon the steps, was not in and of itself negligence in law. (Boone v. Oakland Transit Co. 139 Cal. 490, 73 Pac. 243; Renfro v. Fresno City R. Co. 2 Cal. App. 317, 84 Pac. 357.) The complaint, after setting forth the names and ages of the minor children and establishing that they were under the age of

fourteen, averred "that by an order of the court made on the 28th day of October, 1912, August Froeming was appointed their guardian *ad litem* and was by said order authorized to commence and prosecute this action in their behalf, and that he accepted said appointment." It is argued that the demurrer should have been sustained because this was not a due pleading of the appointing of a guardian *ad litem*, but that it was a pleading of the conclusion of the pleader. But even if these averments could have been drawn with more legal skill, suffice it to say that the overruling of the demurrer did not injure, and could not have injured, appellant, and the facts of the due appointment and acceptance by the appointee were shown without contradiction upon the trial. Certain ambiguities and uncertainties in the counts were also urged in the demurrer. Some of these it may be conceded exist. They were, however, of trivial character, and the overruling of the demurrer upon this account in no way confused or misled the defendant in its defense. The error was, therefore, immaterial. (*Stein v. San Francisco United Railroads*, 159 Cal. 368, 113 Pac. 663.)

The court granted appellant's motion for a nonsuit as to the count charging that the car had stopped. Appellant insists that it should have granted the nonsuit upon the whole action. The evidence of plaintiffs disclosed that Mrs. Froeming lived at or near Seventh Street; that she asked the conductor to stop the car when it was at or near Seventh Street; that she asked the conductor twice; that when the conductor signaled for the car to stop it had passed Seventh Street, and [406] its next usual stopping place was at or near Eighth Street; that Mrs. Froeming had been sitting in a rear seat in the back open end of the car. Immediately in front of her were two witnesses—Shoaf and his wife—and immediately in front of them a third witness, Anderson. They testified to the slowing down of the car—whether it actually stopped or not they were uncertain—to its sudden lunge and jerk forward, and to hearing the fall of a body, which they knew must be that of the woman they had heard ask the conductor to stop the car. The men testified that they immediately swung off the car while it was in motion and went to the rescue of the woman, finding her lying in the street unconscious. They testified further that after the conductor had signaled for the car to stop (the car was approaching the end of its run) the conductor went forward to read and record his register of fares, and was doing this, or was talking to the motorman, when the accident occurred. Walter Sanborn was called on behalf of plaintiffs and testified that he was the conductor of the car, and that Mrs. Eva Froeming

was a passenger on his car about 10 o'clock in the evening when the accident occurred. On cross-examination he gave his version of the accident, which is as follows: After the car had passed Seventh Street Mrs. Froeming told him she desired to get off at Eighth Street. He signaled to the motorman to stop at Eighth Street. His car did not slow down for the purpose of letting Mrs. Froeming off and then start up suddenly with a jerk; nor yet did it stop for the purpose of letting her off. Mrs. Froeming deliberately alighted from the car when it was going about six or seven miles an hour. He saw her getting off the car and warned her to wait until it stopped, saying to her, "Lady, wait for the car to stop." She made no reply and stepped to the bottom step and then stepped off. He saw her fall and immediately swung off after her. Appellant's argument upon its motion for a nonsuit and the argument which it here addresses to this court is that plaintiffs were bound by this testimony, since they had called the conductor as a witness, and that if it be thought there is a conflict between this testimony and that of the other witnesses who did not actually see the occurrence, then the testimony of the other witnesses must be utterly discarded as incredible and unworthy of belief. The statement of appellant's position in this regard demonstrates its unsoundness. There was substantial [407] testimony before the trial court and before this court supporting plaintiffs' charge. It was not for the trial court upon the hearing of the motion for a nonsuit, nor yet for this court upon appeal, to cast out of consideration all of that evidence. It was the duty of the trial court to submit it, as it did, to the consideration of the jury, and the verdict of the jury establishes that they regarded it as trustworthy and true. What has been said touching the motion for a nonsuit sufficiently answers appellant's next contention, elaborately argued, that the evidence is insufficient to justify the verdict. The argument here is based upon the same grounds as those above noted—the incredibility of plaintiffs' witnesses other than the conductor, who was not called by them to testify upon any of these matters, and the assertion that the plaintiffs must be bound by the testimony of the conductor, which testimony appellant itself brought out on so-called cross-examination. But as it was cross-examination on matters not touched upon in the testimony in chief, under familiar principles the appellant made the conductor its own witness upon these matters. For, as has been said, all that plaintiffs sought to elicit by their examination in chief of the conductor was the fact, not even in controversy, that Eva Froeming had been a passenger upon his car at the time of the accident.

We are asked to consider some sixty-three asserted errors in the reception and rejection of evidence. It would be profitless to review them all. Thus, exception is taken to the court's refusal to allow a witness to testify to what the conductor did and said after the accident, the purpose of the inquiry being to show that the conductor voiced some explanation as to how the accident occurred. The ruling was proper. Such *ex post facto* evidence forming no part of the *res gestae* and being usually self-serving is not admissible. Again, the court suggested: "Mr. Levinsky, allow me to suggest, when you repeat the witness' testimony, you give the witness a chance to state whether that was his testimony or not. I did not so understand his testimony." This remark, to which an exception was taken, is urged as error. The order appointing August Froeming guardian *ad litem*, offered in evidence, is objected to, amongst many others, upon the ground that the defendant cannot be bound by the allegation set forth in the petition for the appointment of guardian. The court properly admitted the order, limiting the admission with care [408] for the purpose of only showing the fact of appointment and not the truth of any of the matters contained in the petition. Exception to this is taken. These may serve as exemplars showing the inutility of a detailed consideration of all, for most of them are of the same general character. Of the few that merit consideration, one is the exception to the introduction of McCarty's Tables of Life Expectancy without a foundation being laid therefor. But courts take judicial notice of the standard tables of life expectancy, and so of course take judicial notice of the tables that are standard tables, and any such table satisfactory to the court may be introduced without foundation proof. (Valente v. Sierra R. Co. 151 Cal. 539, 91 Pac. 481.)

The three principal witnesses for the plaintiffs had each been interviewed by an emissary of the defendant, a notary public, who took down their statements in writing. These statements, after having been so taken down, were read to these witnesses. The witnesses were uncertain whether it could be said that they had sworn to these statements. They said they were asked whether they would swear to them, and replied that with certain corrections they would. They did not seem to understand that they had in fact sworn to them. Upon cross-examination of these witnesses these statements were produced and extracts from them read to the witnesses. Objections were from time to time interposed to the method of cross-examination, upon the ground that if it was sought to impeach the witness by showing contradictory statements, the proper foundation for the questions had

not been laid. Complaint is made of the court's rulings upon this matter and of its further rulings against admitting the testimony of the witness for the defense who had taken down these statements. The court's rulings were to the effect that if it was designed to impeach the witness by showing that he had made contradictory statements embodied in the writing, the proper foundation therefor had not been laid. The attorney for the defendant is no novice at the bar, and needed no enlightenment as to the proper course to pursue in the matter. That he failed to pursue it, as unquestionably he did, forces the inference that the statements contained in the writing were not contradictory to the statements given by the witnesses upon the stand, and that the efforts of the attorney were directed to establishing the imputation and implication that [409] they were so contradictory rather than the fact that they were. Thus, to illustrate, witness Shoaf for plaintiff having testified upon direct examination that, while he could give no definite distance in feet, the car proceeded about three hundred feet after the accident before it came to a stop, he is asked upon cross-examination whether he did not make a statement to Mr. Breitenbucher and replied that he did, when the following took place:

"Q. Did you not in that statement say, the car went about one-half a block after the accident?

"A. (Witness.) I don't think you will find that in that statement.

"Q. Sir?

"A. I don't think you will find that in that statement.

"Q. You please read this language and see if I find it there or not. Read it, please. (Hands paper to witness.)

"A. Yes; that says 'half a block.'

"Q. Read what it says there 'the car,' start with that; what does it say?

"Mr. Young: Well, I submit that is not the way to testify, if your Honor please; if the counsel wants to introduce anything that contradicts him let him introduce it. We submit it is incompetent for him to read from the statement.

"The Court: The objection may be sustained.

"To which ruling counsel for defendant then and there duly excepted. Exception No. 6.

"Q. And you didn't say the car went about one-half a block after the accident, did you?

"A. That is what I said.

"Q. What is that?

"A. About half a block.

"Q. That is what you said in that statement on June 26th—the 26th of August, 1912, wasn't it?

"A. Yes, sir.

"Q. Now, is your memory any better to-day than it was on August 26, 1912?

"A. Not that I know of.

"Q. How do you testify to-day that car went two or three hundred feet?

"A. Well, that is in the neighborhood of my judgment a half a block would be two or three hundred feet, one or the [410] other wouldn't make no difference to me; I didn't measure the ground; just simply offered it as—"

It is apparent that there could be no impeachment of the witness in this condition of the record. He admits that he used the language contained in his written statement and quite clearly explains it when he says that he regarded half a block as the equivalent of two or three hundred feet.

The same is true of a similar effort to impeach Mrs. Shoaf. She had testified concerning the accident that the car had not actually stopped, but "it did come to nearly a stop, so near—it was not stopped; but it came very near to it. It was not quite a stop, no, sir." Then upon cross-examination she was asked concerning the statement which she admitted that she made to Mr. Breitenbucher. The record discloses the following:

"Q. Did he not in that conversation ask you: 'How fast was the car going when Mrs. Froeming got off of the car;' and did you not answer him; 'I cannot state how fast the car was going at the time, but will state that I would not want to jump off while it was going at the rate it was?'

"A. (Witness.) No, sir. If I answered I misunderstood; he asked me if I understood him right, how far, or how fast was the car going after it started, after the lady fell off, and I said I would hate to get off at the rate it was traveling. If I remember right, that is it. If he asked me the other question, I didn't understand it that way.

"Q. Did you not tell him in that same conversation that the car was in motion when this lady fell off?

"A. I did say that the car had not come to a complete stop.

"Q. What is that?

"A. I did say that the car did not come to a complete standstill.

"Q. Did you tell him anything about a 'standstill'—it came to a standstill, in that conversation?

"Mr. Young: Now, one moment. We object to that, not the proper foundation for contradiction. We can't go into everything she told.

"The Court: That is true. Objection sustained.

"Q. Now, after having read that paper, did you not state to Mr. Breitenbucher on the twenty-sixth day of August, 1912, you, he,

and Mr. Tretheway being present, and also the driver of the automobile, whether he was in the house or not I don't [411] know, that the car was in motion when she stepped off which was about twenty feet north of the street crossing; after the lady fell the car went about one-half a block after the accident? Did you tell that to him at that time?

"A. I say the car came very near to a standstill.

"Q. I haven't asked you that.

"A. I beg your pardon, I didn't understand the question.

"Q. Asking if you made this statement just read to you to Mr. Breitenbucher at that time?

"A. Well, I don't know that I worded it just that way. If I did I didn't understand it in that way, because I have always said that the car didn't come quite to a standstill. But the car started up—my idea of it, my understanding of what he said was when the car started to go on over across the street.

"Q. Did you tell him anything in that conversation about the car having—in the conversation that you had with Mr. Breitenbucher on the twenty-sixth day of August, 1912, did you tell him anything about the car having come to almost a stop?

"Mr. Young: We object to it as incompetent, irrelevant, and immaterial, more particularly incompetent, to get out testimony in that way."

Here the witness affirmed and explained the matters contained in her written statement. She did not deny having said those things, but declared what she meant by them. When Mr. Breitenbucher was placed upon the witness-stand appellant's efforts were directed not to legitimate impeachment, but to an effort to show a valueless negative, that the witness did not make these explanations at the time he took down her statement. The court's rulings that this evidence was not legitimate evidence in impeachment were correct.

Witness McCann, motorman of the defendant's car, had testified to his having received the signal bell to stop his car at Eighth Street and that he proceeded so to stop it, slowing it down, and that he made no stop until the car had partially crossed Eighth Street, when he brought it to a standstill at its usual place of rest. Upon cross-examination the foundation of time, place, circumstances, and persons present being laid, he was asked if he did not testify at the coroner's inquest in certain language, and what purported to be his testimony was then read to him. He declared that such was his testimony save in one or two minor particulars, as that there [412] were four passengers upon the front of the car with him instead of three, and that the rear end of his car

was not at the Eighth Street crosswalk, but farther into Eighth Street. Under these explanations no effort was made to impeach the witness by proving what in fact his testimony was at the coroner's inquest. We are unable to perceive and we have not been shown the error which appellant asserts was embodied in the ruling permitting plaintiff's attorney to ask the question concerning the testimony which the witness had given at the coroner's inquest.

The jury was ably and painstakingly instructed by the court. Instruction 2 is in the following language:

"It is the duty of a street railway company to afford a reasonable time for its passengers to alight from its cars at the place where the car stops for that purpose, and if a passenger is injured without fault on his part, while on the steps of a car slowing down for the purpose of enabling passengers to alight, preparatory to alighting when the car has stopped, by reason of a sudden starting of the car, the burden is thrown upon the company to show that the injury was not the result of its own act of negligence."

Appellant complains of this instruction as declaring to the jury "that a passenger has a right to be on the steps of a moving car." Unquestionably a passenger has the right to be on the steps of a moving car at times. He has that right when he has embarked on the car and the car starts forward before he can enter it. He has the right (in the sense that he is not guilty of negligence *per se* in so doing) to be upon the steps of the car preparatory to debarking therefrom. Were this not so, then his mere presence upon the step would in every case be negligence *per se* which would bar a recovery. Such, however, is not the law, as the court further instructed the jury in instructions 8 and 9, of which complaint is also made, and which are to the following effect:

"When it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in its business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on its part. It is for you to determine whether or not a passenger is guilty of contributory negligence in going upon [413] the platform of a car or the steps thereof preparatory to alighting therefrom when the car stops.

"Contributory negligence on the part of a passenger cannot be presumed from the mere fact of injury, but must be proved, and the burden of proving contributory negligence on the part of the injured person is cast upon the defendant."

That these instructions fairly embrace the law is fully established by *Boone v. Oakland*

Transit Co. 139 Cal. 490, 73 Pac. 243; *Renfro v. Fresno City R. Co.* 2 Cal. App. 317, 84 Pac. 357; *Valente v. Sierra R. Co.* 151 Cal. 539, 91 Pac. 481; *Kline v. Santa Barbara Consol. R. Co.* 150 Cal. 741, 90 Pac. 125; *Dougherty v. Union Traction Co.* 23 Cal. App. 17, 136 Pac. 722; *Scott v. Bergen Traction Co.* 63 N. J. L. 407, 43 Atl. 1060. And, finally, to show the completeness with which the trial judge covered this phase of the law, the court further, at the request of appellant, gave the following instructions upon this matter:

"If you believe, from the evidence in this case, that Eva Froeming stepped off of the car, or attempted to alight from the car of the defendant, while said car was in motion, and before the said car had stopped, then she was guilty of contributory negligence in this case, and the plaintiffs herein are bound by such contributory negligence, and they cannot recover in this case, and your verdict must be for the defendant.

"If you believe, from the evidence in this case, that Eva Froeming attempted to alight from the car of Stockton Electric Railroad Company while said car was in motion, and by reason of such attempt she received injuries which resulted in her death, then I instruct you that she, in such an attempt to alight from said car (if you so believe that she did attempt to alight from said car while the said car was in motion), was guilty of negligence, and the plaintiffs herein cannot recover any damages by reason of her death, and your verdict must be for the defendant."

Instruction 3, which the court gave, is in the following language:

"It is not contributory negligence, as a matter of law, for a passenger to start to leave a street-car before it comes to a full stop, but it is a question of fact for the jury to determine whether the act of the passenger in so doing constituted negligence on his or her part."

[414] Of this complaint is made that it is misleading. Whatever uncertainty appellant may think exists in this one sentence, detached from the other instructions, is certainly removed when the instructions are read as a whole. Appellant further objects to an instruction which the court gave, and which declares a familiar rule of law, that the burden of proving contributory negligence is cast upon defendant. He argues that the rule of law is that the defendant is relieved from this burden if the evidence of the plaintiff establishes this contributory negligence. This is quite true. But the jury could not have been misled, for it was repeatedly instructed that if "from the evidence," meaning thereby necessarily and of course all of the evidence, it believed Eva Froeming to have

been guilty of contributory negligence, the plaintiffs could not recover. Moreover, if appellant desired an instruction embodying this particular modification of the general principle, it should have proposed it. None of the other asserted errors, either in giving or refusing to give instructions, requires further detailed consideration. The proposed instructions, the giving of which was refused, either were erroneous in point of law or were adequately covered by instructions which the court actually gave.

We are asked to declare that the verdict—a judgment in the sum of eighteen thousand dollars—is excessive. The deceased was devoted to her husband and children. Of the latter, three were girls of tender years, and all were minors under the age of fourteen years. The deceased had a knowledge of accounts and computation and had been a bookkeeper in a bank. She aided her husband, who was a contractor, in the computations necessary for his bids in the matter of his contracts. At the time of her death she was working to help maintain her home. It cannot be said that the award of the jury was excessive. (*Valente v. Sierra R. Co.* 158 Cal. 412, 111 Pac. 95.)

The judgment and order appealed from are therefore affirmed.

Melvin and Lorigan, JJ., concurred.

Hearing in Bank denied.

NOTE.

Judicial Notice of Mortality Tables.

General Rule, 415.

Application of Rule:

Particular Tables Judicially Noticed, 415.

Authenticity of Table Offered in Evidence, 418.

General Rule.

It is well settled that the courts take judicial notice of standard mortality tables in estimating the probable duration of human life. *Southern Pac. Co. v. De Valle Da Costa*, 190 Fed. 689, 111 C. C. A. 417; *Gordon v. Tweedy*, 71 Ala. 202; *Kansas City, etc. R. Co. v. Phillips*, 98 Ala. 159, 13 So. 65; *Keast v. Santa Ysabel Gold Min. Co.* 138 Cal. 256, 68 Pac. 771; *Valente v. Sierra R. Co.* 151 Cal. 534, 91 Pac. 481; *Dickinson v. Southern Pac. Co.* 172 Cal. 727, 158 Pac. 183; *Nelson v. Branford Lighting, etc. Co.* 75 Conn. 548, 54 Atl. 303; *McHenry v. Yokum*, 27 Ill. 160; *Louisville, etc. R. Co. v. Miller*, 141 Ind. 533, 563, 37 N. E. 343; *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45; *Ruehl v. Lidgerwood Rural Telephone Co.* 23 N. D. 6, Ann. Cas.

1914C 680, 135 N. W. 793; *Suell v. Jones*, 49 Wash. 582, 96 Pac. 4; *Abell v. Penn Mut. L. Ins. Co.* 18 W. Va. 400. And see the reported case. See also *Nelson v. Lake Shore, etc. R. Co.* 104 Mich. 582, 62 N. W. 993; *Jackson v. Edwards*, 7 Paige (N. Y.) 387.

In *McHenry v. Yokum*, 27 Ill. 160, the court said: "But the plaintiff thinks it impossible to compute the exact value of this dower interest, so as to determine the extent to which the consideration has failed. The proof clearly shows what was the annual value of the dower and the age of the doweress. From this it is as easy to compute the cash value of the dower, as it is the interest on a note of hand, from tables which have been formed with great care, from well established facts, and these tables are recognized and acted upon by all courts, at least in this country and in England, whenever occasion requires."

In *Ruehl v. Lidgerwood Rural Telephone Co.* 23 N. D. 6, Ann. Cas. 1914C 680, 135 N. W. 793, it was said that "the overwhelming weight of authority is to the effect that the court will take judicial notice of the standard tables, and if called upon, or even if not called upon, may instruct the jury in relation thereto."

Judicial notice has been taken of the fact that life tables are based on the expectancy of life of persons in good health and in employments not extrahazardous. *Gordon v. Tweedy*, 74 Ala. 232; *Chicago Veneer Co. v. Jones*, 143 Ky. 21, 135 S. W. 430.

Application of Rule.

PARTICULAR TABLES JUDICIALLY NOTICED.

Judicial notice has been taken of each of the following mortality tables:

—*Actuary's*.—*Abell v. Penn Mut. L. Ins. Co.* 18 W. Va. 400.

—*American Experience*.—*Gordon v. Tweedy*, 74 Ala. 232; *McDonnell v. Alabama Gold L. Ins. Co.* 85 Ala. 401, 5 So. 120; *Louisville, etc. R. Co. v. Mothershed*, 97 Ala. 261, 12 So. 714; *Spice v. Astry*, 184 Ind. 1, 110 N. E. 201; *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207; *Mug v. Ostendorf*, 49 Ind. App. 71, 96 N. E. 780; *Hay v. Meridian L. etc. Co.* 57 Ind. App. 536, 101 N. E. 651, 105 N. E. 919; *Kreuger v. Sylvester*, 100 Ia. 647, 69 N. W. 1059; *Denman v. Johnston*, 85 Mich. 387, 48 N. W. 565; *Boettger v. Scherpe, etc. Architectural Iron Co.* 136 Mo. 531, 38 S. W. 298; *Timson v. Manufacturer's Coal, etc. Co.* 220 Mo. 580, 119 S. W. 565; *Chambers v. Minneapolis, etc. R. Co.* (N. D.) 163 N. W. 824; *Suell v. Jones*, 49 Wash. 582, 96 Pac. 4; *Abell v. Penn Mut. L. Ins. Co.* 18 W. Va. 400.

—*Bland's*.—See *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207; *Williams' Case*, 3 Bland Md. 186.

—*Carlisle*.—*Lincoln v. Power*, 151 U. S. 436, 14 S. Ct. 387, 38 U. S. (L. ed.) 224; *Louisville, etc. R. Co. v. Miller*, 141 Ind. 533, 563, 37 N. E. 343; *Mug v. Ostendorf*, 49 Ind. App. 71, 90 N. E. 780; *Pittsburgh, etc. R. Co. v. Sudhoff*, 173 Ind. 314, 90 N. E. 467 (transferred from appellate court 88 N. E. 702); *Williams' Case*, 3 Bland (Md.) 186; *Camden, etc. R. Co. v. Williams*, 61 N. J. L. 646, 40 Atl. 634; *Rober v. Northern Pac. R. Co.* 25 N. D. 394, 142 N. W. 22; *Suell v. Jones*, 49 Wash. 582, 96 Pac. 4. See also *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207; *Donaldson v. Mississippi, etc. R. Co.* 18 Ia. 280, 87 Am. Dec. 391.

—*Equitable*.—*Williams' Case*, 3 Bland (Md.) 186. And see *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207.

—*Finlaison's*.—*Williams' Case*, 3 Bland (Md.) 186. And see *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207.

—*London*.—*Williams' Case*, 3 Bland (Md.) 186.

—*McKean's*.—See *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207.

—*Northampton*.—*The Ferryboat D. S. Gregory, etc.* 2 Ben. (U. S.) 239; *Wager v. Schuyler*, 1 Wend. (N. Y.) 553; *Davis v. Standish*, 26 Hun (N. Y.) 608; *Suell v. Jones*, 49 Wash. 582, 96 Pac. 4. See also *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207; *Williams' Case*, 3 Bland (Md.) 186.

—*Philadelphia*.—*Williams' Case*, 3 Bland (Md.) 186.

—*Portsmouth*.—*Wager v. Schuyler*, 1 Wend. (N. Y.) 553.

—*Sweden*.—*Williams' Case*, 3 Bland (Md.) 186. And see *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207.

—*United States*.—See *supra*, *American Experience*.

—*Wigglesworth*.—*Winn v. Cleveland, etc.* R. Co. 143 Ill. App. 71, *affirming* 239 Ill. 132, 87 N. E. 954; *Muhlke v. Tiedman* (Ill.) 117 N. E. 708; *Alexander v. Bradley*, 3 Bush (Ky.) 667; *Estabrook v. Hapgood*, 10 Mass. 313; *Mills v. Catlin*, 22 Vt. 98; *Suell v. Jones*, 49 Wash. 582, 96 Pac. 4; *Abell v. Penn Mut. L. Ins. Co.* 18 W. Va. 400. See also *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207.

In *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207, the court apparently took judicial cognizance of the fact that the mortality tables enumerated in its opinion were standard. In that case it was said: "The use of life and annuity tables has long been resorted to by the courts of this country and England in making estimates of present values. The business of life insurance and the sale of annuities by societies and corporations proved to be so successful among our British ancestors that the government itself, by the statute of 5 W. & M. ch. 5 and 20, assumed the

undertaking for the purpose of raising some of its revenues. Statistics concerning the longevity of human lives were necessary, therefore, to estimate the required charges for such protection, and these statistics were gradually arranged by mathematicians into 'tables,' from which the average duration of life at certain ages and conditions could be ascertained with reasonable certainty. Between the years 1735 and 1780 Dr. Richard Price, of England, prepared his celebrated 'Northampton Tables' from bills of mortality kept in the parish of All Saints, a town in the North of England, and during the years 1779 and 1780 the 'Carlisle Tables' were framed for the town of Carlisle, also in the north of England, from observations made upon a population of 8,000 persons. In addition to these there are the 'Equitable Tables,' prepared by the Equitable Insurance Company, of London; the 'Sweden Tables,' based upon estimates of mortality among the populations of Sweden and Finland; 'Finlaison's Tables,' made by John Finlaison, under the direction of the British government; 'McKean's Tables,' by Alexander McKean, actuary, of London, and others. 'Wigglesworth's Tables,' prepared by Dr. Wigglesworth, were prepared from observations made in New England, and 'Bland's Tables' were arranged by Chancellor Bland, of Maryland, from other tables. See *Williams' Case*, 3 Bland (Md.) 186 (227); 2 Edinburgh Ency. tit. 'Annuities,' p. 150 et seq.; 2 Ency. Brit. tit. 'Annuities,' p. 72 et seq.; *Estabrook v. Hapgood* 10 Mass. 313 (315). These tables are regarded as standard and authoritative data for making estimates of the character of those under consideration and have long been used in different ways by the courts of Great Britain and America as among the most available means for the equitable adjustment of such controversies. In the statistical reports of the United States census office, upon the taking of every census, there are published by the government certain tabulated statements of mortality among different groups of the population of the United States, including tables showing the expectation of lives at all ages and among various classes of population. These statements are based upon the experience and observation of scientific men, and form a portion of the vital statistics as well as of the current history of the country. They are known as the 'Mortality Tables of the United States,' or as 'American Mortality Tables.' It seems to be well established that of the contents of these tables the courts will take judicial knowledge."

In *Abell v. Penn Mut. L. Ins. Co.* 18 W. Va. 400, the Actuary's and American Experience tables of life expectancy were judicially recognized as standard. The court said: "There

was no table of mortality offered in evidence in this case, but the court may take judicial notice of such tables. The table, which has been generally used in Virginia, was one made by Professor Wigglesworth of Cambridge University, and is published in Robinson's Practice (old) vol. 2, p. 381. It was adopted by the supreme court of Massachusetts soon after its publication some seventy years ago (*Estabrook v. Hapgood*, 10 Mass. 322) as the rule in estimating the value of a dower or other life interest, and it has been extensively used in Virginia and formerly in this state for that purpose. But there have been more recently published two tables of mortality, which can be more relied on than Professor Wigglesworth's table, where the lives of assured persons are concerned, as they were constructed from accurate observations made by insurance companies in their business. The first of these tables is known as the combined experience or actuary's table. It was prepared by a committee of eminent actuaries on data afforded by the combined experience of seventeen of the principal life insurance offices in England and was deduced from sixty-two thousand five hundred and thirty-seven assurances. It was first published in 1843. The other table of mortality was constructed from the experience of the Mutual Life Insurance Company of New York by Mr. Shepard Homans, who availed himself of other statistics to ascertain the laws of mortality as applicable to healthy insured lives in this country; and all the standard European tables were used in adjusting it. This table is known as the American Experience Table and was adopted by New York in 1868. . . . Of these two tables, it seems to me, the combined experience table should be preferred, because on account of the material, out of which it was constructed, it is more likely to be accurate and better adjusted than the American Experience Table."

In *Gordon v. Tweedy*, 74 Ala. 232, in order to ascertain the present value of an inchoate right of dower, the American Tables of Mortality were used to determine the probable duration of the life of the dowress and her husband. The court said: "More than forty years ago, the courts were accustomed to resort to the 'Northampton' and the 'Carlisle' Tables of observation, showing the probabilities of human life by actual observation in the towns of Northampton and Carlisle, England. These deaths, however, were not taken from selected lives, but from the population generally. The field was so circumscribed, that they have never been deemed entirely reliable. We judicially know that the business of life insurance has made rapid advancement in modern times, especially within the past twenty years. New fields of observation have been explored, based upon the

Ann. Cas. 1918B.—27.

combined and actual experience of American life insurance companies. This has led to the tabulation of results in what is now known as the 'American Table of Mortality,' which is now regarded as the orthodox standard throughout the United States and the Canadas. This table is based on the lives of insurable or healthy persons, and is known to be now in use generally by modern life insurance companies, for the arithmetical estimate of valuations. We are of opinion that, for these reasons, our courts should resort to the 'American Table of Mortality' as a basis for the calculation of annuities dependent on the probabilities of human life in this country. We see no reason why the chancellor, or register, should be precluded from taking judicial knowledge of both the existence of this table and its contents. It is customary for courts to take judicial knowledge of what ought to be generally known within the limits of their jurisdictions. This cognizance may extend far beyond the actual knowledge, or even the memory of judges, who may, therefore, resort to such documents of reference, or other authoritative sources of information as may be at hand, and may be deemed worthy of confidence."

To the same effect is the decision in *McDonnell v. Alabama Gold L. Ins. Co.* 85 Ala. 401, 5 So. 120, wherein the court said: "There is, in this case, a manifest and total breach of contract by the company, in its failure to carry on the business of life insurance. This breach has resulted in damage to all persons holding policies, for which an immediate action will lie. These damages, moreover, are liquidated, being capable of the most accurate and certain mathematical ascertainment. The legal measure of such damages is the surrender or equitable value of the policy, calculated on the basis of the 'American Tables of Mortality,' which are now the orthodox standard throughout the United States and Canada, and of which judicial notice will be taken by the courts."

In *Chambers v. Minneapolis, etc. R. Co.* (N. D.) 163 N. W. 824, the court said: "Counsel for appellant argues that the trial judge erred in his instructions to the jury in stating the life expectancy of Chambers according to the American Mortality Table. It appears that the plaintiff requested the court to take judicial notice of the mortality tables, without specifying what tables. Section 7922 of the Compiled Laws of 1913 provides that in all cases in which probable duration of the natural life of any person is material the statistical tables known as the Carlisle Tables of Mortality are competent evidence of such probable duration or expectation of life. In the case of *Ruehl v. Lidgerwood Rural Telephone Co.* 23 N. D. 6-19, 135 N. W. 793, Ann. Cas. 1914C 680, this

court held that it would take judicial notice of standard tables according to which the life expectancy of an individual may be determined, and it was said that it would have been competent for the court to have instructed the jury as to the fact of the contents of such mortality tables. . . .

While the statute provides affirmatively that the Carlisle Tables shall be admissible, it does not purport to control or restrict in this particular the application of the doctrine of judicial notice. In disposing of this assignment of error, it need only be said that we adhere to the rule laid down in the case of *Ruehl v. Lidgerwood Rural Telephone Co.* supra."

In *Camden, etc. R. Co. v. Williams*, 61 N. J. L. 646, 40 Atl. 634, it was said: "The second, sixth and tenth assignments of error were waived. . . . The first is that the 'Carlisle Table of Mortality' was admitted in evidence. It is common knowledge that approved mortuary tables are in constant use to aid in determining the probable expectancy of human life. They are derived from statistics preserved through a course of years, and have become standard by the test of subsequent experience. The courts have almost universally availed themselves of help from these sources when expectancy of life became involved in a judicial proceeding. . . . Among mortuary tables that known as the 'Carlisle Table of Mortality' stands pre-eminent. It was elaborately compiled in the latter part of the last century from the statistics of certain parishes in the city of Carlisle, in England, extending over a series of years. It was received with a high degree of favor among insurers and others concerned with forecasting the probable duration of life. It almost entirely superseded the Northampton table and others still earlier, now altogether obsolete. It is said of this Carlisle Table in 13 Encycl. Brit. (9th ed.) 169, that 'no other mortality table has been so extensively employed in the construction of auxiliary tables of all kinds for computing the values of benefits depending upon human lives.' Insurers now resort to their own experience tables, compiled from their statistics of selected lives, but there seems to be no successor to this general table of mortality. Every lawyer knows that it forms the basis of the table adopted by our own court of chancery as a guide for calculating the value of a life estate (Chancery Rule 184), and it everywhere has gained judicial recognition, as will appear upon consulting the decisions noted in the works above cited on the general subject. It is proper, therefore, to admit this standard table in evidence without proof of its repute; that may be assumed."

In *Lincoln v. Power*, 151 U. S. 436, 14 S. Ct. 387, 38 U. S. (L. ed.) 224, which was an action to recover damages for personal injuries, the court said: "Error is assigned to the action of the court in referring to the Carlisle Tables as enabling the jury to find the plaintiff's prospect of life, and the force of the objection is in the allegation that those tables had not been introduced in evidence. There is high authority for the proposition that courts can take judicial notice of the Carlisle Tables, and can use them in estimating the probable length of life, whether they were introduced in evidence or not."

In *Estabrook v. Hapgood*, 10 Mass. 313, it was held that the value of a dower right in that particular court should be ascertained by reference to a particular mortuary table contained in a certain publication. The following appears in a note appended to the report of the case: "Note.—The Chief Justice, referring to the assessment of the damages in this case, observed that the value of the dowager's life estate was to be calculated from the late Dr. Wigglesworth's table, published in the *Memoirs of the American Academy of Arts and Sciences*, Vol. ii, p. 131, which he said had been adopted by this court, as a rule in estimating the value of life estates, since its publication."

In *Muhlke v. Tiedemann* (Ill.) 117 N. E. 708, the court said: "While it is true the proof shows that there were a number of mortality tables, and that under these tables different results are obtained, it is a matter of common knowledge that the Wigglesworth table is recognized as one of the standard tables and is frequently used by the courts of this state in determining the present value of future interests."

AUTHENTICITY OF TABLE OFFERED IN EVIDENCE.

It is believed to be the better opinion that a court may take judicial notice of the authenticity of a mortality table offered in evidence, thereby eliminating the necessity for preliminary proof thereof. *Southern Pac. Co. v. De Valle Da Costa*, 190 Fed. 689, 111 C. C. A. 417; *Keast v. Santa Ysabel Gold Min. Co.* 136 Cal. 256, 68 Pac. 771; *Valente v. Sierra R. Co.* 151 Cal. 534, 91 Pac. 481; *Atchison, etc. R. Co. v. Ryan*, 62 Kan. 682, 64 Pac. 603; *Alexander v. Bradley*, 3 Bush (Ky.) 607; *Scheffler v. Minneapolis, etc. R. Co.* 32 Minn. 518, 21 N. W. 711, 19 Am. & Eng. R. Cas. 173; *Abell v. Penn Mut. L. Ins. Co.* 18 W. Va. 400.

Thus, in *Keast v. Santa Ysabel Gold Min. Co.* supra, an action for death by wrongful act, mortality tables were admitted in evi-

dence to aid in assessing the damages. The court said: "There was no error of the court in admitting in evidence McCarty's Statistician and Economist containing Farr's table of expectancy of life to show the probable duration of the life of the deceased. It is not questioned that proper evidence of such expectancy of life was admissible. In some courts it is said that such tables are admissible after proper preliminary proof of their authenticity and standard quality. Such proof in this case was not made, but the general weight of authority is to the contrary, and permits the introduction of such tables as are satisfactory to the court. The court may or may not require such preliminary proof, depending upon whether of its own knowledge it is satisfied, or whether it desires evidence to satisfy itself of the authenticity of the tables."

In following the decision in *Keast v. Santa Ysabel Gold Min. Co.* supra, the court, in *Valente v. Sierra R. Co.* 151 Cal. 534, 91 Pac. 481, which was also an action for death by wrongful act, said: "The question as to the admission of a table of life expectancy without preliminary proof as to its authenticity and reliability appears to be decided against defendant's contention by the case of *Keast v. Santa Ysabel Gold Min. Co.* 130 Cal. 256, 259, 68 Pac. 771, where it is held that the court may admit any table satisfactory to it, requiring or not requiring preliminary proof, depending upon whether of its own knowledge it is satisfied, or whether it desires evidence to satisfy itself of the authenticity of the table. This ruling is, of course, founded upon the theory that the courts take judicial notice of the standard tables. (20 Am. & Eng. Enc. of Law (2d ed.) 886)."

In *Atchison, etc. R. Co. v. Ryan*, 62 Kan. 682, 64 Pac. 603, it was said: "If the courts judicially know the standard tables of life expectancy when presented to their observation, they may assure their knowledge by reference to publications containing them. The only easily accessible authentic publication of such tables is to be found in the standard encyclopaedias like the *Britannica*. The courts recognize such publications as being authentic and in general use, and, therefore, may receive them in evidence as to matters contained therein of which judicial knowledge is possessed."

In *Scheffer v. Minneapolis, etc. R. Co.* 32 Minn. 518, 21 N. W. 711, 19 Am. & Eng. R. Cas. 173, the court said: "With reference to the admission in evidence of the *Carlisle* and other similar tables for the purpose of showing the 'expectation' and probable duration of life, we think that they are to be received upon judicial notice of their genuineness and authoritativeness. As in regard to many other matters of which judicial notice

is taken, it is proper for a court to inform itself in the premises by reference to books and other sources of information; but legal proof of such genuineness and authoritativeness is not required. In a given case it is for the court to say, without such proof, that they are or are not genuine and authoritative, and that they are or are not admissible accordingly. *Stephen, Ev. art. 59*, and note; 1 *Greenl. Ev. § 6*. Such tables are, however, not conclusive, for there is not only a considerable variance in different tables, but they are not so compiled as to show the probable duration of life under any and all circumstances, but under particular conditions, so that their evidentiary value in a given case is largely analogical."

In *Southern Pac. Co. v. De Valle Da Costa*, 190 Fed. 689, 111 C. C. A. 417, which was an action for damages for death caused by alleged negligence, the court said: "It is urged also that the court erred in permitting the use of mortality tables without requiring any evidence that the tables were authentic or in general use; but this is a matter of judicial notice, and there is no error in this respect."

In *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45, it was said: "Upon the trial counsel for plaintiff offered and read in evidence, over defendant's objection, certain mortality tables for the purpose of showing the probable expectancy of plaintiff's life. The particular objection urged was that the tables were not identified, but were read by an attorney who was not a witness and not under oath. While there is some conflict in the authorities, the weight of the authorities seems to be in harmony with the trial court's ruling, that the court takes judicial notice of standard mortality tables, and, if the court is satisfied that the one offered is of that character, no further identification is necessary; and it is immaterial that the portion read is read by an attorney who is not sworn as a witness in the case."

But courts have refused to take judicial notice of the authenticity of alleged standard mortality tables. *Western, etc. R. Co. v. Hyer*, 113 Ga. 776, 39 S. E. 447; *Notto v. Atlantic City R. Co.* 75 N. J. L. 826, 69 Atl. 968, 127 Am. St. Rep. 835, 17 L.R.A. (N.S.) 1138; *Galveston, etc. R. Co. v. Arispe*, 81 Tex. 523, 17 S. W. 47. See also *Western, etc. R. Co. v. Cox*, 115 Ga. 715.

Thus, in *Western, etc. R. Co. v. Hyer*, supra, which was an action brought by a widow for damages for the death of her husband who had been killed in a railroad wreck, the court, concerning the authenticity of alleged "*Northampton*," "*Carlisle*," and "*Actuary's*" mortality tables, and a supposed "*Carlisle*" annuity table, printed in the appendix to an official report of decided cases, said:

"The mere fact that certain tables were published by the official reporter of this court in the form of an appendix to the 70th Ga. does not authorize us to take judicial notice of the contents of the tables there to be found. On the contrary, we have no authority to look outside of the record of any given case for the purpose of discovering something which that record should, but does not, itself disclose."

In *Galveston, etc. R. Co. v. Arispe*, 81 Tex. 523, 17 S. W. 47, it was said: "The action of the court as indicated in the seventh assignment of error was erroneous, and the following is the assignment, viz.: 'The court erred in permitting plaintiffs over the objection of defendant to introduce in evidence the table of the expectation of the years of life contained in the book entitled "A Million of Facts; Conkling's Handy Manual of Useful Information and Atlas of the World; All for Twenty-five Cents," for the reason specified in defendant's bill of exception No. 1, and because the same was no authority and of no higher character than any cheap book sold on railroads, and there was no evidence offered showing the correctness of the table, and it was calculated to prejudice the minds of the jury against the defendant.' Whether this ruling of the court, if it were the only ground relied on, would constitute a reversible error we need not inquire. Suffice it to say that this book, however flattering may be its title or alluring its price, is not one of those standard works of which the courts take judicial notice and recognize as authority, and consequently it should have been excluded in the absence of any proof of its correctness."

FUSSELMAN

v.

YELLOWSTONE VALLEY LAND AND IRRIGATION COMPANY.

Montana Supreme Court—February 16, 1917.

53 Mont. 254; 163 Pac. 473.

Negligence — Liability to Trespassing Infant.

The basis of the doctrine of liability to a trespassing infant, injured through the dangerous condition of the premises, is implied invitation.

What Constitutes Negligence — Breach of Duty Essential.

Actionable negligence arises only from breach of a legal duty.

Averment of Negligence — Sufficiency.

A complaint for negligence must disclose a duty, breach of it, and resulting damages. Same.

A complaint for negligence must state facts, and not legal conclusions, and so must set forth facts from which it can be said, as matter of law, that defendant owed the injured person a duty at the time of the injury; and an allegation that defendant impliedly invited deceased is insufficient.

Owners of Premises — Liability for Injury — Invitation.

An invitation not accepted or acted on creates no legal relationship so as to be the basis for a charge of negligence.

Negligence — Turntable Doctrine.

To state a cause of action under the doctrine of the turntable cases, it is not enough for the complaint for injury to a trespassing child to show that the premises were attractive to children or that children generally were attracted thereto, but it must show that the attraction lured the particular child there with the resulting injury.

Owners of Premises — Canal — Injury to Trespassing Child.

Evidence in an action for drowning of a child in the canal of an irrigation company is held to be insufficient to support a verdict on the theory that it fell in where the canal crossed a street, and should have been, but was not, covered; it being equally consistent with it having fallen in at another point.

[See note at end of this case.]

New Trial — Affidavit in Motion — Newly Discovered Evidence — Diligence.

It is not enough for the affidavit for a new trial for newly discovered evidence to allege diligent inquiry before trial; but the particular efforts made must be stated.

Appeal from District Court, Park county: Law, Judge.

Action by E. W. Fusselman, plaintiff; against Yellowstone Valley Land and Irrigation Company, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

Walsh, Nolan & Scallon for appellant.

Fred L. Gibson and Miller & O'Connor for respondent.

[257] HOLLOWAY, J.—In 1913 the Yellowstone Valley Land & Irrigation Company maintained a canal for conveying water from the Yellowstone River for irrigation purposes. The canal passed through a portion of the city of Livingston and along and across many streets and alleys. Permission to run the canal through the city had been obtained, and Ordinance No. 99 had been adopted defining the rights and duties of the company within the city. Among other things, it was required

to keep the canal covered wherever it ran in or across a street or alley, but this duty had been neglected, and there was not any covering over the canal where it crossed Yellowstone Street or Gallatin Street or in the vicinity of the intersection of those streets, except a bridge fourteen feet in length near the center of Yellowstone Street. On May 23, [258] 1913, the dead body of Birdena Fusselman was taken from the canal at a point down the canal and 1,100 feet east of the Yellowstone Street bridge. This action was brought by the father of the deceased to recover damages. Issues were framed and a trial had. At the conclusion of the evidence the district court directed a verdict for the defendant, and plaintiff appealed from the judgment entered thereon and from an order denying his motion for a new trial. Appellant advances two theories, upon either of which he insists that a case was made for the jury.

1. It is first contended that even though the deceased was upon the private property of the defendant at the time she fell into the canal, liability may nevertheless attach if the canal, as located with the water flowing in it, was peculiarly attractive to children of tender years, if it was dangerous, if small children were accustomed to play about it and were likely to fall into it and be drowned, and if these facts were known to the defendant or should have been known to it and reasonable care was not taken to prevent injury. In other words, it is sought to invoke the rule announced in *Sioux City, etc. R. Co. v. Stout*, 17 Wall. 657, 21 U. S. (L. ed.) 745.

The doctrine of the turntable cases proceeds upon the assumption that the injured party, if an adult, would have been a trespasser, but because of his tender years and indiscretion is not subject to the rule of liability applicable to trespassers. Anyone who goes upon the private property of another without lawful authority or without permission or invitation, express or implied, is a trespasser to whom the land owner owes no legal duty until his presence is discovered. He is only required to refrain from wanton or willful acts which occasion injury. (*Egan v. Montana Cent. R. Co.* 24 Mont. 569, 63 Pac. 831.) A person upon the private property of another by invitation, express or implied, is there rightfully, and to him the land owner owes the positive duty to exercise reasonable care for his safety. (*Montague v. Hanson*, 38 Mont. 376, 99 Pac. 1063.) It is not contended that the defendant or any officer or agent of it knew of the presence of Birdena Fusselman upon the [259] right of way or along the canal immediately, or at any time, before her death, or that her death resulted from any wanton or willful acts of the defendant. Neither is there any conten-

tion made that the company ever expressly invited the deceased to come upon its property; so that the only possible theory upon which liability may attach under this view of the case is that the deceased was at the canal pursuant to an implied invitation extended to her by the canal company, and that the invitation was to be implied from the acts of the defendant in maintaining the canal under the circumstances disclosed.

In passing, it may be said that no other subject within the domain of the law has given rise to greater divergence of judicial opinion than the doctrine of the *Stout* case. In some jurisdictions it is repudiated altogether; in others applied strictly; in others adopted in a more or less modified form; while in others it has been extended to such a variety of cases that it has lost its original identity and has become a new rule of the substantive law of negligence. The courts which give recognition to the doctrine are not agreed upon the principle which underlies it and encounter difficulty in defining the doctrine itself. By some of these courts it is treated as an exception to the general rule of nonliability to trespassers—an exception born of necessity and applied out of consideration for the irresponsibility of infancy. Others invoke the doctrine only in cases where an invitation can be implied from the acts of the land owner, upon the theory that, "what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years." (*Keffe v. Milwaukee, etc. R. Co.* 21 Minn. 207, 18 Am. Rep. 393.) So much has been written upon the subject that we shall not attempt to add anything new to the discussion. To review the decided cases is useless, and to reconcile them is impossible. An extended reference to them will be found in *Bottum v. Hawks*, 84 Vt. 370, Ann. Cas. 1913A 1025, 35 L.R.A. (N.S.) 440, 79 Atl. 858, and in the notes to the same case in Ann. Cas. 1913A 1032.

[260] In the trial of the *Stout* case, Judge Dillon instructed the jury that notwithstanding the child was upon the private property of the company at the time he was injured, liability would attach if the jury found: (a) That the turntable, in its then condition, situation, and place, was a dangerous machine, which, if left unguarded and unlocked, would be likely to cause injury to children; (b) that the company knew or ought to have known that children resorted to the turntable to play, and that they would likely be injured by it; and (c) that the company employed no means to keep children away or to prevent accidents to them. (*Stout v. Sioux City, etc. R. Co.* 2 Dill. 294, 23 Fed. Cas. No. 13,504.) In the supreme court the instructions were approved as sound and judicious, and reference is made to the rule of

reasonable care—the rule which measures the duty of the land owner to one rightfully upon his property. The court did not assume to state a new rule of law, but sought justification in principles announced and applied in decided cases to which reference was made, among them *Lynch v. Nurdin*, 1 Q. B. 29, 41 E. C. L. 422. The facts of that case were that the defendant's servant left a horse and cart unattended in the street. The plaintiff, a child of tender years, climbed upon the cart in play. Another child struck the horse, causing it to start abruptly, whereby the plaintiff was thrown to the ground and injured. The defendant was held liable, though no stress was laid upon the fact that the horse and cart were in a public street. Upon the question of negligence Chief Justice Denman said: "For if I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." And, disposing of the contention that the negligence of the plaintiff in mounting the cart and so committing a trespass had contributed to the injury, he observed: "The answer is that, supposing that fact ascertained by the jury, but to this extent: That it merely [261] indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief."

Though in the *Stout* case particular emphasis was not laid upon the peculiar attractiveness of the turntable, and the foundation principle upon which liability was made to depend was not sharply defined, the language employed and the references given seem to require the conclusion that the attractiveness of the machine was deemed to be an essential element, and that the theory of implied invitation must have prompted the conclusion reached. The *Stout* case was decided in 1873. Later a case presenting substantially the same facts came before the supreme court of Minnesota (*Keffe v. Milwaukee*, etc. R. Co. above), and the rule of liability was there made to rest upon the theory of implied invitation. Among other things the court said: "The defendant therefore knew that by leaving this turntable unfastened and unguarded, it was not merely inviting young children to come upon the turntable, but was holding out an allurement, which, acting

upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger; and having thus knowingly allured them into a place of danger, without their fault (for it cannot blame them for not resisting the temptation it has set before them), it was bound to use care to protect them from the danger into which they were thus led, and from which they could not be expected to protect themselves."

In his work on Torts, Judge Cooley referred approvingly to the decision in the *Keffe* case, and under the title "Invasion of Rights in Real Property" said: "Every retail dealer impliedly invites the public to enter his shop for the examination of his goods, that they may purchase them if they see fit. . . . So every man, by implication, invites others to come to his house [262] as they may have proper occasion, either of business, of courtesy, for information, etc. . . . In the case of young children and other persons not fully *sui juris*, an implied license might sometimes arise when it would not in behalf of others. Thus, leaving a tempting thing for children to play with exposed, where they would be likely to gather for that purpose, may be equivalent to an invitation to them to make use of it." (Cooley on Torts, 303.)

In the first edition of Thompson on Negligence, published in 1880, the author, referring to *Townsend v. Wathen*, 9 East (Eng.) 277, and *Stout v. Sioux City*, etc. R. Co. above, said: "It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed; and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed or maimed for life." (1 Thompson on Negligence, 305.)

In *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 38 U. S. (L. ed.) 434, 14 S. Ct. 619, the principles of the *Stout* case were approved and applied. *Lynch v. Nurdin* was again analyzed and relied upon, and the language from that case, from *Keffe v. Milwaukee*, etc. R. Co. and from Cooley and Thompson above was quoted to sustain the position taken. It should now be deemed to be settled, so far as the federal courts are concerned, that the doctrine of the *Stout* case, as amplified in the *McDonald* case, is the law upon the subject; that the attractive character of the dangerous instrumentality which causes the injury is an essential element of the doctrine, and that the doctrine has its foundation in the theory of implied invitation.

Lynch v. Nurdin was decided in 1841. In 1909 Cooke v. Midland Great Western R. Co. involving the question of the liability of the railway company for an injury to a child while playing upon an unlocked turntable on the defendant's premises, came before [263] the House of Lords. The defendant was held liable upon the theory of implied invitation, and Lynch v. Nurdin was relied upon as direct authority for the doctrine announced that a land owner who maintains on his premises a dangerous machine peculiarly attractive to children of immature years, and who knows that such children are accustomed to play about and upon it and are likely to be injured by it, owes to such children the duty to exercise ordinary care for their safety. ([1909] App. Cas. (Eng.) 229, 15 Ann. Cas. 557.) The doctrine was invoked in this court for the first time in Driscoll v. Clark, 32 Mont. 172, 80 Pac. 1, 373, but we held that the facts pleaded did not bring the case within the rule, though the doctrine itself received the tacit approval of a majority of the court. The same conclusion was reached in Gates v. Northern Pac. R. Co. 37 Mont. 103, 94 Pac. 751, and in Nixon v. Montana, etc. R. Co. 50 Mont. 95, Ann. Cas. 1916B 299, 145 Pac. 8. In Martin v. Northern Pac. R. Co. 51 Mont. 31, 149 Pac. 89, we reviewed an instruction of the trial court designed to announce and apply the doctrine, but held that it omitted an essential element. In every one of these cases we proceeded upon the assumption that the doctrine is grounded upon the theory of implied invitation, and though it may not appear altogether logical to imply an invitation where none was intended to be extended, still in this jurisdiction the position is fortified somewhat by the rule of law crystallized in the statute, which declares that it will be presumed "that a person intends the ordinary consequences of his voluntary act." (Rev. Codes, sec. 7962.) This rule is applied in civil cases, and though the presumption is a disputable one, it furnished sufficient foundation for a *prima facie* case until contradicted.

The doctrine of the turntable cases is the rule of law in England, in our federal courts, in by far the greater number of the state courts where it has been considered, and has received the tacit approval of the majority of this court. We are satisfied that justification for the doctrine can be found only in the theory of implied invitation, and upon the assumption that in a proper case the doctrine will be applied in this jurisdiction [264] upon that theory, it is insisted by counsel for respondent that the complaint does not state facts sufficient to bring the present case within the doctrine.

It is the rule, recognized generally, that actionable negligence arises only from a

breach of legal duty, and to state a cause of action for damages resulting from negligence, it is necessary that the complaint disclose the duty, the breach, and the resulting damages. The facts, and not legal conclusions, must be stated, and it is therefore necessary to set forth sufficient facts from which it can be said, as a matter of law, that the defendant owed to the injured party a duty arising from some legal relation existing at the time of the injury. It is not sufficient to say that the defendant impliedly invited the deceased to come upon the property. An invitation not accepted or acted upon cannot create any legal relationship whatever. Neither is it sufficient to show that children generally were attracted to the dangerous instrumentality, in order to make out a case under the turntable doctrine as we have defined it. To impose liability upon the defendant for the death of Birdena Fusselman it must be made to appear, among other things, that a legal duty was owed to her, and this could arise only from the maintenance of a dangerous instrumentality peculiarly attractive to children of tender years and which did lure or attract her to her death. It is not sufficient to charge negligence in the abstract. The breach of duty relied upon must have been the proximate cause of the injury, and the facts pleaded must disclose the causal connection between the defendant's negligent act and the injury complained of. Though the canal may have been ever so attractive to children, unless it was that attraction which lured the deceased to her death, the doctrine would have no application.

It is a general rule of pleading in actions for damages for injuries received upon the defendant's property that the complaint must disclose by what right the injured party was upon the premises. (14 Enc. Pl. & Pr. 339; 29 Cyc. 567.) In failing to allege that Birdena Fusselman was attracted to the canal [265] or that by reason of its peculiar attractiveness she went upon the canal and met her death, the complainant fails to state a cause of action under the doctrine of the turntable cases.

2. The other theory adopted by the appellant is that the child fell into the canal while she was in Yellowstone Street near the bridge and at a point where the canal was not protected by a covering or barrier; that she was drowned and her body carried by the water to the point where it was found; and upon this theory it is sought to fasten liability upon the company for its negligence in failing to comply with the city ordinance.

Since the ordinance required the canal to be covered only where it ran in or across a street or alley, the burden was cast upon the plaintiff, in the maintenance of this theory, to prove that the child was in a street or al-

ley at the time she fell into the canal. To sustain this burden, plaintiff offered evidence of the following facts:

The Fusselman home is 700 feet south of the Yellowstone Street bridge, and 226 feet south and west of the bridge is a garage. About 5:30 o'clock in the afternoon of May 23 the deceased, three years and three months old, and her playmate, Genevieve Rowe, four years old, were taken from near the Fusselman residence to the garage, and soon afterward were seen playing in Gallatin Street, about midway between the garage and the bridge, picking small white flowers—referred to by some of the witnesses as daisies. About 6 o'clock the Rowe child returned to its home near the garage apparently much excited. The absence of the deceased was noticed about the same time, and at 6:30 the body was recovered from the canal at a flume where it had lodged against a screen. Mrs. Rowe, a witness for plaintiff, testified that, aiding in the search for the missing child, she and Mrs. Fusselman went to the canal in Yellowstone Street. Her testimony then continues: "We went just a few feet west of the bridge and found on the edge of the bank there quite a bunch of white flowers—I believe they call them lilies. Q. Do you know whether or not they were fresh looking? A. They were quite fresh. I should say it was three and one-half or four feet [266] west of the bridge we found those little lilies, and they were right on the bank. Those lilies or lilies like them were growing on Gallatin Street at that time around our barn and all over the little flat where the street is."

It is insisted that from these facts and circumstances the inference is a legitimate one that after picking flowers in Gallatin Street, the two children proceeded on to the Yellowstone Street bridge, that the deceased fell into the canal near the bridge, and that the flowers found by Mrs. Rowe were dropped by the deceased. In their brief, counsel for appellant refer to the *freshly picked daisies* found by Mrs. Rowe as furnishing strong circumstantial evidence that the child fell into the canal at the point where the flowers were found; but it is to be observed that Mrs. Rowe was not asked if the flowers were plucked, or growing at the place indicated, and it is only an inference from her testimony that they were picked flowers, and another inference that the lilies to which she referred were the daisies mentioned by other witnesses. The allegations of the complaint and the proof are that children of the neighborhood were accustomed to play along the canal and on the streets and unoccupied lots along or near the canal, and if we are to assume that the flowers found by Mrs. Rowe had been plucked recently, what justification can there be for saying that they were left there by the deceased rather than by someone else?

Considering that the child's body was found 1,100 feet from the place where the flowers were, that she could have approached the canal at any point within that distance, and that it was unguarded throughout, we think it could not be more nor less than a guess to say from this evidence that the accident occurred at or near the bridge rather than at some other point, not in a street or alley.

Actionable negligence may be shown by circumstantial evidence, but the circumstances must tend directly to establish the cause of action. The burden of proof is upon the plaintiff, and is not satisfied if the conclusion rests merely upon conjecture or speculation, or if the facts and circumstances have an [267] equal or stronger tendency to support some other theory inconsistent with the one upon which plaintiff relies. (*Shaw v. New Year Gold Mines Co.* 31 Mont. 138, 77 Pac. 515; *Gilmore v. Ostronich*, 48 Mont. 305, 137 Pac. 378.)

3. Error is predicated upon the refusal of the court to grant a new trial upon the ground of newly discovered evidence. Maude Schanelec and Gertrude Husted each made affidavit to facts discovered by them on the evening of May 23, 1913—facts which would have been material to plaintiff in the trial of this case. In his affidavit in support of the motion, plaintiff says: "I am the plaintiff in the above-entitled action. I made diligent inquiry before the trial of said cause took place to obtain evidence to show that my little girl fell into the ditch in which she was drowned, and especially as to the place where she did fall in. The only evidence that I was able to obtain as to the place where the child fell in was the evidence of Mrs. Rowe, who testified to finding a bunch of lilies on the bank of the ditch a short distance west of the bridge crossing Yellowstone Street. That since the trial of said cause I learned that Maude Schanelec and Gertrude Husted had some information as to where the child fell into the ditch, and immediately on getting that information I went to see them and learned from them as to the footprints on the bank, and also as to the markings on the edge of the ditch, as shown by their affidavits. This information came to me, as already stated, for the first time after the case was tried."

In *State v. Matkins*, 45 Mont. 58, 121 Pac. 881, this court reviewed at length the subject now under consideration, stated the reasons which impel courts to look with disfavor upon an application for a new trial based upon newly discovered evidence, and reiterated the rules governing such an application. One of the rules recognized and insisted upon by the authorities everywhere is that the moving party must disclose that he exercised due diligence to procure the newly discovered evidence before the trial. "The particular

efforts which were made to discover the testimony before the trial must be stated, giving the [268] circumstances, and the names of persons of whom inquiry was made. It is not sufficient merely to aver that affiant used 'due diligence' or 'reasonable diligence,' or to employ equivalent expressions, as the court must determine the question of diligence from the facts related in the affidavit of the applicant." (14 Enc. Pl. & Pr. 824; Nicholson v. Metcalf, 31 Mont. 276, 78 Pac. 483.)

Aside from any consideration of the counter-affidavits which were presented, the showing made falls short of the requirements of these rules. It would not be sufficient cause for reversal that the members of this court, if sitting at *visi prius*, might have viewed the application in a more favorable light. The motion was addressed to the sound, legal discretion of the trial court, and we cannot say from this record that the discretion was abused.

The judgment and order are affirmed.

Affirmed.

Brantly, C. J. and Sanner, J. concur.

NOTE.

The reported case holds that an irrigation company maintaining a canal which ran through a city and which was not guarded except at street crossings, was not liable for the death of a child who was drowned in the canal while trespassing on the premises of the company. The doctrine of the "turn-table cases" is held not to be inapplicable to such a state of facts. The liability of a landowner for injury to a trespassing child on account of an unguarded pond, pool, well or the like is discussed in the notes to Sullivan v. Huidekoper, 7 Ann. Cas. 196; Wheeling, etc. R. Co. v. Harvey, 11 Ann. Cas. 981; Bottom v. Hawks, ALN. Cas. 1913A 1025; Riggle v. Lens, Ann. Cas. 1918C 1083; and Barnes v. Shreveport City R. Co. 48 Am. St. Rep. 400, 423. See also the recent case of Thompson v. Alexander City Cotton Mills Co. Ann. Cas. 1917A 721.

STATE

v.

TETRAULT.

New Hampshire Supreme Court—October 5, 1915.

78 N. H. 14; 95 Atl. 669.

Age — Testimony as to Age of Another.

In a prosecution for statutory rape, testimony of defendant's adoptive parents as to

her age and the date of her birth, made upon information by her aunt, who was dead at the time of the trial, and her appearance when they first knew her at the age of three, is admissible.

[See Ann. Cas. 1918A 262.]

Witnesses — Competency — Mental Capacity — Question for Court.

In a prosecution for rape, the question of the mental capacity of prosecutrix is one of fact, to be decided by the court before permitting her to testify.

[See 9 Ann. Cas. 1218; Ann. Cas. 1913E 323.]

Same.

The trial court's conclusion that a witness was of sufficient capacity to testify, based upon evidence warranting the finding, is not reviewable by the supreme court.

Age — Testimony by Person as to His Own Age.

In a prosecution for rape, the testimony of prosecutrix as to her age, while founded on hearsay, is admissible.

[See note at end of this case.]

Rape — Evidence — Subsequent Familiarities.

In a prosecution for rape, evidence as to advances made to the prosecutrix by the defendant, when they met at a time subsequent to the date of the alleged offense, is admissible, as it is such as to indicate that they had probably had improper relations before, and tends to corroborate the state's theory of the defendant's guilt.

[See 11 Ann. Cas. 672.]

Conduct of Prosecutrix with Others.

In a prosecution for rape, where the state did not claim that the defendant had exclusive opportunity, evidence that the prosecutrix was seen away from her home with other men at about the time in question is inadmissible.

Argument of Counsel — Stating Penalty for Crime.

In a prosecution for statutory rape, the refusal to allow defendant's counsel to state to the jury the penalty prescribed for the offense, on the ground that more evidence would be required to convict of a serious crime than of a trivial one, is proper.

Criminal Law — Degree of Proof.

In a prosecution for crime, the defendant's guilt must be proved beyond a reasonable doubt.

Exceptions from Superior Court, Sullivan county.

Criminal action. Louis Tetrault convicted of statutory rape and alleges exceptions. The facts are stated in the opinion. EXCEPTIONS OVERRULED.

Frank O. Chellis and James A. Moynihan for State.

Hurd & Kinney for defendant.

[14] PRASLEE, J.—The crime was alleged to have been committed upon a feeble-minded

girl under sixteen years of age. She was an adopted child and had been known to her adoptive parents since she was supposed to be three years old. Subject to exception, they were permitted to state her age and the date of her birthday. The sources of their information were statements to them by her aunt (who was dead at the time of the trial), her appearance when they first knew her, and the time when she arrived at puberty. The two latter circumstances are of little consequence in this case, for the offense is alleged to have been committed less than two months before the prosecutrix's sixteenth birthday.

Ordinarily, any member of a family is permitted to testify to matters of family history, including, of course, facts as to age or [15] date of birth. It is not necessary to determine whether the rule is made inapplicable by the fact that the person whose age was in question did not become a member of the family to which the witness belonged until three years after the event in her history to which their testimony related took place. The source of information was fully disclosed by the evidence. It appeared that the witnesses fixed the date of the prosecutrix's birth as August 8, 1888, because they had been told that was the fact by her aunt. The whole substance of the evidence as to the date was that the aunt said it was as stated. The aunt being dead, her statement was properly received. *Emerson v. White*, 29 N. H. 482; *Waldron v. Tuttle*, 4 N. H. 371, 378. If there was technical error in the presentation of this evidence, there was none in substance. The jury must have understood that the adoptive parents neither had nor claimed to have any personal knowledge of the fact in question, and that they based their belief upon the competent declaration of the aunt.

The theories upon which testimony as to pedigree is admitted are not wholly harmonious. By most of them the positive statement of the fact in question by these adoptive parents would be received as evidence. 2 Wig. Ev. s. 1489. Whether these precedents should be followed, or whether the stricter limitation sometimes insisted upon should be applied, the result here would be the same.

The prosecutrix was permitted to testify, subject to the defendant's exception. The question of her mental capacity was one of fact to be decided by the presiding justice. *Day v. Day*, 56 N. H. 316. The conclusion that she was of sufficient capacity was based upon evidence warranting the finding and therefore is not open to revision here. *State v. Sawtelle*, 66 N. H. 488, 502, 32 Atl. 831.

The admission of her testimony as to her age was in accordance with the best authorities. "Strictly speaking, one cannot know his exact age except upon hearsay information;

for he is not capable of knowing this, or anything, until an appreciable time after birth. But practically a person's belief on this point has a satisfactory basis. Courts have commonly preferred to accept this practical certainty rather than to insist on academic nicety." 1 Wig. Ev. s. 667, and cases cited.

Several witnesses testified to advances made to the prosecutrix by the defendant when they met at a time subsequent to the date of the alleged offence. The conduct of the parties at this time was [16] such as to indicate that they had probably had improper relations before, and thus tended to corroborate the state's theory of the defendant's guilt. There was no error in the admission of this evidence.

The defendant offered to prove that the prosecutrix was seen away from her home with other men at about the time in question. The exception to the exclusion of this evidence is urged upon the ground that the state's witnesses claimed that the defendant had exclusive opportunity. The prosecutrix was pregnant at the time of the trial, and if the claim as to the state's position were true, the exception would be well grounded. But the state had taken no such position. Such evidence as there was upon the question was brought out by the defendant's counsel upon cross-examination. The question upon this exception is, therefore, whether the evidence tended to show "guilt in another inconsistent with his own participation in the crime." *State v. Wren*, 77 N. H. 361, 363, 92 Atl. 170. It is apparent that the evidence offered had but slight tendency in the desired direction and that its exclusion was not erroneous as matter of law. The question at issue was not the paternity of the child, nor the consent of the prosecutrix, but whether the defendant had intercourse with her.

Counsel also excepted to a refusal of permission to state to the jury the penalty prescribed for the offence and now argue that such statement should be permitted because more evidence should be required to convict of a serious crime than of a trivial one. However well founded the contention may be in morals or philosophy, it has no place in the law. The rule is, proof beyond a reasonable doubt in each case. The jury had no duty to perform in the assessment of the penalty and therefore no occasion to know what it might be. The exclusion of this matter from their consideration was in accord with the uniform practice in this state.

The exception to the charge presents only questions as to the admissibility of the evidence of the prosecutrix's age and is disposed of by the conclusion that there was no error in the admission of the evidence.

Exceptions overruled.

All concurred.

NOTE.**Competency of Witness to Testify as to His Own Age.**

It is the purpose of this note to review the recent decisions passing on the competency of a witness to testify as to his own age. The earlier cases are collected in the notes to *Koester v. Rochester Candy Works*, 16 Ann. Cas. 589, and *Grand Lodge, etc. v. Bartes*, 111 Am. St. Rep. 577.

The recent decisions including the reported case are in accord with the earlier authorities in holding that a witness is competent to testify as to his own age. Such testimony is one of the well-defined exceptions to the rule excluding hearsay evidence. *Klicke v. Allegheny Steel Co.* 200 Fed. 933, 119 C. C. A. 317; *Chicago v. Betti*, 192 Ill. App. 87; *State v. Vinn*, 50 Mont. 27, 144 Pac. 773; *State v. Huggins*, 83 N. J. L. 43, 83 Atl. 495; *Freeman v. Boynton First Nat. Bank*, 44 Okla. 146, 143 Pac. 1165; *Harris v. Hart* (Okla.) 151 Pac. 1038-1042; *Hanson v. Greenlee*, 19 Pa. Dist. 885; *Vaughn v. State*, 62 Tex. Crim. 24, 136 S. W. 476; *Rogers v. State*, 65 Tex. Crim. 105, 143 S. W. 631. See also *People v. Schultz*, 260 Ill. 35, 102 N. E. 1045; *Harvick v. Modern Woodmen of America*, 158 Ill. App. 570; *Stevens v. Elliott*, 30 Okla. 41, 118 Pac. 407; *Caples v. State*, 74 Tex. Crim. 127, 167 S. W. 730; *Smits v. State*, 145 Wis. 601, 130 N. W. 525.

The rule is recognized in criminal as well as in civil cases. Thus in *Boyd v. State*, 72 Tex. Crim. 521, 163 S. W. 67, a prosecution for rape, testimony of the prosecutrix as to her age, based on information of her mother, was admitted. The court said that the weight of such evidence was for the jury to determine. So in *State v. Huggins*, 83 N. J. L. 43, 83 Atl. 495, the court in admitting such testimony said: "The girl herself testified to her own age, and although at one time on her cross-examination she said that all she knew about it was what Mr. Williams told her, she also said on her recross, when asked whether that was all she knew, that her mother told her. It is well settled that one may testify to his own age. *Wigmore on Evidence*, § 667. . . . The reasons for permitting testimony of this character have been nowhere better stated than by Mr. Justice Dixon, speaking for the court of errors and appeals, in *Hancock v. Supreme Council Catholic Benev. Legion*, 69 N. J. L. 308, 55 Atl. 246. Testimony as to the exact birthday must, as he says, rest on hearsay; but testimony as to the approximate age rests on one's own recollection. By counting the years of memory and adding the short period that antedates memory, a period which all normal persons can from observation and experience approximate with much accuracy, a

person can form a sufficiently accurate estimate of his age." See also the reported case.

In *Chicago v. Betti*, 192 Ill. App. 87, an action for the violation of a city ordinance forbidding the sale of tobacco to minors, a witness was allowed to testify as to his own age.

In *Hanson v. Greenlee*, 19 Pa. Dist. 885, an action on a promissory note, the defense was that the note was signed when the defendant was an infant. Testimony by the defendant as to his age at the time of signing the note was admitted.

It would appear, however, from two recent decisions that the Canadian courts are inclined to take the view that a witness is not competent to testify as to his own age. In *Hargreaves v. Wrigley*, 7 Sask. L. Rep. 415, 30 West. L. Rep. 92, the plaintiff brought suit on a promissory note. The defense relied on was infancy, and in support of this the defendant testified as to the date of his birth on information from his mother, and from a copy of the certificate of birth. The court however excluded the testimony, saying that it was merely hearsay. In *Rex v. Hauberg*, 24 Can. Crim. Cas. 297, 8 Sask. L. Rep. 239, 8 West. W. Rep. 1130, 31 West. L. Rep. 779, the defendant was convicted of having seduced a woman of previously chaste character under the age of twenty-one years. At the trial the prosecutrix testified as to her age, and on appeal the supreme court in holding the evidence to be inadmissible said: "The only evidence adduced as to the age of *Elen Caroline Staberg* was her own statement that she was born on the 19th day of July, 1894, in Norway, and her appearance, and a statement made by accused to his sister in April, 1914, when speaking of marrying the private prosecutrix, 'Elen is young, but it will have to go on' referring to the intended marriage. *Wigmore on Evidence*, par. 222, says that 'the appearance of an alleged minor may be considered in judging of his age,' and at par. 667 he says, 'strictly speaking, one cannot know his exact age except upon hearsay information; for he is not capable of knowing this, or anything, until an appreciable time after birth. But practically a person's belief on this point has a satisfactory basis. Courts have commonly preferred to accept this practical certainty rather than to insist upon academic nicety.' For these propositions he cites a number of American cases. . . . As to the second proposition stated by *Wigmore*, that persons may give evidence of their own age, he cites no English or Canadian authorities in support of it, but does cite one Canadian case against the proposition: *Doe v. Ford*, 3 U. C. Q. B. 352. *Robinson, C. J.*, in delivering the judgment of the court said: 'Now, that depends upon what the fact was with regard to the age of *Matthew Hender-*

son at the time of making his will; he died a few days afterwards. The evidence is certainly strong to show that he was only about nineteen years of age, and though there is some evidence to the contrary yet it is much less circumstantial and satisfactory. Still, we should not have disturbed the verdict if it had not seemed to us most probable that the jury were much influenced by the evidence given of the declarations of the deceased Matthew Henderson in regard to his own age, which declarations we consider were not admissible in evidence, for they regarded a fact of which he could not have any personal knowledge, namely, the exact time of his own birth.' . . . I am therefore of the opinion that there was no evidence of the age of the girl to go to the jury." On the other hand in *Rex v. Spera*, 34 Ont. L. Rep. 539, the American rule was recognized by the court and it was held that the mother of the witness being dead, her own statement as to her age, which was corroborated by one who had known her for a long time, was admissible.

CHAMBERS

v.

PRESTON ET AL.

Tennessee Supreme Court—March 23, 1917.

137 Tenn. 324; 193 S. W. 109.

Equitable Conversion — Testamentary Direction for Future Sale.

A will devising the use of land as a loan to the testator's wife to be sold by the executors on her death or on the son's attaining majority, and the proceeds thereof to be distributed among the children, operates to convert the realty into personalty as of the date of the testator's death.

[See note at end of this case.]

Reconversion — How Accomplished.

The beneficial owner of real estate which has been equitably converted into personalty has the power by word or act to reconvert it into realty, but his words or acts to have such effect must be unequivocal, and clearly indicate the purpose to countermand the trust.

Same.

There can be no reconversion except by unequivocal act or declaration of the owner of the entire beneficial interest, and persons under disability are incapable of making such election.

Same.

Where testator by will converted realty to personalty, and one heir mortgaged his inter-

est, which was also levied on by certain creditors, and court proceedings were had, and his interest was sold and bid in by the other legatees, and partition was had, there is no reconversion of the personalty into realty, especially where certain remaindermen in interest were not made parties to the partition suit.

Parties — Virtual Representation.

In a partition suit, where actual appearance of minor children in interest of certain legatees could have been enforced, their interest cannot be bound by the judgment on the theory of virtual representation.

[See note at end of this case.]

Appeal from Chancery Court, Sumner county: STOUT, Chancellor.

Action by John H. Chambers, plaintiff, against M. S. Preston et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

Wm. A. Guild and *Baskerville & Collier* for appellant.

George W. Boddoo, B. G. Ellis and Pitts & McConnico for appellees.

[326] GREEN, J.—This bill was filed by the complainant, John H. Chambers, to recover a reversionary interest in lands in Sumner county alleged to have accrued to him under the will of his father, John Chambers. The chancellor dismissed his bill, and he has appealed to this court.

John Chambers died in Sumner county in 1863, leaving a large estate which he disposed of by will. Among other property he owned a tract of land of about 390 acres, and it is to recover an interest in this tract of land or portions thereof that the bill in this case is filed.

The first item of the will directs the payment of debts of the testator and other items of the will pertinent to this litigation are as follows:

"2nd. I loan to my wife, Mary H., the tract of land on which I now live, containing about 390 acres; also the use of my stock, household and kitchen furniture and farming utensils until my youngest child, Walter R. Chambers, arrives at the age of twenty-one years; at that time my wife, Mary H., if living, is to select of the stock, household and kitchen furniture and farming utensils as may be necessary for her comfort, which I have give to her absolutely. And the balance of said stock, etc., is to be sold on a credit of twelve months; my executor is also to sell said land at that time, or at the death of my wife, on a credit of one [327] and two years. The proceeds of said sale and other property is to be distributed and hereinafter

provided, among my wife and children. I also loan to my wife, Mary H., my negroes, Ned, Dick, Ben, Lucky, Rose and infant child, Matilda, during her natural life, and at her death said slaves and increase are to be disposed of as hereinafter provided. My wife is to furnish my children, Martha, Mary, Sarah and Walter, a saddle horse each, free of charge, as they arrive at age or marry; she is also to complete the education free of charge of my children as have not finished their education at my death.

"3rd. I loan to my daughter, Ann C. Dickerson, my slaves, Lorene and child Lizzie, and a boy, William. To my daughter, Rebecca Shelby, I have given a negro girl, Mittie, four mules, one mare and seven hundred and twenty-five acres of land in Texas and some other property. I loan to my daughter, Martha A., my negroes, Marcia and child, Andrew, a boy Ned. I loan to my daughter Mary J., my slaves, George, Kitty and Alice. I loan to my daughter Sarah, my slaves, Wade, Mary Ann and Henry. I also loan to each of my said daughters an interest with my sons and wife in the proceeds of the land and other property mentioned in clause 2nd and a like interest in all other property I may die possessed of and during their natural lives, to be for the sole and separate use of each of them, free from the contracts and liabilities of their respective husbands, and at the death of my said daughters, thus loaned to them I give and bequeath [328] to their respective children and their heirs, the issue of any child to represent such child. Should any one or more of my daughters die without issue, or the children of such, then the property herein given to such daughters I give to their remaining brothers and sisters.

"4th. I give to my son, John Chambers, my slaves, Polly and Eliza, and to my son Walter R. Chambers, my slaves, Rubin, Adelina and Iona. I also give to my sons an equal interest each in land and other property mentioned in clause 2nd. And also an equal interest in all other property I may die possessed of, to them and their heirs.

"5th. Should my wife be living at the time my son Walter R. arrives at age, then I give and bequeath to her an equal interest with my sons and daughters in the proceeds of my land ordered to be sold, to be hers absolutely. Should she die before that time, then the land is to be sold and divided as herein provided."

The testator left surviving him his widow, Mrs. Mary Chambers, and seven children, as follows: John H. Chambers, Walter Chambers, Sally Chambers, who afterwards married Overton, Martha Chambers, who afterwards married Abbott, Ann. Chambers, who became Abbott's second wife on the death of her sister, Martha, Rebecca Chambers, who married Shelby, and Mary Chambers.

The complainant has outlived all of his brothers and sisters. Neither Mary nor Ann left children or the issue of children. Complainant is a very old man [329] being eighty-six years of age at the time his deposition was taken herein. Shortly after the war he left Sumner county, and has resided since in Texas, Oklahoma, and elsewhere. For many years his family heard nothing of him, and supposed he was dead. On the supposition that complainant was dead, this tract of land, after a partition hereafter referred to, has been dealt with and transferred from time to time, and those portions formerly belonging to Mary and Ann, in which complainant now seeks to establish a right, are in the hands of innocent purchasers, who have made extensive improvements thereon. In the conveyances of the land no account was taken of complainant's reversionary interest inasmuch as he was thought to have died without issue.

It is insisted for the defendants that the will of John Chambers, the father, effected a conversion of the said tract of land from realty into personalty, and that complainant's remedy, if any he has, is against the representatives of his sisters Ann and Mary. These sisters made conveyances, as before stated, in disregard of complainant's reversionary interest. It is conceded that complainant has no right to recover the land if it was indeed converted into personalty by the will of his father, and disbursed by the two sisters, unless certain acts of the parties amounted to a reconversion.

We think the will of John Chambers did not accomplish a conversion of the tract of land into personalty.

[330] By the second clause of said will heretofore quoted, the said tract, together with other property, was loaned to testator's wife "until my youngest child, Walter R. Chambers, arrives at the age of twenty-one years," and at that time the executor was directed to sell said land, or at the death of testator's wife, on a credit of one and two years. Testator then directed that the "proceeds of said sale and other property is to be distributed as hereinafter provided among my wife and children."

In the third section of the will this language appears:

"I also loan to each of my said daughters an interest with my sons and wife in the proceeds of the land and other property mentioned in clause 2nd, and a like interest in all property I may die possessed of during their natural life to be for the sole and separate use of each of them," etc.

In the fifth clause of the will it was provided that if the widow should be living at the time Walter R. Chambers arrived at age, then she was to be given an equal interest with the sons and daughters in the proceeds of the land ordered to be sold to be hers

absolutely. This clause then contained the following:

"Should she die before that time the land is to be sold and divided as herein provided."

We think that the foregoing was an explicit, imperative, and an unequivocal direction to the executor of testator to sell the land and divide the proceeds as indicated by the will. The sale was to be made at all events when Walter R. Chambers arrived at the [331] age of twenty-one years, or if the widow died sooner the sale was to be made and the proceeds divided upon her death.

There seems to be no doubt of the testator's intention, and the language used by him was sufficient to accomplish an equitable conversion of the tract of land. *Wayne v. Fouts*, 108 Tenn. 145, 65 S. W. 471; *Wheless v. Wheless*, 92 Tenn. 295, 21 S. W. 595; *Bedford v. Bedford*, 110 Tenn. 204, 75 S. W. 1017; *Bennett v. Gallaher*, 115 Tenn. 568, 92 S. W. 66; *Stephenson v. Yandle*, 3 Hayw. (Tenn.) 109; *McCormick v. Cantrell*, 7 Yerg. (Tenn.) 615; *Campbell v. Campbell*, 3 Head (Tenn.) 325; *Reynolds v. Brandon*, 3 Heisk. (Tenn.) 593.

There was no contingency as to the sale of this land. It was directed to be sold at a definite future time, namely, when the youngest son reached the age of twenty-one years, or earlier, upon the death of the widow, if she died prior to the son's majority. The rule is established in Tennessee that where land is directed to be sold at a definite future time it is to be regarded as converted into personality as of the time of the testator's death. *Green v. Davidson*, 4 Baxt. (Tenn.) 488; *Bennett v. Gallaher*, 115 Tenn. 568, 92 S. W. 66.

The great weight of authority is to this effect. Note, 17 Ann. Cas. 643, and note, Ann. Cas. 1915D 434.

It is contended, however, for the complainant that, although the will may have brought about a conversion [332] of testator's real estate, a reconversion was thereafter effected by certain proceedings we now detail.

We first observe that the beneficial owner of real estate, equitably converted into personality has the power by his words and acts to reconvert it into realty and stamp it with the character of realty at any time before an actual sale of the land. To have such an effect, however, the words and acts of the beneficial owner must be unequivocal and clearly indicate his purpose to countermand the trust. *Wayne v. Fouts*, 108 Tenn. 145, 65 S. W. 471.

The complainant gave a mortgage on his interest in the aforesaid real estate, and this interest likewise was levied on by certain of his creditors. Court proceedings were had, and the said interest of the complainant was sold and bid in by the other legatees of the testator. Thereafter about 1859, in a cause

pending in the chancery court of Sumner county, a petition was filed by A. W. Overton and wife, Sally (Chambers) Overton, John Shelby and wife, Rebecca (Chambers) Shelby, Ann (Chambers) Abbott, Mary H. Chambers, Walter Chambers, and Mrs. Mary Chambers, against Reginald Abbott. The complainants were the widow and all of the children of the testator except John H. Chambers and Mrs. Martha Abbott. Mrs. Martha Abbott had died leaving a son, Reginald Abbott, who was made a defendant to the said petition as aforesaid.

In this petition it was recited that the petitioners had acquired the interest of John H. Chambers in the [333] tract of land left by their father; that the executor had endeavored to sell the land, but had not been able to get a suitable offer; reference was made to the will of John Chambers, and it was asked that the petitioners be permitted to partition in kind the tract of land among them. It appears to have been assumed in this petition that the parties before the court represented all the beneficial interests in the land, and a reference was asked to determine whether such partition in kind would be to the advantage of Reginald Abbott, the minor defendant son of Mrs. Martha Abbott, deceased.

A reference was ordered, and the master reported that such partition in kind would be to the advantage of the minor, and this report was confirmed, partition made, and by appropriate decree the various parties before the court were assigned portions of the tract of land in severalty.

It is urged by the complainant that these proceedings had the effect of reconverting the converted land into real estate.

It is said in the case of *Wayne v. Fouts*, supra, that the doctrine of reconversion is not so familiar as the doctrine of equitable conversion. Still the principles of the former doctrine are well established. In *Wayne v. Fouts* this court said:

"Of course, the burden of establishing a countermand of the trust, a reconversion of the estate, is upon those who assert it. They must show the election claimed, by proof of some unequivocal act or [334] declaration of the beneficiaries, evincing an intention on their part to extinguish the trust and terminate the equitable character impressed upon the property in the first instance of the instrument conferring the benefit."

In 2 Jarman on Wills, 191 (quoted in *Wayne v. Fouts*), it is said:

"That in order to amount to an election to take property in its actual, as contradistinguished from its eventual, or destined, state, the act must be such as to absolutely determine and extinguish the converting trust, and hence it would seem to follow that where two or more persons are interested in the

property, it is not in the power of any one coproprietor to change its character, in regard even to his own share; for, as the act of the whole world be requisite to put to the trust, nothing less will suffice to impress upon the property a transmissible quality, foreign to that which it had received from the testator."

The supreme court of the United States used this language:

"Thus, where the whole beneficial interest in the money in the one case, or in the land in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust*, but will permit him to take the money or the land if he elect to do so before the conversion has actually been made; and this election he may make, as well by acts or declarations, clearly indicating a determination [335] to that effect, as by application to a court of equity. It is this election, and not the mere right to make it, which changes the character of the estate so as to make it real or personal, at the will of the party entitled to the beneficial interest. If this election be not made in time to stamp the property with a character different from that which the will or other instrument gives it, the latter accompanies it, with all its legal consequences, into the hands of those entitled to it in that character. So that in the case of the death of the *cestui que trust*, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done had the trust been executed, and the conversion actually made in his lifetime." *Craig v. Leslie*, 3 Wheat. 578, 579, 4 U. S. (L. ed.) 460, 464.

The following appears in Ruling Case Law:

"Moreover, if any of the beneficiaries are incapable of making an election—that is, if they are infants, or lunatics, or incompetent, or otherwise disqualified from making contracts with reference to their property—there can be no reconversion of the estate. . . . Only those who are not incapacitated *sui juris*, for dealing with their own property effectively, may elect to have a reconversion; and where the interest of a person properly qualified so to elect is absolute and wholly vested in himself, there is no doubt of his right so to elect, no matter whether the conversion intended was that of land into money or money into land." 6 R. C. L. 1091.

[336] To like effect see *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600; *Ukiah Bank v. Rise*, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118; *Ebey v. Adams*, 135 Ill. 80, 25 N. E. 1013, 10 L.R.A. 162; 9 Cyc. 85 et seq.

It would seem from these authorities that there can be no reconversion except by unequivocal act or declaration of the owners

of the entire beneficial interest, and that persons under disability are incapable of making such an election. This indeed is conceded by counsel for complainant, but they insist that the court, in the partition suit, after hearing proof, made an election for the minor defendant to reconvert.

It is said that these proceedings so far as the adult parties were concerned, unmistakably indicated an election on their part to take the land in its original form; that the action of the court upon the reference accomplished a reconversion as to the minor's interest; that although complainant was not a party, he had theretofore by a mortgage of his interest in the tract of land elected to take it as real estate and thereby reconverted his interest, or if his interest was not in this way reconverted, such interest had passed to the parties to this suit, and was reconverted along with their original interest by the proceedings just mentioned.

There are two cases in which a reconversion was ordered by the court for an infant when it appeared to the advantage of the latter, namely, *Swann v. Garrett*, 71 Ga. 566, and *Robinson v. Robinson*, 19 Beav. (Eng.) 494.

[337] In the latter case there was no discussion of the question. In the Georgia case there was a vigorous dissent.

If it be true that a court of equity in Tennessee has the power to make an election for an infant in such cases and to decree for him a reconversion of converted realty, nevertheless we think the proceedings relied on by the complainant failed to reach the result ascribed to them for several reasons.

In the first place, as said of proceedings discussed in *Wayne v. Fouts*, supra, the question of reconversion was not presented in the pleadings nor adjudged in the decree. While the petition referred to the will of John Chambers, yet the matter was presented rather as if the land itself had been devised to the parties interested, and the particular attention of the court was not called to the conversion directed by the testator. The decree certainly did not directly adjudge the propriety of a countermand of the testamentary trust, nor do we think that the effect of the decree was to bring about such a result, inasmuch as the parties before the court did not represent the entire beneficial interest involved, nor did said decree, in any way, protect the contingent remaindermen.

The daughters of the testator took only a life estate in the property bequeathed to them with remainder "to their respective children and their heirs, the issue of any child to represent such child." It was further provided in the will that should any of the daughters die without issue or children of such, then [338] the property given to them

was to go to their remaining brothers and sisters.

It appears almost certainly from the deposition of John H. Chambers and otherwise in the record that at the time of the partition suit Mrs. Rebecca Chambers Shelby had children, and likewise Mrs. Sally Chambers Overton had children. These two daughters were merely life tenants. Their children, who were first takers in remainder, were not made parties. The case progressed as if these daughters were absolute owners instead of life tenants. The rights of the Shelby and Overton children were not noticed.

It is contended, however, by complainant that the doctrine of virtual representation should here find application and all interests treated as having been before the court.

This doctrine may be invoked to bind the interests of parties uncertain, indeterminable, or not in being at the time of suit. Respecting the rights of the Shelby and Overton children, they should have been brought in. They were known and available. There is no room for virtual representation when actual appearance can be enforced. Likewise, under our rule, these children were necessary parties to a suit to pass the estate of the contingent remaindermen.

We had occasion to discuss virtual representation in the late case of Bransford Realty Co. v. Andrews, 128 Tenn. 725, 164 S. W. 1175, and there said:

"It is well settled that contingent limitations and executory devises to persons not in being, or uncertain [339] and indeterminable at the time of the proceedings, may be bound by a decree against the person then claiming the vested estate. In suits to enforce a trust, or with reference to trust property, so limited in remainder, if the holder of the legal title, the life tenant, and the persons in being in whom the remainder would become a vested estate if the life estate then fell in—all these are parties, a valid decree may be pronounced."

The foregoing rule was deduced from *Andrews v. Andrews*, 7 Heisk. (Tenn.) 234; *Freeman v. Freeman*, 9 Heisk. (Tenn.) 301; *Rutherford v. Rutherford*, 116 Tenn. 383, 92 S. W. 1112, 115 Am. St. Rep. 799.

The partition suit relied on by complainant fell short of the requirements laid down above. There were persons in being in whom the remainder would have become a vested estate if the life estate had then fallen in, to wit, the children of Mrs. Shelby and of Mrs. Overton.

In the other particular indicated, the partition suit failed to comply with the rules as to the conversion of an estate with contingent limitations in favor of indeterminable parties. In *Ridley v. Halliday*, 106 Tenn. 607, 619, 61 S. W. 1025, 53 L.R.A. 477, 82 Am. St. Rep. 902, it is said to be essential in

every such case, that the interest of the contingent remainderman in the proceeds of the converted property be preserved by the decree directing the conversion. A decree which fails so to preserve the interest [340] of virtually represented contingent remaindermen is not binding on them. As heretofore pointed out, the petition and the decrees relied on by complainant seemed to assume that all the parties to the suit had absolute interests in the property dealt with, and ignored the rights of the contingent remaindermen altogether. These proceedings therefore did not, and could not, have amounted to a transmutation of the contingent interest in this estate, and thereby no reconversion was accomplished.

It results that the chancellor correctly dismissed the complainant's bill, and his decree will be affirmed.

NOTE.

In the reported case it is held that a testamentary direction for the sale of realty when the testator's youngest son reaches his majority, or on the death of the testator's widow, whichever event first occurs, operates to convert the land into personalty as of the date of the death. The earlier cases discussing the time when conversion takes place under a will directing a sale at a future time are reviewed in the notes to *Beaver v. Ross*, 17 Ann. Cas. 640; *Greenman v. McVey*, Ann. Cas. 1915D 430; and *Ford v. Ford*, 5 Am. St. Rep. 117.

It is also held in the reported case that the doctrine of virtual representation does not warrant the omission as parties to a partition suit of remaindermen who are in being and in whom the remainder will become a vested estate if the life estate falls in. For a discussion of the equitable doctrine of virtual representation, see the note to *Leviness v. Consolidated Gas, etc. Co.* Ann. Cas. 1913O 649.

BARTHOLOMEW

v.

TOWN OF SPRINGDALE.

Washington Supreme Court—June 9, 1916.

91 Wash. 408; 157 Pac. 1090.

Public Officers — Right to Compensation — Failure to Approve Bond.

Under Rem. & Bal. Code, § 7722, requiring the marshal in towns of the fourth class, before entering upon his official duties, to

execute a bond to the town, and providing that the bond shall be approved by the council, a marshal appointed, giving bond and oath and entering upon and performing the duties of his office is entitled to salary as marshal de jure, notwithstanding failure of the council to approve his bond.

Effect of Neglect of Duty.

The right of a de jure officer to salary is not affected by the quantity of services rendered by him or even neglect to render them where such failure falls short of actual abandonment of the office.

[See note at end of this case.]

Appeal from Superior Court, Stevens county: JACKSON, Judge.

Action by C. E. Bartholomew, plaintiff, against Town of Springdale, defendant. From judgment rendered, plaintiff appeals. The facts are stated in the opinion. REVERSED.

Jesseph & Bourland for appellant.

J. B. Slater and Carey & Johnson for respondent.

[408] PARKER, J.—The plaintiff, C. E. Bartholomew, seeks recovery of the sum of \$720 from the defendant, Town of Springdale, which he claims as the salary attaching to the office of marshal of the town while he was the incumbent of that office for the period of one year. Trial before the superior court of Stevens county sitting with a jury resulted in verdict and judgment for the sum of \$300, from which the plaintiff has appealed to this court.

Counsel for appellant contend he is entitled to have judgment rendered in his favor for the full amount of salary claimed by him, and that the trial court erred in refusing to [409] so rule, as a matter of law, upon motion made by his counsel for a directed verdict immediately following the announcement of counsel for respondent that they rested their case.

We note that, after the denial of this motion by the court, some rebuttal evidence was introduced in appellant's behalf, and also some sur-rebuttal evidence introduced in respondent's behalf; but none of this additional evidence, as we view it, had any bearing whatever upon the undisputed facts which we regard as determinative of the question of whether or not appellant is entitled to judgment as a matter of law, as in effect asked for in his motion for directed verdict. Therefore, if the trial court committed error in refusing to direct a verdict in appellant's favor when requested so to do, such error was not cured by anything appearing in the rebuttal and sur-rebuttal evidence introduced thereafter.

The undisputed facts determinative of appellant's right to judgment as a matter of Ann. Cas. 1918B.—28.

law may be summarized as follows: On February 3, 1912, the mayor of the Town of Springdale appointed appellant marshal of the town. This appointment was evidenced by a communication addressed to appellant by the mayor stating "I hereby appoint you town marshal of the town of Springdale, Wash." This appointment was unqualified by other language and is silent as to the time it became effective, so far as the giving of bond and taking of the oath of office by appellant is concerned. At that time, there was in force in the town an ordinance fixing the salary of the town marshal at \$60 per month, and there was also at that time in force an ordinance fixing the amount of the official bond required to be furnished by the town marshal at \$300. On the same day, appellant executed and deposited with the town clerk his official bond in the sum of \$300, conditioned as the ordinance and Rem. & Bal. Code, § 7722 (P. C. 77 § 371), require. The bond was executed by two sureties with appellant, who, by affidavit in due form indorsed thereon, stated they were each worth \$600 over and above [410] all liabilities, in separate property situated within the state not exempt from execution. There was also indorsed upon this bond appellant's oath of office in due form, sworn to before a notary public. Some controversy arose as to whether or not this bond was formally approved by the town council as required by Rem. & Bal. Code, § 7722. The evidence upon this question was rejected, however, by the trial court, evidently because the approval claimed by appellant to have been had was at a meeting of the council where there was not a quorum of qualified members of the council present. We will therefore proceed as though the town council never formally approved the bond by proper evidencing of such approval upon their minutes or by indorsement upon the bond. From that time until February 3, 1913, no other person was appointed to the office of marshal. During all this period of one year, appellant claimed and held himself out to be marshal of the town, and at least in some substantial measure performed the duties pertaining to that office. There is some conflict in the evidence as to the extent of such performance, but that no one else was legally authorized to perform or performed such duties is certain. We may add that appellant had possession of the personal property of the town used by the incumbent of the office, such as star, handcuffs, club, etc. It also inferentially appears that he had possession of the town jail. It is undisputed in any event that he put persons in the jail, assuming in doing so to act as marshal.

Rem. & Bal. Code, § 7722, relating to the qualifications of officers of towns of the fourth class, to which class the town of Springdale

belongs, so far as necessary to here notice the provisions thereof, reads:

"The clerk, treasurer, and marshal shall respectively, before entering upon the duties of their respective offices, execute a bond to such town in such penal sum as the council by ordinance may determine, conditioned for the faithful performance of his duties; . . . such bonds shall be approved [411] by the council. . . . Every officer of such town, before entering upon the duties of his office, shall take and file with the clerk the constitutional oath of office."

It is plain from a reading of this section that appellant in receiving his appointment, depositing with the town clerk his bond and oath of office, and the entering upon his duties as marshal, became an officer *de jure* with all the powers, and entitled to all the emoluments of the office, unless we are to hold otherwise because of the fact that his bond was not formally approved by the town council. That the failure on the part of the council to formally approve his bond did not prevent him from becoming an officer *de jure*, we think is determined by the decision of this court in *State v. Carroll*, 57 Wash. 202, 106 Pac. 748. The office there involved was civil service commissioner of the city of Seattle. Chealander, the appointee, did not then, nor thereafter, give and file the bond required by the city charter before entering upon the duties of such office. Touching the question of whether or not Chealander was a *de jure* or merely a *de facto* officer, Justice Fullerton, speaking for the court, at page 208 of the decision, said:

"The failure to give a bond does not render an officer duly elected or appointed a *de facto* officer. He is a *de jure* officer holding by a defeasible title. *Foot v. Stiles*, 57 N. Y. 399. The giving of a bond is a mere ministerial act for the security of the government, and not a condition precedent to the officer's authority to act, unless especially made so by statute. *Glavey v. U. S.* 182 U. S. 595. The courts generally hold that, even though the statute expressly provides that, upon a failure to give a bond within the time prescribed, the office shall be deemed vacant and may be filled by appointment, the default is a ground for forfeiture only, not forfeiture *ipso facto*, and that if, notwithstanding such default, the state or other power sees fit to excuse the delinquency by granting the officer his commission, the defects of his title are cured, and it is a title *de jure* having relation back to the time of his election or appointment."

[412] The earlier decision of *State v. Ruff*, 4 Wash. 234, 29 Pac. 999, 16 L.R.A. 140, lends support to this view.

Now, § 7722, above quoted, requires only that the marshal shall "execute a bond to

such town" before entering upon the duties of his office, not that such bond shall be approved by the council before entering upon the duties of his office. Manifestly, then, when appellant so executed and delivered to the town clerk his official bond, sufficient upon its face as to form and qualification of sureties, as this bond plainly was, he had performed every duty required of him by § 7722 as a prerequisite to his right to enter upon the duties of his office. Plainly the delivery to the town clerk was a delivery to the town, and also a delivery to the council for its approval. It is not claimed that the counsel ever affirmatively rejected this bond or demanded of appellant another or different bond. It may be that the council could have required another bond, so far as the sufficiency of the sureties are concerned, and that the failure on the part of appellant to furnish a bond such that the qualifications of the sureties would meet the council's approval would be cause for his removal from the office of marshal; but that is foreign to the question of appellant then being the lawful incumbent of the office of marshal. It seems quite clear to us that appellant was, during the year for which he claims salary, the marshal *de jure*.

It seems plain from the authorities that the quantity of service rendered by a *de jure* officer, or even the question of neglect to render the official services required of him, in any event when such failure falls short of an actual abandonment of the office, is wholly immaterial to the question of his right to the salary or compensation which the law attaches to the office; this, manifestly upon the theory that the question of his right to compensation is not a question of contract. The question was considered learnedly and at some length in the supreme court of Iowa in *Bryan v. Cattell*, 15 Ia. 538. [413] That case involved an attempt to collect salary by a district attorney from the state, the auditor declining to issue the warrant therefore because of his absence from the state and neglect of the duties of that office. Recognizing the possible wrong and injustice to the state, but there being no statute providing for the deduction or forfeiture of salary for the cause which there appeared and which might be considered as morally entitling the state to resist payment of the salary, the court observed, on page 552, as follows:

"It must be remembered, however, that we are dealing with a practical, and not an abstract, question. And practically, the difficulty in the view suggested is, that it would be impossible to tell where the true line should be drawn. That is to say, how long an absence from official duties—how great delinquency shall work a forfeiture of salary. In the absence of statute, shall it be one day,

or one week, or one month, or one year? Where shall faithfulness end, and delinquency begin? Add to these considerations the fact, that it is frequently impossible to tell to what extent the services of the officers were necessary, at the time covered by the supposed delinquency, and the propriety of the rule which entitles the officer to his salary so long as he remains in office, becomes reasonably manifest. The better and safer rule doubtless is, that if he is in point of law actually in office, he has a legal right to the salary pertaining to it. His conduct may be such as to render him liable to removal, but when the statute makes no deduction for absence or neglect of duty, and the state takes no step as a consequence of such absence or delinquency, we suppose it is the legal right of the officer to demand the full salary allowed him by law."

The reason of this doctrine is rendered evident by the general rule stated in Throop on Public Officers, in § 443, as follows:

"It has been often held, that an officer's right to his compensation does not grow out of a contract between him and the state, or the municipality by which it is payable. The compensation belongs to the officer, as an incident of his office, and he is entitled to it, not by force of any contract, but because the law attaches it to the office."

[414] See also Mechem, Public Officers, § 855, and 29 Cyc. 1423.

The undisputed facts which bring this case within this doctrine are: Appellant's appointment, his bond and official oath on file with the town clerk, which are record facts; and also the undisputed fact that appellant held himself out and assumed to act as town marshal, having possession of such property of the town as usually attaches to such an office. The conflicting evidence has only to do with the extent of the official duties performed by appellant as town marshal, but even as to that, there is no evidence in this record tending to show that he neglected to perform all such duties as he was called upon to perform or that were necessary for him to perform.

We cannot escape the conclusion that appellant was the town marshal *de jure* and, as such, entitled to the salary which by law attached to that office during the year claimed, that he was entitled to the ruling for an instructed verdict as asked for when respondent rested its case, and that the rebuttal and sur-rebuttal evidence thereafter introduced did not cure the error of the court in denying appellant's motion for a directed verdict.

Some claim is made in appellant's complaint touching the matter of interest upon his unpaid salary. The question is not, however, presented here by either argument or

citation of authority. We therefore give it but passing attention without assuming to lay down any rule of law relative to cases of this kind, and conclude that appellant is entitled to interest upon his year's salary of \$720 at the legal rate of six per cent from the 13th day of September, 1913, the date of filing his complaint in this action. He may be technically entitled to interest commencing at an earlier date, but under all the circumstances, we conclude to fix this as the date of the commencement of his interest.

The judgment is reversed, and the cause remanded to the superior court with direction to enter judgment in appellant's [415] favor and against respondent for \$720, with legal interest thereon from September 13, 1913.

Morris, C. J., Main, Holcomb, and Chadwick, JJ., concur.

NOTE.

Neglect of Duty as Affecting Right of Public Officer to Salary.

Introductory, 435.

Office Not Abandoned:

In Absence of Statute, 436.

Under Statute, 439.

Office Abandoned, 441.

Suspension from Office:

Illegal Suspension, 442.

Legal Suspension, 445.

Removal from Office:

Illegal Removal, 446.

Legal Removal, 449.

Occupancy of Office by De Facto Officer, 450.

Introductory.

This note discusses the cases dealing with the effect of the neglect of duty by a public officer on his right to salary. The term "neglect of duty" as used here refers not only to a voluntary failure to perform the services called for by an office, but also to a prevention of performance of duties by the acts of others. The general rule deducible from the cases is that a public officer is entitled to the compensation attached to the office as long as he is the lawful incumbent thereof, though he does not perform the duties thereof, either through his own fault or because he has been wrongfully excluded or ousted from it. The rule rests on the reason that the officer's right to compensation is statutory and not contractual.

In *State v. Gordon*, 245 Mo. 12, 149 S. W. 638, the court said: "Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the

amount or value of services performed, but is incidental to the office. Throop on Public Officers (sec. 443) says: 'It has been often held, that an officer's right to his compensation does not grow out of a contract between him and the state. The compensation belongs to the officer, as an incident of his office, and he is entitled to it, not by force of any contract, but because the law attaches it to the office.' Mechem on Public Offices and Officers says: 'Sec. 855. As has been seen, the relation between the officer and the public is not the creature of contract, nor is the office itself a contract. So his right to compensation is not the creature of contract. It exists, if it exists at all, as the creation of the law, and when it so exists, it belongs to him "not by force of any contract, but because the law attaches it to the office." The most that can be said is that there is a contract to pay him such compensation as may from time to time be by law attached to the office. 'Sec. 856. Unless, therefore, compensation is by law attached to the office, none can be recovered. A person who accepts an office to which no compensation is attached is presumed to undertake to serve gratuitously, and he cannot recover anything upon the ground of an implied contract to pay what the service is worth.'"

See also *Bennett v. Orange*, 69 N. J. L. 176, 54 Atl. 249, wherein it was said: "But it must be remembered that the officer's right to compensation does not grow out of a contract between him and the municipality by which it is payable. The compensation belongs to him, not by force of any contract, but because the law attaches it to the office. . . . And where a salary thus attaches to an office the right to it is not affected by a diminution of the duties of the office—the office itself remaining."

Office Not Abandoned.

IN ABSENCE OF STATUTE.

When an officer does not abandon his office, the fact that he does not perform all or any of its duties will not affect his right to the salary attached thereto unless a statute otherwise provides.

England.—*Slingsby's Case*, 3 Swanst. 176, 36 Eng. Rep. (Reprint) 821; *Reg. v. Sandwich*, 2 Q. B. 895, 42 E. C. L. 965, 2 Gale & D. 28, 6 Jur. 684, 11 L. J. Q. B. 132.

United States.—*Sleigh's Case*, 9 Ct. Cl. 369; *Reinhard's Case*, 10 Ct. Cl. 282; *Knight v. U. S.* 35 Ct. Cl. 129; *Pack v. U. S.* 41 Ct. Cl. 414.

Alabama.—See *White v. State*, 123 Ala. 343, 26 So. 577, stated at length *infra* in the subdivision *Under Statute*.

Arkansas.—*Brizzolari v. Crawford*, 38 Ark. 218. See also case cited *infra* in the subdivision *Under Statute*.

California.—*Bergerow v. Parker*, 4 Cal. App. 169, 87 Pac. 248.

Georgia.—*Adams v. Justices of Inferior Ct.* 21 Ga. 206.

Hawaii.—*MacFarlane v. Damon*, 8 Hawaii 19. But compare *King v. Green*, 6 Hawaii 711.

Illinois.—*Dinneen v. Bradford*, 190 Ill. App. 239; *People v. Bradford*, 267 Ill. 486, 108 N. E. 732.

Indiana.—*Leonard v. Terre Haute*, 48 Ind. App. 104, 93 N. E. 872.

Iowa.—*Bryan v. Cattell*, 15 Ia. 538.

Kansas.—*Miami County v. Collins*, 47 Kan. 417, 28 Pac. 175; *Whitaker v. Topeka*, 9 Kan. App. 213, 59 Pac. 668. Compare case cited *infra* in the subdivision *Under Statute*.

Kentucky.—*Auditor v. Adams*, 13 B. Mon. 150; *Garrard v. Nuttall*, 2 Metc. 106; *Auditor v. Cochran*, 9 Bush 7; *Perkins v. Auditor*, 79 Ky. 306. Compare case cited *infra* in the subdivision *Under Statute*.

Michigan.—*People v. Miller*, 24 Mich. 458, 9 Am. Rep. 131; *Comstock v. Grand Rapids*, 40 Mich. 397; *Carney v. Whelan*, 147 Mich. 15, 110 N. W. 128, 13 Detroit Leg. N. 955. Compare cases cited *infra* in the subdivision *Under Statute*.

Minnesota.—*Larson v. St. Paul*, 83 Minn. 473, 86 N. W. 459.

Mississippi.—*Holder v. Sykes*, 77 Miss. 64, 24 So. 261.

Missouri.—*Bates v. St. Louis*, 153 Mo. 18, 54 S. W. 439, 77 Am. St. Rep. 701; *State v. Carr*, 3 Mo. App. 6; *Cavanee v. Milan*, 99 Mo. App. 672, 74 S. W. 708.

Nevada.—*Meagher v. Storey County*, 5 Nev. 244.

New Hampshire.—*Baker v. Nashua*, 77 N. H. 347, 91 Atl. 872.

New York.—*Minto v. New York*, 3 E. D. Smith 384; *Whitney v. New York*, 39 Super. Ct. 108; *People v. French*, 91 N. Y. 265; *O'Leary v. New York Board of Education*, 93 N. Y. 1, 45 Am. Rep. 156; *Goetting v. New York*, 29 Misc. 717, 61 N. Y. S. 334; *O'Hara v. New York*, 33 Misc. 53, 66 N. Y. S. 909. Compare cases cited *infra* in the subdivision *Under Statute*.

Oklahoma.—*Young v. Morris*, reported in full post, this volume, at page 450.

South Dakota.—*Putnam v. Custer County*, 25 S. D. 542, 127 N. W. 641.

Utah.—*Tanner v. Edwards*, 31 Utah 80, 10 Ann. Cas. 1091, 86 Pac. 765, 120 Am. St. Rep. 919.

Washington.—See the reported case.

Thus in *MacFarlane v. Damon*, 8 Hawaii 19, the court said: "As to the third ground of defense, i. e., that the petitioner has not performed the duties of the office, and has

been absent from the country during a large part of the time for which he claims to be paid, I feel, as I have suggested above, that the best remedy for such a state of things is to dismiss the official so failing to perform. But it seems to me that a person holding an office is entitled to the pay of the office in full, so long as he remains in it. To admit that the minister of finance has the discretion to call an official to account for lost time or incompetent performance, and investigate his official record with a view to pay him only for work actually performed, and to discount his salary accordingly, would place upon his shoulders, in addition to his other responsibilities, a duty so onerous and uncertain and easily capable of abuse as to render its performance well-nigh impracticable, and its attempt inconsistent with public policy. The obvious remedy for official dereliction is dismissal, which is one of the arguments before stated for the necessity of a responsible appointing power. A decrease by the executive of the salary of an official, fixed by law, would be in the nature of an interference with the legislation, the legislature being the sole judge of the value to the government of the work pertaining to any office."

In *People v. Bradford*, 267 Ill. 486, 108 N. E. 732, it was said: "The law is well settled in this state that the right to the salary is attached to and follows the legal title to the office. This is true irrespective of the question by whom the services were, in fact, actually rendered. . . . In *City of Chicago v. Luthardt* [191 Ill. 516] supra, it is said: 'The legal right to the office carries with it the right to the salary or emoluments of the office. The salary follows the legal title. This doctrine is so generally held by the courts that authorities hardly need be cited.' While this rule has been most frequently announced and applied in suits between de jure and de facto officers over the salary to an office, it is nevertheless a basic principle of law and one of general application. It has been so applied not only in cases of protracted absence and nonperformance of duties, . . . but in cases of actual suspension from office. . . . An officeholder may recover the full amount of the salary accruing during the time of his suspension, without any deduction of the amount he may have earned in other employments during that time. . . . That the duties of appellee's office were actually performed by someone is disputed. Had they been performed by a mere intruder or interloper, without warrant or authority of law, the right of appellee to recover such salary must be conceded. . . . That these duties may have been performed by the other commissioners under a claim of right and lawful authority to do so does not alter the situation. This would be true, also, in the case of a de facto officer."

In *Leonard v. Terre Haute*, 48 Ind. App. 104, 93 N. E. 872, the court said: "The salary of an official position belongs to the officer occupying such position as an incident to the office, and does not depend upon his performance of the duties of the office. The statute makes provision for the chief of the fire force. It also provides for his appointment, the manner of fixing his compensation, and the proceedings by which he can be removed. His duties are of a public nature. We therefore conclude that the duties of the chief of the fire force or a member of the department are so far official in their character that one holding either position is entitled to draw his salary as an incident to such position, whether he performs the duties of such position or not."

In *Bryan v. Cattell*, 15 Ia. 538, it was said: "It seems to us, the dictate of reason and good conscience, that the state should not be required to pay for services never rendered; that public officers should be paid their salaries when and only when they discharged the duties imposed upon them by law; that the same rule should apply to the state as to individuals, and that no court ought to consent to the auditing of a demand against the state where it was admitted that the claimant made no pretense of having rendered the services for which he claims. It must be remembered, however, that we are dealing with a practical, and not an abstract, question. And practically, the difficulty in the view suggested is, that it would be impossible to tell where the true line should be drawn. That is to say, how long an absence from official duties—how great delinquency shall work a forfeiture of salary. In the absence of statute, shall it be one day, or one week, or one month, or one year? Where shall faithfulness end, and delinquency begin? Add to these considerations the fact that it is frequently impossible to tell to what extent the services of the officers were necessary, at the time covered by the supposed delinquency, and the propriety of the rule which entitles the officer to his salary so long as he remains in office, becomes reasonably manifest. The better and safer rule doubtless is, that if he is in point of law actually in office, he has a legal right to the salary pertaining to it. His conduct may be such as to render him liable to removal, but when the statute makes no deduction for absence or neglect of duty, and the state takes no step as a consequence of such absence or delinquency, we suppose it is the legal right of the officer to demand the full salary allowed him by law."

In *Baker v. Nashua*, 77 N. H. 347, 91 Atl. 872, it was said: "Although some courts hold that a de jure officer cannot recover under such circumstances when the salary has been paid to a de facto officer without notice of the former claim, most courts hold that

the simple fact an officer *de jure* has not performed the duties of his office is no defense to an action to recover the salary attached to the office."

In *Putman v. Custer County*, 25 S. D. 542, 127 N. W. 641, the court said: "The decisions and textwriters, however, lay down the rule that, so long as an officer is permitted to remain in office he is entitled to the salary prescribed by law, even though his failure to perform his duties is made a crime, in the absence of a statute establishing a different rule."

In *Reinhard's Case*, 10 Ct. Cl. 282, it appeared that the plaintiff was a clerk in the United States Treasury Department. He handed in his resignation to take effect October 31st, having been given a leave of absence during October. It was held that he was entitled to his salary during that month notwithstanding he did not work.

In *Dineen v. Bradford*, 190 Ill. App. 289, it appeared that the plaintiff was duly elected and qualified as a city commissioner. The mayor and other members of the commission refused to pay him his salary alleging that he had not attended a meeting of the council for some time and had neglected to perform his duties. In an action to recover the salary, it was held that though the plaintiff had neglected all of his duties, it was his right to demand full salary for the term of his office if the statute under which he held office made no provision for such delinquency; and that the fact that he was not present at the council meetings did not affect his right to recover unless some one else had been paid to perform his duties.

In *Miami County v. Collins*, 47 Kan. 417, 28 Pac. 175, it appeared that the plaintiff was appointed to the office of probate judge at a specified salary per annum. The statute under which he was appointed provided that he should perform certain acts, but also provided for his salary in terms absolute and unconditional. The plaintiff's claim for salary was rejected on the ground that he had not performed all of the duties laid on him by the statute. It was held that since the salary was not conditioned on the performance of the duties, he was entitled to his salary whether they were performed or not. The court said: "The terms of the statute are absolute and unconditional; his office is open, and he is in attendance day by day to discharge the additional duties imposed upon him by the act of the legislature. If the conditions are such that no labor is imposed upon him, this is no reason why we should disregard a plain command of the lawmaking power. Such a construction would involve the courts or the boards of county commissioners in prolonged investigations as to whether salaried officers of the state and

county had performed all or any of the particular acts enumerated in the statute that are required of persons occupying these salaried positions."

In *Goetting v. New York*, 29 Misc. 717, 61 N. Y. S. 334, it appeared that the plaintiff was appointed a justice of the municipal court. This office was intended to take the place of that of justices of the peace which was abolished a month after the plaintiff qualified. In an action to collect salary for that month it was held that the compensation was due from the moment the plaintiff had entered into office irrespective of how much work was performed, and that though he did not carry out any of its duties for a month he could recover. The court said: "The defendant contends that because the justices' courts and the office of justice of the peace in the borough of Brooklyn were not abolished until midnight of January 31, 1898 (Charter, §§ 1350, 1384), and the municipal court justices, who were to exercise on an enlarged plan the powers of the superseded officials, were not to have possession of the rooms assigned for holding their courts until February 1, 1898 (Id. § 1380), when the machinery of their courts was to go into full and active operations, the salary belonging to the office did not commence until that day. Such a result could follow only the mistaken notion that a fixed salary belonging to a judicial office must be earned by the incumbent before it is recoverable by him. Such a salary is not measured by the duties the official actually performs or is called upon to perform, and is recoverable without regard to the labors imposed or the manner of their performance. . . . There is no variation in official salaries on account of light or heavy work, or the total absence of work—a feature that may perhaps have attracted some to official life, and led to the repeated use of that much-abused term 'sinecure.'"

In *Tanner v. Edwards*, 31 Utah 80, 10 Ann. Cas. 1091, 86 Pac. 765, 120 Am. St. Rep. 919, it appeared that the relator was commissioned as state engineer by the governor, and he took the oath of office March 14th. He did not perform any duties until March 31st, and the auditor of public accounts refused to pay him his salary for the period prior to that date. The relator then applied for a writ of mandamus to compel the auditor to pay him this salary. It was held he was entitled to his salary from the time he was appointed and qualified.

Where a public officer is absent from illness, it is generally held that he may recover for the period that he is away and not working. Thus in *O'Hara v. New York*, 33 Misc. 53, 66 N. Y. S. 909, the court said: "While sickness may furnish sufficient reason for the removal of a public officer, when

his absence on that account has been permitted he is entitled to compensation until some action is taken on the subject." See also *Cavanee v. Milan*, 99 Mo. App. 672, 74 S. W. 408; *Minto v. New York*, 3 E. D. Smith (N. Y.) 384.

In *Sleigh's Case*, 9 Ct. Cl. 369, it appeared that the claimant was a clerk of the third class in the Treasury Department at Washington. A regulation of the department provided that when a clerk was absent from illness he must furnish a certificate of the attending physician, and the regulation did not authorize a stoppage of salary for such absence. The claimant was sick for 122 days and away from his desk, for which he had leave of absence with pay. After this time he again applied for a continued leave because of his sickness, but the department refused to pay him for the second leave of absence. The claimant brought his claim before the court of claims. It was held that he was entitled to compensation as long as he held his office, though he was disabled by illness from performing its duties. If he held his office at the will of the appointing power, the latter could remove him; but could not, in the absence of an express law or regulation, stop the compensation while the office was held. The court said: "The incumbent of an office is prima facie entitled to the lawful compensation thereof so long as he holds the office, though he may be disabled by disease or bodily injury from performing its duties. If it be an office held at the will of the appointing power, and that power does not see fit to have the compensation go on while the incumbent is so disabled, the only remedy, in the absence of express law or regulation authorizing the stoppage of the compensation during the disability, is to remove the incumbent and so end his right to compensation. If the appointing power suffers him to continue in office, notwithstanding the disability, he is entitled to the compensation. This right may be cut off by law or regulation authorizing it; but not by the act of the appointing power without the authority of law or regulation."

In *People v. French*, 91 N. Y. 265, the court said: "It would then appear that the salary is annexed to, or is an incident of, the office, and the relator entitled to it so long as he possesses the title to the office. It is not only fixed by statute, but the same laws provide (§ 43, supra) that the commissioners may 'fix the salary and compensation of such clerks other than policemen,' whom they may be authorized by law to appoint, and therefore by implication forbids them to enlarge or diminish the salary of one of the excepted class." See also *O'Leary v. New York Board of Education*, 93 N. Y. 1, 45 Am. Rep. 156.

In *Brizzolari v. Crawford*, 38 Ark. 218, it appeared that the petitioner had been duly

appointed as special judge of the circuit court, and after the term of his office had expired the state auditor refused to pay him his salary on the ground that during the time he was alleged to have acted as special judge no business had been transacted. It was held that since he was duly appointed under a statute, he was entitled to his full salary regardless of the work he had performed; and that the auditor could not inquire into the amount of service rendered, or the degree of fidelity with which he had acted. See also *Auditor v. Adams*, 13 B. Mon. (Ky.) 150; *Garrard v. Nuttall*, 2 Metc. (Ky.) 106; *Auditor v. Cochran*, 9 Bush (Ky.) 7; *Perkins v. Auditor*, 79 Ky. 306; and *Holder v. Sykes*, 77 Miss. 64, 24 So. 261.

UNDER STATUTE.

In some jurisdictions statutes applicable to certain officers or certain municipalities provide that there shall be no compensation unless the duties of an office are actually performed. Under such an act an officer cannot recover compensation unless he has performed the duties of the office. *Ricksecker v. Reno County*, 83 Kan. 346, 111 Pac. 427; *Wheatly v. Covington*, 11 Bush (Ky.) 18; *Wilkinson v. Saginaw*, 111 Mich. 585, 70 N. W. 142, 3 Detroit Leg. N. 809; *Hawkins v. Bay City*, 149 Mich. 268, 112 N. W. 997, 14 Detroit Leg. N. 424; *Smith v. New York*, 37 N. Y. 518; *Wilkes-Barre v. Meyers*, 113 Pa. St. 395, 6 Atl. 110; *Cox v. Oil City*, 157 Pa. St. 613, 27 Atl. 786; *Robbins v. Wilkes-Barre*, 37 Pa. Super Ct. 382. See the preceding subdivision of this note for cases from the same jurisdictions involving officers to whom no such statute was applicable.

In *Wheatly v. Covington*, 11 Bush (Ky.) 18, the court said: "Where specific compensation is given by law to a public officer by way of fees or commissions, for the performance of specific duties, the true rule would seem to be that he is not entitled to the compensation unless he performs the services; . . . nor can he recover damages on account of having been prevented from performing the services whereby he would have earned the designated compensation."

In *Ricksecker v. Reno County*, 83 Kan. 346, 111 Pac. 427, it was held that where a statute provided that the salary of an officer was conditioned upon his performing the duties specified in the statute, he could not recover the salary, unless the duties had been performed.

In *Robbins v. Wilkes-Barre*, 37 Pa. Super. Ct. 382, it appeared that the plaintiff was an auditor of the borough of Wilkes-Barre and under a statute was entitled to \$2.50 for each day's work. It was held that where he was prevented from performing the duties of his

office even though wrongfully, he could not recover compensation for work not done.

In *Wilkes-Barre v. Meyers*, 113 Pa. St. 395, 6 Atl. 110, it appeared that the plaintiff was appointed a policeman of the city of Wilkes-Barre. An ordinance of the city provided that patrolmen absent from duty without leave should forfeit their pay for the time of such absence except in cases of illness when properly certified by a physician. The plaintiff was absent for five months without leave because of illness, and he did not present the proper certificate. He brought an action to recover for salary during his illness. It was held that he could not recover because he had not performed any work, nor had he obeyed the conditions of the ordinance. The court said: "It is well settled that a person holding a public office has a prima facie right to the salary thereof, although he be physically disabled from performing his duties. If there be no law or regulation authorizing the discontinuance of the compensation during the disability, the only remedy is his removal. It may be granted that police officers are not excepted out of this general rule. But there was a regulation of the city providing that the officer absent from duty without leave should forfeit all pay during the time of such absence, except when sick and so certified by a physician. The plaintiff forebore to procure and give the certificate; the council forbore to remove him. Had he brought himself within the exception, the council at once might have ended liability by his removal. Under the circumstances the council preferred not to act. There is no pretense that his sickness was of such a nature as to prevent him procuring a certificate." See also *Cox v. Oil City*, 157 Pa. St. 613, 27 Atl. 783.

A statute providing for a deduction from the salary of a judge during a time when he is without fault on his part absent from his duties has been held to be in violation of a constitutional provision against the diminution of judicial salaries. *White v. State*, 123 Ala. 577, 26 So. 343, wherein it appeared that the petitioner was a regularly elected circuit court judge who had qualified as such. While engaged in holding his court, he received news of the serious illness of his mother which resulted in her death. During his absence as a result of this, he made arrangement for the attendance of a special judge. On his return, the auditor of the state refused to pay him his salary for the time he was away on the ground that a statute directed him to deduct from the judge's salary one-half of the amount due him during the time a special judge was required to sit for him. It was held that the statute was in violation of a constitutional provision forbidding the diminution of a circuit judge's

salary; that he could not be deprived of his salary except for neglect of duty in his official capacity; and in order to constitute such neglect there must not only be a failure to perform from design or carelessness, but there must also be the capacity on the part of the judge to perform. The court said: "We are fully aware and we entertain no doubt of its correctness, that this court has repeatedly held, that the right to an office is not property, and that if it be one of legislative creation the office may be abolished by the creator without impairing any constitutional property rights of the incumbent. And so, too, it must be conceded that the people undoubtedly have the right by legal methods, such as a constitutional convention, to abolish the circuit courts, or depose an incumbent thereof, or diminish or destroy the amount of his compensation he was to receive when elected. But all this has nothing to do with the question of the property right of a circuit judge in and to the compensation secured to him under the constitution. The people have not abolished the court, the office, or deposed the judge, and the right to his salary becomes fixed upon his induction into office, and is immutably fixed, so long as the constitution is permitted to stand as the organic law, and he cannot be deprived of it or any portion of it, so long as he remains in the office, unless he has been guilty of neglect of duty in his official capacity. . . . There must be not only a failure by carelessness or design to perform the duty required to be performed, but the party failing must have the capacity to perform the acts required of him as they should be done, provided the incapacity is not superinduced by his fault or the result of his own misconduct. The nature of judicial duties is such, that a judge is under no duty to undertake the discharge of them when without his fault he is mentally or physically unfit to perform them. On the contrary, we may affirm, that when from any cause his physical or mental condition is such as to impair his capacity to discharge the responsible duties required of him, it is his duty not to undertake a performance of them; and this too, without reference to the cause which precipitated such incapacity. No one doubts that if his incapacitated condition is the result of his own act or misconduct, this would be a neglect of official duty. But if his condition is the result of the serious illness of his mother or other causes over which he has no control, providential in their character, it is not and cannot be a breach of duty but a misfortune to 'which all flesh is heir.' It is against the intent of the constitution and the policy of our government that he should attempt to determine the property rights of parties litigant or pass upon the rights of

the commonwealth and the citizen charged with crime, involving the maintenance of the law to the end of depriving a citizen of life or liberty, when physically or mentally disabled. The character of his duties are too consequential in their results, of too great importance to a just administration of the law, and decisions rendered by him, and his manner of conducting the trials of causes are too potential in their moral effect upon the people, to say nothing of the consequences to litigants in his court, to punish him by a diminution of his salary for his failure to hold his court when his mental or physical condition, without fault on his part, is such as to render him incapable of doing so."

In *Ex p. Tully*, 4 Ark. 220, 38 Am. Dec. 33, it appeared that one of the circuit judges of the state failed to hold court as required by law, and the auditor in accordance with a statute withheld a part of his salary in order to meet the statutory forfeiture of \$150 for failure to hold the court. The judge brought a writ of mandamus to compel the payment of his full compensation. It was held that the legislature under the constitution had no power to diminish the salary of a judge during the time for which he was elected, and therefore it could not affect his compensation indirectly by means of a forfeiture. The court said: "If the judges fail to do their duty they are liable to removal by address or impeachment. The constitution forbids their salary being taken from them or reduced in its amount. The legislature cannot effect, indirectly, what it is forbid to do directly. It is certainly a clear proposition, that the legislature cannot declare that the salary of the judges, upon a failure to discharge their duties, shall be forfeited to the state. To allow them to do that, necessarily makes them the judges of what should constitute a forfeiture, and that would indirectly place in their hands the power to lessen, or entirely take away their salary during the term for which they are elected, which is clearly and pointedly inhibited by the constitution. The salaries of the judges of the supreme and circuit courts stand upon the same ground, and the legislature can no more touch the salary of the one than of the other. They are both fixed, so far as their diminution is concerned, by the constitution, and are inviolate and excepted out of the powers of the legislature. The act in question declares, in express terms, a penalty against the circuit judges for a failure to hold a court in each circuit of a hundred and fifty dollars, and makes the auditor a judge of the sufficiency of the excuse, upon the certificate of the clerk of the county, and makes it his duty, if the judge was not prevented from attending his courts by causes unavoidable, rendering his attendance impossible, to withhold from him

his salary for that amount. We can regard this law in no other light than as an act of forfeiture in favor of the state for the non-performance of a judicial duty, and for that failure it decrees a certain amount of the judge's compensation forfeited to the state. If this does not expressly diminish the salary of the judge during the time he is in office by indirect, yet effectual means, then we are sure language cannot give the power. To our mind, the act is a clear and palpable violation of the constitution. It is a direct and dangerous attack upon the independence of the judiciary, and upon the freedom and happiness of the people, and in contravention of their supreme will, as expressed in the constitution."

Office Abandoned.

Where an officer abandons his office before the end of his term, he cannot recover his salary for the remainder of the term. *Thwing's Case*, 16 Ct. Cl. 13; *Barbour's Case v. U. S.* 17 Ct. Cl. 149; *Howard v. U. S.* 22 Ct. Cl. 305; *Cote v. Biddeford*, 96 Me. 491, 52 Atl. 1019, 90 Am. St. Rep. 417; *Phillips v. Boston*, 150 Mass. 491, 23 N. E. 202; *Byrnes v. St. Paul*, 78 Minn. 205, 79 Am. St. Rep. 384; *Monroe v. New York*, 28 Hun (N. Y.) 258; *Wardlaw v. New York*, 137 N. Y. 194, 33 N. E. 140; *Devlin v. New York*, 149 N. Y. S. 1061; *Bush v. Newton County (Tex.)* 135 S. W. 604; *San Antonio v. Steingruber (Tex.)* 177 S. W. 1023. Thus in *Wardlaw v. New York*, *supra*, the court said: "An officer suspended from the performance of the duties of his office by the appointing power, but not removed, is entitled to the salary of the office during the period of the suspension. . . . But the suspended officer may waive that right by express agreement or by conduct from which such an agreement or intention on his part may be fairly and reasonably inferred." In *Barbour's Case*, 17 Ct. Cl. 149, it appeared that the claimant was assistant appraiser in the custom house commissioned by the President. It was recommended that the office should be abolished. The secretary of the treasury determined to vacate the office and requested the claimant's resignation. He did not send it in and was thereupon suspended. At the next session of the Senate no nomination was made. On the adjournment of the Senate, the claimant did not seek to recover the office, nor did he offer to perform any services, and he did not seek reinstatement nor the salary of his office; but on the contrary accepted the balance due him at the time of his suspension. Some time later he claimed that his suspension could not last longer than the end of the next session of the Senate, as a new appointment had not been made nor had the office

been abolished by Congress. It was held that the acts of the claimant after his suspension had practically amounted to an abandonment of his office and he could not recover any compensation.

In *Phillips v. Boston*, 150 Mass. 491, 23 N. E. 202, it appeared that the plaintiff was a police officer of the city of Boston. By a vote of the police commissioners he was dismissed without any charges being preferred and without a chance for a hearing; and he gave up the buttons and the badge of his office and all other city property in his possession. The plaintiff did not resign his office, nor was there any communication between him and the police commissioners. He did not offer to perform any of the duties of his office, but ten years later he brought an action to recover the salary due to him. It was held that by waiting so long he had abandoned his office and could not maintain an action for the salary. The court said: "If one voluntarily relinquishes an office, as if he accepts another inconsistent therewith, or if he removes from the place where its functions must be exercised, no formal resignation would be necessary. If, having it in his power to reinstate himself, or be reinstated by proper proceedings, in an office from which he has been wrongfully but actually removed, and he makes no effort to that end, but submits for a long term of years to the removal, the inference is inevitable that he waives his right thereto during that period. In the case at bar, the plaintiff yielded to the demand made upon him for the badge of his office and the city property in his possession. He made no effort to retain them, nor did he insist that he might rightfully do so as the lawful possessor thereof. While it is found that he was prevented by the commissioners from further performing his duties as a member of the police force of the city, it is also found that he neither performed nor attempted to perform any act of police duty. At no time by any formal demand did he ever assert (so far as appears) that he was of right a member of the police force, or claim to be put on duty as such by the commissioners, nor did he demand his salary as such from the defendant. While the failure to pay it might not be a bar to its recovery, except so far as the statute of limitations might operate, the failure to demand it tends strongly to show that he had ceased to consider himself a police officer. If his removal was unlawful, it was in his power to bring up the proceedings of the board by petition for certiorari, by which its action could have been quashed and the petitioner afterwards restored by mandamus to his public office. It was his duty to initiate this promptly, and not to wait, and seek, after ten years of apparent acquiescence, to maintain that during

all this time he was of right entitled to a public office in which he made no effort to be reinstated, and the duties of which he did not attempt to perform." In *Brynes v. St. Paul*, 78 Minn. 205, 80 N. W. 959, 79 Am. St. Rep. 384, it was said: "An appointive municipal officer, as was plaintiff, unlawfully dismissed and prevented from rendering any service, who has made no complaint to the mayor or to the city council, has not attempted to secure a reinstatement, but who has apparently acquiesced in the dismissal, cannot recover of the municipality the compensation incident to the office during the period in which he has performed no service."

Suspension from Office.

ILLEGAL SUSPENSION.

Where an officer is illegally suspended he may unless he waives his rights by an abandonment of the office (see the preceding subdivision of this note) recover his salary notwithstanding his failure to perform the duties of his office. *Corcoran v. U. S.* 38 Ct. Cl. 341; *Steele v. U. S.* 40 Ct. Cl. 403; *Beuhring v. U. S.* 45 Ct. Cl. 404; *Ward v. Marshall*, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198; *Bergerow v. Parker*, 4 Cal. App. 169, 87 Pac. 248; *Morgan v. Denver*, 14 Colo. App. 147, 59 Pac. 619; *Louisville v. Ross*, 138 Ky. 764, 129 S. W. 101; *Newberry v. Smith*, 157 Mich. 181, 121 N. W. 746, 16 Detroit Leg. N. 315; *State v. Carr*, 3 Mo. App. 6; *State v. Walbridge*, 153 Mo. 194, 94 S. W. 447; *People v. Police Com'rs*, 27 Hun (N. Y.) 261; *Morley v. New York*, 58 Hun 610 mem. 12 N. Y. S. 609; *Myers v. New York*, 64 Hun 635 mem. 18 N. Y. S. 904; *Stoddard v. New York*, 80 App. Div. 254, 80 N. Y. S. 344; *Shane v. New York*, 63 Misc. 304, 116 N. Y. S. 685; *Phelan v. New York*, 14 N. Y. S. 785; *Gregory v. New York*, 113 N. Y. 416, 21 N. E. 119, 3 L.R.A. 854; *Emmitt v. New York*, 128 N. Y. 117, 28 N. E. 19; *People v. Woods*, 218 N. Y. 124, 112 N. E. 915; *Reising v. Portland*, 57 Ore. 295, Ann. Cas. 1912D 895, 111 Pac. 377; *Pratt v. Swann*, 16 Utah 483, 52 Pac. 1092; *Bringgold v. Spokane*, 27 Wash. 202, 67 Pac. 612.

In *Corcoran v. U. S.* 38 Ct. Cl. 341, it appeared that the claimant was a letter carrier. A postmaster suspended him and preferred charges against him. The postmaster-general, having investigated, found him to be innocent and directed that he should be restored to duty. It was held that as the law protected the letter carrier in his office and did not give the postmaster authority to suspend or dismiss him, he was entitled to his salary during the period of suspension. The court said: "It will be noted that the suspension from duty was by the postmaster

and not by the postmaster-general; and it will be remembered that letter carriers may be dismissed by the postmaster-general, but not by a postmaster. From a legal point of view it seems as impossible that a postmaster can deprive a duly appointed officer serving under him of his lawful salary by suspending him as that the colonel of a regiment can deprive an officer under his command of his lawful pay by putting him under arrest and thereby preventing him from rendering service. Whether the postmaster-general can delegate to postmasters, by regulations, the power of depriving a letter carrier of his pay for thirty days is a question not presented by this case and concerning which the court expresses no opinion. Two things are essential to deprive an officer of his statutory compensation: The first is that the power so to do must be lodged, directly or by necessary implication, in some official hands; the second is that it must be exercised actually and expressly, and not indirectly or by implication. The two principal facts in this case are, first, that the claimant was acquitted and not convicted, and therefore stands innocent ab initio, prevented from rendering service which he was willing to render and from receiving the salary which he was prevented from receiving by the unfounded charges of the postmaster. The second is that the postmaster-general did not exercise his power of inflicting punishment by dismissing the carrier or of punishing him by forfeiture to pay, but, on the contrary, restored him to duty." See also *Steele v. U. S.* 40 Ct. Cl. 403; *Beuhring v. U. S.* 45 Ct. Cl. 404.

In *Ward v. Marshall*, 98 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198, it appeared that the plaintiff, a justice of the peace, was convicted of misconduct in office, and was then suspended from office. He appealed from the conviction, and the judgment was reversed. He then brought a writ of mandamus to recover his salary during the suspension. It was held that since the right of a public officer to receive his salary was attached to his office he could not be deprived of it because, without his fault and against his will, he was suspended from his office and released from performing his duties, pending his appeal from an erroneous judgment. The court said: "The plaintiff, by virtue of his election and qualification as justice of the peace, became entitled to the salary attached to such office during the term, if he should live so long, and was not guilty of any misconduct for which he should be removed, or did not otherwise forfeit his legal title to such office. The right to receive the salary is an incident which attaches itself to the legal title to the office. . . . And when an officer is accused of misconduct in office, and an action brought to remove him therefrom, the ques-

tion of his guilt or innocence can only be determined by the final judgment in the proceeding; and when, in the action brought against plaintiff, it was finally adjudged that he was not guilty of the misconduct charged against him, or that the accusation itself did not state facts which would justify his removal, the litigation was then terminated in his favor, and it would be unreasonable to hold that notwithstanding the final judgment to the effect that he had done nothing to warrant his removal from office, yet he had, by the erroneous and reversed judgment, been deprived of all that made the office of any pecuniary value. The fact that during the time of his suspension from office its duties were performed by a person properly appointed for that purpose, and that the county has paid him the salary, does not affect the right of plaintiff to recover. He was, without fault on his part and against his consent, released from the performance of the duties of such office for the period named."

In *Bergerow v. Parker*, 4 Cal. App. 169, 87 Pac. 248, it appeared that the plaintiff was duly elected to and qualified for the office of constable. Two weeks later he was arrested on a charge of murder. He was detained in jail for two years before the charge was finally dismissed. He returned to the township where he had been elected and served continuously until he moved away from the county. During his confinement he did not resign, nor voluntarily cease from the duties of his office; nor was the office declared vacant. The plaintiff brought suit for his salary during the two years of his confinement. It was held that no vacancy occurred from his mere arrest and detention; that in order to constitute a vacancy under a statute (Political Code § 996) because of "ceasing of the incumbent to discharge the duties of the office for the period of three consecutive months," the cessation must be the voluntary act of the incumbent, and that he was entitled to receive the entire salary as an incident of his legal title to the office.

In *Morgan v. Denver*, 14 Colo. App. 147, 59 Pac. 619, it appeared that the plaintiff, a license inspector, was suspended by the city treasurer who had no power to do so. The plaintiff continued to offer to do his work; but he was prevented from doing so. It was held that he was entitled to his salary during the suspension. The court said: "But it is said that to enable the plaintiff in error to maintain this action, he should first proceed by mandamus to compel his reinstatement. A reinstatement supposes a removal. Where the power of removal is confided to a board or officer, and the power is irregularly or wrongfully exercised, mandamus will lie to undo the act. But there must be a removal, and in the absence of power to re-

move, there can be no removal. The treasurer had no authority to discharge the license inspector, and the action he assumed to take was not a discharge. Morgan remained the license inspector and needed no reinstatement; and, as he performed the duties of his office, in so far as he could do so in the face of the active hostility of the treasurer, continuously down to the time of this proceeding, he is entitled to the salary which he has earned, amounting, according to the stipulation of counsel, to \$800."

In *Louisville v. Ross*, 138 Ky. 764, 129 S. W. 101, it was held that a police officer who was suspended without any charges being filed against him could recover salary during the period of the suspension. See to the same effect *Newberry v. Smith*, 157 Mich. 181, 121 N. W. 746, 16 Detroit Leg. N. 315.

In *People v. Police Com'r*, 27 Hun (N. Y.) 261, the court said: "There is no doubt of the general rule that an officer is not entitled to compensation unless he has rendered the service incidental to his office. . . . But this rule can have no application to a case where the officer is prevented by the exercise of a superior power, residing within the sovereignty of the state, which unjustly deprives him of his liberty. The relator was arrested by a superior officer on behalf of the people, on a charge of which he was declared to be innocent, and held in durance vile for a long time, and thus precluded from discharging his duty. He was not voluntarily absent from his post from the time of his arrest until the day of his acquittal, and on that day, as soon as the opportunity occurred, he presented himself for duty. It cannot be said with any propriety, therefore, that he was absent without leave, which implies and necessarily involves an omission to appear or present himself for duty voluntarily when he had the opportunity to do otherwise. His position could not be considered vacant, and it would seem, from his trial by the police commissioners subsequent to his acquittal, that his office was not regarded as having been vacated up to the time of his acquittal. Not having lost his office and having been restrained of his liberty unjustly by the people of the state, in the exercise of their power, initiated through a member of the police department, it would seem to be unjust that he should be deprived of his salary during the period of his confinement."

In *Pratt v. Swann*, 16 Utah 483, 52 Pac. 1092, it was said: "To hold that, under the circumstances of this case, the incumbent of a public office had forfeited his right to the emoluments of the office, would be a menace to good government, because it would enable the suspending power to be exercised from mere ill-will, caprice, or other improper motive, regardless of the public weal. Com-

petent persons would doubtless be loath to enter the public service, under such a condition of affairs, if their salaries could be forfeited and their reputations attacked, for an indefinite period, by mere suspension, without an opportunity to be heard. No such power will be aided by judicial construction. It savors too much of despotism and injustice, and will not be countenanced, except upon the mandate of positive law. Whether the suspension in the first instance was merited we have no means of knowing, and, because of the total failure of the suspending power to provide for a hearing, we would not be justified in assuming that it was so. If, however, the appellant failed in the performance of his duty, or was guilty of improper conduct, he ought to have been suspended, and then his case promptly heard, and, if upon the hearing it had been ascertained that the charges were sufficient and sustained, he ought to have been as promptly removed, or suspended without pay, as the evidence might have warranted. In such event, forfeiture of salary could not have been questioned. Plain business principles as well as the law dictate such a course, and persons endowed with a public trust must not forget that they are bound by every principle of honor to discharge public affairs with the same fidelity as they would their own. But, aside from these considerations, we have already decided that the appellant was and is the lawful incumbent, or *de jure* officer, and, in the absence of a lawful suspension without pay, the right to hold the public office includes the right to receive the salary, which is an incident to the office itself. This is the settled rule in this state."

In *Gregory v. New York*, 113 N. Y. 416, 21 N. E. 119, 3 L.R.A. 854, it appeared that the plaintiff was an inspector of excise in the city of New York. He was notified by a resolution of the excise board that he was suspended without pay, but he never received a notice of dismissal. He brought an action to recover the salary due him during this suspension. It was held that though the board of excise commissioners had the right to dismiss, they did not have the right to suspend without pay, and that since the plaintiff had been illegally suspended, he was entitled to recover the salary accruing during this time.

In *Morley v. New York*, 58 Hun 610 mem. 12 N. Y. S. 609, it appeared that the plaintiff was appointed to the office of assistant engineer in the department of public works. After acting in this office for about a year, he was notified that he was suspended. During several months he was not permitted to perform any services, though repeatedly stating his willingness to do so. He never received a notice of dismissal. In an action to recover his salary, it was held that the de-

partment of public works had no right to suspend one of its officers, and as the plaintiff had never been dismissed and was already to perform his duties if permitted, he was entitled to recover his salary. See also *Emmitt v. New York*, 128 N. Y. 117, 28 N. E. 10; *Phalem v. New York*, 14 N. Y. S. 785; *Shane v. New York*, 63 Misc. 304, 116 N. Y. S. 685; *Jenkins v. Scranton*, 205 Pa. St. 598, 55 Atl. 788.

LEGAL SUSPENSION.

Where a public officer is legally suspended from his office, he cannot recover his salary subsequently accruing. *Small v. U. S.* 45 Ct. Cl. 13; *Westberg v. Kansas City*, 64 Mo. 493; *Lewis v. St. Louis*, 12 Mo. App. 570; *Blackwell v. Thayer*, 101 Mo. App. 661, 74 S. W. 375; *Shannon v. Portsmouth*, 54 N. H. 183; *Kastor v. New York*, 39 Misc. 709, 80 N. Y. S. 952; *People v. Butler*, 120 App. Div. 751, 105 N. Y. S. 631; *Steubenville v. Culp*, 38 Ohio St. 18, 43 Am. Rep. 417; *Craighead v. Philadelphia*, 5 Pa. Dist. 310; *In re Simmers*, 12 Pa. Dist. 285, 27 Pa. Co. Ct. 658. Thus in *Westberg v. Kansas City*, *supra*, the court said: "After a tolerably extensive examination of cases, we have failed to find one where an officer, legally suspended from office, was permitted to recover for services, which he did not, and had no right to, render. If a legally suspended officer can, notwithstanding his suspension, recover his salary, a suspension is to be coveted by him, for he could then lie in the shade and draw compensation for labor performed by some one else. In what condition would this place incorporated towns and cities? The duties imposed upon their officers are important, and there must always be some one in place to perform them. The law gives the corporation the right to suspend one, and this suspension is generally for some fault of the officer, and necessitates the employment of another to perform his duties. If compelled to pay both, the city will hesitate to exercise the right to suspend, and be tempted to keep in office unfit and unworthy men, or expel from office, to their disgrace, those whose faults do not merit so extreme a punishment. We hold, therefore, that whether removed or suspended, plaintiff was not entitled to recover the salary, or any part of it, from the date of such removal or suspension."

Where a public officer is given a leave of absence without pay, it amounts to a limited dismissal, and he cannot recover his salary. See *Small v. U. S.* 45 Ct. Cl. 13.

Where an officer is legally suspended on charges and is later dismissed, he is not entitled to his salary during the suspension. *People v. Butler*, 120 App. Div. 751, 105 N. Y. S. 631, wherein the court said: "It would

be a strained construction of this section of the charter to hold that an officer, who was concededly liable to be removed because of misconduct in office, should be permitted, during the term of his suspension, to draw the salary attached to the office where it appeared upon the hearing that the facts not only warranted a dismissal at the time the charges were made, but that the delay which occurred was to a considerable extent due to himself.

. . . Here, as we have already seen, the commissioner not only had the right to remove, but also to suspend, and if the suspension were during the pendency of the trial of charges, the result of the trial, in case of removal, related back and took effect as of the date of the suspension." In *O'Brien v. New York*, 57 Misc. 639, 108 N. Y. S. 611, it was held that where a tenement house commissioner was suspended pending investigation of charges, and they were found to be true and the plaintiff dismissed as a result, the suspension was legal, and no recovery could be had for salary during the period of suspension.

Some cases hold that where a public officer is suspended legally, he cannot recover his salary even if he is later reinstated. *Blackwell v. Thayer*, 101 Mo. App. 661, 74 S. W. 375; *Shannon v. Portsmouth*, 54 N. H. 183; *Steubenville v. Culp*, 38 Ohio St. 18, 43 Am. St. Rep. 417.

In the case of *In re Simmers*, 12 Pa. Dist. 285, 27 Pa. Co. Ct. 658, the court said: "Inasmuch as suspension prevents the rendering of the services, it is clear that there is nothing earned during the period of suspension. If it were otherwise, suspension would be ineffectual, for it would give the pecuniary benefit to the suspended officer, while exacting no equivalent in service in return. The entire loss would then fall upon the public and not upon the officer. Reinstatement, while restoring the status of the individual and giving him the right to earn in future the salary attached to the post, gives him no claim for salary or wages during the period of suspension. There was and could be no opportunity during suspension to render the services for which the salary constitutes the compensation. This is necessarily involved in the very idea of suspension, which is not simply a moral but a legal discipline, involving a double loss—a loss to the suspended officer and a loss to the public—for the services of the officer are irrecoverably lost and can never be made up to the commonwealth. If a substitute be employed, the expense is at the cost of the public; if there be no substitute, the crippling of the service is still a loss to the state. Hence, it is clear that the suspended officer cannot point to the hardship of his own position and assert that the hardship falls upon him alone. I find no au-

thority, either in the general principles of law or in the statutes, which would authorize the payment of salary or wages to a man under such circumstances, even though he be reinstated."

Removal from Office.

ILLEGAL REMOVAL.

It is generally held that where a public officer is illegally removed, he may unless he waives his rights by abandoning the office (see *supra* the subdivision *Office Abandoned*) recover his salary for the remainder of the term unless the salary has been paid to a *de facto* officer.

United States.—Smith's Case, 2 Ct. Cl. 206; Winters's Case v. U. S. 3 Ct. Cl. 136; Lellmann v. U. S. 37 Ct. Cl. 128; Collins v. U. S. 45 Ct. Cl. 63; U. S. v. Wickersham, 201 U. S. 39, 26 S. Ct. 469, 50 U. S. (L. ed.) 798. Compare Reynolds's Case, 3 Ct. Cl. 197.

Illinois.—People v. Stevenson, 272 Ill. 215, 111 N. E. 595; Chicago v. Luthardt, 91 Ill. App. 324, *affirmed* 191 Ill. 516, 61 N. E. 410; Chicago v. Fitzmaurice, 138 Ill. App. 239; Chicago v. Bullis, 138 Ill. App. 297.

Kansas.—Whitaker v. Topeka, 9 Kan. App. 213, 59 Pac. 668.

Massachusetts.—Kimball v. Salem, 111 Mass. 87.

Minnesota.—Larsen v. St. Paul, 83 Minn. 473, 86 N. W. 459.

Missouri.—State v. Walbridge, 153 Mo. 194, 94 S. W. 447; Magner v. St. Louis, 179 Mo. 495, 78 S. W. 782; Gracey v. St. Louis, 213 Mo. 384, 111 S. W. 1159; Basse v. St. Louis, 213 Mo. 401, 111 S. W. 1165; Butterfield v. St. Louis, 213 Mo. 402, 111 S. W. 1165; Williams v. St. Louis, 213 Mo. 403, 111 S. W. 1165.

Montana.—Peterson v. Butte, 44 Mont. 401, Ann. Cas. 1913B 538, 120 Pac. 483.

New York.—Dolan v. New York, 8 Hun 440; Fitzsimmons v. Brooklyn, 102 N. Y. 536, 7 N. E. 787, 55 Am. Rep. 835; Smith v. Brooklyn, 6 App. Div. 134, 39 N. Y. S. 990; Alsberge v. New York, 75 App. Div. 360, 78 N. Y. S. 145; People v. Howe, 88 App. Div. 617, 84 N. Y. S. 604, *affirmed* 177 N. Y. 499, 69 N. E. 1114, 66 L.R.A. 664; Cross v. New York, 123 App. Div. 917, 107 N. Y. S. 942; Sutcliffe v. New York, 132 App. Div. 831, 117 N. Y. S. 813; O'Hara v. New York, 28 Misc. 258, 59 N. Y. S. 36, *affirmed* 46 App. Div. 518, 62 N. Y. S. 146, and 167 N. Y. 567, 60 N. E. 1117; Holt v. New York, 35 Misc. 242, 72 N. Y. S. 201; Padden v. New York, 45 Misc. 517, 92 N. Y. S. 926; Matter of Barton, 69 Misc. 38, 125 N. Y. S. 691, *reversing* 141 App. Div. 295, 126 N. Y. S. 47; Cantwell v. New York, 75 Misc. 335, 135 N.

Y. S. 285; O'Neill v. New York, 81 Misc. 453, 143 N. Y. S. 431; McVay v. New York, 116 N. Y. S. 908.

Ohio.—Cleveland v. Luttner, 92 Ohio St. 493, 111 N. E. 280.

Texas.—San Antonio v. Micklejohn, 89 Tex. 79, 33 S. W. 735; Cawthon v. Houston, 31 Tex. Civ. App. 1, 71 S. W. 329; Houston v. Estes, 35 Tex. Civ. App. 99, 79 S. W. 848; Houston v. Johnson, 35 Tex. Civ. App. 105, 79 S. W. 1199; Houston v. Lubbock, 35 Tex. Civ. App. 106, 79 S. W. 851; Paris v. Cabiness, 44 Tex. Civ. App. 587, 98 S. W. 925; San Antonio v. Serna, 45 Tex. Civ. App. 341, 99 S. W. 875.

Utah.—Everill v. Swan, 20 Utah, 56, 57 Pac. 716.

Vermont.—Finneran v. Burlington, 89 Vt. 1, 93 Atl. 254.

Thus in *Holt v. City of New York*, 35 Misc. 242, 72 N. Y. S. 201, the court said: "The statutes have given permanency to positions in the public service, whether they be called 'officers' or 'employees,' and if, in violation of the statute, the individual is removed, and subsequently reinstated by the courts, he may recover his salary or compensation when no other person has filled the position and been paid for the performance of the duties."

In *Smith's Case v. U. S.* 2 Ct. Cl. 206, it appeared that the claimant was an assistant quartermaster in the volunteer army, and he was dismissed from the service in September, 1862, for the alleged reason that he was absent from duty when the army was fighting in the field. In 1864 it was discovered that the order of dismissal was founded on a mistake, and the claimant was reinstated. It was held that when the order of the President was revoked, as having been made without cause and by mistake, it was revoked from its inception and all of its consequences annulled. Therefore the claimant was entitled to his salary from the date of dismissal to the date of reinstatement. The court said: "When the order of dismissal was revoked, it was revoked from its inception, and altogether, because, from its nature, it was indivisible and could not operate for a term; for if it did, it would be in effect a suspension merely, and that was not intended, and is legally impossible; for, though an officer may be suspended from his duty, he cannot be suspended from his office, for that once vacant, can be filled again only, like any other vacancy, by a nomination by the President, confirmed by the Senate; and when a dismissal is without cause and by mistake, the reason for revoking it goes to the whole, and not to a part of it, and such is to be taken as the purpose of the revocation." See also *Winters's Case*, 3 Ct. Cl. 136. But compare *Reynolds's Case*, 3 Ct. Cl. 197, wherein it

was held that where an officer was discharged by order of the President, and then was reinstated by a new appointment, he could not claim salary between the time of his dismissal and that of his new appointment.

In *Collins v. U. S.* 45 Ct. Cl. 63, it appeared that the claimant was appointed tinner for the Carlisle School, by the commissioner of Indian affairs under the civil service, and he duly reported for work. The superintendent refused to permit him to enter on his duties and directed him to return to Washington. The claimant lingered around for three months offering to perform the duties of his office and then engaged in other work. Later he brought suit for the salary covering the three months. It was held that he was entitled to recover the salary until he was properly discharged from service by the proper authority or by his own act. The court said: "We think that when the claimant regularly received his appointment as tinner by the proper authorities and was assigned to duty and reported for duty, he thereby became invested with that office and entitled to receive the salary attached to the same until he was detached from the service either by some proper authority or by his own act. The findings show not only that the claimant reported for duty as such tinner at the place to which he was assigned, but that he remained ready and willing to discharge the duties of his position until such time as his own conduct may be said to have separated him from the service; and for such time we believe he is entitled to recover for his stated salary in this suit."

In *U. S. v. Wickersham*, 201 U. S. 390, 26 S. Ct. 469, 50 U. S. (L. ed.) 798, it appeared that the claimant, a stenographer, was appointed to a position in the office of the U. S. surveyor-general. Under an executive order, he was brought within the protection of the civil service law so that he could be removed only for just cause and on written charges or notice with an opportunity to defend. He was removed by the surveyor-general, though no written or verbal charges were made. It was held that as long as he remained ready and willing to perform the duties of his office, he could not be deprived of the compensation legally belonging to him notwithstanding his discharge by the surveyor-general. The court said: "Whether he could have been summarily removed or suspended by the President or other competent authority is not the question now before the court, but the question is whether the employee during his wrongful suspension by a subordinate officer is entitled to the compensation provided by law. We see no reason in such an attitude of the case, where the wrongful suspension is clearly established, and the ability

of the incumbent to discharge the duties of his office affirmatively found, for withholding from him the compensation given by law to an incumbent of the place. If this be not so, then a regular and duly qualified employee in the public service, protected by the statute and the orders of the President made in pursuance thereof, can be deprived of the benefit and emolument of his position by a wrongful and illegal suspension from his duties. We do not think such a contention can be sustained either by reason or authority. Where an officer is wrongfully suspended by one having no authority to make such an order, he ought to be, and is, entitled to the compensation provided by law during such suspension."

In *Magner v. St. Louis*, 179 Mo. 495, 78 S. W. 782, it was held that where an officer was illegally deprived of his office and was otherwise entitled to it, the fact that there was not sufficient appropriation to meet his salary would not be a defense in a proceeding to compel payment.

In *State v. Walbridge*, 153 Mo. 194, 94 S. W. 447, the court said: "To the office of policeman from which he was removed he had good title, he was in possession, and no one was disputing it. To that office the law attached a monthly salary, and to that salary he was entitled so long as the law remained in force and under it he lawfully held the office. The legal right to the office carried with it the right to the salary. The board by its wrongful act could not deprive him of this legal right. The right of a public officer to the salary of his office, it is a right created by law, is incident to the office, and not the creature of contract, nor dependent upon the fact or value of services actually rendered. . . . Hence, the fact that the relator after he was wrongfully and without warrant of law discharged from his position as policeman, and was thereby and thereafter prevented from discharging the duties of that position, and did not in fact discharge those duties or offer to do so, affords no ground for denying him his salary, and the court committed no error in awarding him a mandamus therefor." See also *Gracey v. St. Louis*, 213 Mo. 384, 111 S. W. 1159; *Basse v. St. Louis*, 213 Mo. 401, 111 S. W. 1165; *Butterfield v. St. Louis*, 213 Mo. 402, 111 S. W. 1165; *Williams v. St. Louis*, 213 Mo. 403, 111 S. W. 1165.

In *Chicago v. Luthardt*, 91 Ill. App. 324, affirmed 191 Ill. 516, 61 N. E. 410, it appeared that the plaintiff was appointed a member of the detective bureau of the police department of Chicago. He entered on the performance of his duties, but was dismissed illegally by the chief of police and was not allowed to perform his duties until he was reinstated by a writ of mandamus. He brought an action

to recover his salary for the period of his illegal dismissal. It was held that he was entitled to his full salary.

In *Fitzsimmons v. Brooklyn*, 102 N. Y. 536, 7 N. E. 787, 55 Am. Rep. 835, it appeared that the plaintiff was a police officer in the service of the city of Brooklyn. The police commissioners made an order removing him, but the order of removal was reversed on certiorari and the plaintiff restored to his office. It was held that he was entitled to recover his full salary. The court said: "We have often held that there is no contract between the officer and the state or municipality by force of which the salary is payable. That belongs to him as an incident of his office, and so long as he holds it; and when improperly withheld he may sue for it and recover it. When he does so he is entitled to its full amount, not by force of any contract, but because the law attaches it to the office; and there is no question of breach of contract or resultant damages out of which the doctrine invoked has grown."

In *Finneran v. Burlington*, 89 Vt. 1, 93 Atl. 254, the court said: "An office having emoluments attached to it is a thing of value, though it is primarily an agency for public purposes. The right to the emoluments attaches to and follows the legal title to the office. A de jure officer cannot be deprived thereof without due process of law. . . . Such an officer may recover his salary after an attempted removal which fails for illegality. The action of Mayor Bigelow being ineffective as a removal, the plaintiff is entitled to recover."

Where an officer is removed under an unconstitutional or void statute, ordinance or resolution, he is entitled to salary notwithstanding the illegal removal. In *Kimball v. Salem*, 111 Mass. 87, it appeared that a city passed an ordinance under the authority of a general statute requiring the school committee to elect a superintendent of schools annually, and one was duly elected. The city council repealed the ordinance before the year was up. It was held that the superintendent was entitled to his salary for the year in spite of the repeal of the ordinance, as the power to appoint when once exercised was effectual for the whole year, and the city council had no further control over the matter.

In *People v. Howe*, 88 App. Div. 617, 84 N. Y. S. 604, affirmed 177 N. Y. 499, 69 N. E. 1114, 86 L.R.A. 664, it appeared that the relator was superintendent of the Albany county penitentiary appointed for four years. Two years after this appointment, assuming to act under an unconstitutional statute, the Albany penitentiary commission attempted to remove the relator and place the penitentiary under the charge of the

sheriff of the county. The relator then applied for an injunction to restrain the commission from removing him. It was issued, but the commission appealed. During the pendency of the appeal the county treasurer refused to pay his salary to the relator. It was held that the relator could not be removed under the statute, and that as a de jure officer he was entitled to his salary regardless of his illegal removal by the commission.

In *San Antonio v. Mickeljohn*, 89 Tex. 79, 33 S. W. 735, it appeared that the city of San Antonio passed an ordinance creating the office of superintendent of public works. The ordinance did not state the length of the term, but the constitution of Texas provided that the terms of all officers not otherwise limited should be for two years. After the plaintiff had served in the office for a few months, the city attempted to abolish the office by a resolution. No other method was attempted. The plaintiff was ready and willing to perform the duties of his office, but was prevented by the city. It was held that as the office was created by an ordinance, it could not be abolished by a resolution; that under the constitution it was created for two years; and as the plaintiff had been illegally removed, and had always been willing and ready to perform his duties, he was entitled to his salary for the two years.

Some cases hold that where an officer has been illegally removed, he must be reinstated in his office or the act of removal must be formally reversed before he can recover salary for the time subsequent to the removal. *Gersch v. Chicago*, 192 Ill. App. 190; *Dolan v. Louisville*, 142 Ky. 818, 135 S. W. 272; *Kammerer v. Louisville*, 142 Ky. 848, 135 S. W. 411; *Van Sant v. Atlantic City*, 68 N. J. L. 449, 53 Atl. 701; *Hagan v. Brooklyn*, 126 N. Y. 643, 27 N. E. 265; *McManus v. Brooklyn*, 5 N. Y. S. 424.

In *Kammerer v. Louisville*, supra, it appeared that the plaintiff was illegally discharged from the police force of Louisville. Subsequently the roster of the police force was filled up. It was held that the plaintiff could not recover his salary until he had proved his right to the office in a direct suit against those who had been appointed after his illegal discharge. The court said: "But appellant contends that the rule is a hard one, because it would require the discharged policeman, in case he was denied a recovery merely because the roster was full, to sue every member of the force in order to establish his right to his office. Such is not the result. If only one policeman should be removed, he could sue the new appointee. On the other hand, if several policemen should be removed at one time and the roster thereafter filled, each would have to sue only the

new appointees. In no event, then, would it be necessary ever to sue any one except the men subsequently appointed to complete the roster. Nor will this rule permit the board of safety to violate the law and make illegal dismissals. If that board does not fill the roster, the discharged policeman may recover. If it does fill the roster, he may sue immediately. This, in our opinion, is better than to permit the discharged policeman to wait an indefinite time and then recover the full amount of his salary, notwithstanding the fact that his place has been filled by some one else who has performed the duties and received the pay of the policeman discharged."

In *Van Sant v. Atlantic City*, 68 N. J. L. 449, 53 Atl. 701, it appeared that the plaintiff was a police officer of Atlantic City. He alleged that he was dismissed by the mayor without cause, without complaint and without a hearing, and that he was protected by a statute which prevented him from being removed arbitrarily. The plaintiff brought an action to recover his salary during the dismissal. It was held that the mayor in removing the plaintiff was acting judicially; that his decision could be reversed because there were no charges and no trial, but while unreversed, it stood; that before the plaintiff could sue for his salary, the mayor's proceeding must be reversed by a direct proceeding to set aside the illegal removal or there must be a mandamus issued to compel the city to restore him to the office; and therefore he could not recover in the present action.

In *Hagan v. Brooklyn*, 126 N. Y. 643, 27 N. E. 265, it was held that where an officer was illegally removed from an office to which another had been appointed, he could not recover the salary accruing during the illegal removal, if he had not first obtained a reversal of the order removing him, or a reinstatement in the office by the authority having the power to do so.

LEGAL REMOVAL.

Where an officer has been legally removed from an office, he cannot recover salary for the remainder of the term. *Queen v. Atlanta*, 59 Ga. 319; *Hay v. Pleasure Driveway*, 181 Ill. App. 23; *Fassey v. New Orleans*, 17 La. Ann. 299; *Mandell v. New Orleans*, 21 La. Ann. 9; *Wood v. New York*, 44 Super. Ct. (N. Y.) 321; *Wiley v. Worth*, 61 N. C. 171. Thus in *Queen v. Atlanta*, supra, it appeared that the plaintiff was appointed as a police officer for a definite term. He was charged with immoral conduct, tried before the commissioners of police and dismissed from the police force. He then brought an action to recover his salary for the full term of his appointment. It was held that the commis-

sioners had jurisdiction to try the plaintiff; that having been found guilty of immoral conduct, he was properly expelled from the force; and that he could not recover his salary for the balance of the term.

In *Hay v. Pleasure Driveway*, 181 Ill. App. 23, it appeared that the plaintiff was an engineer who had been appointed by a park board for the period of one year. The statute under which the appointment was made provided that the board could appoint at its pleasure. The plaintiff was dismissed before his term expired, and brought suit for his salary, contending that though the board could appoint at pleasure the appointment for a year was an expression of that pleasure and it could not afterwards discharge him. It was held that the mere appointment for a year did not deprive the board of its right to remove at pleasure, and therefore the plaintiff could not recover his salary. The court said: "It is insisted by appellee that the board having elected to designate the term of office for the chief engineer for one year, that this was an expression of the pleasure of the board, and it could not afterwards discharge him. We cannot agree with this contention. The statute gave the engineer only the right to hold the office during the pleasure of the board; he took his office with full knowledge of this provision of the statute and is bound thereby. To hold this contention would be to deprive the board of the powers expressly given it by the statute. If the contention could be maintained that when the board designated one year as the limit of his appointment he was not subject to removal within that time, if the board had seen fit to designate the limit of his appointment for either two, three, four or five years, the same result would follow, and he could not be removed until the expiration of the full term designated in his appointment. The mere fact that the board designated one year as the limit of his appointment did not deprive it of the right to remove him at its pleasure."

In *Wood v. New York*, 44 Super Ct. 321, it appeared that the plaintiff was the foreman of a fire engine company in the fire department of New York. He was tried on charges, found guilty, and sentenced to be retired from active service on a small annuity. It was held that after the plaintiff was legally retired from duty, he was not entitled to recover his salary. The court said: "This being so, and the plaintiff not having performed the duties of the office since that time, it is difficult to perceive how he can recover the compensation which would have attached if he had performed the duties. The corporation of the city of New York is only liable to pay such compensation when the officer, having possession of the office, has performed

the necessary services. No contract exists between the plaintiff and the corporation, by which the latter is bound to pay the salary irrespective of the question whether the plaintiff exercises the duties of the office or not. In a case like the present, the right to the salary arises out of the rendition of services, and not out of any contract between the government and the officer that the services shall be rendered by him."

In *Fassey v. New Orleans*, 17 La. Ann. 299, it appeared that the plaintiff was appointed tax assessor of New Orleans in the year 1862. Before his duties were fully performed, the military authorities of the United States took possession of the city. The plaintiff was removed and another person was placed in office. The plaintiff brought suit for his compensation. It was held that as he was removed by the military authorities who recognized only martial law, he could not recover from the city. See also *Wendell v. New Orleans*, 21 La. Ann. 9.

In *Smith v. Philadelphia County*, 2 Pars. Eq. Cas. (Pa.) 293, it was held that where the plaintiff was appointed for the term of one year to the office of register clerk by the board of commissioners of the county of Philadelphia, the board could remove him at any time even though he had performed his duties faithfully without being liable to pay his salary during the remainder of the term. The court said: "A clerk of the commissioners of the county holds his office during the pleasure of the power that appoints him, and they can discharge him for any cause they please; and they are not bound to pay him a salary for any longer period than they choose to continue him in office. It is not, in the language of the supreme court, a 'contract.' The man who accepts an office under any municipal public corporation, only holds it at the will and pleasure of the power that confers the appointment; it is a will which can be determined at any moment, and when determined by the officers of the corporation the appointee has no legal remedy against the corporation, for an alleged injury arising from a dismissal from office. He accepts the appointment subject to such a contingency, and must abide by his acceptance on those terms. This is the settled law." See also *Koontz v. Franklin County*, 76 Pa. St. 154. Compare *Jenkins v. Scranton*, 205 Pa. St. 598, 55 Atl. 788, where in it was found that there was in fact no removal.

Occupancy of Office by De Facto Officer.

Where a de jure officer is prevented from performing the duties of his office by a de facto officer to whom the salary is paid, the general rule is that there can be no recovery of the salary by the de jure of-

ficer except in some instances where the de facto officer is a mere intruder. See the notes to *Nall v. Coutler*, 4 Ann. Cas. 671; *Tanner v. Edwards*, 10 Ann. Cas. 1091; *Cleveland v. Luttner*, Ann. Cas. 1917D 1134; and *Andrews v. Portland*, 10 Am. St. Rep. 280. As to the right to recover the salary from the de facto officer, see the notes to *Chubbuck v. Wilson*, 12 Ann. Cas. 888; *Jones v. Dusan*, Ann. Cas. 1916D 472; and *Howard v. Benke*, 140 Am. St. Rep. 159.

YOUNG

v.

TOWN OF MORRIS.

Oklahoma Supreme Court—July 13, 1915.

47 Okla. 748; 150 Pac. 684.

Public Officers — Neglect of Duty — Effect as Creating Vacancy.

The law of this state requires that the incumbent of a public office shall devote his personal attention to the duties of the office to which he is elected or appointed (article 2, § 11, Const.), but does not contemplate that such officer shall lose his title to office because he may be absent for a short period of time, for any reason, and does not, during such period of time, personally give all his time and attention to the duties of his office. While such failure of duty may furnish grounds of removal, it does not ipso facto create a vacancy.

Effect on Right to Salary.

The compensation of a public officer is a matter of statute, incidental to the office, and not of contract; nor does it depend on the amount or value of the services rendered. While such officer holds the office, his right to the salary is in no wise impaired by his absence from office or neglect of duty.

[See note at end of this case.]

(Syllabus by court.)

Error to County Court, Okmulgee county:
JOHNS, Judge.

Action by Frank Young, plaintiff, against Town of Morris, defendant. Judgment for defendant. Plaintiff brings error. The facts are stated in the opinion. REVERSED.

James M. Hayes for plaintiff in error.
C. B. McCrory for defendant in error.

[744] SHARP, J.—This action was instituted by plaintiff, in a justice court in Okmulgee county, according to the averments of the bill

of particulars, to recover from the defendant salary for himself as town marshal, and one Hornbeck as deputy marshal, for the months of August and September, 1911. From the judgment rendered in the justice court, defendant appealed to the county court, where trial was had, the jury returning a verdict for the defendant. From the judgment rendered in accordance therewith, plaintiff brings error.

From the evidence it would seem to be plain that Young was the duly elected and qualified marshal of the town of Morris during August and September, 1911, and entitled to his salary for said months, unless it be that he had abandoned said office or had been removed therefrom. In June prior thereto, plaintiff, Young, secured the consent of the board of trustees of the town to confirm the appointment of one Hornbeck as deputy marshal, who would perform the duties of marshal (section 706, Rev. Laws 1910), but receive no salary therefor, except such as would be paid to him by Young. This arrangement apparently was satisfactory to all parties until a meeting of the board of trustees, September 7th following, at which [745] time Young was informed that he must appoint another party as deputy marshal in the place of Hornbeck. This was not done, however, and Hornbeck continued to act as deputy until October 7th thereafter. During the larger part of the months of August and September, plaintiff worked as a carpenter in the construction of a house a mile from the town of Morris, and it was this fact upon which defendant attempts to base its claim that the office was abandoned, and that therefore plaintiff was not entitled to salary.

It is not contended that proceedings were at any time had to remove plaintiff as marshal, the only question of fact at the trial being: Did he prior to, or during the months of August and September, abandon the office of marshal? There is no evidence in the record that plaintiff did so abandon his office, other than that with the consent of the board of trustees he appointed a deputy, who was to act in his place and stead during the time plaintiff was absent from town. From the fact that the board confirmed plaintiff's appointment of Hornbeck as deputy, and at the meeting September 7th informed him that he must appoint some one else as deputy, it is clear that he was, at least up until that time, considered marshal of the town by the board of trustees. That he did not perform the duties of town marshal during the larger part of said months, and that most of said time he was engaged in the carpentry trade, did not prove an abandonment of the office—at least, not when taken in connection with the fact that Hornbeck was appointed deputy without pay other than that received from

Young. Probably such a course of conduct as that pursued by plaintiff would be sufficient, if true, upon which to base an action for his removal, but it did not of itself, without any action of the proper authorities, remove him from the office to which he was elected. It is the purpose of the law of this state that the [746] incumbent of an office shall devote his personal attention to the duties of the office to which he is elected or appointed. Article 2, sec. 11, Const. But this does not mean that he shall lose his title to office because he may be absent or away for a short period of time, for any reason, and does not, during such period of time, personally give all of his time and attention to the duties of his office. That he does not fulfil the mandate of the Constitution would serve as grounds of removal, but would not *ipso facto* remove him.

The above provision of the Constitution is similar to article 2, sec. 18, of the Missouri Constitution, which was under consideration in the case of *State v. Slover*, 113 Mo. 202, 20 S. W. 788. From the opinion in that case it must be concluded that it was not intended by said provision to remove a public official from office without a hearing. In *Christy v. Kingfisher*, 13 Okla. 585, 76 Pac. 135 (a case arising before the adoption of our Constitution), it was held, in effect, that while abandonment is clearly a cause for forfeiture of an office, it does not of itself create a completed vacancy, but a judicial determination of the fact is necessary to render it conclusive. In *State v. Chaney*, 23 Okla. 788, 103 Pac. 133 (an opinion of this court since the adoption of the Constitution), the *Christy* Case was followed, and it was held that the mayor and counsel of a town had no power to try and remove a city marshal, because the procedure called for judicial action, and not the exercise of political or administrative power or action. Among the authorities supporting this rule are the following: *Sutcliffe v. New York*, 61 Misc. 514, 115 N. Y. S. 186 (reversed in 132 App. Div. 831, 117 N. Y. S. 813, but this principle adhered to); *Atty.-Gen. v. Maybury*, 141 Mich. 31, 104 N. W. 324, 113 Am. St. Rep. 512; *Bush v. State*, 10 Ga. App. 544, 73 S. E. [747] 697; *Graham v. Cowgill*, 13 Kan. 114; *Throop on Public Officers*, sec. 421; *Dillon, Municipal Corporations*, secs. 480, 481.

It follows that plaintiff, during the months in question, still retaining the office of marshal, was entitled to the salary. The rule in such cases is that the salary of an official position belongs to the officer occupying such position as an incident to the office, and does not depend upon his performance of the duties of the office. The right of an officer to salary is such only as is prescribed by statute, and while he holds the office such right

is in no wise impaired by his occasional or protracted absence from his office or the neglect of his duties. Such derelictions find their correction in the power of removal, impeachment, and punishment, provided by law. *Bates v. St. Louis*, 153 Mo. 18, 54 S. W. 439, 77 Am. St. Rep. 701; *Leonard v. Terre Haute*, 48 Ind. App. 104, 93 N. E. 872; *State v. Gordon*, 245 Mo. 12, 149 S. W. 638; *Sutcliffe v. New York*, supra; *Fitzsimmons v. Brooklyn*, 102 N. Y. 536, 7 N. E. 787, 55 Am. Rep. 835; *Emmitt v. New York*, 128 N. Y. 117, 28 N. E. 19; *Bergerow v. Parker*, 4 Cal. App. 169, 87 Pac. 248; *Adams v. Justices*, 21 Ga. 206; *Larsen v. St. Paul*, 83 Minn. 473, 86 N. W. 459; *Putnam v. Custer County*, 25 S. D. 542, 548, 127 N. W. 641; 29 Cyc. 1423.

As said by Throop in his excellent work on Public Officers, sec. 500:

"The compensation for official services are not fixed upon any mere principle of *quantum meruit*, but upon the judgment and consideration of the Legislature, as a just medium for the services which the officer may be called upon to perform. These may, in some cases, be extravagant for the specific services, while in others they may furnish a remuneration which is wholly inadequate. The time and occasion may, from change of circumstances, render the service onerous and oppressive, and the Legislature [748] may also increase the duties to any extent it chooses; yet nothing additional to the statutory reward can be claimed by the officer. He accepts the office 'for better or for worse,' and whether oppressed with constant and overburdening cares, or enabled, from absence of claims upon his services, to devote his time to his own pursuits, his fees, salary, or statutory compensation constitutes what he can claim therefor, and is yet to be accorded, although he performs no substantial service, or neglects his duties. The fees or salary of office are *quicquid honorarium* and accrue from mere possession of the office."

There being error in the instruction given by the court, in the above regard, the judgment of the trial court should be reversed and the cause remanded for a new trial.

All the Justices concur.

NOTE.

It is held in the reported case that while neglect of duty by a public officer may be a ground for his removal it does not ipso facto create a vacancy, and that, while the office is retained, the incumbent's right to compensation is not impaired by his absence or neglect of duty. The note to *Bartholomew v. Springdale*, reported ante, this volume, at page 432, collates the cases passing on the neglect of duty by a public officer as affecting his right to salary.

SOPER

v.

CISCO ET AL.

New Jersey Court of Errors and Appeals—
November 15, 1915.

85 N. J. Eq. 165; 95 Atl. 1016.

Deeds — Consideration — Future Support.

A deed for lands made by a grantor in consideration of "support during her natural life" therein recited, is not a gift, but is founded upon a valuable consideration, and when made by one having the mental capacity to make it, and without fraud, duress or undue influence, will be sustained.

Capacity of Grantor — Test.

The test of mental capacity to make a deed is that a person shall have ability to understand the nature and effect of the act in which he is engaged and the business he is transacting.

Gifts — Conveyance by Parent to Child — Presumption and Burden of Proof.

No presumption of undue influence in the case of a conveyance by a parent to a child, in consideration of support of the grantor, arises from the mere relation of the parties, and, therefore, the burden is upon the party attacking the conveyance to show undue influence.

[See note at end of this case.]

Same.

The rule that undue influence is not to be presumed from the mere relation of parent and child, in case of a conveyance from a parent to a child, does not conflict with the broad rule that where parties stand in confidential relation to each other a conveyance from the weaker to the dominant party is presumed to result from undue influence, and therefore, where facts are shown, other than the mere relation of parent and child, establishing between the parties a confidential relation in which the child is the dominant party, a conveyance from the parent to the child is presumed to be tainted with undue influence, and the burden is upon the child to show the bona fides of the transaction.

[See note at end of this case.]

Same.

A mother, seventy-seven years of age, in the full possession of her mental faculties and in good physical health, made a deed for her homestead property to her daughter, forty-five years of age, who had been her chief support for fifteen years prior thereto. The consideration for the deed was \$300 and "support during her natural life" therein expressed. It was drawn by and acknowledged before a competent lawyer, with whom the mother conferred privately, and was recorded immediately. The property was then worth about \$5,000, but of small rental value and not readily marketable. The bargain was made at the solicitation of the mother, the

daughter being reluctant. No effort was made to keep the transaction secret. Before and at the time of making the deed and until eleven years thereafter, when failing mental faculties rendered some restraint necessary, the mother had perfect liberty of action and freely saw such of her other children as she wished to see and who wished to see her. Her daughter supported the mother satisfactorily at the homestead for sixteen years after the deed was made, when the mother, without any fault of the daughter, went away and refused to return. Held, that the bargain was a natural and provident one for the mother to make and was not the product of undue influence, and will not be set aside for failure to show that the mother had "independent advice."

[See note at end of this case.]

Laches — Proof Obscured by Delay.

He who, without adequate excuse, delays asserting his rights until the proofs respecting the transaction out of which he claims his rights arose, are so indeterminate and obscure that it is impossible for the court to see whether what is asserted to be justice to him is not injustice to his adversary, has no right to relief.

Same.

A grantor, having made a conveyance of her property to her daughter in consideration of \$300 and "support during her natural life" therein expressed, and having at the time the undoubted mental capacity to make it, and who delays challenging its validity for sixteen years and until the lawyer who transacted the business is dead, and the memory of other witnesses respecting important facts is dim, and the mental faculties and memory of the grantor herself have been so impaired as to render her testimony valueless, will not be permitted to set aside such conveyance when it appears that during all such time she had been supported by her daughter satisfactorily, and the grantor for eleven years after the conveyance was well aware that she had made it and was under no physical or mental disability nor prevented by coercion or poverty from filing a bill to set it aside if she had desired to do so.

Contracts — Contract for Future Support — Rescission after Part Performance.

After a partial performance by the grantee of his obligation to support the grantor, the grantor may not abandon the same or prevent further performance upon the part of the grantee and take advantage of such failure to secure equitable aid to cancel or rescind the deed.

Construction of Contract — Place of Support.

When an obligation upon the part of the grantee to support the grantor is created by deed and there is no express direction where and how the support should be furnished, the grantor is entitled to require it to be furnished at any place he may select if it can be supplied there without needless or unnecessary expense.

Cancellation of Instruments — Decree — Enforcing Performance of Condition.

Where a grantor under a deed is entitled to support, and, at the age of ninety-three, when her mental faculties are so impaired as to render it unjust to hold her to a strict accountability for her attitude, declines to be supported at the place where she has been satisfactorily supported for sixteen years, and makes no demand for support elsewhere but files a bill for cancellation of the deed, which relief must be denied by the court, equity requires that at the option of the complainant provision for prompt and adequate support shall be secured to her in that proceeding.

(Syllabus by court.)

Appeal from Court of Chancery.

Action by Mary Soper, plaintiff, against Mary S. F. Cisco et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. **REVERSED.**

Bilder & Bilder for appellants.

Lefferts & Lefferts for respondent.

[167] TRENCHARD, J.—This is an appeal by the defendants from a decree of the court of chancery, setting aside two deeds of conveyance, made by the complainant to the defendant Mary S. F. Cisco, of two tracts of land, aggregating about twelve acres, situate at Lodi, Bergen county, New Jersey. The deeds are dated respectively, March 30th, 1897, and November 5th, 1898, each being recorded on the day of their respective dates.

The complainant is the mother of Mary S. F. Cisco, and the widow of Benjamin Soper, and was residing at the time the conveyances were made with Mary and the latter's husband in the homestead located upon the tract in question.

About the middle of March, 1897, the complainant expressed a desire to convey the property to her daughter Mary, in consideration of \$300 and support during her natural life, and also in the consideration of the fact that Mary had cared for her and supported her for fifteen years prior thereto.

On March 30th, 1897, the complainant attended at the office of Ernest Koester, a counselor-at-law, at Hackensack, and at her request, he prepared and she executed, acknowledged and delivered the 1897 deed. At the same time, there was paid to the complainant \$300, for which she signed a receipt, witnessed by Mr. Koester and his stenographer. The deed expressed the consideration as follows: "In consideration of the sum of one dollar, filial affection, and support during her natural life."

Shortly prior to November 5th, 1898, the complainant told her daughter Mary that she

had another lot which she still owned, and which had not been transferred, and that she desired, to sell it for its assessed value, which was fifty dollars, which proposal was accepted and a deed executed for the lot. The deed was drawn by and acknowledged before A. H. G. Maidment, an attorney-at-law, at his office in Hackensack.

[168] At the time of the conveyance of 1897, the complainant represented that the premises were free and clear of all encumbrances, but in 1900, the defendants learned that the complainant in 1896 had given a lease of the premises for the term of her natural life to her son Oliver Soper. After an expenditure of \$200 by the defendants, that interest was obtained from Oliver.

Ernest Koester, the lawyer who drew the 1897 deed and took complainant's acknowledgment thereto, died on August 2d, 1909.

This bill of complaint was filed August 30th, 1913, and charged that the deeds were obtained by fraud, duress and undue influence. The answer of the defendants denies such charges.

The learned advisory master found that the deeds in question were "mere voluntary gifts," that the complainant was without "independent advice," and that by the transfer, she parted with her whole estate, thereby impoverishing herself, and advised a decree that the deeds were "from the execution and delivery of the same, voidable and of no force or effect, at the option of the complainant," and directing that they be delivered up and canceled and the property re-conveyed to the complainant.

After careful consideration we are of the opinion that the conclusion of the advisory master cannot be sustained, for reasons we will now state.

It is quite clear that these conveyances were not "mere voluntary gifts," and in that respect are to be distinguished from those set aside in *Slack v. Rees*, 66 N. J. Eq. 447, 59 Atl. 466, 69 L.R.A. 393, and *Post v. Hagan*, 71 N. J. Eq. 235, 65 Atl. 1026, 124 Am. St. Rep. 997.

The conveyance of 1898 was for a consideration of \$50. It is so stated in the deed. That the \$50 was paid to the complainant is demonstrated by the production of the receipt, the testimony of the lawyer who drew the receipt upon the occasion of the execution and delivery of the deed, and by the entry in complainant's savings bank deposit book. We pause to remark that this deed is of relatively small importance because it appears that \$50 was probably a fair price, for the land conveyed by it, that being its valuation for taxation purposes.

[169] It is equally plain that the conveyance of 1897 was not a "mere voluntary gift." It appears to our satisfaction that \$300 was

paid to the complainant. This is demonstrated by the production of the receipt witnessed by the lawyer who drew the deed, and his stenographer, and by the entry in the complainant's savings bank deposit book.

But apart from such money consideration the deed itself recites that it was made in consideration of "support during her natural life," and in that respect this case is to be distinguished from *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997, and *Walsh v. Harkey*, 69 Atl. 726. Now a deed for lands made by a grantor in consideration of "support during her natural life" therein recited, is not a gift, but is founded upon a valuable consideration, and when made by one having the mental capacity to make it, and without fraud, duress or undue influence, will be sustained. *Collins v. Collins*, 45 N. J. Eq. 813, 15 Atl. 849, 18 Atl. 860; *Holland v. John*, 60 N. J. Eq. 435, 46 Atl. 172.

The test of mental capacity to make a deed is that a person shall have ability to understand the nature and effect of the act in which he is engaged and the business he is transacting. It appears beyond dispute, and it is not seriously questioned, that the complainant had such mental capacity. The fact that there was an outstanding lease not mentioned by the complainant does not show mental incapacity, but rather shows, as the evidence indicates, her willingness to conceal the fact in order to make a bargain with her daughter which complainant regarded as advantageous to her.

It remains to be considered whether the deeds were obtained by fraud, duress or undue influence.

The real contention of the complainant is that these deeds were the product of that species of fraud known as undue influence.

We think that contention is not well founded.

No presumption of undue influence in the case of conveyance by parent to child in consideration of support of the grantor, arises from the mere relation of the parties, and therefore, the burden is upon the party attacking the conveyance to show undue influence. *Collins v. Collins*, 45 N. J. Eq. 813, 15 Atl. 849, 18 Atl. 860.

[170] Of course the rule that undue influence is not to be presumed from the mere relation of parent and child, in case of a conveyance from a parent to a child, does not conflict with the broad rule that where parties stand in a confidential relation to each other a conveyance from the weaker to the dominant party is presumed to result from undue influence; and therefore, where facts are shown, other than the mere relation of parent and child, establishing between the parties a confidential relation in which the child is the dominant party, a conveyance

from the parent to such child is presumed to be tainted with undue influence, and the burden is upon the child to show the *bona fides* of the transaction. *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997. See also 17 Ann. Cas. 989, note.

At the time these conveyances were made the complainant was about seventy-seven years of age. She was living with her daughter, the defendant, who was then about forty-five years of age, and was practically dependent upon her daughter. No doubt the application of the rule stated casts upon the daughter the burden of showing the conveyance was without undue influence.

Whether or not the deeds were the product of undue influence of course depends upon the relation of the parties and the facts and circumstances leading up and surrounding the execution of the deeds. We shall hereinafter deal with the effect of the impossibility, by reason of the lapse of time, of the production of full proof with respect to these essential matters.

We turn now to a statement of what the evidence discloses, and what it does not disclose, concerning these relations and transactions.

In 1897 and 1898 when the deeds were made, the complainant was living at the homestead (the property in question) with her daughter Mary, the defendant. Mary had lived there all her life. Her father, in his later years, was an invalid. For fifteen years she ministered to him with loving care. The other children had left home. During these last fifteen years of her father's life Mary was the chief support of the family, her parents being without substantial means except the premises in question. The property was not readily marketable. It had [171] but slight rental value, most of the twelve acres being low lands and unproductive, and the buildings being in a dilapidated condition. Mary acquired somehow some cows and chickens, and by selling milk and eggs, and making and selling ladies' hats and bonnets, managed to support her father and mother until her father's death in 1895 at the age of eighty-seven years. That she did this substantially without help, seems not seriously questioned.

But it is said that, at this early day she had conceived the idea of getting the property, and that such was the motive for her self-denying conduct. We think not. We think rather that hers is the true version. At the hearing she was asked "Why did you struggle so?" She replied:

"I didn't want to see my father die in want, and I supported him for fifteen years. He was a good man, and when I saw them all . . . putting nothing in I said, 'Father, don't cry, I will stay with you, and you shall

never want,' and I dressed him beautifully and gave him everything I could, and that is why I kept the cows for milk."

When her father died in 1895 Mary was forty-three years old. She remained at the homestead, with the acquiescence of her mother, who went to live with her married daughter, Helen Butterworth, near by in Garfield, Bergen county. In 1897 Mary married the defendant, Joseph Cisco, and was contemplating moving with her husband to New York, when the complainant returned unsolicited to the homestead, with the avowed purpose of making her home with her daughter, and proposed that Mr. Cisco purchase the homestead property. This Cisco declined to do stating that much of it was worthless, being covered by water. At that time the property was valued by the assessor for taxation purposes at \$1,300. It probably was worth about \$5,000. She then proposed to deed the property to Mary in consideration of past services, \$300, and support during her natural life. Mary and her husband seem to have been unwilling to accept such a conveyance chiefly because they wished to go to New York to live unburdened with their mother's care and support. However, they finally yielded, and a few weeks thereafter the complainant, and Mary, and Mr. Cisco went to the office of Mr. [172] Koester, in Hackensack, where the deed was prepared and delivered.

Of course what occurred there is of the utmost importance upon the question of undue influence, and we will deal with this phase of the case more particularly hereinafter.

At that time, according to the undisputed evidence, the complainant was at least of average mental and physical health for a person of her age. She could read and write; her eyesight was good and her hearing fair. According to the testimony of the defendants she transacted the business with Mr. Koester herself, being alone with him in his private office, and the defendants waiting in the outer office until the deed was ready for delivery. The deed was recorded immediately. No effort was made to keep the transaction secret. The complainant frequently mentioned it to those with whom she came in contact, and the other children seem to have been apprised of it in due course of events and many years before this bill was filed. It is quite clear that they knew of it as early as 1904.

We have no further evidence worthy of consideration as to the circumstances surrounding the execution of the deed. Sixteen years elapsed before this bill was filed. Meanwhile Mr. Koester died and the complainant's mental faculties have so far failed that she can give no intelligent account of

what then took place. Indeed we are constrained to think that her memory is so far gone, and is so unreliable, that we cannot give any weight at all to her testimony.

Following the execution of the deed, the complainant lived with the defendants happily for sixteen years. She was supported by them there at the homestead, was furnished with ample food and clothing, was nursed and furnished medicine and medical attendance when ill. She visited and received visits from her daughter Helen and from friends and neighbors. As we shall hereafter have occasion to point out she saw freely such of her other children as she chose to see and who wished to see her.

For eleven or twelve years her mental and physical health was usually good considering her advanced age. But about 1908 or 1909 she began to fail both physically and mentally. For [178] a time her physical ailments rendered almost constant nursing necessary. Thereafter she improved physically but continued to fail mentally. In the last year or two her mental condition rendered it necessary to put more or less restraint upon her. Her old friend and physician testifies that in these last years she "has not been herself." She became restive under this necessary restraint, and in May, 1913, she evaded the vigilance of her daughter Mary and went to the home of her daughter Helen Butterworth near by.

Shortly thereafter the defendant Joseph Cisco went to Mrs. Butterworth's and sought to induce the complainant to return to her home, but she declined to do so. In August following complainant filed this bill, acting with the assistance, and no doubt at the instigation of her daughter Helen Butterworth, and her son Warren Soper. The son Oliver had long since died and the son John took no interest in this controversy.

During these sixteen years while the defendants were thus supporting and caring for the complainant, they paid all of the expenses. They paid the insurance upon the property. They made improvements thereon amounting to over \$1,100. They paid assessments amounting to about \$340. They paid the taxes amounting to over \$1,600. During all these years they received no income from the property, it being unproductive. At no time did its rental exceed \$25 per month, but no doubt its present market value, due chiefly to improvements in the neighborhood, is largely in excess of what its rental value indicates.

This outline of the facts and circumstances surrounding and leading up to this conveyance, when taken in connection with other facts to which we shall hereafter refer, shows, we think, that the bargain in which it resulted was a natural and provident one for

the complainant to make, and that it was not the product of undue influence.

But it is contended that this conveyance should be set aside for want of "independent advice." We think not. It is true that if a child upon whom a parent by reason of advanced years or infirmity has in fact come to be dependent, accepts from such dependent parent a voluntary conveyance of all of [174] his or her estate, a court of equity, moved by the apparent improvidence of such gift, will presume that the donor did not appreciate the consequence to himself of his voluntary act, and hence will place upon the donee the burden of overcoming this presumption by showing that the donor in making the conveyance had the benefit of proper independent advice. *Post v. Hagan*, 65 Atl. 1026, 71 N. J. Eq. 234, 124 Am. St. Rep. 997. It is also true that proper independent advice, in this connection, means that the donor had the preliminary benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform him correctly of its legal effect, but who was, furthermore, so disassociated from the interests of the donee as to be in position to advise with the donor impartially and confidentially as to the consequences to himself of his proposed benefaction. *Post v. Hagan*, *supra*. In the present case we should hesitate before saying that the defendants have not borne such burden, because as we have pointed out, the proof seems to indicate that complainant conferred privately with the quite competent lawyer who drew the deed. But however that may be it is plain that under the facts of this case no such burden is cast upon the defendants. The conveyance was not a voluntary gift. It was for a valuable consideration. The bargain in which it resulted was a natural and provident one for the complainant to make and the defendants have borne the burden of showing that it was not the product of undue influence.

But if we were to take a different view, and were also to assume that they have failed to bear that burden, or the burden of showing absence of undue influence, still this complainant could not succeed in setting aside these deeds in the circumstances disclosed by this record.

The general rule is well settled that he who, without adequate excuse, delays asserting his rights until the proofs respecting the transaction, out of which he claims his rights arose, are so indeterminate and obscure that it is impossible for the court to see whether what is asserted to be justice to him is not injustice to his adversary, has no right to relief. *McCartin v. Traphagen*, 43 N. J. Eq. 324, 11 Atl. 156, *affirmed* 45 N. J. Eq. 265, 17 Atl. 809.

[175] Now sixteen years intervened between the making of the conveyance in question and the filing of the bill. The result was that at the time of hearing the lawyer who drew and took complainant's acknowledgment of the 1897 deed was dead, and the lawyer who drew and took her acknowledgment of the 1898 deed had no reliable memory of the transaction. The memory of other witnesses with regard to important facts had become dim. The complainant herself had reached such an extreme age, and her mental faculties had become so far impaired as to render her testimony practically valueless. Meanwhile defendants had supported complainant and had expended large sums on the property. Such delay, in such circumstances, without adequate excuse, is a bar to relief.

We find no excuse for the delay. At the time of these conveyances and for eleven or twelve years thereafter the complainant was in the full possession of her faculties, and enjoyed fair health. She was well aware that she had made the conveyances. She was not either directly or indirectly prevented by the defendants from taking steps to avoid the deeds. She had the financial ability to protect her rights if she thought they had been violated. She was not restrained of her liberty or freedom of action. She saw and visited such of her other children as she wished to see and visit, and who wished to see her. No doubt at times the relations between her and her other children were strained. Her daughter Helen for years before and after these conveyances were made seems to have been rather inattentive to her. No doubt complainant resented that. For seventeen years prior to the making of the deeds her son Warren seems not to have visited his parents nor contributed to their support. Indeed not until 1903, six years after the conveyances were made, did he visit his mother, and then not again until 1908, when and later he manifested more interest. It is clear that complainant resented his inconsiderate conduct. This is made quite clear by the letter which she wrote him in 1909 requesting him to stay away and in which, not without some reason it seems, she characterized him as a "dangerous man." This reasonable attitude of the complainant [176] towards Warren, in our opinion, is the reason for her disinclination to see Warren, and Helen when accompanied by him, which she exhibited in the years 1908 and 1909.

As we have pointed out the complainant has left the defendants' home and seems unwilling to return and receive support and maintenance there as before. Of course that fact cannot justify setting aside these conveyances. The rule is that after a partial performance by the grantee of his obligation to support the grantor, the grantor may not

abandon the same or prevent further performance upon the part of the grantee and take advantage of such failure to secure equitable aid to cancel or rescind the deed. See 25 L.R.A. (N.S.) 932, note.

But there remains the obligation to support the complainant during her natural life. Where, as here, there is no express direction where and how the support should be furnished, the person entitled to receive it is held to have a right to require it to be furnished at any place he may select, if it can be supplied there without needless or unreasonable expense. 13 Cyc. 699. In the present case, there has been no demand for outside support. But looking beneath the surface, and considering the impaired mental condition of the complainant, and her extreme age, we perceive that it would be inequitable to hold her to a strict accountability for her conduct and apparent attitude. Equity requires that at the option of the complainant provision for prompt and adequate "support during her natural life" shall be secured to her in this proceeding.

The decree below will be reversed and the record remitted to the court of chancery for further proceedings, in accordance with this opinion.

Costs will be awarded the appellant in this court.

For affirmance: The Chief-Justice, and Parker, Black, Terhune and Heppenheimer, JJ.—5.

For reversal: Garrison, Swayze, Trenchard, Bergen, Minturn, Kallisch, Vredenburg, White, and Williams, JJ.—9.

NOTE.

Presumption and Burden of Proof of Undue Influence in Case of Conveyance Inter Vivos by Parent to Child.

Introductory, 457.

Mere Relation of Parties, 457.

Relation of Parties and Other Circumstances, 458.

Introductory.

It is intended in this note to review the recent cases passing on the presumption and burden of proof of undue influence in the case of a conveyance inter vivos by a parent to a child. The earlier cases are collected in the notes to *Burton v. Burton*, 17 Ann. Cas. 984; *Hawthorne v. Jenkins*, Ann. Cas. 1915D 707; and *Richmond's Appeal*, 21 Am. St. Rep. 85.

Mere Relation of Parties.

It is held generally that the mere relation of parent and child raises no presumption that a conveyance inter vivos from the former

to the latter is the result of undue influence and hence the burden of showing undue influence rests on the person attempting to invalidate the conveyance. *Whaley v. Crittenden*, 192 Ala. 341, 68 So. 886; *Westphal v. Heckman* (Ind.) 113 N. E. 299; *Thill v. Freiermuth*, 132 Minn. 242, 156 N. W. 260; *Youtsey v. Hollingsworth* (Mo.) 178 S. W. 105; *McFarland v. Brown* (Mo.) 193 S. W. 800; *Jacobus v. Waits*, 86 N. J. Eq. 148, 97 Atl. 958; *Huggins v. Huggins*, 107 S. C. 470, 93 S. E. 129. And see the reported case.

It was held in *Huggins v. Huggins*, *supra*, that the mere fact that a mother usually conformed to the will of her son was not conclusive proof that a conveyance of property made by the former to the latter without consideration was the result of undue influence. The court said: "Where two persons are closely associated in the affairs of life and deeply concerned in the welfare of each other, the mere fact that one usually conforms to the will of the other is by no means conclusive proof that it is the result of undue influence. Happily for society, it is most often the result of commendable motives on the part of both, the desire of the one to co-operate in the efforts of the other in the most helpful way, and the thoughtful consideration of the other, which makes no request that in reason cannot be cheerfully complied with. Harmony of thought and action so induced is not to be attributed to undue influence, which, in its legal sense, is an influence which destroys free agency and substitutes the will of the stronger for that of the weaker mind. There is no direct evidence that plaintiff had or exercised any such influence over his mother. If it had been so, surely some of the other children would have observed and testified to it. The conclusion that he had and exerted such influence rests solely upon the presumption which arose from the relationship between them, which, under the circumstances, was not very strong to begin with, and it was completely overcome by the facts and circumstances of the case and the testimony of the witnesses to the deed."

In *Westphal v. Heckman* (Ind.) 113 N. E. 299, the court said: "There are certain legal and domestic relations in respect to which the law raises a presumption of trust and confidence on one side and a corresponding influence on the other. The relations of attorney and client, principal and agent, husband and wife, and parent and child, belong to this class, and there may be others. Where such a relation exists between two persons and the one occupying the superior position has dealt with the other in such a way as to sustain a substantial advantage, the law will presume that improper influence was exerted and that the transaction is fraud-

ulent. *Keys v. McDowell*, 54 Ind. App. 263, 100 N. E. 385, and cases there cited. This so-called presumption, when indulged, arises out of relations which exist between the contracting parties regardless of any facts or circumstances having a tendency to show that a confidence was reposed by one of the parties and an influence gained by the other. Proof of the existence of such a relation between the parties establishes *prima facie* that the dominant party to such relation occupies a position of trust and confidence which he must not abuse. This rule, however, is applied only as against the one who is assumed to be the dominant party in the relation shown. In the relation of parent and child the parent is assumed to be the dominant party, and, where one seeks to show that the child is the dominant party, he must do so by showing the condition and situation of the parties, their treatment of each other, and other circumstances from which such ultimate fact may be inferred, and unless such fact is found by the court or jury trying the issue he cannot prevail. This court has held that no presumption of fraud or undue influence arises in a case of a conveyance from a parent to a child on account of the mere existence of such relation." *Westphal v. Heckman* (Ind.) 113 N. E. 299.

It was held in *Youtsey v. Hollingsworth* (Mo.) 178 S. W. 105, that although there was no presumption that a deed from a parent to a child made in consideration of the natural affection attending the relation, was unfairly obtained, yet the relation itself was a confidential one and when undue influence was charged it should be taken in consideration in determining the extent and effect of such influence.

Relation of Parties and Other Circumstances.

Though it is held generally that the mere relation of parent and child raises no presumption of undue influence with respect to a conveyance from the former to the latter, where facts appear tending to establish not only confidential relations between parent and child but also that the will of the child predominated, the presumption of undue influence arises and the burden rests on the child to show the bona fides of a conveyance to him. *Whaley v. Crittenden*, 192 Ala. 341, 68 So. 886; *Preston v. Lloyd*, 269 Ill. 152, 109 N. E. 697; *Gish v. St. Joseph Loan, etc. Co.* (Ind.) 113 N. E. 394; *Hull v. Mitchell* (Ia.) 162 N. W. 235; *Miller v. Taylor*, 165 Ky. 463, 177 S. W. 247; *Kelly v. Fields*, 137 Ky. 796, 181 S. W. 657; *Shields v. Burge*, 171 Ky. 149, 188 S. W. 321; *Williamson v. Lowe*, 172 Ky. 86, 188 S. W. 1065; *Williams v. Williams* (Mich.) 164 N. W. 374; *Thill v. Freiermuth*, 132 Minn. 242, 156 N.

W. 260; *Shaughnessy v. Shaughnessy*, 135 Minn. 262, 160 N. W. 769; *Jacobus v. Waits*, 36 N. J. Eq. 148, 97 Atl. 958. And see the reported case.

Where a son was shown to have had much influence over his mother in business matters, and the mother had often stated that she wished her property to be divided equally, in an action to set aside a conveyance of the entire property to the son made by the mother, at the age of seventy years, when she was in poor health, it was held that the burden was on the son to show not only the fairness of the transaction but that it was the free and voluntary act of a capable mind. *Kelly v. Fields*, 167 Ky. 796, 181 S. W. 657.

It has been held that where an educated physician managed the business affairs of his illiterate father, and thereby gained an advantage through conveyances and leases from the father, there was a presumption of constructive fraud. *Gish v. St. Joseph Loan, etc. Co. (Ind.)* 113 N. E. 394, wherein the court said: "In this confidential relation the son, by reason of his education, strength, and business ability, and the age, illiteracy, and declining strength of his father, occupied the superior position, and in the transactions in controversy the son obtained a substantial advantage. . . . Where such confidential relation exists, and it appears that the party occupying the superior position has dealt with the one to whom he owes a duty arising out of such relation, and has gained a substantial advantage thereby, the burden is on the one who holds such superior position to prove that he acted in perfect good faith, gave to the other party full and accurate information possessed by him, took no advantage of his knowledge, or his influence over the other party, and that the transaction involved was fair, well understood, and voluntarily carried out by the person to whom he owed such duty."

In *Shields v. Burge*, 171 Ky. 149, 188 S. W. 321, it was said: "Under the construction of social life prevailing in this country, members of families, as they arrive at mature years, drift away from the home where they were reared, and from the association with their parents, and commence the imposed social duty of rearing families of their own. If perchance others are left at home with the parents, they should not be permitted, and are not permitted, by artifices and wiles which they may practice upon their parents, to secure for themselves the property to which the absent children have as just a claim as themselves, for it cannot be said, as a rule, that the parents only are the beneficiaries of such relationships, because observation teaches that more frequently than otherwise the ones remaining at home are the greater beneficiaries. And it is the policy

of the law, when it is found that the rule just referred to has been violated, to clearly scrutinize all the facts and circumstances, and if it is found that the confidence imposed and growing out of the relationship existing between the parties has been abused, and undue advantages obtained, to correct such abuses by granting such equitable relief as the facts justify."

Where a son was in entire control of the affairs of his mother who was unexperienced in business, the fact that a deed of conveyance by her to him was without adequate consideration has been held to warrant a presumption that he procured the execution of the deed by undue influence and the burden of overcoming this presumption was on him. *Hull v. Mitchell (Ia.)* 162 N. W. 235.

Where it appeared that a deed of conveyance by a mother was made by her in her last illness, it was held that the proof of undue influence, exercised by the grantee, her daughter, need not be very strong since the law looks with suspicion on deathbed transfers. *Miller v. Taylor*, 165 Ky. 463, 177 S. W. 247, wherein a mere suggestion by the daughter to the mother that the other children made mean remarks about her which tended to work up the mother's feelings against the other children was held to be sufficient to set aside the deed.

It was held in *Whaley v. Crittenden*, 192 Ala. 341, 68 So. 886, that while the prima facie presumption is that the parent was the stronger and dominant party, when it is shown by proof that the child as a matter of fact was the dominant party the burden shifts to the child to show the fairness of a conveyance to him.

A conspicuously unequal division of the father's property by deeds of conveyance to his several children, giving the largest parcel of land to the one who was in constant attendance on the grantor who was of weak mentality, has been held to be sufficient to put the burden on the grantee to show that the transaction was fair. *Williamson v. Lowe*, 172 Ky. 80, 188 S. W. 1065. Compare *Westphal v. Heckman (Ind.)* 113 N. E. 299.

Where at the time of making a deed a father was seventy-two years of age and largely under the influence of his son and the evidence tended to show that the father did not understand that the deed would limit or circumscribe his rights in respect to his property, and that the execution of the deed was conceived and brought about by some other controlling mind, the circumstances were held to be sufficient to support a decree setting aside the deed. *Normand v. Normand*, 89 Vt. 77, 94 Atl. 172.

In *Jacobus v. Waits*, 36 N. J. Eq. 148, 97 Atl. 958, it appeared that a mother, seventy years old, while seriously ill and unable to

understand fully the consequences of her acts, conveyed to her daughter nearly all of her property without consideration; the evidence tended to show that the mother did not make the conveyance voluntarily but at the solicitation of her daughter while at the latter's home. In an action brought by the mother to set aside the deeds, it was held that the burden was on the daughter to show that the transaction was not tainted with undue influence.

In *Preston v. Lloyd*, 269 Ill. 152, 109 N. E. 687, it appeared that a father, who was an old man, was about to remarry. His daughter, after hearing of the proposed marriage of her father and with a view of protecting the rights of herself and family in his property, made an appeal to his sense of justice and his affections and thus persuaded him to convey to her certain property. In an action to set aside the deed it was held that the daughter's appeal under the circumstances did not amount to undue influence. The court said: "Upon the issue of undue influence in procuring the execution and delivery of the deed, chiefly relied upon as the bill stood before amendment, we think appellant has not made such proof as would justify setting aside and vacating the deed. Mrs. Lloyd prudently consulted legal counsel and a physician, after receiving notice of the proposed marriage of her father at the age of seventy-seven years, with a view of protecting the rights of himself and of herself and family in his property through a conservatorship, if the same should appear necessary. He knew of this, but her appeal to him to put in writing his promises to her concerning the farm appears to have been made through his affections and his sense of justice, and this is not wrongful and is not undue influence."

It has been held that the fact that a mother depended on her son for advice more than on others and that "he was her pet" was not enough to raise a presumption of undue influence; that there must be substantial evidence showing a special trust in the management of the mother's business matters or unusual influence arising from the son's personal care and charge of the mother to create the presumption. *McFarland v. Brown* (Mo.) 193 S. W. 800.

In *Williams v. Williams* (Mich.) 164 N. W. 374, it appeared that a father deeded his property to his son in consideration of maintenance and support. At the time of the conveyance the father was seventy-seven years old, and somewhat hard of hearing. The evi-

dence did not disclose that the son exercised undue influence in bringing about the conveyance. On the contrary it appeared that the father was satisfied with the arrangement, and that the son performed the conditions on which the conveyance was given. The court refused to set aside the conveyance, saying: "That the presumptions are against transactions of this nature and they are critically scrutinized by the courts, putting the burden of proof upon those seeking to sustain them, requires no citation of authority. In view of plaintiff's age, their kinship, and the confidential relations shown to exist between them at the time, it was incumbent upon defendants to show that the agreement with their father was not to his disadvantage, was fair to him and of his own free will, that no advantage was taken by them of his age, mental condition, or confidence in them, that they have fulfilled the terms of their agreement, in letter and spirit, so far as permitted by him, and are ready and willing to continue so to do."

It was held in *Shaughnessy v. Shaughnessy*, 135 Minn. 262, 160 N. W. 769, that the burden of establishing undue influence in a conveyance by a mother to her daughter was on the person attacking the conveyance, and an instruction to the jury that if they believed from the evidence that the relations between the parent and the child were such that the former relied on the latter in all her business affairs, then the burden of proof shifted and it devolved on the child to show that the deeds were free from undue influence, was held to be erroneous. The court said: "While proof of confidential relationship under certain circumstances gives rise to a presumption, or more accurately, perhaps, to an inference of undue influence exerted by the one benefited by the transaction, we take it the jury is not compelled to accept the presumption or inference as sufficient to establish undue influence as a fact. Hence the court should not instruct that the mere coming into play of an evidentiary presumption, which may or may not be accepted by the jury, shifts the burden of proof from the party upon whom it is placed by the general rules of practice."

Following the decision in *Rader v. Rader*, 108 Minn. 139, 121 N. W. 393, it was held in *Thill v. Freiermuth*, 135 Minn. 262, 156 N. W. 260, that a transaction resulting in a deed from a parent to a child will be scrutinized carefully; but that the presumption is in favor of the validity of the deed.

HITCHMAN COAL AND COKE COMPANY

v.

MITCHELL ET AL.

United States Supreme Court—December 10, 1917.

245 U. S. 229; 38 S. Ct. 65.

Appearance — Objection to Jurisdiction — Effect.

Under the federal practice, an appearance to object to the jurisdiction of the court does not bind the parties appearing to submit to the jurisdiction on the overruling of the objection.

Injunctions — Parties — Successor of Official — Necessity of Service of Process.

In a suit for an injunction against officers of certain labor unions and others, it is error to grant personal relief by injunction against persons who, pending the suit, were chosen to succeed some of the original defendants as officers of such unions, but who were not served with process and did not appear, on the ground that they were before the court by representation, as there is no such privity between the holder of an office in a voluntary association and his successor as to bind the latter by process issued against the former, and the suit was not a representative one within equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix), providing that when a question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

Form of Decree — Official Party — Injunction in Individual Capacity Only.

In a suit to enjoin certain persons individually and as officers of labor unions, the error, if any, in enjoining them only in their individual capacities, and not in their official capacities, may not be complained of by them.

Improper Inclusion of Persons in Injunction — Right of Others to Object.

In a suit for injunction against officers of labor unions, a clause in the decree, enjoining as confederates all present and future members of the unions, is not a matter of which the defendants may complain.

Labor Combinations — Injunction against Officer — Possibility of Injury to Complainant.

Where one attempting to organize the employees of a mine was acting as agent of an organized body of men united in a purpose to close the mine unless the proprietor would make it a union mine, and who lacked the power to carry out that purpose only because they had not, as yet, persuaded a sufficient number of the miners to join with them, and

employed such agent with the very object of securing the support of the necessary number of miners, the right to an injunction against his activities is not dependent on whether he had power or authority to shut down the mine.

Injunction against Unionizing Employees.

An employer, operating a nonunion mine and having agreements with his employees that they would not become members of a union, is as much entitled to an injunction to prevent the unionizing of the miners as the unionizing of the mine, assuming that there is a practical distinction between the two; the first being but a step in the process of unionizing the mine.

[See note at end of this case.]

Conspiracy — Declarations of Coconspirators — Proof of Conspiracy as Prerequisite to Admission.

In order that the declarations and conduct of third persons may be admissible against defendant, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful, and the element of illegality may be shown by the declarations themselves.

Same.

Where H. was engaged in an effort to organize the coal mines of a particular district as the representative of a voluntary association of which defendants were active members, and in the execution of a purpose to which they had given consent, and in which some of them were actively co-operating, his declarations and conduct while so doing are evidence against defendants.

Labor Combinations — Right of Employer to Forbid Membership.

An employer is acting within his lawful rights in making nonmembership in a union a condition of employment, and no explanation or justification for such course is needed.

Same.

The right of an employer to make nonmembership in a union a condition of employment is a part of the constitutional rights of personal liberty and private property which cannot be taken away even by legislation, unless through some proper exercise of the paramount police power.

Injunction against Unionizing Employees.

Where an employer makes nonmembership in a labor union a condition of employment, with the free assent of its employees, the fact that the employment is at will and terminable by either party at any time does not affect the right of the employer to an injunction against the efforts of third parties to organize the employees.

[See note at end of this case.]

Same.

The right of employees to strike gives no right to a third party having no agency for

the employees to instigate a strike, even though they have a grievance.

[See note at end of this case.]

Same.

Workingmen have a right to form unions and to enlarge their membership by inviting other workingmen to join, but this right, like all other rights, must be exercised with reasonable regard for the conflicting rights of others.

[See note at end of this case.]

Same.

A combination to procure concerted breaches of contract by plaintiff's employees constitutes a violation of plaintiff's legal rights, though the measures resorted to stop short of physical violence or coercion through fear of such violence.

[See note at end of this case.]

Same.

Plaintiff was operating a nonunion mine under a mutual agreement, assented to by every employee, that it would not recognize the union, and that if any man wanted to become a member of the union he might do so, but could not be a member and remain in its employ. Defendants, with full notice of this working agreement and without any agency for the employees, but as representatives of an organization of mine workers in other states and in order to require the operation of the mine as a union mine, sent their agent to the mine, who with full notice of and for the very purpose of subverting the status arising from the working agreement and subjecting the mine to union control, proceeded, without physical violence, but by persuasion accompanied by deceptive statements, to induce the employees to join the union, and at the same time to break their agreement with plaintiff by remaining in its employ after joining, and this was done, not for the purpose of enlarging the membership of the union, but of coercing plaintiff through a strike, or the threat of one, into recognition of the union. It is held that the purpose and the methods resorted to were unlawful and not justified as a fair exercise of the right to increase the membership of the union, and plaintiff was entitled to an injunction against such acts; the damage resulting from a strike being regarded as irretrievable at law.

[See note at end of this case.]

Certiorari to United States Circuit Court of Appeals, Fourth Circuit.

Action by Hitchman Coal and Coke Company, plaintiff, against John Mitchell et al., defendants. Judgment for plaintiff in District Court. Judgment reversed by Circuit Court of Appeals. Plaintiff brings certiorari. The facts are stated in the opinion. REVERSED.

Hannis Taylor and *George R. E. Gilchrist* for petitioner.

Charles E. Hogg and *Charles J. Hogg* for respondents.

[232] *PITNEY, J.*—This was a suit in equity, commenced October 24, 1907, in the United States Circuit (afterwards District) Court for the Northern District of West Virginia, by the Hitchman Coal & Coke Company, a corporation organized under the laws of the State of West Virginia, against certain citizens of the State of Ohio, sued individually and also as officers of the United Mine Workers of America. Other non-citizens of plaintiff's State were named as defendants but not served with process. Those who were served and who answered the bill were T. L. Lewis, Vice President of the U. M. W. A. and of the International Union U. M. W. A.; William Green, D. H. Sullivan, and "George" W. Savage (his correct Christian name is Gwilym), respectively President, Vice President, and Secretary-Treasurer of District No. 6, U. M. W. A.; and A. R. Watkins, John Zelenka, and Lee Rankin, respectively President, Vice President and Secretary-Treasurer of Sub-district No. 5 of District No. 6.

[233] Plaintiff owns about 5,000 acres of coal lands situate at or near Benwood, in Marshall County, West Virginia, and within what is known as the "Pan Handle District" of that State, and operates a coal mine thereon, employing between 200 and 300 men, and having an annual output, in and before 1907, of about 300,000 tons. At the time of the filing of the bill, and for a considerable time before and ever since, it operated its mine "non-union," under an agreement with its men to the effect that the mine should be run on a non-union basis, that the employees should not become connected with the Union while employed by plaintiff, and that if they joined it their employment with plaintiff should cease. The bill set forth these facts, *inter alia*, alleged that they were known to defendants and each of them, and "that the said defendants have unlawfully and maliciously agreed together, confederated, combined and formed themselves into a conspiracy, the purpose of which they are proceeding to carry out and are now about to finally accomplish, namely: to cause your orator's mine to be shut down, its plant to remain idle, its contracts to be broken and unfulfilled, until such time as your orator shall submit to the demand of the Union that it shall unionize its plant, and having submitted to such demand unionize its plant by employing only union men who shall become subject to the orders of the Union," etc. The general object of the bill was to obtain an injunction to restrain defendants from interfering with the relations existing between plaintiff and its employees in order to compel plaintiff to "unionize" the mine.

A restraining order having been granted, followed by a temporary injunction, the served defendants filed answers, and there-

upon made a motion to modify the injunction, which was refused. 172 Fed. 963. An appeal taken by defendants from this order was dismissed by the Circuit Court of Appeals 176 Fed. 549. Afterwards [234] they applied for and obtained leave to withdraw their answers and file others; the order, however, prescribed that the withdrawn answers were "not to be removed from the file." The new answers denied all material averments of the bill, some of which had been admitted in the former answers. Plaintiff, having filed replications, obtained an order that the former answers should be treated as evidence on behalf of the plaintiff upon the issue joined. Upon this evidence and other evidence introduced before the court orally, the case was submitted, with the result that a final decree was made January 18, 1913, granting a perpetual injunction. 202 Fed. 512. This was reversed by the Circuit Court of Appeals June 1, 1914 (214 Fed. 685), but the mandate was stayed pending an application to this court for a writ of certiorari. Afterwards an appeal was allowed. This court dismissed the appeal, but granted the writ of certiorari (241 U. S. 644), the record on appeal to stand as a return.

The final decree of the District Court included an award of injunction against John Mitchell, W. B. Wilson, and Thomas Hughes, who while named as defendants in the bill were not served with process and entered no appearance except to object to the jurisdiction of the court over them. Under the federal practice, the appearance to object did not bind these parties to submit to the jurisdiction on the overruling of the objection (*Harkness v. Hyde*, 98 U. S. 476, 479, 25 U. S. (L. ed.) 237, 238; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 206, 13 S. Ct. 44, 36 U. S. (L. ed.) 942, 945; *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 209, 13 S. Ct. 859, 37 U. S. (L. ed.) 699, 705; *Goldrey v. Morning News*, 156 U. S. 518, 15 S. Ct. 559, 39 U. S. (L. ed.) 517; *Davis v. Cleveland*, etc. R. Co. 217 U. S. 157, 174, 18 Ann. Cas. 907, 30 S. Ct. 463, 54 U. S. (L. ed.) 708, 718, 27 L.R.A. (N.S.) 823), and since the injunction operates only in *personam*, it was erroneous to include them as defendants. It also was erroneous to include personal relief by injunction against certain named parties who, pending suit, were chosen to succeed some of the original defendants as officers of the international, district, and sub-district [235] unions, but who were not served with process and did not appear, they being included upon the ground that they were "before the court by representation through service having been had upon their said predecessors in office." This suit was commenced, and was carried to final decree in the trial court, before the taking effect

of the present Equity Rules (226 U. S. 629), and hence is governed by the former Rule 48 (210 U. S. 524), under which the rights of absent parties were expressly reserved.

But these procedural difficulties do not affect that part of the decree which awarded an injunction against the answering defendants (Lewis, Green, Sullivan, Savage, Watkins, Zelenka, and Rankin) "individually" and not as officers of the Union or its branches except as to Savage, against whom the decree goes in both his individual and official capacities, he alone having retained at the time of the final decree the same office he held at the beginning of the suit. If there was error in excluding the "official" responsibility of the others, it was not one of which they could complain, and it was not assigned for error upon their appeal to the Circuit Court of Appeals. If they were subject to injunction at all, they were so in their individual capacities. Whether the decree will bind their successors in office, or their fellow-members of the Union, is a question to be determined hereafter, if and when proceedings are taken to enforce the injunction against parties other than the answering defendants.

We proceed, therefore, to consider the case as it stands against the answering defendants.

The District Court based its decision upon two grounds: (1) That the organization known as the United Mine Workers of America, and its branches, as conducted and managed at the time of the suit and for many years before, was a common-law conspiracy in unreasonable restraint of trade, and also and especially a conspiracy against the rights of non-union miners in West Virginia; [236] and (2) That the defendants, in an effort to compel the plaintiff to enter into contractual relations with the Union relating to the employment of labor and the production of coal, although having knowledge of express contracts existing between plaintiff and its employees which excluded relations with the Union, endeavored by unlawful means to procure a breach of these contracts by the employees.

A brief recital of previous transactions between the parties becomes material. The Union is a voluntary and unincorporated association which was organized in the year 1890 in the States of Ohio and Indiana, and afterwards was extended to other States. It is made up of national or "international," district, sub-district, and local unions. District No. 6 comprises the coal districts of Ohio and the Panhandle of West Virginia. Sub-district No. 5 of that district comprises five counties and parts of counties in Ohio, and the Panhandle.

The answering defendants were and are active and influential members—leaders—of the Union, as well as officers. Savage, Lewis, and Sullivan have been members from its formation in 1890, and have held important offices in it and attended the national conventions. The others are long-time members, and possessed an influence indicated by the offices they held, but not limited to the duties of those offices.

From 1897 to 1906 what were known as joint interstate conferences were held annually or biennially between officials of the Union and representatives of the operators in the "Central Competitive Field" (which includes Western Pennsylvania, Ohio, Indiana, and Illinois, but not West Virginia), for the purpose of agreeing upon the scale of wages and the conditions of employment in that field. In addition there were occasional conferences of the same character affecting other States and districts.

[237] Plaintiff's mine is within the territorial limits of Sub-district No. 5 of District No. 6. Coal-mining operations were commenced there in the early part of the year 1902, and the mine was operated "non-union" until April, 1903, when, under threats from the Union officials, including defendants Watkins and Sullivan, that a certain unionized mine in Ohio, owned by the same proprietors, would be closed down if the men at the Hitchman were not allowed to organize, plaintiff consented to the unionization of the latter mine. This went into effect on the 1st of April, 1903, and upon the very next day the men were called out on strike because of a disagreement with the company as to the basis upon which mining should be paid for. The strike continued until May 23, requiring plaintiff to cease operations and preventing it from fulfilling its contracts, the most important of which was one for the daily supply of engine coal to the Baltimore & Ohio Railroad at a coaling station adjoining the mine. The financial loss to plaintiff was serious. The strike was settled and the men resumed work upon the basis of a modification of the official mining scale applicable to the Hitchman mine.

Again, in the spring of 1904, there was difficulty in renewing the scale. A temporary scale, agreed upon between operators and miners for the month of April, 1904, was signed in behalf of the Hitchman Company on the 18th of April. Two days later the men at the Hitchman struck, and the mine remained idle for two months, during which time plaintiff sustained serious losses in business and was put to heavy expense in obtaining coal from other sources to fill its contract with the Baltimore & Ohio Railroad Company. The strike was settled by the adoption of the official scale for the Pan-

handle District, with amendatory local rules for the Hitchman mine.

After this there was little further trouble until April 1, [238] 1906, when a disagreement arose between the Union and an association of operators with which plaintiff was not connected—the association being in fact made up of its competitors—about arranging the terms of the scale for the ensuing two years. At the same time a similar disagreement arose between the operators and the Union officials in the Central Competitive Field. The result was a termination of the interstate conferences and a failure to establish any official scale for the ensuing two years, followed by a widespread strike, or a number of concurrent strikes, involving the most of the bituminous coal-producing districts. There was absolutely no grievance or ground of disagreement at the Hitchman mine, beyond the fact that the mining scale expired by its own terms on March 31, and the men had not received authority from the Union officials either to renew it or to agree to a new one in its place. Plaintiff came to an understanding with the local union to the effect that if its men would continue at work the company would pay them from April 1st whatever the new scale might be, except that if the new scale should prove to be lower than that which expired on March 31, there should be no reduction in wages, while if the scale was raised the company would pay the increased amount, dating it back to April 1st. This was satisfactory to the men; but as the question of a new scale was then under discussion at a conference between the officials of the Union and the representatives of the Operators' Association, and plaintiff's employees wished to get the sanction of their officers, the manager of the Hitchman mine got into communication with those officials, including defendant Green, President of District No. 6, and endeavored to secure their assent to the temporary arrangement, but without success. Then a committee of the local union, including Daugherty, its President, took up the matter with Green and received permission to mine and load engine coal [239] until further notice from him. Under this arrangement the men remained at work for about two weeks. On April 15th, defendant Zelenka, Vice President of the sub-district, visited the mine, called a meeting of the miners, and addressed them in a foreign tongue, as a result of which they went on strike the next day, and the mine was shut down until the 12th of June, when it resumed as a "non-union" mine, so far as relations with the U. M. W. A. were concerned.

During this strike plaintiff was subjected to heavy losses and extraordinary expenses with respect to its business, of the same kind

that had befallen it during the previous strikes.

About the 1st of June a self-appointed committee of employees called upon plaintiff's president, stated in substance that they could not remain longer on strike because they were not receiving benefits from the Union, and asked upon what terms they could return to work. They were told that they could come back, but not as members of the United Mine Workers of America; that thenceforward the mine would be run non-union, and the company would deal with each man individually. They assented to this, and returned to work on a non-union basis. Mr. Pickett, the mine superintendent, had charge of employing the men, then and afterwards, and to each one who applied for employment he explained the conditions, which were that while the company paid the wages demanded by the Union and as much as anybody else, the mine was run non-union and would continue so to run; that the company would not recognize the United Mine Workers of America; that if any man wanted to become a member of that union he was at liberty to do so; but he could not be a member of it and remain in the employ of the Hitchman Company; that if he worked for the company he would have to work as a non-union man. To this each man employed gave his assent, understanding [240] that while he worked for the company he must keep out of the Union.

Since January, 1908 (after the commencement of the suit), in addition to having this verbal understanding, each man has been required to sign an employment card expressing in substance the same terms. This has neither enlarged nor diminished plaintiff's rights, the agreement not being such as is required by law to be in writing.

Under this arrangement as to the terms of employment, plaintiff operated its mine from June 12, 1906, until the commencement of the suit in the fall of the following year.

During the same period a precisely similar method of employment obtained at the Glendale mine, a property consisting of about 1,200 acres of coal land adjoining the Hitchman property on the south, and operated by a company having the same stockholders and the same management as the Hitchman; the office of the Glendale mine being at the Hitchman Coal & Coke Company's office. Another mine in the Panhandle, known as the Richland, a few miles north of the Hitchman, likewise was run "non-union."

In fact, all coal mines in the Panhandle and elsewhere in West Virginia, except in a small district known as the Kanawha field, were run "non-union," while the entire industry in Ohio, Indiana, and Illinois was operated on the "closed-shop" basis, so that

no man could hold a job about the mines unless he was a member of the United Mine Workers of America. Pennsylvania occupied a middle ground, only a part of it being under the jurisdiction of the Union. Other States need not be particularly mentioned.

The unorganized condition of the mines in the Panhandle and some other districts was recognized as a serious interference with the purposes of the Union in the [241] Central Competitive Field, particularly as it tended to keep the cost of production low, and, through competition with coal produced in the organized field, rendered it more difficult for the operators thereto maintain prices high enough to induce them to grant certain concessions demanded by the Union. This was the subject of earnest and protracted discussion in the annual international convention of the U. M. W. A. held at Indianapolis, Indiana, in the month of January, 1907, at which all of the answering defendants were present as delegates and participated in the proceedings. The discussion was based upon statements contained in the annual reports of John Mitchell, as President of the Union (joined as a defendant in the bill but not served with process), and of defendant Lewis, as Vice President, respecting the causes and consequences of the strike of 1906, and the policy to be adopted by the Union for the future. In these reports it was made to appear that the strike had been caused immediately by the failure of the joint convention of operators and miners representing the central and southwestern competitive fields, held in the early part of the year 1906, to come to an agreement for a renewal of the mining scale; that the strike was widespread, involving not less than 400,000 mine workers, was terminated by "district settlements," with variant results in different parts of the territory involved, and had not been followed by a renewal of the former relations between the operators and miners in the Central Competitive Field. Another result of the strike was a large decrease in the membership of the Union. Two measures of relief were proposed: first, that steps be taken to re-establish the joint interstate conferences; and second, the organization of the hitherto unorganized fields, including the Panhandle District of West Virginia, under closed-shop agreements, with all men about the mines included in the membership of the United Mine Workers [242] of America. In the course of the discussion the purpose of organizing West Virginia in the interest of the unionized mine workers in the Central Competitive Field, and the probability that it could be organized only by means of strikes, were repeatedly declared and were disputed by nobody. All who spoke advocated strikes, differing only as to wheth-

er these should be nation-wide or sectional. Defendant Lewis, in his report, recommended an abandonment of the policy of sectional settlements which had been pursued in the previous year. This recommendation, interpreted as a criticism of the policy pursued under the leadership of President Mitchell in the settlement of the 1906 strike, was the subject of long and earnest debate, in the course of which Lewis said: "When we organize West Virginia, when we organize the unorganized sections of Pennsylvania, we will organize them by a strike movement." And again, towards the close of the debate: "No one has made the statement that we can organize West Virginia without a strike." Defendant Green took part, favoring the view of Mr. Lewis that strikes should be treated nationally instead of sectionally. In the course of his remarks he said: "I say to you, gentlemen, one reason why I opposed the policy that was pursued last year was because over in Ohio we were peculiarly situated. We had West Virginia on the south and Pennsylvania on the east, and after four months of a strike in eastern Ohio we had reached the danger line. We felt keenly the competition from West Virginia, and during the suspension our mines in Ohio chafed under the object lesson they had. They saw West Virginia coal go by, train-load after train-load passing their doors, when they were on strike. This coal supplied the markets that they should have had. There is no disguising the fact, something must be done to remedy this condition. Year after year Ohio has had to go home and strike in some portion of the district to enforce the [243] interstate agreement that was signed up here. . . . I confess here and now that the overwhelming sentiment in Ohio was that a settlement by sections would not correct the conditions we complained of. Now, something must be done; it is absolutely necessary to protect us against the competition that comes from the unorganized fields east of us." Mr. Mitchell opposed the view of defendant Lewis, reiterating an opinion, repeatedly expressed before, that West Virginia and the other unorganized fields, "would not be thoroughly organized except as the result of a successful strike;" but declaring that "they will not be organized at all, strike or no strike, unless we are able to support the men in those fields from the first day they lay down their tools. . . . Now, I believe it is possible, indeed I believe it is probable, that in the not distant future we will be able to inaugurate a movement in West Virginia and the other unorganized fields that will involve them in a strike, and then we will expect you to furnish the sinews of war, as you have done in the past, to keep these men in idleness."

The discussion continued during three days, and at the end of it the report of a committee which expressed disagreement with Vice President Lewis' opposition to sectional settlements and recommended "a continuation in the future of the same wise, conservative business-like policies" that had been pursued by President Mitchell, was adopted by a *viva voce* vote.

The plain effect of this action was to approve a policy which, as applied to the concrete case, meant that in order to relieve the union miners of Ohio, Indiana, and Illinois from the competition of the cheaper product of the non-union mines of West Virginia, the West Virginia mines should be "organized" by means of strikes local to West Virginia, the strike benefits to be paid by assessments upon the union miners in the other States mentioned, while they remained at work.

[244] This convention was followed by an annual convention of Sub-district 5 of District 6, held in the month of March, 1907, at which defendants Watkins and Rankin were present as President and Secretary of the sub-district. Defendant Lewis, as National Vice President, occupied the chair during several of the sessions. Defendant Zelenka was present as a delegate, and also Thomas Hughes, who, while named as a defendant in the present suit, was not served with process. Watkins and Rankin in their reports recommended the complete unionization of the mines in the Panhandle counties, with particular reference to the Hitchman, the Glendale, the Richland, and two others; and as a result it was resolved "that the Sub-District officers, together with the District officers, be authorized to take up the work of organizing every mine in the Sub-District as quickly as it can be done."

Evidently in pursuance of this resolution, defendants Green, Zelenka, and Watkins, about July 1, 1907, called at plaintiff's office and laid before its general manager, Mr. Koch, a proposition for the unionization of the mine. He declined to consider it, but at their request laid it before plaintiff's board of directors, who rejected the proposition, and the manager informed Green of this. In one of the interviews Koch informed these defendants of the terms of plaintiff's working agreement with its employees to the effect that the mine was to be run non-union and they were not to become members of the Union.

About the same time, a Mr. McKinley, who was operating the Richard mine non-union, was interviewed by the Union leaders, notified of the resolution adopted by the sub-district convention, and, having asked that his mine be let alone, was met with the threat that they would secure the support of his men, and that if he did not recognize

the Union they would shut down his mine. [245] In one of the interviews that ensued he was told that it was their purpose to organize the Glendale, the Hitchman, the Richland, and some other mines; that at the Glendale they had twenty-four men who had joined the organization, "and that they had sixty men who had signed up or had agreed to join the organization at Hitchman, and that they were going to shut the mine down as soon as they got a few more men." With respect to their progress at his own mine he was kept in the dark until about the middle of October, 1907, when, through the activities of the organizer Hughes, they succeeded in shutting it down, and it remained closed until a restraining order was allowed by the court, immediately after which it resumed non-union.

The evidence renders it clear that Hughes was sent into the Panhandle to organize all the mines there, in accordance with the resolution of the sub-district convention. The bill made a statement of his activities, and alleged that he was acting as an organizer for the Union. Defendants' final answers made a complete denial, but in this are contradicted by admissions made in the earlier answers and by other and undisputed evidence. The only defendant who testified upon the subject declared that Hughes was employed by District No. 6 as an organizer, but denied that he had power or authority to shut down the Hitchman mine.

He arrived at that mine some time in September, 1907, and remained there or in that vicinity until the latter part of October, conducting a campaign of organization at the Hitchman and at the neighboring Glendale and Richland mines.

The evidence shows that he had distinct and timely notice that membership in the Union was inconsistent with the terms of employment at all three mines, and a violation of the express provisions of the agreement at the Hitchman and Glendale.

[246] Having unsuccessfully applied to Koch and McKinley for their co-operation, Hughes proceeded to interview as many of the men as he could reach and to hold public meetings in the interest of the Union. There is clear and uncontradicted evidence that he did not confine himself to mere persuasion, but resorted to deception and abuse. In his public speeches he employed abusive language respecting Mr. Pickett, William Daugherty, and Jim Jarrett.¹ He prophesied, in such a way that ignorant, foreign-born miners, such as he was addressing, naturally

might believe him to be speaking with knowledge, that the wages paid by the Hitchman would be reduced unless the mine was unionized. The evidence as to the methods he employed in personally interviewing the miners, while meagre, is significant. Myers, a Hitchman miner, testified: "He told me that he was a good friend of Mr. Koch, and that Mr. Koch had nothing against having the place organized again. He said he was a friend of his, and I made the remark that I would ask Mr. Koch and see if it was so; and he said no, that was of no use because he was telling me the truth." He did not confine his attentions to men who already were in plaintiff's employ, but in addition dissuaded men who had accepted employment from going to work.

A highly significant thing, giving character to Hughes' entire course of conduct, is that while his solicitation of the men was more or less public, as necessarily it had to be, he was careful to keep secret the number and the names of those who agreed to join the Union. Myers, being asked to allow his name to be entered on a book [247] that Hughes carried, tried to see the names already entered, "but he would not show anything; he told me he had it, and I asked him how many names was on it, and he said he had about enough to 'crack off.'" To Stewart, another Hitchman miner, he said "he was forming a kind of secret order among the men; he said he had a few men—he did not state the number of them—and he said each man was supposed to give him so much dues to keep it going, and then he said after he got the majority he would organize the place." Pickett, the mine superintendent, had learned of only five men at the Glendale who were inclined to join Hughes' movement; but when these were asked to remain outside of the mine for a talk, fifteen other men waited with them, and upon being reminded that while the company would not try to prevent them from becoming members of the Union, they could not be members and at the same time work for the Glendale Company, they all accepted this as equivalent to a notice of discharge. And, as has been stated, the owner of the Richland, while repeatedly threatened with unionization, was kept in the dark as to the progress made by the organizer amongst his employees until the mine was actually shut down.

The question whether Hughes had "power or authority" to shut down the Hitchman mine is beside the mark. We are not here concerned with any question of *ultra vires*,

at the Hitchman, and had been, respectively, President and Financial Secretary of the local union at the time of the 1906 strike, when the local deserted the U. M. W. A.

¹ Mr. Pickett was superintendent of the Hitchman and Glendale mines, and it was with him that the miners made their agreements to refrain from membership in the Union; Daugherty and Jarrett were miners

but with an actual threat of closing down plaintiff's mine, made by Hughes while acting as agent of an organized body of men who indubitably were united in a purpose to close it unless plaintiff would conform to their wishes with respect to its management, and who lacked the power to carry out that purpose only because they had not as yet persuaded a sufficient number of the Hitchman miners to join with them, and hence employed Hughes as an "organizer" and sent him to the mine with the very [248] object of securing the support of the necessary number of miners. They succeeded with respect to one of the mines threatened (the Richland), and preparations of like character were in progress at the Hitchman and the Glendale at the time the restraining order was made in this cause.

If there be any practical distinction between organizing the miners and organizing the mine, it has no application to this case. Unionizing the miners is but a step in the process of unionizing the mine, followed by the latter almost as a matter of course. Plaintiff is as much entitled to prevent the first step as the second, so far as its own employees are concerned, and to be protected against irreparable injury resulting from either. Besides, the evidence shows, without any dispute, that defendants contemplated no half-way measures, but were bent on organizing the mine, the "consent" of plaintiff to be procured through such a control of its employees as would render any further independent operation of the mine out of the question. This is evident from the discussions and resolutions of the international and sub-district conventions, from what was said by defendants Green, Zelenka, and Watkins to plaintiff's manager, and to the operator of the Richland, and from all that was said and done by Hughes in his effort to organize the Hitchman, Glendale, and Richland mines.

In short, at the time the bill was filed, defendants, although having full notice of the terms of employment existing between plaintiff and its miners, were engaged in an earnest effort to subvert those relations without plaintiff's consent, and to alienate a sufficient number of the men to shut down the mine, to the end that the fear of losses through stoppage of operations might coerce plaintiff into "recognizing the union" at the cost of its own independence. The methods resorted to by their "organizer" were such as have been described. The legal consequences remain for discussion.

[249] The facts we have recited are either admitted or else proved by clear and undisputed evidence and indubitable inferences therefrom. The proceedings of the international and sub-district conventions were shown by the introduction of official verbatim

reports, properly authenticated. It is objected that these proceedings, especially in so far as they include the declarations and conduct of others than the answering defendants, are not admissible because the existence of a criminal or unlawful conspiracy is not made to appear by evidence *aliunde*. The objection is untenable. In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves. The rule of evidence is commonly applied in criminal cases, but is of general operation; indeed, it originated in the law of partnership. It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them. *Pleasants v. Fant*, 22 Wall. 116, 119, 22 U. S. (L. ed.) 780, 792; *Connecticut Mut. L. Ins. Co. v. Hillmon*, 188 U. S. 208, 218, 23 S. Ct. 294, 47 U. S. (L. ed.) 446, 451; *Story Part*, §§ 107, 108; 1 *Greenleaf Ev.* §§ 112, 113 (184 b, c); 2 *Starkie Ev.* (2d ed.) 25, 26; *King v. Hardwick*, 11 East (Eng.) 578, 586, 589; *Sandilands v. Marsh*, 2 B. & Ald. (Eng.) 673, 679; *Wood v. Braddick*, 1 Taunt. (Eng.) 104, 105; *Van Reimsdyk v. Kane* (Story, J.), 1 Gall. 630, 635, 28 Fed. Cas. 16,872; *Aldrich v. Warren*, 16 Me. 465, [250] 468; *Pierce v. Wood*, 23 N. H. 519, 531; *Page v. Parker*, 40 N. H. 47, 62; *State v. Thibreau*, 30 Vt. 100, 105; *Jenne v. Joslyn*, 41 Vt. 478, 484; *Locke v. Stearns*, 1 Metc. (Mass.) 560, 563, 35 Am. Dec. 382; *Love v. Dairymple*, 117 Pa. St. 564, 568, 12 Atl. 567; *Main v. Aukam*, 4 App. Cas. (D. C.) 51, 56.

Upon a kindred principle, the declarations and conduct of an agent, within the scope and in the course of his agency, are admissible as original evidence against the principal, just as his own declarations or conduct would be admissible. *Barreda v. Silsbee*, 21 How. 146, 164, 165, 16 U. S. (L. ed.) 86, 92; *Vicksburg, etc. R. Co. v. O'Brien*, 119 U. S. 99, 104, 7 S. Ct. 118, 30 U. S. (L. ed.) 299, 301; *LaAbra Silver Min. Co. v. U. S.* 175 U. S. 423, 498, 20 S. Ct. 168, 44 U. S. (L. ed.) 223, 250. And since the evidence of Hughes' agency is clear and undisputed—that as the representative of a voluntary association of which the answering defendants

were active members, and in the execution of a purpose to which they all had given consent, and in which some of them were actively co-operating, he was engaged in an effort to organize the coal mines of the Panhandle District—it is equally clear that his declarations and conduct while so doing are evidential against the defendants.

What are the legal consequences of the facts that have been detailed?

That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing nonmembership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experiences of strikes and other interferences while attempting to "run union" were a sufficient explanation of its resolve to run "non-union," if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of "Collective bargaining," it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through the union to enter into agreements [251] with employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power. *Adair v. U. S.* 208 U. S. 161, 174, 13 Ann. Cas. 764, 28 S. Ct. 277, 52 U. S. (L. ed.) 436, 442; *Coppage v. Kansas*, 236 U. S. 1, 14, 35 S. Ct. 240, 59 U. S. (L. ed.) 441, 446, L.R.A.1915C 960. In the present case, needless to say, there is no act of legislation to which defendants may resort for justification.

Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employees, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. That the employment was "at will," and terminable by either party at any time, is of no consequence. In *Truax v. Raich*, 239 U. S. 33, 38, Ann. Cas. 1917B 283, 36 S. Ct. 7, 60 U. S. (L. ed.) 131, 134, L.R.A.1916D 545, this court ruled upon the precise question as follows: "It is said that the bill does not show an employment for a term, and that

under an employment at will the complainant could be discharged at any time for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion, and, by the weight [252] of authority, the unjustified interference of third persons is actionable although the employment is at will." (Citing many cases.)

In short, plaintiff was and is entitled to the good will of its employees, precisely as a merchant is entitled to the good will of his customers although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that by properly treating its employees, and paying them fair wages, and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of relations. See *Brennan v. United Hatters of North America* (cited with approval in *Truax v. Raich*, supra), 73 N. J. L. 729, 749, 9 Ann. Cas. 698, 65 Atl. 165, 118 Am. St. Rep. 727, 9 L.R.A.(N.S.) 254; *Brown v. Honiss*, 74 N. J. L. 501, 514 et seq. 68 Atl. 150; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 767, 53 Atl. 230; *Walker v. Cronin*, 107 Mass. 555, 565-566; *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 83 Am. St. Rep. 289, 52 L.R.A. 115, and cases there cited; *L. D. Wilcutt, etc. Co. v. Driscoll*, 200 Mass. 110, 117, 85 N. E. 897, 23 L.R.A.(N.S.) 1236, etc.

The right of action for persuading an employee to leave his employer is universally recognized—nowhere more clearly than in West Virginia—and it rests upon fundamental principles of general application, not upon the English statute of laborers. *Thacker Coal Co. v. Burke*, 59 W. Va. 253, 255; 8 Ann. Cas. 885, 886, 53 S. E. 161, 5 L.R.A. (N.S.) 1091; *Walker v. Cronin*, 107 Mass. 555, 567; *Angle v. Chicago, etc. R. Co.* 151 U. S. 1, 13, 14 S. Ct. 240, 38 U. S. (L. ed.) 55, 63; *Noice v. Brown*, 39 N. J. L. 569, 572. We turn to the matters set up by way of justification or excuse for defendants' interference with the situation existing at plaintiff's mine.

The case involves no question of the rights of employees. [253] Defendants have no agency for plaintiff's employees, nor do they assert any disagreement or grievance in their

behalf. In fact, there is none; but, if there were, defendants could not, without agency, set up any rights that employees might have. The right of the latter to strike would not give to defendants the right to instigate a strike. The difference is fundamental.

It is suggested as a ground of criticism that plaintiff endeavored to secure a closed non-union mine through individual agreements with its employees, as if this furnished some sort of excuse for the employment of coercive measures to secure a closed union shop through a collective agreement with the Union. It is a sufficient answer, in law, to repeat that plaintiff had a legal and constitutional right to exclude union men from its employ. But it may be worth while to say, in addition: first, that there was no middle ground open to plaintiff; no option to have an "open shop" employing union men and non-union men indifferently; it was the Union that insisted upon closed-shop agreements, requiring even carpenters employed about a mine to be members of the Union, and making the employment of any non-union man a ground for a strike; and secondly, plaintiff was in the reasonable exercise of its rights in excluding all union men from its employ, having learned, from a previous experience, that unless this were done union organizers might gain access to its mine in the guise of laborers.

Defendants set up, by way of justification or excuse, the right of workmen to form unions, and to enlarge their membership by inviting other workmen to join. The right is freely conceded, provided the objects of the union be proper and legitimate, which we assume to be true, in a general sense, with respect to the Union here in question. *Gompers v. Bucks Stove, etc. Co.* 221 U. S. 418, 439, 31 S. Ct. 492, 55 U. S. (L. ed.) 797, 805, 34 L.R.A.(N.S.) 874. The cardinal error of defendants' position lies [254] in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others. *Brennan v. United Hatters of North America*, 73 N. J. L. 729, 749, 9 Ann. Cas. 698, 65 Atl. 165, 118 Am. St. Rep. 727, 9 L.R.A.(N.S.) 254. The familiar maxim, *Sic utere tuo ut alienum non laedas*—literally translated, "So use your own property as not to injure that of another person," but by more proper interpretation, "so as not to injure the rights of another," (Broom's Leg. Max. 8th ed. 289)—applies to conflicting rights of every description. For example, where two or more persons are entitled to use the same road or passage, each one in using it is under a duty to exercise care not to

interfere with its use by the others, or to damage them while they are using it. And a most familiar application is the action for enticing an employee, in which it never was a justification that defendant wished to retain for himself the services of the employee. 1 Black Com. 429; 3 Id. 142.

Now, assuming defendants were exercising, through Hughes, the right to invite men to join their Union, still they had plain notice that plaintiff's mine was run "non-union," that none of the men had a right to remain at work there after joining the Union, and that the observance of this agreement was of great importance and value both to plaintiff and to its men who had voluntarily made the agreement and desired to continue working under it. Yet defendants, far from exercising any care to refrain from unnecessarily injuring plaintiff, deliberately and advisedly selected that method of enlarging their membership which would inflict the greatest injury upon plaintiff and its loyal employees. Every Hitchman miner who joined Hughes' "secret order" and permitted his name to be entered upon Hughes' list was guilty of a breach of his contract of employment and [255] acted a lie whenever thereafter he entered plaintiff's mine to work. Hughes not only connived at this, but must be deemed to have caused and procured it, for it was the main feature of defendants' plan, the *sine qua non* of their programme. Evidently it was deemed to be necessary, in order to "organize the Panhandle by a strike movement," that at the Hitchman, for example, man after man should be persuaded to join the Union, and having done so to remain at work, keeping the employer in ignorance of their number and identity, until so many had joined that by stopping work in a body they could coerce the employer and the remaining miners to "organize the mine," that is, to make an agreement that none but members of the Union should be employed, that terms of employment should be determined by negotiation not with the employees but with union officers—perhaps residents of other States and employees of competing mines—and that all questions in controversy between the mine operator and the miners should likewise be settled with outsiders.

True, it is suggested that under the existing contract an employee was not called upon to leave plaintiff's employ until he actually joined the Union, and that the evidence shows only an attempt by Hughes to induce the men to agree to join, but no attempt to induce them to violate their contract by failing to withdraw from plaintiff's employment after actually joining. But in a court of equity, which looks to the substance and essence of things and disregards matters of form and technical nicety, it is sufficient to

say that to induce men to agree to join is but a mode of inducing them to join, and that when defendants "had sixty men who had signed up or agreed to join the organization at Hitchman," and were "going to shut the mine down as soon as they got a few more men," the sixty were for practical purposes, and therefore in the sight of equity, already members of the [256] Union, and it needed no formal ritual or taking of an oath to constitute them such; their uniting with the Union in the plan to subvert the system of employment at the Hitchman mine, to which they had voluntarily agreed and upon which their employer and their fellow employees were relying, was sufficient.

But the facts render it plain that what the defendants were endeavoring to do at the Hitchman mine and neighboring mines cannot be treated as a *bona fide* effort to enlarge the membership of the Union. There is no evidence to show, nor can it be inferred, that defendants intended or desired to have the men at these mines join the Union, *unless they could organize the mines*. Without this, the new members would be added to the number of men competing for jobs in the organized districts, while non-union men would take their places in the Panhandle mines. Except as a means to the end of compelling the owners of these mines to change their method of operation, the defendants were not seeking to enlarge the union membership.

In any aspect of the matter, it cannot be said that defendants were pursuing their object by *lawful* means. The question of their intentions—of their *bona fides*—cannot be ignored. It enters into the question of malice. As Bowen, L. J., justly said, in the *Mogul Steamship Case*, 23 Q. B. D. (Eng.) 613, "intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse." And the intentional infliction of such damage upon another, without justification or excuse, is malicious in law. *Bitterman v. Louisville*, etc. R. Co. 207 U. S. 205, 223, 12 Ann. Cas. 693, 28 S. Ct. 91, 52 U. S. (L. ed.) 171, 183; *Brennan v. United Hatters of North America*, 73 N. J. L. 729, 744 et seq. 9 Ann. Cas. 698, 65 Atl. 165, 118 Am. St. Rep. 727, 9 L.R.A. (N.S.) 254, and cases cited. Of course, in a court of equity, when passing upon the right of injunction, damage threatened, irremediable by action at law, is equivalent to damage done. And we cannot deem [257] the proffered excuse to be a "*just cause or excuse*," where it is based, as in this case, upon an assertion of conflicting rights that are sought to be attained by unfair methods, and for the very purpose of

interfering with plaintiff's rights, of which defendants have full notice.

Another fundamental error in defendants' position consists in the assumption that all measures that may be resorted to are lawful if they are "peaceable"—that is, if they stop short of physical violence, or coercion through fear of it. In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employees constitutes such a violation. *Flaccus v. Smith*, 199 Pa. St. 128, 48 Atl. 894, 85 Am. St. Rep. 779, 54 L.R.A. 640; *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905] A. C. 239, 244, 250, 253, 2 Ann. Cas. 436; *George Jonas Glass Co. v. Glass Bottle Blowers' Assoc.* 77 N. J. Eq. 219, 223, 79 Atl. 262, 41 L.R.A. (N.S.) 445.

The present is not a case of merely withholding from an employer an economic need—as a supply of labor—until he assents to be governed by union regulations. Defendants have no supply of labor of which plaintiff stands in need. By the statement of defendant Lewis himself, made in his formal report to the Indianapolis convention of 1907, out of more than 370,000 coal miners in the States of Pennsylvania, Maryland, Virginia, and West Virginia, less than 80,000 (about 22 per cent) were members of the Union. Considering the Panhandle separately, doubtless the proportion was even smaller, and the supply of non-union labor ample. There is no reason to doubt that if defendants had been actuated by a genuine desire to increase the membership of the Union without unnecessary injury to the known rights of plaintiff, they would have permitted their proselytes to withdraw from plaintiff's employ when and as they became [258] affiliated with the Union—as their contract of employment required them to do—and that in this event plaintiff would have been able to secure an adequate supply of non-union men to take their places. It was with knowledge of this, and because of it, that defendants, through Hughes as their agent, caused the new members to remain at work in plaintiff's mine until a sufficient number of men should be persuaded to join so as to bring about a strike and render it difficult if not practically impossible for plaintiff to continue to exercise its undoubted legal and constitutional right to run its mine "non-union."

It was one thing for plaintiff to find, from time to time, comparatively small numbers of men to take vacant places in a going mine, another and a much more difficult thing to find a complete gang of new men to start up

a mine shut down by a strike, when there might be a reasonable apprehension of violence at the hands of the strikers and their sympathizers. The disordered condition of a mining town in time of strike is matter of common knowledge. It was this kind of intimidation, as well as that resulting from the large organized membership of the Union, that defendants sought to exert upon plaintiff, and it renders pertinent what was said by this court in the *Gompers Case*, 221 U. S. 418, 439, 31 S. Ct. 492, 55 U. S. (L. ed.) 797, 805, 34 L.R.A. (N.S.) 874, immediately following the recognition of the right to form labor unions: "But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made it is the duty of government to protect the one against the many as well as the many against the one."

[259] Defendants' acts cannot be justified by any analogy to competition in trade. They are not competitors of plaintiff; and if they were their conduct exceeds the bounds of fair trade. Certainly, if a competing trader should endeavor to draw custom from his rival, not by offering better or cheaper goods, employing more competent salesmen, or displaying more attractive advertisements, but by persuading the rival's clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places, any court of equity would grant an injunction to restrain this as unfair competition.

Upon all the facts, we are constrained to hold that the purpose entertained by defendants to bring about a strike at plaintiff's mine in order to compel plaintiff, through fear of financial loss, to consent to the unionization of the mine as the lesser evil, was an unlawful purpose, and that the methods resorted to by Hughes—the inducing of employees to unite with the Union in an effort to subvert the system of employment at the mine by concerted breaches of the contracts of employment known to be in force there, not to mention misrepresentation, deceptive statements, and threats of pecuniary loss communicated by Hughes to the men—were unlawful and malicious methods, and not to be justified as a fair exercise of the right to increase the membership of the Union.

There can be no question that plaintiff was threatened with danger of an immediate strike as a result of the activities of Hughes.

The effect of his arguments and representations is not to be judged from the testimony of those witnesses who rejected his overtures. Naturally, it was not easy for plaintiff to find men who would testify that they had agreed with Hughes to break their contract with plaintiff. One such did testify. But the true measure of the extent of his operations and the probability of his carrying them to success are indicated by his [260] declaration to Myers that he had about enough names at the *Hitchman* to "crack off," by the statement to McKinley that twenty-four men at the *Glendale* mine had joined the organization, and sixty at the *Hitchman*, and by the fact that they actually succeeded in shutting down the *Richland* about the middle of October. The declaration made concerning the *Glendale* is corroborated by the evidence of what happened at that mine.

That the damage resulting from a strike would be irremediable at law is too plain for discussion.

Therefore, upon the undisputed facts of the case, and the indubitable inferences from them, plaintiff is entitled to relief by injunction. Having become convinced by three costly strikes, occurring within a period of as many years, of the futility of attempting to operate under a closed-shop agreement with the Union, it established the mine on a non-union basis, with the unanimous approval of its employees—in fact upon their suggestion—and under a mutual agreement, assented to by every employee, that plaintiff would continue to run its mine non-union and would not recognize the *United Mine Workers of America*; that if any man wanted to become a member of that Union he was at liberty to do so, but he could not be a member and remain in plaintiff's employ. Under that agreement plaintiff ran its mine for a year and more, and, so far as appears, without the slightest disagreement between it and its men, and without any grievance on their part. Thereupon defendants, having full notice of the working agreement between plaintiff and its men, and acting without any agency for those men, but as representatives of an organization of mine workers in other States, and in order to subject plaintiff to such participation by the Union in the management of the mine as necessarily results from the making of a closed-shop agreement, sent their agent to the mine, who, with full notice of, and for the very purpose of subverting, [261] the status arising from plaintiff's working agreement and subjecting the mine to the Union control, proceeded, without physical violence, indeed, but by persuasion accompanied with threats of a reduction of wages and deceptive statements as to the attitude of the mine management, to induce plaintiff's employees to join the Union and

at the same time to break their agreement with plaintiff by remaining in its employ after joining; and this for the purpose not of enlarging the membership of the Union, but of coercing plaintiff, through a strike or the threat of one, into recognition of the Union.

As against the answering defendants, plaintiff's right to an injunction is clear; as to the others named as defendants, but not served with process, the decree is erroneous, as already stated.

Respecting the sweep of the injunction, we differ somewhat from the result reached by the District Court.

So far as it restrains—(1) Interfering or attempting to interfere with plaintiff's employees for the purpose of unionizing plaintiff's mine without its consent, by representing or causing to be represented to any of plaintiff's employees, or to any person who might become an employee of plaintiff, that such person will suffer or is likely to suffer some loss or trouble in continuing in or in entering the employment of plaintiff, by reason of plaintiff not recognizing the Union, or because plaintiff runs a non-union mine; (2) Interfering or attempting to interfere with plaintiff's employees for the purpose of unionizing the mine without plaintiff's consent, and in aid of such purpose knowingly and wilfully bringing about the breaking by plaintiff's employees of contracts of service known at the time to exist with plaintiff's present and future employees; (3) Knowingly and wilfully enticing plaintiff's employees, present or future, to leave plaintiff's service on the ground that plaintiff does not recognize the United Mine Workers of America or runs a non-union mine, [262] etc.; (4) Interfering or attempting to interfere with plaintiff's employees so as knowingly and wilfully to bring about the breaking by plaintiff's employees, present and future, of their contracts of service, known to the defendants to exist, and especially from knowingly and wilfully enticing such employees, present or future, to leave plaintiff's service without plaintiff's consent; (5) Trespassing on or entering upon the grounds and premises of plaintiff or its mine for the purpose of interfering therewith or hindering or obstructing its business, or with the purpose of compelling or inducing, by threats, intimidation, violent or abusive language, or persuasion, any of plaintiff's employees to refuse or fail to perform their duties as such; and (6) Compelling or inducing or attempting to compel or induce, by threats, intimidation, or abusive or violent language, any of plaintiff's employees to leave its service or fail or refuse to perform their duties as such employees, or compelling or attempting to compel by like means any person desiring to seek

employment in plaintiff's mine and works from so accepting employment therein;—the decree is fully supported by the proofs. But it goes further, and awards an injunction against picketing and against acts of physical violence, and we find no evidence that either of these forms of interference was threatened. The decree should be modified by eliminating picketing and physical violence from the sweep of the injunction, but without prejudice to plaintiff's right to obtain an injunction hereafter against these forms of interference if proof shall be produced, either in proceedings supplemented to this action or in an independent action, that such an injunction is needed.

The decree of the Circuit Court of Appeals is reversed, and the decree of the District Court is modified as above stated, and as so modified it is affirmed, and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

[263] BRANDEIS, J. (*dissenting*).—This suit was begun October 24, 1907. The Hitchman Coal & Coke Company, plaintiff below, is the owner of a coal mine in West Virginia. John Mitchell and nine others, defendants below, were then the chief executive officers of the United Mine Workers of America and of its district and sub-district organizations having "jurisdiction" over the territory in which plaintiff's mine is situated; and were sued both individually and as such officers. The mine had been "unionized" about three years prior to April 16th, 1906; and until about that date was operated as a "union" mine, under a collective agreement with a local union of the United Mine Workers of America. Then a strike was declared by the union; and a short shut-down followed. While the strike so declared was still in force, as the bill alleges, the company re-opened the mine as a closed non-union mine. Thereafter persons applying for work were required as a condition of obtaining employment to agree that they would not, while in the service of the company, be a member of the union, and if they joined the union would withdraw from the company's employ.¹

¹ About two months after the restraining order was issued in this case the plaintiff company began the practice of requiring applicants for work to sign employment cards, in the following terms:

"I am employed by and work for the Hitchman Coal & Coke Company with the express understanding that I am not a member of the United Mine Workers of America, and will not become so while an employee of the Hitchman Coal & Coke Company; that the Hitchman Coal & Coke Company is run non-union and agrees with me that it will run non-union while I am in its employ. If at

[264] Alleging that efforts were being made illegally to unionize its mine "without its consent," the company brought in the United States Circuit (now District) Court for the Northern District of West Virginia this suit to enjoin such efforts. District Judge Dayton granted a restraining order upon the filing of the bill. An order was entered May 26, 1908, continuing it as a temporary injunction. A motion to modify the same was denied, September 21, 1909. 172 Fed. 963. An appeal from this order was dismissed by the Circuit Court of Appeals, March 11, 1910. 176 Fed. 549. The case was then heard on the merits; defendants having denied in their answer all the charges of unlawful conduct set forth in the bill; and on January 18, 1913, a decree was entered for a perpetual injunction substantially in the form of the restraining order. 202 Fed. 512. This decree was reversed by the Circuit Court of Appeals on June 1, 1914 (214 Fed. 685); but a stay was granted pending an application to this court for a writ of certiorari. The company appealed to this court and also applied for a writ of certiorari. The appeal was dismissed, as the jurisdiction of [265] the Circuit (District) Court was rested wholly upon diversity of citizenship, plaintiff being a corporation organized under the laws of West Virginia and all the defendants citizens and residents of other States. 241 U. S. 644. A writ of certiorari was granted, however, March 13, 1916. The case was argued at that term and a reargument was ordered.

The District Court held that the United Mine Workers of America with its subordinate branches constitutes an unlawful organization—illegal both under the law of West Virginia and under the Federal Anti-Trust Act; that its long continued effort to unionize the mines of West Virginia had not been "in the interest either of the betterment of mine labor in the State or of upholding that free commerce in coal between the States guaranteed by Federal law," but to restrain if not destroy it for the benefit of "rival operators and producers in Ohio, Western Pennsylvania,

Illinois, and Indiana, competitive fields" in which the mines had been unionized; and that "in pursuit of its unlawful purposes" the union "have sought and still seek to compel the plaintiff . . . to submit to contractual relations with it as an organization relating to the employment of labor and production contrary to the will and wish of said company; that its officers, in pursuance of such unlawful effort to monopolize labor and restrain trade, and with knowledge of the express contracts existing between this plaintiff and its employees, have unlawfully sought to cause the breach of the said contracts on the part of its said employees."

The decree, besides the usual injunction against threat, intimidation, force or violence, and against inducing breaches of employees' contracts or trespassing upon plaintiff's property, enjoined defendants (and others hereinafter described), among other things, from—

1. "Representing ["for the purpose of unionizing plaintiff's mine without plaintiff's consent"] . . . to [266] any of plaintiff's employees, or to any person who might become an employee of plaintiff, that such person . . . is likely to suffer some loss or trouble in continuing in or in entering the employment of plaintiff, . . . representing . . . to such employee . . . that such loss or trouble . . . may come by reason of plaintiff not recognizing the United Mine Workers of America, or because plaintiff runs a non-union mine."

2. " . . . knowingly and wilfully enticing ["for the purpose of unionizing plaintiff's mine without plaintiff's consent"] plaintiff's employees, present or future, . . . to leave plaintiff's service, giving or assigning . . . as a reason for . . . leaving of plaintiff's service, that plaintiff does not recognize the United Mine Workers of America, or that plaintiff runs a non-union mine."

3. " . . . knowingly and wilfully enticing plaintiff's employees, present or future, . . . to leave plaintiff's service, without

any time I am employed by the Hitchman Coal & Coke Company I want to become connected with the United Mine Workers of America, or any affiliated organization, I agree to withdraw from the employment of said company, and agree that while I am in the employ of that company I will not make any efforts amongst its employees to bring about the unionizing of that mine against the company's wish. I have either read the above or heard the same read."

Prior to that time, the agreement rested in oral understanding merely, and is sufficiently indicated in the following excerpts from the testimony of the mine superintendent as to what he told the men applying for employment:

"I also told them that any man who wanted to become a member of the United Mine Workers—that that was his business—but he could not be a member of the United Mine Workers and be affiliated with the United Mine Workers and be under the employ of the Hitchman Coal & Coke Company, or be under the jurisdiction of the United Mine Workers; that the mine was run non-union so far as the United Mine Workers of America were concerned.

"Q. You mean you made every man understand that while he worked for the Hitchman Company he must keep out of the union?

"A. Yes, sir; or at least they said they understood it."

plaintiff's consent, against plaintiff's will, and to plaintiff's injury."

4. "... establishing a picket . . . for the purpose of inducing . . . by . . . persuasion . . . any person . . . coming to plaintiff's mine to accept employment . . . to refuse . . . to accept service with plaintiff."

5. "... interfering in any manner whatsoever, either by . . . persuasion or entreaty with any person in the employ of plaintiff who has contracted with and is in the actual service of plaintiff to . . . induce him to quit the service of plaintiff . . . or assisting, or abetting in any manner" his doing so.

Three of the defendants—Mitchell, Wilson and Hughes—were never served with process and did not enter any appearance except to object to the jurisdiction of the court over them. Of the remaining seven all but two had, prior to the entry of the final decree, ceased to hold [267] any office either in the United Mine Workers of America or in any of the district or sub-district organizations. Nevertheless the decree directed that the injunction issue against each of the ten original defendants, "individually;" and also in their official capacities against their successors in office (who were named in the decree) although these had not been served with process or been named in the bill; the court declaring such persons to be "before the court by representation through service having been made upon their said predecessors in office, sued as such officers and as members of the United Mine Workers of America." The decree extended the injunction, among others, also to "all persons now members of said United Mine Workers of America, and all persons who though not now members do become members of said United Mine Workers of America."

The Circuit Court of Appeals, reversing the decree of the District Court, held that the United Mine Workers of America was not an unlawful organization under the laws of West Virginia, that its validity under the Federal Anti-Trust Act could not be considered in this proceeding; that so long as defendants "refrained from resorting to unlawful measures to effectuate" their purpose "they could not be said to be engaged in a conspiracy to unionize plaintiff's mine;" that "the evidence fails to show that any unlawful methods were resorted to by these defendants in this instance;" and specifically that there was nothing in the individual contracts which barred defendants from inducing the employees to join the union. With these conclusions I agree substantially.

First: The alleged illegality of the United Mine Workers of America under the law of West Virginia.

The United Mine Workers of America does not appear to differ essentially in character and purpose from other international unions which, like it, are affiliated with the American Federation of Labor. Its membership is said [268] to be larger than that of any other; and it may be more powerful. But the common law does not limit the size of unions or the degree to which individual workmen may by union increase their bargaining power. As stated in *Gompers v. Bucks Stove, etc. Co.* 221 U. S. 418, 439, 31 S. Ct. 492, 55 U. S. (L. ed.) 797, 805, 34 L.R.A. (N.S.) 874: "The law, therefore, recognizes the right of workmen to unite and to invite others to join their ranks, thereby making available the strength, influence and power that come from such association." We do not find either in the decisions or the statutes of West Virginia anything inconsistent with the law as declared by this court. The union is not an unlawful organization, and is not in itself an unlawful conspiracy. We have no occasion to consider the legality of the specific provisions contained in its constitution or by-laws.

Second: The alleged illegality of the United Mine Workers of America under the Federal Anti-Trust Act.

The District Judge undertook to pass upon the legality of the United Mine Workers of America under the Federal Anti-Trust Act; but the question was not in issue in the case. It had not been raised in the bill or by answer. Evidence bearing upon the issue was properly objected to by defendants and should have been excluded.

Third: The alleged conspiracy against the West Virginia Mines.

It was doubtless the desire of the United Mine Workers to unionize every mine on the American continent and especially those in West Virginia which compete directly with the mines of Western Pennsylvania, Ohio, Indiana, and other States already unionized. That desire and the purpose to effect it were not unlawful. They were part of a reasonable effort to improve the condition of workmen engaged in the industry by strengthening their bargaining power through unions; and extending the field of union power. No conspiracy to shut down or otherwise injure West Virginia was proved, nor was there [269] any averment in the bill of such conspiracy, or any issue otherwise raised by the pleadings which justified the consideration of that question by the District Court.¹

¹ This alleged conspiracy not being in issue, the District Court improperly allowed the introduction of, and considered, a mass of documents referring to various mine workers' conventions, and joint conventions of miners and operators held years previous to the filing of the bill. Judge Dayton laid great stress

Fourth: "Unionizing plaintiff's mine without plaintiff's consent."

The fundamental prohibition of the injunction is against acts done "for the purpose of unionizing plaintiff's mine without plaintiff's consent." Unionizing a shop does not mean inducing the employees to become members of the union.¹ It means inducing the employer [270] to enter into a collective agreement with the union governing the relations of the employer to the employees. Unionizing implies, therefore, at least *formal* consent of the employer. Both plaintiff and defendants insisted upon exercising the right to secure contracts for a closed shop. The plaintiff sought to secure the *closed non-union shop* through individual agreements with employees. The defendants sought to secure the *closed union shop* through a collective agreement with the union. Since collective bargaining is legal, the fact that the workingmen's agreement is made not by individuals directly with the employer, but by the employees with the union and by it, on their behalf, with the employer, is of no significance in this connection. The end being *lawful*, defendant's efforts to unionize the mine can be illegal, only if the methods or means pursued were unlawful; unless indeed there is some special significance in the expression "unionizing without plaintiff's consent."

It is urged that a union agreement curtails the liberty of the operator. Every agreement curtails the liberty of those who enter into it. The test of legality is not whether an

agreement curtails liberty, but whether the parties have agreed upon some thing which the law prohibits or declares otherwise to be inconsistent with the public welfare. The operator by the union agreement [271] binds himself: (1) to employ only members of the union; (2) to negotiate with union officers instead of with employees individually the scale of wages and the hours of work; (3) to treat with the duly constituted representatives of the union to settle disputes concerning the discharge of men and other controversies arising out of the employment. These are the chief features of a "unionizing" by which the employer's liberty is curtailed. Each of them is legal. To obtain any of them or all of them men may lawfully strive and even strike. And, if the union may legally strike to obtain each of the things for which the agreement provides, why may it not strike or use equivalent economic pressure to secure an agreement to provide them?

It is also urged that defendants are seeking to "coerce" plaintiff to "unionize" its mine. But coercion, in a legal sense, is not exerted when a union merely endeavors to induce employees to join a union with the intention thereafter to order a strike unless the employer consents to unionize his shop. Such pressure is not coercion in a legal sense. The employer is free either to accept the agreement or the disadvantage. Indeed, the plaintiff's whole case is rested upon agreements secured under similar pressure of economic necessity or disadvantage. If it is coercion to threaten to strike unless plaintiff

on reported declarations of the delegates to these conventions, although the declarations of alleged co-conspirators were obviously inadmissible, there being no foundation for the conspiracy charge.

1 A witness for the defendants testified as follows:

"There is a difference between unionizing a mine and unionizing the employees in a mine; unionizing the employees is having the men join the organization; unionizing a mine is creating joint relations between the employers and employees; a mine cannot be unionized unless the employer enters into contractual relations with the union; it is not the policy or purpose of the United Mine Workers as an organization to coerce a man into doing a thing against his will; this distinction between unionizing a mine and unionizing the employees of a mine has existed since the organization came about, and this method of unionizing a mine existed in 1906 and 1907."

A witness for the plaintiff testified that "the term 'union,' when applied to mining, means the United Mine Workers, and a union mine is a mine that is under their jurisdiction and so recognized. . . ." The contrary is "non-union or open shop." And further, "The men might be unionized at a mine and

the mine owners not recognize the union. That would in effect be an open shop. When I said 'unionize the employees' I meant practically all of the employees; but a union mine, as I understand it, is one wherein the closed shop is practically enforced." In such case, the witness explained, the operator would be practically in contract relation with the organization.

It was also testified: "The difference between organizing the men at the mine and organizing the mine is that when the miners are organized the work of organizing the mine is only just started. They next proceed to meet with the operator who owns the mine, or operates it, for the purpose of making contracts or agreements. Under the constitution and methods of the United Mine Workers a mine cannot be organized without the consent of the owner, and it is not the object or purpose of the United Mine Workers to do so, and never has been; it has never been attempted as far as witness knows. After a mine has been organized, the agreement between the employer and the organization is paramount. The constitution of the organization has nothing to do with the workings afterwards; that agreement does not take away from the operator the control of his men."

consents to a closed union shop, it is coercion also to threaten not to give one employment unless the applicant will consent to a closed non-union shop. The employer may sign the union agreement for fear that labor may not be otherwise obtainable; the workman may sign the individual agreement for fear that employment may not be otherwise obtainable. But such fear does not imply coercion in a legal sense.

In other words an employer, in order to effectuate the closing of his shop to union labor, may exact an agreement to that effect from his employees. The agreement [272] itself being a lawful one, the employer may withhold from the men an economic need—employment—until they assent to make it. Likewise an agreement closing a shop to non-union labor being lawful, the union may withhold from an employer an economic need—labor—until he assents to make it. In a legal sense an agreement entered into, under such circumstances, is voluntarily entered into; and as the agreement is in itself legal, no reason appears why the general rule that a legal end may be pursued by legal means should not be applied. Or, putting it in other words, there is nothing in the character of the agreement which should make *unlawful* means used to attain it, which in other connections are recognized as *lawful*.

Fifth: There was no attempt to induce employees to violate their contracts.

The contract created an employment at will; and the employee was free to leave at any time. The contract did not bind the employee not to join the union; and he was free to join it at any time. The contract merely bound him to withdraw from plaintiff's employ, if he joined the union. There is evidence of an attempt to induce plaintiff's employees to agree to join the union; but none whatever of any attempt to induce them to violate their contract. Until an employee actually joined the union he was not, under the contract, called upon to leave plaintiff's employ. There consequently would be no breach of contract until the employee both joined the union and failed to withdraw from plaintiff's employ. There was no evidence that any employee was persuaded to do that or that such a course was contemplated. What perhaps was intended was to secure agreements or assurances from individual employees that they would join the union when a large number of them should have consented to do so; with the purpose, when such time arrived, to have them join the union [273] together and strike—unless plaintiff consented to unionize the mine. Such a course would have been clearly permissible under the contract.

Sixth: Merely persuading employees to leave plaintiff's employ or others not to enter it was not unlawful.

To induce third persons to leave an employment is actionable if done maliciously and without justifiable cause although such persons are free to leave at their own will. *Truax v. Raich*, 239 U. S. 33, 38, Ann. Cas. 1917B 283, 36 S. Ct. 7, 60 U. S. (L. ed.) 131, 134, L.R.A.1916D 545; *Thacker Coal Co. v. Burke*, 59 W. Va. 253, 8 Ann. Cas. 885, 53 S. E. 161, 5 L.R.A. (N.S.) 1091. It is equally actionable so to induce others not to enter the service. The individual contracts of plaintiff with its employees added nothing to its right in this connection, since the employment was terminable at will.

As persuasion, considered merely as a means, is clearly legal, defendants were within their rights if, and only if, their interference with the relation of plaintiff to its employees was for justifiable cause. The purpose of interfering was confessedly in order to strengthen the union, in the belief that thereby the condition of workmen engaged in mining would be improved; the bargaining power of the individual workingman was to be strengthened by collective bargaining; and collective bargaining was to be ensured by obtaining the union agreement. It should not, at this day, be doubted that to induce workingmen to leave or not to enter an employment in order to advance such a purpose is justifiable when the workmen are not bound by contract to remain in such employment.

Seventh: There was no "threat, violence or intimidation."

The decree enjoined "threats, violence or intimidation." Such action would, of course, be unlawful though employed in a justifiable cause. But there is no evidence that any of the defendants have resorted to such means. The propaganda among plaintiff's employees was conducted almost entirely by one man, the defendant Hughes, a District No. 6 organizer. His actions were orderly and [274] peaceable, consisting of informal talks with the men, and a few quietly conducted public meetings,¹ in which he argued the benefits of organization and pointed out to the men that, although the company was

¹ Following is a notice of one of Hughes' meetings which was torn from a telegraph pole in the street by the plaintiff's mine superintendent:

"Notice to the miners of the Hitchman mine. There will be a mass meeting Friday evening at 6:30 P. M. at Nick Heil's Base Ball Grounds, for the purpose of discussing the principals of organization. President William Green will be present. All miners are cordially invited to attend."

then paying them according to the union scale, there would be nothing to prevent a later reduction of wages unless the men united. He also urged upon the men that if they lost their present jobs, membership in the union was requisite to obtaining employment in the union mines of the neighboring States. But there is no suggestion that he exceeded the moderate bounds of peaceful persuasion, and indeed, if plaintiff's witnesses are to be believed, men with whom Hughes had talked, his argument made no impression on them, and they expressed to him their satisfaction with existing conditions at the mine.

When this suit was filed no right of the plaintiff had been infringed and there was no reasonable ground to believe that any of its rights would be interfered with; and, in my opinion, the Circuit Court of Appeals properly reversed the decree of the District Court, and directed that the bill be dismissed.

Mr. Justice Holmes and Mr. Justice Clarke concur in this dissent.

NOTE.

The reported case, applying the rule that an interference with established contract relations may be unlawful though no illegal means are adopted to that end, holds that an attempt to organize a labor union among the employees of a particular company was unlawful under the circumstances disclosed and was properly enjoined. It appeared that a mine owner had by contract with its employees established a nonunion mine, the employees agreeing not to join a union during their employment and that in the event of their so joining the employment should terminate. This contract, the court holds, established a status which the employer was entitled to have protected against the acts of third persons. It is therefore held that an injunction was properly issued against the officers of a miners' union who sought to secure the employees to join the union secretly, with the intention of calling a strike to enforce the recognition of the union as soon as enough men had joined. The civil liability for interference with contract relations is discussed with specific reference to injunction against such interference by labor organizations, in the notes to *South Wales Miners' Federation v. Glamorgan Coal Co.* 2 Ann. Cas. 436; *Beekman v. Marsters*, 11 Ann. Cas. 332; *Jones v. Leslie*, Ann. Cas. 1912B 1158; *Johnson v. Aetna L. Ins. Co.* Ann. Cas. 1916E 603; and *Webber v. Barry*, 11 Am. St. Rep. 466. The holding of the reported case was reiterated in *Eagle Glass, etc. Co. v. Rowe*, 245 U. S. 275, 38 S. Ct. 80, decided on the same day.

CUNNINGHAM

v.

CUNNINGHAM.

Michigan Supreme Court—June 14, 1915.

187 Mich. 68; 153 N. W. 8.

Divorce — Cruelty — Habits of Spouse.

That complainant's husband was untidy in his habits, walked through the house with muddy feet, spat on the stove and occasionally indulged in a game of cards for small stakes at a place which formerly had been a saloon, is not "extreme cruelty" under the statute.

[See note at end of this case.]

Appeal from Circuit Court, Hillsdale county: CHESTER, Judge.

Action by Esther Cunningham, plaintiff, against Isaiah Cunningham, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

Merton Fitzpatrick for appellant.
F. A. Lyon for appellee.

[69] KUH, J.—The defendant appeals from a decree granting complainant a divorce on the ground of extreme cruelty, and an allowance of \$2,000 as permanent alimony.

The parties were married in 1892, in Pennsylvania, and at the time of their marriage the complainant was 23 years of age and the defendant 48. Shortly thereafter they moved to the State of North Dakota, where they lived on a farm until 1900. In that year they sold the Dakota farm and came to Michigan to live, purchasing a farm in the township of Allen in Hillsdale county, where they lived until 1903. In that year they moved to the city of Hillsdale, where they continued to reside until the time of their separation, December 22, 1913. While they were living in Dakota their only child, a daughter was born, who is now living and is 18 years of age.

On coming to the city of Hillsdale, the defendant engaged in the coal business, and during a portion of the time he also carried on a grocery and feed business in connection therewith. The home which they occupied was in close proximity to the railroad tracks and coal yards. It appears that at the time this property was purchased, the matter of going into the business was discussed between them, and that the deed to the property was taken in their joint names.

The allegations in the bill of complaint as originally filed consist largely of complaints of the personal habits [70] and manners of

the defendant and of his conduct in and about the house. Simply as evidence of the character of these complaints, the following is taken from the testimony of the complainant:

"It was muddy and coal black and dirty around the place, and he would come in and walk through the store and into the kitchen and through the sitting room quite frequently; he would go through the whole house at times. He was quite a hand to smoke and knock ashes out on the stove, and to sit around in front of the stove and knock them out and light his pipe and snip the matches around. I told him I thought it was just as easy from him to empty his pipe into the stove as it was to empty it out onto the stove and the floor. He didn't say anything, but sometimes he'd say, 'Babe can sweep them up.' He meant our daughter Lorena. I worked all I possibly could. He told me I didn't do anything, and I wasn't interested in anything, and that I always threw the coal business aside for my washing."

And the following from the testimony of the daughter:

"Our home was right along by the railroad track. There was a house between our house and the road. Our house was on the back end of the lot. Mrs. Osborn and her daughter, Mrs. Perry, lived on the front end of the lot. Mr. Eldridge lives the first house west of Mrs. Osborn. There were no other houses on the back end of the lot. The Hillsdale Grocery Company's warehouse was directly east of our house. The coal bins were between our house and Mrs. Perry's. They were right by our house. We kept the groceries in the office. They would drive in to get coal between Mrs. Perry's and Mrs. Eldridge's, and they would drive in around to the grocery company's warehouse. They would have to drive in from the street. My mother did the housework and had no help except myself. There were four rooms below and only one carpeted. Mother had to mop all the other floors. It was real muddy down there when it rained. Father would track in mud; it would stick to his feet and he wouldn't try to get it off. This would happen every [71] day when it was muddy. It would dirty up the floor. I have heard mother ask him not to come in without cleaning his feet. He said that he would just as soon live in it. Father was always smoking and when he would empty his pipe he would empty it on the stove, on the outside of the stove, or else on the floor. I have heard mother speak to him about that. I don't remember what he would say. I have seen him blow his nose on the floor to dirty it. He did not chew tobacco very much; did once in awhile. He would sometimes spit on the stove. It would sometimes go in and sometimes beyond the side. My mother's conduct toward him was kind. During the past year

his conduct toward her wasn't very kind. She couldn't do anything to please him, and he would find fault with everything she did. I heard him swear at her once."

Complaint is also made as to his lack of personal cleanliness, but it would profit no one to attempt to repeat the many seemingly trivial complaints which are set up in the record and discussed in the briefs of counsel.

After the case had been heard, an amendment was permitted to the bill of complaint to show misconduct on the part of the defendant because of his having visited frequently a resort known as "Boyd's Place," which it seems was at one time a saloon, and later a place where men congregated to play cards. It is complainant's claim, and she so testified, that knowledge of this habit of visiting Boyd's Place, because of its bad reputation, brought great shame, humiliation, and disgrace to her and her family.

There is unquestionably ground for the complaint that the defendant was inclined to enjoy a game of cards, which he indulged in even when small amounts of money were at stake, and this he frankly admits in his testimony. It is true that his conduct in frequenting the place where he indulged in this practice and the pleasure that he seemed to get from gambling in a small way, could be the subject of some criticism, but, as was said by this court in *Cadieux v. Cadieux*, [72] 180 Mich. 99, at page 105, 146 N. W. 161, at page 163:

"While culpable and an evidence of moral instability, we are not prepared to hold that, as proven, it amounted to a cause for divorce."

We have carefully read this record, and although having in mind the fact that the learned chancellor, who heard the case below, had the advantage of seeing and hearing the witnesses, nevertheless we cannot escape the conclusion, taking the record as a whole and carefully weighing the testimony, that no just and legal cause for a divorce has been proved. These parties had resided together as man and wife for a period of 20 years, and it does not appear that any remarkable change has come about in the personal conduct and habits of the defendant from the time of his marriage. The record is convincing that both of the parties have been industrious and apparently willing to meet the everyday problems of life in the proper spirit, and considering their station in life and the surroundings in which the defendant toiled to fulfill his duties as a provider for his family, assisted by the complainant, it does not seem just and equitable that now, when the defendant has reached the age of 70 years, because of grievances of a character which might easily be found in the married life of many people in such a period of time, he should be deprived

of the association and comfort of his wife and only child, both of whom he still insists he loves and wishes to have with him. As this court said in *Root v. Root*, 164 Mich. 638, 644, 130 N. W. 194, 32 L.R.A. (N.S.) 837, Ann. Cas. 1912B 740:

"Neither incompatibility of temper nor the ordinary misunderstandings and bickerings which are characteristic of the marriage relation in a considerable percentage of cases, have been made grounds for divorce in this State. The legislature might, if it chose, extend [73] the jurisdiction of courts to grant decrees of divorce upon these grounds. It has not done so, however, and those who are married must bear the real or fancied burdens they have assumed, unless the conduct of one entitles the other, that other being without fault, to a severance of the relation for one or other of the statutory causes."

We are of the opinion that in this case the proofs are not satisfactory to make out a case of extreme cruelty under the statute, and that the decree must be reversed and the bill dismissed, without costs to either party.

Brooke, C. J., and McAlvay, Stone, Ostrander, Bird, Moore, and Steere, JJ., concurred.

NOTE.

Habits or Course of Conduct of Spouse as Cruelty Warranting Divorce.

Introductory, 480.

In General:

Facts Warranting Divorce, 480.

Facts Not Warranting Divorce, 483.

Offensive Language:

In General, 485.

Intent to Injure, 487.

Coupled with Charge of Unchastity, 488.

Accompanied by Actual or Threatened Violence, 489.

Habitual Intemperance or Use of Drugs, 491.

Refusal of Marital Rights, 493.

Sexual Excesses, 494.

Acts of Bestiality, 495.

Refusal to Speak, 496.

Effect of Complainant's Provocation, 496.

Introductory.

In view of the modern rule that physical violence is not necessary to constitute cruelty (see the note to *Goff v. Goff*, 9 Ann. Cas. 1083) it is impossible to formulate a general rule as to what habits or course of conduct of a spouse will constitute cruelty warranting a divorce. The habits and dispositions of different married persons vary so much that the courts must necessarily determine what constitutes such cruelty from the facts and circumstances of each particular case, keeping always in view the intelligence, apparent re-

finement, temperament and disposition of the parties to the action. "Cruelty," "extreme cruelty," and like terms used in different divorce statutes are exceedingly elastic in their application, and thus a course of conduct or language, which in some walks of life would pass as an ordinary incident of the marital relation, might constitute in others the very refinement of cruelty. The law in regard to cruelty as ground for divorce has been considerably modified in late years, both in England and the United States, it being now generally held that torture inflicted on the mental and emotional nature by constant insinuations of evil doing, unfounded and repeated charges of unfaithfulness, studied and gross discourtesies, and the like, which go to the extent of affecting bodily health may constitute cruelty. For an extended and learned discussion of this question, see *Butler v. Butler*, 4 Clark (Pa.) 388, 1 Pars. Eq. Cas. 329.

In General.

FACTS WARRANTING DIVORCE.

The continued manifestation by one spouse of indifference or aversion to the other, coupled with persistent neglect of the duties incident to the marital relation may constitute cruelty warranting a divorce. Thus in *Glenn v. Glenn*, 84 Wash. 215, 146 Pac. 619, a divorce was granted for cruelty on the ground that a wife for several years manifested continual hatred and aversion for her husband and maintained an improper correspondence with other men.

In *Sabot v. Sabot* (Wash.) 166 Pac. 624, a finding of cruelty based on persistent neglect and expression of aversion by a wife was sustained.

In *Eistedt v. Eistedt*, 187 Mich. 371, 153 N. W. 676, the court said: "It is alleged that the defendant left her home without excuse, and this complainant and their children of tender age, and was gone for several days at a time, and on some of those occasions she consorted with other men, visiting rooming houses with them. If this charge were sustained by the proofs, the ground of extreme cruelty would be established."

In *Massey v. Massey*, 40 Ind. App. 407, 80 N. E. 977, 81 N. E. 732, it was held that "cruel and inhuman treatment" might consist in a wife's habit of reading frivolous literature to the neglect of her household duties and her cold, abusive and scornful neglect of her husband's welfare. And see *Rice v. Rice*, 6 Ind. 100.

Proof that for over a year, a husband purchased nothing but a pair of shoes and rubbers for the wife, he being worth from eight to ten thousand dollars, and that he had left her for six weeks without any funds with which

to pay her board, besides using insulting and abusive language to her, has been held to be sufficient to support a divorce for cruelty. *Carey v. Carey*, 106 Mich. 646, 64 N. W. 510.

In *Hiecke v. Hiecke*, reported in full, post, this volume, at page 497, cruelty was held to be shown by certain facts found by the trial court.

In *Mills v. Mills*, 88 Neb. 596, 130 N. W. 419, the facts and conclusion of the court were stated as follows: "It is evident that the plaintiff is a hardworking, clean, and industrious but sickly woman, and that the defendant is a man of gruff manners, strong will, coarse language, and careless ways. There is no evidence of actual violence on his part against his wife, but there is ample proof of cruel, unfeeling, and harsh treatment of her. The plaintiff seems to have been singularly liable to accidents resulting in fractures of her upper and nether limbs. The last incident of this kind occurred in 1908. At this time she fell and broke the bones of her wrist when procuring water at the flowing well near the house. She testifies in detail to the harsh language and the cold and unfeeling conduct of defendant at that time and while she was partially disabled by the accident, and his own testimony in regard to the occurrence corroborates her. While the defendant was a good provider of food, this seems to have been all that he thought it was his duty to supply beyond the barest necessities in the way of house room, furniture, and clothing. The case falls under the rule of *Ellison v. Ellison*, 65 Neb. 412. It is unnecessary to refer to the argument on condonation. Sufficient cruelty has been proved since plaintiff's return to make a case. From the whole record we think the testimony justifies and requires the decree."

In *Gloster v. Gloster*, 23 App. Div. 336, 48 N. Y. S. 160, the following facts were held to warrant a divorce on the ground of cruelty: "The court found that the husband was guilty of cruel and inhuman treatment of the wife; that he compelled her from the time of the marriage until near the time of the birth of her child, against her remonstrances, not only to do the ordinary housework, but to cook free lunch for the saloon, the lunch consisting of large pieces of meat of different kinds, often weighing about fourteen pounds, to place this meat in a large iron pot which she had to lift upon a stove three feet high, the whole weighing about fifty pounds including water, to lift same down when cooked, she being all the while in delicate health, unused and physically unable to do this work; that he swore at her and used violent and profane language toward her, shocking her and causing her mental anguish; that he often left her alone at night, in great fear, saying on his return that he had been playing poker; that

Ann. Cas. 1918B.—31.

he failed to provide for her proper clothing to enable her to go out of doors, and finally abandoned her, refused her admittance to his house, and neglected to furnish her with the necessities of life. These findings were sufficiently supported by the evidence. The wife weighed only 103 pounds, and her health was not good. She was compelled by her husband to do the work described during her pregnancy, and until within three days of the birth of her child. It caused her a terrible feeling inwardly; lifting the pot caused her sides to feel as if falling in, and she had terrible stitching pains in the side from it. She complained to her husband, but he merely gave her abuse, swore at her, said that he didn't get her to put in a glass case, and that she couldn't live with him unless she did this work. Once she left him on this account, about four months after the marriage, but he made her fair promises and she returned, when he treated her the same again. It is no wonder the child, when born, was a feeble, sickly one and soon died. The treatment was cruel in the extreme, and, taken in connection with his swearing at her, his leaving her alone at night, and his refusal to furnish her proper clothing, and his denying her the right to visit her own people who lived nearby, was sufficient ground for granting the separation by reason of cruel and inhuman treatment."

In *Glass v. Wynn*, 76 Ga. 319, it was alleged by a wife as cruelty that her husband "would go off, neglect her, leave her when she was sick, would not provide proper food or assistance for her, and would call her names, and say that she was no better than a hound-dog or an African negro, and that he poisoned the mind of one of their sons against her and caused him to speak to her in an insulting and unbearable manner." The court said: "Even if there must be cruel treatment or voluntary separation in order that this proceeding may be had, we think in such a case cruel treatment may exist from conduct other than blows. Mental anguish, wounded feelings, constantly aggravated by repeated insults and neglect, are as bad as actual bruises of the person; and that which produces the one is not more cruel than that which causes the other."

In *Marks v. Marks*, 62 Minn. 212, 64 N. W. 561, the court reviewed the facts as follows: "It is enough to say that his bad conduct was systematic and continued; that he seems to have studied ways in which to humiliate and degrade his wife, that she might become strictly dutiful and obedient in the most trivial matters; and that by personal indignities, such as unmerited reproach, contemptuous and insulting expressions, open insult, and continual badgering, he became a petty tyrant in his household. His treatment all during the ten years we have mentioned was

about as cruel and inhuman as it could have been without inflicting corporal punishment. The evidence before us establishes an exceptionally strong case of this character, and we wish here to emphasize what was, in substance, said in our former opinion—that, to warrant the granting of a divorce on the ground of cruel and inhuman treatment, where there is no proof of overt bodily harm, actually inflicted or threatened, the evidence must be strong and convincing, the course of ill treatment complained of long continued, of serious character, and further, that it must have had an injurious effect upon the health of the complainant.” See also the same case on a former appeal, 56 Minn. 284, 57 N. W. 651, 45 Am. St. Rep. 466.

In *Emery v. Emery*, 181 Mich. 646, 147 N. W. 452, persistence by a husband in harsh and exacting conduct with habitual use of profane and threatening language was held to constitute cruelty.

In *Beebe v. Beebe*, 10 Ia. 133, wherein it appeared that the husband's occupation was such that it was necessary for him to keep poison about the house, and that his wife often declared that she would be glad of his death, and continually threatened to poison him, her conduct was held to be sufficient to cause him to apprehend danger and to be cruel and inhuman treatment justifying a divorce.

In *Wall v. Wall* (Mich.) 162 N. W. 100, a finding of cruelty was held to be supported by proof of indignities inflicted by a husband such as marking the wife's face with an indelible pencil, holding her by the legs and making her walk on her hands and the like, though he testified that his acts were committed by way of jest.

In *Kinsey v. Kinsey*, 90 Va. 16, 17 S. E. 819, persistent conduct of a husband in exposing himself indecently not only before his wife and child but in public, and in teaching his child to swear, was held to amount to cruelty.

Wide circulation by a wife of anonymous letters making false charges against her husband has been held to amount to cruelty. *Carpenter v. Carpenter*, 30 Kan. 712, wherein the court said: “The next question to be considered is, whether the facts as found by the trial court and as proved on the trial constitute extreme cruelty on the part of the defendant below toward the plaintiff below. We think they do. In the first place, the evidence shows that the plaintiff, prior to his marriage and since, has been a man of some pretensions as to character, integrity and ability. He was (and we suppose still is) a member of the Methodist Episcopal church, and professed to be an honest and faithful Christian; and he had high aspirations for political preferment. He was then holding

the office of collector of internal revenue for the district of Kansas, and had twice before been a candidate for the office of governor of the state, though he was defeated in his own party for the nomination. In November and December, 1882, his wife kept a diary, in which she recorded many things derogatory to his character, and cruelly unjust to him. She sought for scandal affecting his moral standing; and then, to humiliate him in his own estimation, and to disgrace him in the opinion of all good people, sent cruel, anonymous letters to editors of newspapers known by her to be his personal or political enemies, with the expectation that these editors would publicly accuse him in their journals of immoral conduct, of which she herself did not believe him guilty, and of which she had no good reason to even suspect that he was guilty. She also sent to one of the clerks in his office similar anonymous letters falsely charging her husband with criminal intimacy with the wife of such clerk. Also, in the absence of her husband, she invited another clerk in his office to a secret interview with herself, and there poured forth her grievances, and exhibited to such clerk another of such anonymous letters, obscene in its character, and containing similar false charges against her husband. And after their separation, she wrote to her husband an insulting letter, falsely charging him with meanness and gross misconduct unbecoming a gentleman and finally filed an answer in this case falsely accusing him of many things which she at no time believed, and at no time even attempted to prove. The legal question that arises upon these facts is, whether they constitute ‘extreme cruelty,’ or not, within the meaning of the divorce statute. It was formerly thought that to constitute extreme cruelty, such as would authorize the granting of a divorce, physical violence is necessary; but the modern and better-considered cases have repudiated this doctrine as taking too low and sensual a view of the marriage relation, and it is now very generally held that any unjustifiable conduct on the part of either the husband or the wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other as to seriously impair the bodily health or endanger the life of the other, or such as in any other manner endangers the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes ‘extreme cruelty’ under the statutes, although no physical or personal violence may be inflicted, or even threatened.”

Insistence by a husband, as a condition of the continuance of the marital relations, that his wife should bear no children, in consequence of which she submitted to two abortions, has been held to constitute extreme

cruelty warranting a divorce. *Dunn v. Dunn*, 150 Mich. 476, 114 N. W. 385.

Compelling a wife to expose herself and young children by a former marriage to a demoralized condition in the home because the husband allows his daughters to live in meretricious relations with strangers, is cruelty warranting a divorce. *Davis v. Davis*, 86 Ky. 32, 4 S. W. 822.

Where it appeared that a wife became a convert to Christian Science, continuing the practice of the science as a doctor, against the opposition of her husband, her insistence causing him to become ill, it was held that the granting of a divorce to the husband for cruelty was warranted. *Robinson v. Robinson*, 66 N. H. 600, 23 Atl. 362, 49 Am. St. Rep. 632, 15 L.R.A. 121. Compare *Kauhimahu v. Kauhimahu*, 19 Hawaii 378.

In *Kentucky* a divorce is authorized by statute for treatment of a wife by her husband showing a settled aversion to her or tending to destroy permanently her peace and happiness. With respect to conduct of that kind it was said in *Beall v. Beall*, 80 Ky. 675: "It should appear that the habitual behavior of the husband to the wife was such as showed a settled aversion to her. Hatred and bad treatment must be the rule of his conduct towards her, and his exhibition of affection for her the exception, in order to entitle the wife to relief upon that ground; but while the husband may now and then manifest such an affection for the wife as to negative the idea that he has lost all regard for her, still if his cruel and inhuman conduct towards her is such as to destroy permanently her peace and happiness, the wife is entitled to a divorce." To the same effect see *Zumbiel v. Zumbiel*, 113 Ky. 841, 69 S. W. 718; *Burns v. Burns*, 173 Ky. 105, 190 S. W. 683; *Wilson v. Wilson*, 38 S. W. 140, 18 Ky. L. Rep. 741.

FACTS NOT WARRANTING DIVORCE.

The mere fact that a spouse is sulky, petulant, and sometimes uses abusive language does not constitute such cruelty as will warrant the granting of a divorce. *Stoner v. Stoner*, 134 Ga. 368, 67 S. E. 1030; *Trenchard v. Trenchard*, 245 Ill. 313, 92 N. E. 243; *Downey v. Downey*, 135 Mich. 265, 97 N. W. 699; *Sheffield v. Sheffield*, 3 Tex. 79; *Johnson v. Johnson*, 107 Wis. 186, 83 N. W. 291, 81 Am. St. Rep. 836.

Slight acts of violence committed by a wife, where there was no reason to suppose that the husband could not protect himself by a proper exercise of his marital authority, has been held not to constitute extreme cruelty. *Severns v. Severns*, 107 Ill. App. 141.

A husband's propensity for attending horse races and betting, and occasionally gambling and speculating in stocks, losing money there-

by which he might have used for the better support of his family, has been held not to be such cruelty as will warrant a divorce. *Cadieux v. Cadieux*, 180 Mich. 99, 146 N. W. 161.

The fact that a husband is sulky and is frugal even to the extent of being parsimonious and niggardly is not cruelty. *Barker v. Barker*, 25 Okla. 48, 105 Pac. 347, 26 L.R.A. (N.S.) 909. And see *Duhme v. Duhme*, 3 Ohio Dec. 95, 3 Wkly. L. Gaz. 186. Nor does the failure of a husband to supply his wife and daughter with a suitable wardrobe commensurate with their social position and wealth constitute cruelty. *Rowley v. Rowley*, 19 La. 557.

The failure of a wife to remain at home during her husband's illness, and her frequent visits to theaters and dance places do not constitute cruelty. *Bonney v. Bonney*, 175 Mass. 7, 55 N. E. 461, 78 Am. St. Rep. 473.

Proof that a wife had the habit of finding fault and nagging the husband for everything he did, that she scolded him for coming home late at night, and objected to the kind of work he did, and the places where he worked, and insisted on having her own way, the effect of which was to render him nervous and deprive him of sleep, etc., has been held to be too trivial in character to justify a decree of divorce for cruelty. *Geisseman v. Geisseman*, 34 Colo. 481, 83 Pac. 635.

The mere fact that a husband was unreasonably jealous of his wife, and showed it in such ways as to make it very uncomfortable for her and render her unhappy, and that when in a rage of jealousy he wrote an anonymous note in which he indicated that he thought her unfaithful to him, has been held not to be such cruelty as to warrant a divorce. *Elliott v. Elliott*, 5 Boyce (Del.) 406, 93 Atl. 963.

In *Branscheid v. Branscheid*, 27 Wash. 368, 67 Pac. 812, a divorce for cruelty was refused on proof that the wife showed no interest in her husband and his affairs, refusing to enter into the mode of life which he desired her to follow socially, and that she was moody, whimsical, exacting and irascible, rendering his life miserable.

It was held in *Densmore v. Densmore*, 6 Mackey (D. C.) 544, that the following averments did not state a case of cruelty: "And he further says that, notwithstanding his anxious and strenuous efforts to provide and have a home for himself and family, he has no home, because the said Emma A. Densmore takes neither interest or care of, or in any matter concerning him or what concerns their mutual welfare; but, on the contrary, opposes every and all efforts the affiant makes to advance the interest of the family; that when he returns from his daily or nightly vocation, as the case may be, tired and worn, there is neither rest nor sympathy for him; and that

often during the past few years he has been compelled, in order to obtain the rest and repose demanded by nature, to sleep and eat away from his home; that she, the said Emma, is a constant growler, a chronic complainer, and seems to be delighted when she can do and say things in the presence of others to wound and mortify his feelings, and is never apparently so happy as when she has an opportunity to humiliate this affiant in the presence of his children or others; and that she is a constant gossip and termagant, and is often guilty of the most indiscreet conduct, so much so as to excite remark, and allows no opportunity to pass where or when she can do an act or say a word to the detriment of his interest, or the degradation of his name in the estimation of the community; that she, the said Emma, is too lavish in her household expenditures, and has often declared she did not know what goods cost, and that it was of no interest or difference to her. And this petitioner says, that the said Emma is a constant smoker of cigars, and that the use of tobacco in all forms, either smoking, chewing or snuffing is very objectionable and nauseating to him as he does not use the weed in any form or shape, and he regards this as a very dangerous example for a mother to set before her daughters. And this affiant further says, that because of the foregoing reasons and because of the violent temper and jealous disposition and extravagant expenditures of his means and all want of sympathy with or in what relates to or concerns this petitioner, an estrangement of all affection, sympathy and esteem has been engendered, and that a hopeless and irreconcilable trouble exists between this affiant and the respondent because of the foregoing facts and allegations. And he further says, that during a recent severe illness, because of the said Emma's words and suspicious actions in declaring that she wished this affiant was dead, etc., those who called, especially his physician, became alarmed, but at no time during his said illness did she offer in any manner to minister to his wants, or even at any hour during his helplessness offer any assistance, nor even answer the bell calls; and that because of her turbulence this affiant was urged by his physician to take refuge in a hospital, this he did not do, but he did leave his bed and room long before he ought to have and was thereby caused a great and unnecessary bodily pain. Because of the foregoing he feels that his health and life are endangered by living with said Emma." The court said: "There is no aggression set forth on the part of the wife, no act of violence, no attempt upon his life in any way, nothing but the mere expression of a wish that he was dead, which it appears she made in her ill temper; at most it appears that she is ill tempered and disagreeable, and

neglects her duty. If gross neglect of duty was one of the causes for divorce in this district this bill would probably be sufficient. We are not prepared to say that in no case can a divorce be granted unless there be actual physical violence or some attempted injury by violence to the health and life of the complainant. There may be cases where the husband, by threatening violence, threatened acts, without committing any actual violence, might so put his wife in fear as to not only materially injure her health but endanger her life. And it is possible that the reverse might be true, that this might occur under some circumstances by the wife obtaining this sort of control by threats over her husband with equally injurious consequences, but we think such cases would be very rare. The facts here stated, even if all true, do not amount to such cruelty, and the complainant is not entitled by the averments of his bill to any relief."

In *Walsh v. Walsh*, 20 British Columbia 482, the facts and conclusion of the court were stated as follows: "It is contended, however, that the evidence is sufficient to prove that the conduct of the respondent was such that the petitioner might reasonably apprehend bodily injury, and her mental health was affected. The evidence in support of this contention is that the petitioner found beneath the pillow of the respondent, in the bed they both occupied, a razor and a sharp knife, and on asking him what it was for, he said to protect himself. She then inquired: 'What do you want to protect yourself for?' and his reply was: 'I thought you might do me some harm while I was sleeping.' She was then asked by her counsel what effect this discovery had upon her, and her answer was: 'Well, it made me very nervous. I made him take another room after that.' This seems to have ended the matter. The petitioner frankly admitted that her husband had 'never laid hands on her' in any way in a violent manner. She does not even state that she apprehended that he would do so or that the weapons referred to were kept by him for that purpose. Accepting her statement that she became nervous through his actions, this would not be sufficient. I do not think the petitioner's safety was compromised, nor any fears for it entertained by her. There is no evidence, in my opinion, to support the allegation of legal cruelty."

The fact that a husband on returning from work preferred to read or go to bed and refused to go to places of amusement with his wife has been held not to constitute cruelty. *Bowen v. Bowen*, 179 Mich. 574, 146 N. W. 271, 51 L.R.A. (N.S.) 460.

That a husband frequently absented himself from home and that he ridiculed the church of which the wife was a member and constantly professed in her hearing affection

for his first wife from whom he was divorced was held in *Ryan v. Ryan* (Tex.) 114 S. W. 484, not to constitute cruelty.

Lewd and indecent conduct of a husband towards a young daughter of his wife by a former marriage has been held not to be cruelty. *Cline v. Cline*, 10 Ore. 474.

In the reported case, untidy habits of a husband and occasional gambling for small stakes are held not to constitute cruelty.

Offensive Language.

IN GENERAL.

It is generally held that the mere use of offensive language and occasional paroxysms of rage on the part of a spouse without any fixed purpose of injuring the other spouse does not constitute cruelty warranting a divorce.

Arizona.—*Sneed v. Sneed*, 14 Ariz. 17, 123 Pac. 312.

California.—*Avery v. Avery*, 148 Cal. 239, 82 Pac. 967. *Compare Wolff v. Wolff*, 102 Cal. 433, 36 Pac. 767.

Illinois.—*Vignos v. Vignos*, 15 Ill. 186; *Turbitt v. Turbitt*, 21 Ill. 438; *Embree v. Embree*, 53 Ill. 394; *Duberstein v. Duberstein*, 171 Ill. 133, 49 N. E. 316; *Fritts v. Fritts*, 30 Ill. App. 31; *Fritz v. Fritz*, 138 Ill. 436, 28 N. E. 1058, 32 Am. St. Rep. 156, 14 L.R.A. 685.

Iowa.—*Wheeler v. Wheeler*, 53 Ia. 511, 5 N. W. 689, 36 Am. Rep. 240; *Potter v. Potter*, 75 Ia. 211, 39 N. W. 270; *Goeldner v. Goeldner*, 158 Ia. 415, 139 N. W. 889.

Kansas.—*Masterman v. Masterman*, 58 Kan. 748, 51 Pac. 277; *Rowe v. Rowe*, 84 Kan. 696, 115 Pac. 553.

Kentucky.—*Finley v. Finley*, 9 Dana 52, 33 Am. Dec. 528; *Gains v. Gains*, 19 S. W. 929.

Massachusetts.—*Hill v. Hill*, 2 Mass. 150; *Freeborn v. Freeborn*, 168 Mass. 50, 46 N. E. 428.

Michigan.—*Bennett v. Bennett*, 24 Mich. 482; *Johnson v. Johnson*, 49 Mich. 639, 14 N. W. 670.

Nebraska.—*Gleason v. Gleason*, 16 Neb. 15, 19 N. W. 784; *Shuster v. Shuster*, 3 Neb. (unofficial) Rep. 610, 92 N. W. 203.

New Hampshire.—*Poor v. Poor*, 8 N. H. 307, 29 Am. Dec. 664.

New Jersey.—*Close v. Close*, 24 N. J. Eq. 338; *Disborough v. Disborough*, 26 Atl. 852; *Hewitt v. Hewitt*, 37 Atl. 1011.

New York.—*Ruckman v. Ruckman*, 58 How. Pr. 278.

North Carolina.—*Everton v. Everton*, 50 N. C. 202.

Oklahoma.—*Beach v. Beach*, 4 Okla. 359, 46 Pac. 514.

Pennsylvania.—*Sowers v. Sowers*, 11 Phila. 213, 33 Leg. Int. 220; *Schulze v. Schulze*, 33

Pa. Super. Ct. 325; *Biddle v. Biddle*, 50 Pa. Super. Ct. 30.

Tennessee.—*Shell v. Shell*, 2 Sneed 716.

Virginia.—*Latham v. Latham*, 30 Grat. 307.

The acts of extreme cruelty charged in *Bennett v. Bennett*, 24 Mich. 482, consisting of the wife's leaving the house without cause, remaining absent for considerable lengths of time, using indecent, profane and obscene language, and neglecting her household affairs, were held to fall far short of extreme cruelty to the husband, the court saying: "It is extremely doubtful whether any of them, on the part of the wife, could, in any case, constitute that extreme cruelty which the statute contemplates as a ground of divorce; but in the present case, at least, the slight degree of negligence about household affairs, and the very short periods of absence proved (which seem to have been mostly brief visits of a few hours to some of her children who resided in the neighborhood), fall so far short of such extreme cruelty as to render it merely ludicrous to consider them as amounting to cruelty in any form. As to the second ground of extreme cruelty: profane, obscene and insulting language, habitually indulged in towards a person of a sensitive nature and refined feelings, may, doubtless, in some cases, amount to extreme cruelty, as intimated in *Briggs v. Briggs*, 20 Mich. 34. But this, as a general rule, would be more readily recognized, when used by the husband to the wife, than by the wife to the husband. In the present case we see no evidence that complainant was a person of such sensitive nature and refined feelings as would be likely to be affected to the degree of extreme cruelty by any such language as the wife is shown to have used. A man who habitually locks up his pork and his flour in his granary in the barn, and hides even his tea from his wife, who is expected to do his cooking and prepare his table, on suspicion that she might use them too freely or give them away to her children by a former marriage, and charges those children with stealing his blankets (when no evidence is shown warranting such charge or suspicions), as the complainant is shown by one of his own witnesses to have done in this case, cannot lay claim to a very high degree of susceptibility or refinement of feeling, and ought to expect an occasional tempest, and to make up his mind and prepare his nerves for a pretty large share of abusive language; and though this consideration will not justify some of the profane and indecent language claimed to have been used by the wife, it shows that his own feelings were proof against anything of extreme cruelty to be inflicted by mere words. . . . The real and the whole difficulty, as we infer from the evidence, grew up from the jealousy or sus-

picion he seems to have indulged (so far as the evidence shows, without justifiable cause), against her children by a former marriage, and her attachment to them, and his morbid apprehension lest they might, in some way, by her aid, get hold of some of his pork or tea, or blankets. In any view we have been able to take of the evidence, we think it fails to establish any ground upon which a decree of divorce could safely be granted."

While offensive language habitually used may constitute cruelty if it grievously affects or wounds the feelings, and thus destroy the peace of mind of the other spouse resulting in the impairment of his health, where the testimony shows that both parties are addicted to the use of profane language towards each other, the court will refuse to grant a divorce. *Gleason v. Gleason*, 16 Neb. 15, 19 N. W. 784; *Shuster v. Shuster*, 3 Neb. (unofficial) Rep. 610, 92 N. W. 203.

In *Rader v. Rader*, 136 Ia. 223, 113 N. W. 817, the court stated the facts and its conclusion as follows: "The sole question in the case is one of fact, and that is: Was defendant guilty of such inhuman treatment of plaintiff as endangered her life? We shall not, of course, attempt to set out the entire record. It is enough for the purpose of the case to state our conclusions. Whilst the case is not a strong one, we think there is enough to show that defendant used profane, obscene, insulting, and abusive language toward his wife, complained of her cooking, and generally treated her in such a manner as to endanger her life and health. He never, it is true, used physical violence, but he did that which to an ordinary woman is more cruel. After the first few weeks of married life, he seems to have lost all affection for his wife. He was profane and abusive, criticised her cooking, failed to provide her with clothing, and in other ways made life miserable. True, most of the charge defendant denies; but the witnesses were all before the trial court, and plaintiff's condition of health as autoptically disclosed, and her manner and demeanor, should all be considered and given due weight. And in such cases as this the finding of the trial court should be given due consideration in view of the conflicting testimony adduced. Plaintiff was comparatively a well woman when she married the defendant, and when she left him she was much broken both in health and spirits, and for this defendant seems to have been responsible. It is not necessary, of course, to show physical assaults in order to make out a case of cruelty. The general treatment accorded the wife by the husband should be considered, and if, upon the whole record, it appears that the life and health of the wife has been endangered by ill treatment, be that nothing more than abusive, insulting, profane, and vulgar lan-

guage, lack of affection, or failure to furnish the necessities of life, a divorce should be granted."

In *Banks v. Banks*, 162 Wis. 87, 155 N. W. 916, a divorce for cruelty was granted where the evidence showed that the defendant, without cause or provocation, applied to her husband insulting epithets, and almost daily interfered with his professional duties as a physician, by calling him up at his office and showering abuse on him, all of which destroyed his peace of mind and affected his mental and bodily health to a degree which rendered it impracticable to discharge properly the duties imposed by the marriage relation.

A continued use of vile language by a wife accusing her husband of illegal acts of which he was innocent, and constant uncontrollable paroxysms of rage and violence, by which she harassed the husband, making his life unbearable and tending to destroy permanently his peace and happiness, have been held to constitute legal cruelty and ground for divorce. *Sylvis v. Sylvis*, 11 Colo. 319, 17 Pac. 912, wherein it was said: "The natural effect of such conduct upon an ordinarily sensitive person would be to destroy his peace and happiness, and from the destruction of peace and happiness the impairment of health is a natural consequence; and the presumption is that the conduct of the defendant produced the natural and usual result of such conduct. To authorize a divorce on the ground of cruelty the evidence should show that the acts complained of are such as that danger to life, limb or health will naturally arise from the continued commission of such acts, but it is not necessary that the evidence should show that actual physical violence has been used. Extreme cruelty may be as effectually caused by conduct which produces mental suffering, and robs complainant of his or her peace of mind, as by blows inflicted; and to many persons the burden of the mental suffering will be much harder to bear than the burden of any ordinary physical suffering. These views are sustained by many recent and well-reasoned decisions."

In *Morehouse v. Morehouse*, 70 Conn. 420, 39 Atl. 516, it appeared that the husband knowing that his wife was affected with heart trouble, and that his conduct aggravated it, would frequently appear before her in a drunken condition and humiliate her by his vulgar and profane abuse. It was held that cruelty was established.

In *Wolff v. Wolff*, 102 Cal. 433, 36 Pac. 767, the facts and the court's conclusion were stated as follows: "That since said marriage the defendant has treated the plaintiff in a cruel and inhuman manner, and in particular as follows: That almost ever since the commencement of the married life of said parties

the defendant has been in the habit of grossly abusing the plaintiff, and of applying to her, and to members of her family and relatives, vile, profane, and obscene language, the particulars whereof are stated at length in the complaint on file in this action; and the court finds as facts that such language was used by the defendant as, and when, and in the manner alleged by the plaintiff; that almost immediately after said marriage the plaintiff became and was pregnant, and that during the term of her pregnancy she was highly nervous and in a delicate state of health, and defendant used toward her during said period vile, abusive, and indecent language, and which language and treatment of defendant caused the plaintiff physical pain, and greatly aggravated the physical sufferings undergone by her during said period, and that the harsh and abusive treatment and language of defendant toward plaintiff caused her physical suffering, affected her health, and also inflicted upon her grievous mental suffering, and that plaintiff has not condoned said offenses. . . . The testimony of plaintiff as to the facts thus found, having been sufficiently corroborated, and these being sufficient to constitute extreme cruelty, even according to the case of *Waldron v. Waldron*, 85 Cal. 251, and surely so according to the decision in *Barnes v. Barnes*, 95 Cal. 171, it was not material nor necessary that her testimony should have been corroborated as to all other distinct acts of cruelty alleged in her complaint."

Evidence showing that a wife became abusive, applying various abusive and opprobrious epithets to her husband, refusing to do any of the house work, though she was a healthy woman, and persistently acting in an abusive and insulting manner, has been held to be sufficient to entitle the husband to a divorce on the ground of cruelty. *McGee v. McGee*, 72 Ark. 355, 80 S. W. 579.

In *Gholston v. Gholston*, 31 Ga. 625, it was held that the persistent commission of acts which outraged the feelings of modesty and decency of the wife, such as threatening to commit adultery and cursing and abusing her and using insulting and opprobrious language, constituted cruel treatment.

The habitual use of indecent and obscene language by a husband to his wife in the presence of others has been held to constitute extreme cruelty. *Goodman v. Goodman*, 26 Mich. 416. And so where a wife was shown to be extremely profane in her conversation in the presence of the husband, and at times before others, and repeatedly told obscene stories in his presence and in the presence of his children of a former marriage it was held that he was entitled to a divorce. *Mosher v. Mosher*, 16 N. D. 269, 113 N. W. 99, 125 Am. St. Rep. 654, 12 L.R.A.(N.S.) 820.

In *Fay v. Fay*, 27 Pa. Super. Ct. 328, a divorce was allowed, it appearing that the wife neglected her children and household duties, and frequently in the presence of their children, neighbors and visitors addressed her husband in profane, obscene and abusive language, and often threatened to poison him, the court saying that such conduct persisted in for a long period of time, is well calculated to render the condition of the aggrieved party intolerable, and cause him a reasonable apprehension of physical violence.

The use of offensive language towards a wife, and circulating among her friends reports to the effect that she was of unsound mind, and other stories reflecting on her good name and moral character, and frequent threats by the husband that he would resort to legal proceedings to test her sanity and thus deprive her of her liberty have been held to be sufficient to constitute cruelty warranting a divorce. *Russell v. Russell*, 37 Pa. Super. Ct. 348.

That the husband was a man of hasty and violent temper, that he frequently cursed and called his wife vile names, and denounced and reviled her parents and friends, by reason of which she was made ill and nervous, has been held to constitute cruelty warranting a divorce. *Berry v. Berry*, 115 Ia. 543, 88 N. W. 1075, wherein the court said: "It is to be admitted that the showing of cruel and inhuman treatment is not as overwhelming as is sometimes made in cases of this kind, but, after due deliberation, we think it sufficient. Some women may be so constituted that loud-mouthed curses upon themselves, their parents and friends, and course insinuations against their wifely virtue, will be received with perfect equanimity; and as to them, while it is cruel and inhuman treatment, it does not endanger life. But women who thrive upon such treatment are rare. With the husband a strong man of violent temper and profane and abusive tongue, and the wife a woman in frail health and of weak and sensitive nerves, it does not require murderous blows or the display of firearms to endanger life, within the meaning of the statute. Upon such a woman every curse and foul epithet falls with as killing effect as a stroke from the clenched fist. Cruelty of this kind is good grounds for divorce."

In *Sackrider v. Sackrider*, 60 Iowa 397, 14 N. W. 736, a divorce for cruelty was granted on proof that the husband was addicted to violent outbreaks of temper during which he threatened his wife with weapons.

INTENT TO INJURE.

Where it appears that a spouse has deliberately adopted as a course of conduct the use of offensive language toward the other.

spouse, continually calling him or her vile and opprobrious names, with the intent and fixed purpose of causing unhappiness, the courts usually consider such conduct to be legal cruelty. *Sneed v. Sneed*, 14 Ariz. 17, 123 Pac. 312, 40 L.R.A.(N.S.) 99; *Haley v. Haley*, 44 Ark. 429; *McGee v. McGee*, 72 Ark. 355, 80 S. W. 579; *Kientz v. Kientz*, 104 Ark. 381, 149 S. W. 86; *Wolff v. Wolff*, 102 Cal. 433, 36 Pac. 767, 1037; *Gholston v. Gholston*, 31 Ga. 625; *Glass v. Wynn*, 76 Ga. 319; *Berry v. Berry*, 115 Ia. 543, 98 N. W. 1075; *Luetjohann v. Luetjohann*, 147 Ia. 286, 126 N. W. 172; *Dunlap v. Dunlap*, 49 La. Ann. 1696, 22 So. 929; *Goodman v. Goodman*, 26 Mich. 417; *Begrow v. Begrow*, 162 Mich. 349, 127 N. W. 256, 17 Detroit Leg. N. 602, 139 Am. St. Rep. 562; *Kapp v. District Ct.* 31 Nev. 444, 103 Pac. 235; *Mosher v. Mosher*, 16 N. D. 269, 113 N. W. 99, 125 Am. St. Rep. 654, 12 L.R.A.(N.S.) 820; *Melvin v. Melvin*, 130 Pa. St. 6, 18 Atl. 920; *Russell v. Russell*, 37 Pa. Super. Ct. 348; *Dawson v. Dawson*, 63 Tex. Civ. App. 168, 132 S. W. 379; *Cherrington v. Cherrington*, 9 Alberta L. Rep. 181, 9 West. W. Rep. 146, 32 West. L. Rep. 438.

Emphasizing the importance of wilfulness in connection with the use of abusive language, it was said in *Kientz v. Kientz*, 104 Ark. 381, 149 S. W. 86: "In order to constitute cruel treatment, which our law recognizes as ground for divorce, there must be proof of wilfulness or malice on the part of the offending spouse, and the effect of that treatment must be to impair or threaten the impairment of the complaining party's health or such as to cause mental suffering sufficient to make the condition of the complaining party intolerable. Mere incompatibility of temperament or want of congeniality and the consequent quarrels causing unhappiness are not sufficient to constitute that cruelty which, under our statute, will justify divorce."

So in *Sneed v. Sneed*, 14 Ariz. 17, 123 Pac. 312, 40 L.R.A.(N.S.) 99, it was said: "No single act operating mentally is sufficient to constitute cruelty justifying divorce. There must be continuity of such conduct, and many, if not the great majority of, authorities hold that such conduct must be shown to have been induced by malevolence, hatred, or spite."

The ill treatment of a child in the mother's presence by the husband solely for the purpose of grieving her, and the use of offensive language to her, resulting in aggravating her illness, constitute cruelty. *Dunlap v. Dunlap*, 49 La. Ann. 1696, 22 So. 929.

Indignities need not consist of personal violence. They may consist of unmerited reproach, rudeness, contempt, studied neglect, open insult, and many other things habitually and systematically pursued, to an extent which would render life intolerable. Nor is it neces-

sary that the complainant should be wholly blameless. *Haley v. Haley*, 44 Ark. 429.

A series of vexatious and deliberate insults by a wife against her husband was held to justify a divorce for cruelty in *Dawson v. Dawson*, 63 Tex. Civ. App. 168, 132 S. W. 379, the court saying: "What are wounds to the person as compared with those that affect the mind? The former may be healed, the latter endure for a lifetime. It is now generally held, even in jurisdictions where the common-law rule obtains, unaided by statutes such as ours, regarding causes for divorce, that 'any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the feelings of the other, or so utterly destroys the peace of mind of the other as to seriously impair the health, or such as to utterly destroy the legitimate purpose and object of matrimony, constitutes extreme cruelty,' constituting a cause for the dissolution of matrimony. . . . May not the husband's living with a wife who without provocation hates and abuses his daughter in her affliction, defames the memory of his dead wife, wantonly assails his character, publishes him as lazy, indolent, and good for nothing, demands his expulsion from a benevolent society as unworthy of its membership, assaults him, constantly abuses him, applies to him in the hearing of others opprobrious epithets, hates him, excludes him from his dwelling, and ceases to perform towards him the duties of a wife, be insupportable? If so, then, under the law of this state, as declared by its legislature, the sovereign authority of the state, no court has the authority to hold him to such a miserable existence by refusing to entertain a petition setting up such excesses as grounds for the dissolution of the marriage."

COUPLD WITH CHARGE OF UNCHASTITY.

Habitual and persistent use of offensive language together with unfounded accusations of unchastity made by a husband or a wife constitute cruelty warranting a divorce. *Moss v. Moss*, 114 L. T. N. S. (Eng.) 1147, 85 L. J. P. 182, 32 Times L. Rep. 468; *Powelson v. Powelson*, 22 Cal. 358; *Andrews v. Andrews*, 120 Cal. 184, 52 Pac. 298; *Friend v. Friend*, 53 Mich. 543, 19 N. W. 176, 51 Am. Rep. 161; *Whitacre v. Whitacre*, 64 Mich. 232, 31 N. W. 327; *Thompson v. Thompson*, 79 Mich. 124, 44 N. W. 424; *Delor v. Delor*, 159 Mich. 624, 124 N. W. 544; *Rose v. Rose*, 129 Mo. App. 175, 107 S. W. 1089; *Griffith v. Griffith*, 77 Neb. 180, 108 N. W. 981; *Cook v. Cook*, 11 N. J. Eq. 196; *Dietrick v. Dietrick*, 14 Phila. (Pa.) 649, 36 Leg. Int. 413. See also *Potter v. Potter*, 75 Ia. 211, 39 N. W. 270; *Mathewson v. Mathewson*, 81 Vt. 173, 69 Atl. 646, 18 L.R.A.(N.S.) 300.

The use of vile and abusive language towards a wife, falsely and habitually accusing her of adulterous intercourse, etc., may amount to legal cruelty, where the conduct of the husband causes her much mental suffering, producing fits of illness and threatening permanent injury to her health. *Powelson v. Powelson*, 22 Cal. 358.

Charging a wife with infidelity in the presence of the children, constantly applying to her the vilest and most opprobrious epithets which a "vulgar mind could invent or a foul tongue utter," threatening her with bodily harm, and on one occasion daubing her face with paint, have been held to constitute cruelty. *Dietrick v. Dietrick*, 14 Phila. (Pa.) 649, 36 Leg. Int. 413.

Habitual and persistent accusations against a husband by his wife, both in public and private, of infamous conduct in violation of his marriage obligations, and calling him by the vilest epithets, constitute extreme cruelty. *Whitmore v. Whitmore*, 49 Mich. 417, 13 N. W. 800. And so continuous abusive language showing a fixed purpose to hurt him and repeated accusations of incest with his own daughter may amount to cruelty. *Pedersen v. Pedersen*, 88 Neb. 55, 128 N. W. 649.

Repeated charges of infidelity made by the wife against the husband which were unfounded, and which were published by her for many years to his acquaintances and business associates tending to humiliate him and seriously injuring his reputation and business standing, have been deemed to be sufficient ground to warrant a divorce for cruelty. *Williams v. Williams*, 101 Minn. 400, 112 N. W. 528. See also *Carpenter v. Carpenter*, 30 Kan. 712, 2 Pac. 122, 4 Am. Rep. 108; *Holyoke v. Holyoke*, 78 Me. 404, 6 Atl. 827.

Continually calling a husband opprobrious names, unjustly accusing him of improperly associating with other women, and refusing to cohabit with him for a number of years have been held to constitute cruelty. *Waldhorn v. Waldhorn*, 165 Mich. 130, 130 N. W. 199, 18 Detroit Leg. N. 15. See also *Menzer v. Menzer*, 83 Mich. 319, 47 N. W. 219, 21 Am. St. Rep. 605.

In *Fitzpatrick v. Fitzpatrick*, 21 Misc. 378, 47 N. Y. S. 737, a charge of cruelty was sustained on facts stated as follows: "By a preponderance of credible testimony it is established that repeatedly and in wrath the defendant addressed profane and opprobrious language to the plaintiff—denouncing her as a 'cur,' a 'worm' and a 'devil' whom he consigned to 'hell,' and that under circumstances of peculiar atrocity, he maliciously and unjustifiably impugned her conjugal fidelity. On the trial, indeed, he denied that he ever accused her of unchastity, and professed confidence in her virtue: but with cynical insincerity, in face of an answer plainly imputing to her

habitual wantonness and systematic immorality. *Holmes v. Jones*, 121 N. Y. 461, 466; *Cornwall v. Cornwall*, 30 Hun 573, 574. Were the instances of misbehavior casual and exceptional they might claim some indulgence on the score of infirmity of temper; but being persistent and characteristic, they stamp the conduct of the defendant toward the plaintiff with a uniform tenor of deliberate cruelty and inhumanity, and appear, as by implication he confesses, to have been directed to the end of driving her to a separation. Indeed, his vindictiveness did not cease with her departure; but after her escape he subjected her to the infamy of a public advertisement as a recreant to marital duty, to whom no tradesman might safely supply the necessities of life. All these indignities the defendant inflicted upon a woman he knew to be in delicate health—upon a wife who requited his cruelties with angelic gentleness, and to whose spotless purity he is constrained to bear reluctant testimony. Were bodily harm, as the effect of defendant's maltreatment, requisite to the plaintiff's case, it is abundantly apparent in the evidence."

ACCOMPANIED BY ACTUAL OR THREATENED VIOLENCE

It is generally held that where occasional acts of physical violence are resorted to by a spouse in connection with the continued use of vile and offensive language the entire course of conduct will constitute cruelty though the physical violence is not sufficient standing alone to warrant a divorce.

Alabama.—*King v. King*, 28 Ala. 315; *Goodrich v. Goodrich*, 44 Ala. 670.

Arkansas.—*McGee v. McGee*, 72 Ark. 355, 80 S. W. 579.

California.—*Johnson v. Johnson*, 35 Pac. 637.

Illinois.—*Sharp v. Sharp*, 116 Ill. 509, 6 N. E. 15.

Iowa.—*Doolittle v. Doolittle*, 78 Ia. 691, 43 N. W. 616, 6 L.R.A. 187; *Luick v. Luick*, 132 Ia. 302, 109 N. W. 783.

Louisiana.—*Gehrkin v. Kinberger*, 118 La. 458, 43 So. 50.

Michigan.—*Briggs v. Briggs*, 20 Mich. 34; *Stark v. Stark*, 129 Mich. 153, 88 N. W. 391, 8 Detroit Leg. N. 886; *McCue v. McCue*, 191 Mich. 1, 157 N. W. 369; *Tuffelmire v. Tuffelmire*, 192 Mich. 147, 158 N. W. 178.

Mississippi.—*Johns v. Johns*, 57 Miss. 530.

Missouri.—*Strahorn v. Strahorn*, 82 Mo. App. 580; *Motley v. Motley*, 93 Mo. App. 473, 67 S. W. 741; *Stevens v. Stevens*, 170 Mo. App. 322, 156 S. W. 68.

New Hampshire.—*Day v. Day*, 56 N. H. 316.

New Jersey.—*Cook v. Cook*, 11 N. J. Eq. 195.

Oklahoma.—*Clark v. Clark*, 154 Pac. 1142.

Oregon.—Benfield v. Benfield, 44 Ore. 94, 74 Pac. 495; Decker v. Decker, 56 Ore. 381, 108 Pac. 777; Folkenberg v. Folkenberg, 58 Ore. 267, 114 Pac. 99; Belmont v. Belmont, 82 Ore. 612, 162 Pac. 830.

Pennsylvania.—Braun v. Braun, 194 Pa. St. 287, 44 Atl. 1096, 75 Am. St. Rep. 699; Sonricker v. Sonricker, 39 Pa. Super. Ct. 652; Welfer v. Welfer, 54 Pa. Super. Ct. 215.

Tennessee.—Payne v. Payne, 4 Humph. 500, 40 Am. Dec. 660.

Texas.—Taylor v. Taylor, 18 Tex. 574; Shook v. Shook, 125 S. W. 638.

Virginia.—Myers v. Myers, 83 Va. 806, 6 S. E. 630; Owens v. Owens, 96 Va. 191, 31 N. E. 72; Davenport v. Davenport, 106 Va. 736, 56 S. E. 562.

Washington.—Guerin v. Guerin, 45 Wash. 486, 88 Pac. 928; Sullivan v. Sullivan, 52 Wash. 160, 100 Pac. 321; Briggs v. Briggs, 56 Wash. 580, 106 Pac. 126; Johnsen v. Johnsen, 78 Wash. 423, 139 Pac. 189, 1200.

West Virginia.—Maxwell v. Maxwell, 69 W. Va. 414, 71 S. E. 571.

Wisconsin.—Pillar v. Pillar, 22 Wis. 658; Freeman v. Freeman, 31 Wis. 235; Wachholz v. Wachholz, 75 Wis. 377, 44 N. W. 506; Cevene v. Cevene, 143 Wis. 393, 127 N. W. 942.

Thus proof that a husband habitually addressed the wife in profane and obscene language, applied to her opprobrious epithets, and on several occasions treated her with physical violence has been held to be sufficient to warrant a divorce. Doolittle v. Doolittle, 78 Ia. 691, 43 N. W. 616, 6 L.R.A. 187.

In *Johns v. Johns*, 57 Miss. 530 it was said: "Cruel and inhuman treatment practiced by one of the married parties towards the other, with such persistency as to have become the accustomed conduct of the party, and which is characterized by personal violence, entitles its victim to a divorce. This treatment must be habitual. A single act of violence ordinarily would not suffice. It might never be repeated. It need not have been frequent. It is not necessary for personal violence to attend the daily intercourse of the parties. If the treatment is persistently cruel and inhuman, and it is occasionally characterized by personal violence, so as to beget the apprehension that it is liable to occur again at any time when the fury of passion may impel the offender, it is sufficient."

Where it appeared that shortly after a marriage the husband became cool and unkind towards his wife, later offered her direct insults both in words and actions and struck her once a finding of cruelty was sustained. *Taylor v. Taylor*, 18 Tex. 574.

Cursing and abusing a wife and adopting a course of tyrannical conduct towards her which continued for several years, threaten-

ing bodily injury, attempting to do her bodily injury, and falsely and maliciously accusing her of unchastity, have been held to be cruelty. *Shook v. Shook* (Tex.) 125 S. W. 638.

In discussing this phase of the question and adopting the decision of Lord Stowell in *Evans v. Evans*, 1 Hag. Cons. (Eng.) 35, it was said in *Freeman v. Freeman*, 31 Wis. 235: "The causes must be grave and weighty, and such as to show an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and in obligation; but what falls short of this is with great caution to be admitted. . . . What merely wounds the feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offenses in the marriage state undoubtedly, not innocent, surely, in any state of life, but still they are not that cruelty against which the law can relieve. It would seem from these remarks by one whose words ought to be law upon this subject, that there may be cases where what merely wounds the mental feelings, though unaccompanied with bodily injury either actual or menaced, will constitute that cruelty for which the law will afford relief. It would seem from the same remarks, also, that proof of actual bodily injury is not required, but that such injury threatened or menaced will under some circumstances suffice. And it appears to me, in reason and justice, that both propositions ought to be accepted as correct. Everybody knows that there may be a refinement of cruelty practiced on the part of one of the parties towards the other, unconnected with gross and abusive language or epithets or with anything personally violent or threatening, which may render the marriage state absolutely intolerable, and the discharge of the duties of married life an impossibility. Everybody knows that the conduct of the husband towards the wife may be such even without personal violence, actual or threatened, as to render her marriage state intolerable, and, from mere mental suffering and physical debility so produced, to make it utterly impossible for her to perform the duties which are expected of a wife, and which otherwise she would be able and anxious to perform. The language of the above quotation would seem to leave cases of this nature within the rule or definition of legal cruelty, as I must say I think they ought

to be; and it is for this reason I have always doubted the correctness of the decision in the early case in this court of *Johnson v. Johnson*, 4 Wis. 135. With all due respect, I must confess I regard the rule as laid down there, or as applied to the facts of that case, which in my judgment were most aggravating and cruel, as unreasonably narrow and stringent; and I much prefer that indicated in the above language of Lord Stowell. And this view would seem to be most in harmony with the true exposition and obvious intent of the statute, which declares that a divorce from the bond of matrimony may be adjudged 'when the treatment of the wife by the husband had been cruel and inhuman, whether practiced by using personal violence or by any other means.' R. S. ch. 111, § 9, subd. 5; 2 Tay. Stats. 1271, § 9, subd. 5. In the case now before us there is abundant proof, not only of course and abusive language and epithets, often repeated, but of actual personal violence and ~~bodily harm, accompanied by threats~~ at the time the plaintiff left his house, that he, the defendant, would take her life. The facts thus proved are fully as strong, if not stronger, to sustain the charge of cruel and inhuman treatment, than those shown in the case of *Pillar v. Pillar*, 22 Wis. 658, where this court sustained a judgment for divorce on the same ground. It is the opinion of this court, therefore, that judgment should have been rendered for the plaintiff, granting the divorce upon the ground of cruelty set forth in her complaint, and proved at the trial." See also *Hacker v. Hacker*, 90 Wis. 325, 63 N. W. 278. Compare *Johnson v. Johnson*, 4 Wis. 135.

While the courts will not usually regard the husband's status in respect to abusive language accompanied by occasional violence in the same light as that of the wife, yet in some cases conduct of that kind by a wife has been held to be sufficient to warrant the granting of a divorce to the husband. Thus calling the husband vile names and accusing him of being intimate with other women, and on one occasion assaulting him and driving him from the house have been held to be cruelty. *Cevene v. Cevene*, 143 Wis. 393, 127 N. W. 942. So a divorce has been allowed where the wife continually used offensive language towards her husband, tore his clothes, and on one occasion spit in his face. *Stevens v. Stevens*, 170 Mo. App. 322, 156 S. W. 68.

Evidence that a wife had a violent temper and would frequently fly into a rage using most vile language towards the husband and his relatives, that she made several attacks on him once with a razor and another time with a hatchet has been held to warrant a divorce for cruelty. *Johnsen v. Johnsen*, 78 Wash. 423, 139 Pac. 189, 1200.

The continuous taunting of the husband for his ignorance in the presence of others, using vile language towards him, frequently threatening to poison him, and on one occasion actually putting poison in his food have been held to constitute cruelty. *Motley v. Motley*, 93 Mo. App. 473, 67 S. W. 741. But see *Sturgis v. Sturgis*, 173 Mich. 597, 139 N. W. 866.

It was held in *Fizette v. Fizette*, 146 Ill. 328, 34 N. E. 799, that even though a single act of violence was committed after a long period of abusive language it did not constitute legal cruelty. To the same effect see *De Coito v. De Coito*, 21 Hawaii 339; *Richards v. Richards*, 1 Grant Cas. (Pa.) 389; *Cutler v. Cutler*, 2 Brewst. (Pa.) 511; *Hagood v. Hagood* (Tenn.) 48 S. W. 122; *Bingham v. Bingham* (Tex.) 149 S. W. 214; *Pillar v. Pillar*, 22 Wis. 658. "It is quite possible that a single act of cruelty, on a single occasion, may be so severe, and attended with such corresponding circumstances, as might under a fair and liberal construction of this act justify a divorce. But it is not every single touching of the wife's person in anger, at a moment of sudden excitement or of passion, that should bring down on the husband a sentence of separation more cruel than the act that induced it." *Richards v. Richards*, supra, wherein it was held that the fact that a husband pulled his wife's nose on an occasion in which she was quarrelling with his sister, the former holding a knife in her hands in a threatening manner, was not cruelty.

Where it appeared that a wife was struck by her husband as a result of a quarrel between them, and again several years thereafter while he was intoxicated, it was held that cruelty was not established. *Buckland v. Buckland*, 22 Pa. Dist. 965.

Habitual Intemperance or Use of Drugs.

While an action for divorce on the charge of cruelty cannot be grounded on or established by intemperance only, yet habitual intemperance when coupled with other acts which make it dangerous for the other spouse to continue the marital relation is uniformly held to constitute cruelty.

England.—*Marsh v. Marsh*, 5 Jur. N. S. 46, 1 Sw. & Tr. 312, 28 L. J. P. & M. 13, 7 W. R. 129; *Power v. Power*, 11 Jur. N. S. 800, 4 Sw. & Tr. 173, 34 L. J. P. & M. 137, 12 L. T. N. S. 824; *Walker v. Walker*, 77 L. T. N. S. 715. Compare *Hudson v. Hudson*, 3 Sw. & Tr. 314, 12 W. R. 354; *Scott v. Scott*, 29 L. J. P. & M. 64.

Alabama.—*Hughes v. Hughes*, 19 Ala. 307.

Arkansas.—*McDaniel v. McDaniel*, 100 Ark. 629 mem. 140 S. W. 980.

California.—Haskell v. Haskell, 54 Cal. 262; Grierson v. Grierson, 156 Cal. 434, 105 Pac. 120, 134 Am. St. Rep. 137.

Colorado.—Sedgwick v. Sedgwick, 50 Colo. 164, Ann. Cas. 1912C 653, 114 Pac. 488.

Connecticut.—Morehouse v. Morehouse, 70 Conn. 420, 39 Atl. 516.

Kentucky.—Harl v. Harl, 73 S. W. 756, 24 Ky. L. Rep. 2163.

Michigan.—Berryman v. Berryman, 59 Mich. 605, 26 N. W. 789; Murray v. Murray, 169 Mich. 388, 135 N. W. 262; Krusinski v. Krusinski, 170 Mich. 561, 136 N. W. 593; Hall v. Hall, 172 Mich. 210, 137 N. W. 536.

Missouri.—Allen v. Allen, 31 Mo. 479.

Nevada.—Gardner v. Gardner, 23 Nev. 207, 45 Pac. 139.

New Jersey.—McVickar v. McVickar, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. Rep. 422; Boyle v. Boyle, 67 Atl. 690.

North Dakota.—Mahnken v. Mahnken, 9 N. D. 188, 82 N. W. 870.

Ohio.—Beatty v. Beatty, Wright 557.

Oregon.—Ryan v. Ryan, 30 Ore. 226, 47 Pac. 101.

Pennsylvania.—Mason v. Mason, 131 Pa. St. 161, 18 Atl. 1021, 25 W. N. C. 177.

Texas.—Eastman v. Eastman, 75 Tex. 473, 12 S. W. 1107. See also Camp v. Camp, 18 Tex. 528.

Washington.—Lee v. Lee, 3 Wash. 236, 28 Pac. 355; Page v. Page, 43 Wash. 293, 86 Pac. 582, 117 Am. St. Rep. 1054, 6 L.R.A. (N.S.) 914.

West Virginia.—Maxwell v. Maxwell, 69 W. Va. 414, 71 S. E. 571.

Wisconsin.—Crichton v. Crichton, 73 Wis. 59, 40 N. W. 638; Wachholz v. Wachholz, 75 Wis. 377, 44 N. W. 506.

Thus it was said in Hall v. Hall, 172 Mich. 210, 137 N. W. 536: "While the occasional or temperate use of alcoholic stimulants, or even occasional drunkenness, do not, under the statute, constitute valid grounds for divorce, we are of opinion that even occasional intoxication accompanied by cruel conduct and abusive language, may be held to be extreme cruelty under the statute. 'Extreme cruelty' is an exceedingly elastic term. Those acts, or that conduct and language, which in some walks of life, would pass as the ordinary incidents of the marital relation might constitute, in other social phases, the very refinement of cruelty."

So it was held in Lee v. Lee, 3 Wash. 236, 28 Pac. 355, that frequent intoxication of a husband, in which condition he abused his wife and without cause accused her of infidelity, often threatening her with violence, through fear of which she was driven from home, constituted cruelty, the court saying: "While it is not the policy of the law, or the practice of the courts, to sever the marriage relation for any but grave causes satis-

factorily proven, we nevertheless think that the testimony presented in the record in this case, standing as it does uncontradicted, clearly justifies a decree of divorce on the ground of cruelty. To say nothing of the alleged personal violence inflicted by respondent upon appellant, it is hard to conceive how a husband could be more cruel to a wife not entirely devoid of all sensibility and womanly instincts, than to persistently and falsely, and without just cause, accuse her of unchastity, especially to or before other persons. And the fact that he does so in the frenzy of intoxication is no mitigation of the offense, for habitual drunkenness is itself a sufficient ground for divorce under our statute."

It has been held that the fact that the wife was not of the most refined character and was at times guilty of profanity, or that she did not remonstrate with the husband as she ought, or rebuke him for using liquor to excess, furnished no adequate excuse for his habitual intoxication leading to abuse of the wife, nor did good conduct during periods of sobriety avoid the charge of cruelty. Berryman v. Berryman, 59 Mich. 605, 26 N. W. 789.

Frequent intoxication of a husband, by reason of which he abuses his wife, treating her harshly and cruelly, applying to her vile epithets, etc., is sufficient to make her apprehensive of her personal safety, and is of a nature calculated to affect her mind and undermine her health, and hence is sufficient cruelty on which to grant a divorce. Ryan v. Ryan, 30 Ore. 226, 47 Pac. 101.

Occasional intoxication, while not a ground of divorce under the statute, is no excuse for cruelty. Cruelty resulting from drunkenness is a cause for divorce. Maxwell v. Maxwell, 69 W. Va. 414, 71 S. E. 571.

On the question of intoxication it was said in Page v. Page, 43 Wash. 293, 86 Pac. 582, 117 Am. St. Rep. 1054, 6 L.R.A. (N.S.) 914: "To be an habitual drunkard a person does not have to be drunk all the time, nor necessarily incapacitated from pursuing during the working hours of the day ordinary unskilled manual labor. One is an habitual drunkard, in the meaning of the divorce laws, who has a fixed habit of frequently getting drunk. It is not necessary that he be constantly or universally drunk, nor that he have more drunken than sober hours; it is enough that he have the habit so firmly fixed upon him that he is unable to resist when the opportunity and temptation is presented."

But in Waskam v. Waskam, 31 Miss. 154, it was held that habitual intemperance and such manners and conduct as would necessarily be produced by such habits were not sufficient to warrant a divorce on the ground of extreme cruelty.

In New York cruel conduct cannot be made the basis of a divorce a vinculo but will war-

rant a separation or a divorce a mensa et thoro. Frequent drunkenness of a husband and compelling his wife to associate with a woman of ill repute and withdrawing his society and companionship at long intervals from her constitute cruel and inhuman treatment authorizing a limited divorce. *Tower v. Tower*, 134 App. Div. 670, 119 N. Y. S. 506. And see *McBride v. McBride*, 5 N. Y. S. 388. But intemperance alone does not entitle a wife to a limited divorce for cruel and inhuman treatment. *Anonymous*, 17 Abb. N. Cas. 231.

The mere fact that a husband drinks whiskey in moderation at his home because he thinks it is good for him, as his work exposes him to all sorts of weather, does not constitute cruelty. *Bowen v. Bowen*, 179 Mich. 574, 146 N. W. 271, 51 L.R.A. (N.S.) 460.

Evidence of harsh treatment and acts of violence occurring when the husband was under the influence of morphine and usually in resisting the efforts of his wife to take the drug from him, has been said by way of dictum to be sufficient to warrant a divorce. *Youngs v. Youngs*, 33 Ill. App. 223, wherein a divorce was refused because of condonation.

Occasional intoxication by a wife, peevishness, fault finding, and neglect of her household duties and the cleanliness of the children have been held not to be cruelty. *Schulze v. Schulze*, 33 Pa. Super. Ct. 325.

In the case of *Shutt v. Shutt*, 71 Md. 193, 17 Atl. 1024, 17 Am. St. Rep. 519, it was held that acts of violence and outbreaks of passion on the part of a wife in consequence of her habitual intemperance did not constitute such cruelty as to justify a divorce, the court saying: "The evidence in this case exhibits a domestic state well calculated to excite sympathy for the husband. The broils in his family made by the wife with his mother, the gross and revolting language of the wife upon these occasions, and the very reprehensible methods resorted to by the wife to procure liquor to gratify her thirst, were all facts well calculated to produce disgust and extreme mortification in a husband possessed of any degree of refinement. But all this conduct was that of an unfortunate woman who had become addicted to the habit of occasional intoxication, and the proof shows that it was only when she was under the influence of strong drink that she was guilty of the gross improprieties referred to in the evidence. And however deplorable this state of things may be, it is quite certain that the courts cannot interfere to furnish relief against all the troubles and distresses that may exist in the matrimonial relation. By far the greater number of these must be left to the good sense and judicious management of the parties themselves. The husband must exert his influence and authority over the wife for the correction of her bad habits. As has been

said by a great authority (Lord Stowell), it is, the law of religion, and the law of the country, that the husband is intrusted with authority over his wife. He is to practice tenderness and affection, and obedience is her duty. Within and by a proper observance of this principle it may be hoped that the husband will be able effectually to restrain the unfortunate habit in his wife of which he complains, and to restore the happy relation between the wife and himself that formerly existed." See also *McDaniel v. McDaniel*, 100 Ark. 629 mem. 140 S. W. 980.

In *Holland v. Holland*, 4 Leg. Gaz. (Pa.) 372, the fact that a wife became a confirmed opium eater, to the neglect of her domestic duties, was held not to be cruelty.

So in *Ring v. Ring*, 118 Ga. 183, 44 S. E. 861, 62 L.R.A. 878, the continued use of morphine by a wife who became an addict of the drug was held not to be cruelty within the statute.

In *Smith v. Smith*, 119 Ga. 239, 46 S. E. 106, it was held to be proper for the court to exclude evidence that the wife was a habitual user of morphine.

Refusal of Marital Rights.

The refusal by either spouse to allow the other to have marital intercourse is not such conduct as the law will generally recognize as cruelty. *Paterson v. Paterson*, 3 H. L. Cas. (Eng.) 308; *Cousen v. Cousen*, 11 Jur. N. S. (Eng.) 656, 4 Sw. & Tr. 164, 12 L. T. N. S. 712; *D'Aguilar v. D'Aguilar*, 1 Hag. Ecc. (Eng.) 773; *Stewart v. Stewart*, 78 Me. 548, 7 Atl. 473, 57 Am. Rep. 822; *Cowles v. Cowles*, 112 Mass. 298; *Disborough v. Disborough* (N. J.) 26 Atl. 852; *McKinney v. McKinney*, 9 Ohio Dec. 656; *Magill v. Magill*, 3 Pittsb. (Pa.) 25; *Eshbach v. Eshbach*, 23 Pa. St. 343; *Platt v. Platt*, 38 Pa. Super. Ct. 551; *Scott v. Scott*, 61 Tex. 119; *Varner v. Varner*, 35 Tex. Civ. App. 381, 80 S. W. 386; *Lohmuller v. Lohmuller* (Tex.) 135 S. W. 751; *Wills v. Wills*, 74 W. Va. 709, 82 S. E. 1092, L.R.A. 1915B 770; *Schoessow v. Schoessow*, 83 Wis. 553, 53 N. W. 856. See also *Burton v. Burton*, 52 N. J. Eq. 215, 27 Atl. 825; *Hexamer v. Hexamer*, 42 Pa. Super. Ct. 226.

In *Magill v. Magill*, 3 Pittsb. (Pa.) 25, the court said: "In what respect the refusal by the wife to allow the husband access to her bed can be termed cruel and barbarous I cannot conceive; nor, having a reference to the proper meaning of terms, can I see how such treatment will render his life burdensome or condition intolerable. If nonaccess to a man or woman's bed has such startling effects, a great portion of our race must be in a pitiable condition."

So it was said in *Wills v. Wills*, 74 W. Va. 709, 82 S. E. 1092, L.R.A. 1915B 770: "The

policy of the law opposes and denies the allowance of divorces except for weighty and very substantial reasons. To make this a cause for divorce would render the procurement of divorces easy and afford a means of separation to all who desire it, whatever the motive might be. The law may well deem the natural passion of the parties, accompanied by legal and rightful opportunity of gratification, a sufficient inducement to the performance of marital duty in this respect. And ordinarily it is, for the complaint made here by one spouse against the other is seldom heard. The rules of law are made to conform to and answer the purposes of ordinary situations, not extraordinary or exceptional cases. In other words, the trouble here complained of will ordinarily arise in but few cases, say one in a thousand. To make it a ground for divorce would likely bring forth divorces in hundreds of instances in which they would not otherwise occur. Some of the authorities relied upon liken the wife's refusal to a case of impotency of one of the parties to the marriage, but the two cases are not analogous. Pre-existing incurable impotency of one of the parties to a marriage renders impossible the procreation of children, and thus defeats one of the chief purposes of marriage. Mere aversion to the performance of the act of intercourse is not a physical obstacle to the accomplishment of this high and sacred purpose. Impotency is. In cases of normal persons, the aversion may be overcome, and generally is. The parties to this cause are not exceptions from the general rule. The wife's hope of posterity has induced her to bear seven children. Procreative power of both parties to the marriage relation is essential to the achievement of one of its chief purposes, wherefore the law deems it a matter of the highest importance. But, when the act by which procreation is effected is regarded as mere indulgence, no known principle of law dignifies one form of indulgence or pleasure above another. Moreover, impotency is not a ground of divorce, unless it existed at the time of the marriage. The aversion complained of here is subsequent."

The rule heretofore stated is particularly applicable where the husband is old and feeble. *Varner v. Varner*, 35 Tex. Civ. App. 381, 80 S. W. 386, wherein the court said: "The persistent and unjustifiable refusal of marital rights may constitute cruelty, if sufficient to injure the health, but in no case has such injury been established. The refusal of either party to occupy the same bed is not cruelty under any definition of that term. But if it be conceded that a case might be presented in which refusal to grant sexual intercourse would constitute such cruel treatment as would authorize a divorce under our statute, we do not think the record before

us discloses such a case. In our opinion, the effect that such refusal would have upon a husband would depend in a large degree upon his physical condition, as well as upon the condition of the wife. The finding of the court that the defendant refused to accede to the plaintiff's requests carries with it the inference that plaintiff solicited sexual intercourse, and the fact that he made such solicitation is all there is in the record indicating the plaintiff's physical condition. The rule is that in the absence of a statement of facts, or a finding of the court or jury to the contrary, it will be presumed that proof was made of all facts necessary to sustain the judgment. So, in this case, it may have been shown, concerning the plaintiff, that his way of life has fallen into the sear, the yellow leaf.' Old age and infirmity may be upon him; his virility may be greatly diminished; his amorous desires may be few and feeble, and the failure to have them gratified a matter of no great importance. And if such be his condition, whatever might be held as to a husband differently situated, we are of opinion that the trial court did not err in holding in this case that the wife's conduct, though wrongful, was not such an excess, cruel treatment or outrage as to render their living together insupportable."

It was held in *Schoessow v. Schoessow*, 83 Wis. 553, 53 N. W. 856, that in the absence of any proof by a wife that she suffered any injury either mental or physical therefrom, her husband's refusal to have sexual intercourse with her did not warrant a court in granting her a divorce for cruelty. See also *Holyoke v. Holyoke*, 78 Me. 404, 6 Atl. 827.

In *Michigan* it has been held that it is extreme cruelty for a wife to refuse to maintain sexual relations with her husband for a period of three years. *Campbell v. Campbell*, 149 Mich. 147, 112 N. W. 481, 119 Am. St. Rep. 660. To the same effect see *Case v. Case*, 159 Mich. 491, 122 N. W. 538, 124 N. W. 565; *Waldhorn v. Waldhorn*, 165 Mich. 130, 130 N. W. 199, 18 Detroit Leg. N. 15.

Sexual Excesses.

A divorce for cruelty will generally be granted to a woman where the proof shows that her husband compelled her against her wishes and remonstrances to submit to excessive sexual intercourse, the effect of which was to impair her health. *Moss v. Moss*, 114 L. T. N. S. (Eng.) 1147, 85 L. J. P. 182, 32 Times L. Rep. 468; *Mayhew v. Mayhew*, 61 Conn. 233, 23 Atl. 966, 29 Am. St. Rep. 195; *Youngs v. Youngs*, 33 Ill. App. 223, 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313, 6 L.R.A. 548; *Ridley v. Ridley* (Ia.) 100 N. W. 1122; *Maget v. Maget*, 85 Mo. App. 6; *Gardner v. Gardner*, 104 Tenn. 410, 58 S. W. 342,

78 Am. St. Rep. 924; McAllister v. McAllister, 28 Wash. 613, 69 Pac. 119.

It was held in *Ridley v. Ridley*, supra; that it was not necessary to show that the complainant resisted her husband's demands or engaged in angry controversies to repel his advances.

The subjecting of a wife by her husband to excessive sexual intercourse in a rough and unreasonable manner, when he knows that her physical condition is such that it will be likely to inflict injury on her, is such intolerable cruelty as to entitle her to a divorce. *Mayhew v. Mayhew*, 61 Conn. 233, 23 Atl. 966, 29 Am. St. Rep. 195, wherein it was said: "What may or may not constitute intolerable cruelty by a husband towards his wife in the exercise of his marital rights is a difficult and delicate question. Such acts as are usually meant by that term are not ordinarily dangerous or cruel. But sometimes they may be both dangerous and cruel. Marital rights exist on the part of the wife as distinctly as on the part of the husband. . . . Correlative to marital rights are marital duties. The term implies a two sided obligation. In respect to such acts as are here in question, it includes the duty of forbearance on the part of the husband at the reasonable request of the wife, as well as the duty of submission on the part of the wife at the reasonable request of the husband. Any decision of what constitutes intolerable cruelty in these matters that should leave out of consideration the duty of the husband and look only to the duty of the wife, would be manifestly erroneous." Compare *Shaw v. Shaw*, 17 Conn. 189.

In *English v. English*, 27 N. J. Eq. 71, a divorce was granted for extreme cruelty, on proof showing that the husband insisted on having excessive intercourse with his wife against her will and her remonstrance, despite the fact of her delicate and diseased condition; and with knowledge that the intercourse inflicted great and distressing pain on her. The case was reversed on appeal in 27 N. J. Eq. 579, on the ground that there was no reasonable apprehension of a continuance of the cruelty.

Acts of Bestiality.

Unnatural and abnormal practices by either spouse which tend to make the marriage relation so revolting as to defeat the purposes of the relation, constitute cruelty warranting a divorce. *Crutcher v. Crutcher*, 86 Miss. 231, 38 So. 337; Anonymous, 3 Ohio Dec. 450, 2 Ohio N. P. 342. See also *N. v. N.* 9 Jur. N. S. (Eng.) 1203, 3 Sw. & Tr 234, 9 L. T. N. S. 265. Thus the practice of "sodomy" or "pederasty" by a spouse is cruelty within the meaning of the statute

warranting a divorce. *Crutcher v. Crutcher*, supra, wherein it was said: "'Cruelty, in the sense of the statutes on this subject, is such conduct in one of the married parties as renders his continuance of cohabitation either so dangerous to the other party in fact, or attended with such reasonable apprehension in the mind of the other, to the physical distress or discomfort of the other, as to demand his separation on the ground of the real physical safety of the other, or of mental or physical capacity of the other to discharge well the duties of husband or wife.' 1 Bishop on Marriage and Divorce (4th ed.) 716, 717. Tested by these principles and these definitions, the act of sodomy charged is legal cruelty, within the terms of our statute. Unnatural practices of the kind charged here are an infamous indignity to the wife, and which would make the marriage relation so revolting to her that it would become impossible for her to discharge the duties of wife, and would defeat the whole purpose of the relation. In the natural course of things, they would cause mental suffering to the extent of affecting her health, and would give rise to serious apprehension of communication to her of disease in case of the continuance of cohabitation. Such conduct constitutes extreme cruelty, as explained by the courts. All that is here said of sodomy is equally applicable to pederasty, as defined by the bill in this case. Whether restricted to sodomy, as commonly understood, or whether pederasty means what is here alleged in this case, or what it is defined to be in the larger dictionaries, it is cruel and inhuman treatment, within the meaning of our statute."

An action by a wife will lie for extreme cruelty under the statute where the husband commits an act of sodomy with a beast. Anonymous, 3 Ohio Dec. 450, 2 Ohio N. P. 342.

The practice of masturbation by the husband in the presence of his wife, but without compelling her to remain present, though it disturbs her nerves and thus affects her health, is not "cruel and abusive treatment" within the statute. *Wood v. Wood*, 141 Mass. 495, 6 N. E. 541, 55 Am. Rep. 491, wherein it was said: "The words 'cruel and abusive treatment' seem to import on their face conduct directed towards the other party, and with a malevolent motive. Without deciding that a case could not be imagined which would fall within the meaning of the words without such a motive, it is enough to say that purely self-regarding conduct, not forced upon even the knowledge of the wife otherwise than by the usual intimacy of matrimony, does not constitute the offense, merely because its folly, its disgusting character, or its wickedness disturbs her nerves or conscience, and thus affects her health."

Refusal to Speak.

Refusal of a spouse to speak to the other for a long period of time has been held in connection with other circumstances to constitute cruelty. *Sharp v. Sharp*, 116 Ill. 509, 6 N. E. 15; *Zweig v. Zweig*, 46 Ind. App. 594, 93 N. E. 234; *Downey v. Downey*, 135 Mich. 265, 97 N. W. 699; *Preuit v. Preuit*, 88 Neb. 124, 129 N. W. 175; *Hiecke v. Hiecke*, reported in full post, this volume, at page 497. Compare *Duhme v. Duhme*, 3 Ohio Dec. 95; *Harris's Appeal*, 2 W. N. C. (Pa.) 331.

In *Reinhard v. Reinhard*, 96 Wis. 555, 71 N. W. 803, 65 Am. St. Rep. 66, it was said: "Marriage implies companionship, and is supposed to be based upon mutual regard and affection. For a husband and wife to live and sleep in the same house, and eat at the same table food prepared by the wife, without the husband speaking to the wife, except in anger, for a period of three months at a time, must have been, at least, very disagreeable, if not unbearable. That such was the fact does not seem to be very seriously disputed. It certainly evinced abnormal affections, persistent wantonness, and deliberate perversity. The effect of such conduct upon a nervous, sensitive woman can better be imagined than described, and may have seriously impaired the plaintiff's health, as found by the court. This court has repeatedly held that personal violence, whether actual or threatened, or even gross and abusive language, is not absolutely essential to constitute cruel and inhuman treatment."

Effect of Complainant's Provocation.

The complaining party is not entitled to a divorce where the cruel conduct relied on is provoked and brought on by the complainant, unless the conduct complained of is excessive and out of proportion to the provocation. *Reed v. Reed*, 4 Nev. 395; *Davis v. Davis*, 19 N. J. Eq. 180; *Coles v. Coles*, 32 N. J. Eq. 547; *Biddle v. Biddle*, 50 Pa. Super. Ct. 30.

Thus it was said in the case last cited: "If it be conceded that the respondent called the complainant the bad names referred to, the fact is to be noted that she had strong provocation to such conduct by reason of the admitted actions of the complainant. He states that their troubles started in 1897 some time during the fall, about which time he noticed her doing on a number of occasions that which did not appear to be a correct thing for a married woman to do. He then says: 'From the time I commenced to accuse her of things then she commenced to retaliate by many acts and particularly at the table. . . . She would for instance

talk disparagingly of me, and tell me I was not a business man, and if I had more business tact I would make more money, and we could all have a better time, and speak of me in a slurring manner about the operating work I was doing, surgical work. Constantly telling me to go to the board of trustees so I would get more salary, so we could have more money, and always telling me things that the trustees were doing, and what they ought to do, and what they did not do, and I ought to do this, and do that, and, of course, in that way got me in trouble with my board of trustees.' On cross-examination he says: 'I accused her first because I knew she was guilty,' and that he continued accusing her of unfaithfulness; that her unfaithfulness was the original cause of their troubles; that time and again in the presence of his children and others he had said that she was untrue to him; that he announced many times to his children that their mother was a 'whore' and that he repeatedly made this accusation in the presence of strangers. In reply to the question, in this connection, 'The fact is you accused her hundreds of times,' the complainant replied, 'Probably in the thirteen years, yes, I did.' No other accusation as degrading could be made against a married woman as that which the complainant frankly admits he made against his wife very many times and which he persisted in up to the time of the taking of the testimony, although he had withdrawn the charge of adultery on an application to the court in which he stated under oath that he had been misinformed and did not believe it to be true. In view of the gravity of this accusation and its persistent repetition it would not be surprising to learn that the respondent retaliated and if she did not, as she claims, she exhibited a remarkable forbearance. A complainant is not entitled to a divorce where the indignities relied on are provoked by the complaining party unless the retaliation is excessive: *Richards v. Richards*, 37 Pa. St. 225; and it can hardly be contended here that the respondent equaled the complainant in the enormity of the accusations."

So in *Coles v. Coles*, 32 N. J. Eq. 547, it was said: "Had her own conduct been different from what it was, had she herself been free from blame, I would not hesitate to pronounce the desired decree for divorce. But I cannot shut my eyes to the fact that her conduct has been unforgiving and unbearingly, calculated to exasperate rather than conciliate; that she seems to have been unwilling to conform to her husband's wishes in regard to his household affairs, and to discharge her duties under the circumstances in which she was placed."

HIECKE

v.

HIECKE.

Wisconsin Supreme Court—May 2, 1916.

163 Wis. 171; 157 N. W. 747.

Appeal from Circuit Court, Milwaukee county: TURNER, Judge.

Action by Mrs. Hiecke, plaintiff, against Hiecke, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

[171] Action for a divorce on the ground of cruel and inhuman treatment.

Defendant answered, denying all allegations upon which the claim of cruel and inhuman treatment was based, and [172] pleading misconduct of plaintiff, palliating, if not justifying, any improper treatment of her.

As the trial court viewed the evidence it established the following situation:

(1) The parties intermarried at the city of Milwaukee, Wisconsin, May 25, 1898. (2) Since that time they have resided there. (3) They have four children, a son fifteen years old, a daughter twelve years old, a daughter ten years old, and a daughter seven years old,—all of whom have resided with plaintiff since June 29, 1914. (4) On many occasions defendant slighted plaintiff and did not speak to her, causing her much mental anguish. Upon her kindly protesting against such treatment, she was told by defendant that it was none of her business and if she did not like it she could go. In July, 1898, she was compelled to leave defendant and to reside with her parents. Following their advice and that of her brother, she returned, but defendant refused to speak to or forgive her. (5) On each occasion of the birth of a child, defendant neglected plaintiff by purposely remaining away from home. On one such occasion, though he was only four blocks away and knew that she was alone and in need of her nurse and physician, he refused to answer her urgent call for his presence. (6) He has been accustomed, for days, weeks, and months at a time, to refuse to speak to her. (7) June 25, 1914, he was out till 2:30 the following morning; then returned home intoxicated, took a valuable new blanket she had purchased, made it into a ball and threw it at her, stating that it was a cheap lodging-house blanket; at the same time, in the presence of the oldest son and a servant, using very vile and abusive language toward her, and he was accustomed to do that. (8) About six years prior to the commencement of the action, he returned home under the influence of liquor and, with his clothing offensive from tobacco and cigarette smoke, entered plaintiff's apartments, whereupon she spoke to him as to his condition and he left the room, since which time they have not cohabited as man and [173] wife. (9) On social occasions he customarily neglected her. (10) Usually she and the children have spent the summer months at her mother's at Cedar Lake, Wis.

Appeal and Error — Review of Findings of Fact.

Findings of fact by the trial court are presumed correct, unless against the clear preponderance of the evidence.

Divorce — Recrimination.

The doctrine of "recrimination" in divorce cases, whereby one spouse, guilty of offenses against the married status, will be denied divorce notwithstanding an offense of the other, does not necessitate that the spouses be guilty of the same offenses, but a wife, seeking a divorce on account of the inhuman and cruel treatment of her husband, will not be denied a divorce where she was guilty of no offense against the married status, though her conduct was not, in all respects, what it should have been.

[See 6 Ann. Cas. 171.]

Cruelty — What Conduct Constitutes.

That a husband was guilty of neglect and abuse which ultimately would affect his wife's health, leaving her without medical attention when in a delicate condition, and refusing to speak to her for long periods of time, constitutes cruel and inhuman treatment within the statute, although the wife's health had not at the time she sought a divorce become impaired.

[See note at end of this case.]

Costs — Expenses of Proceeding before Commissioner.

In a divorce case, where defendant was examined before a commissioner, expenses actually incurred by the commissioner in such proceeding may be properly taxed against defendant as costs.

Alimony — Amount of Allowance.

Where a wife was granted a divorce and custody of minor children of the marriage, an award of \$80 a month for the support of such children, four in number, while large, cannot be held excessive; the defendant husband having in the past paid the house rent and allowed the wife \$30 a week for expenses.

Same.

While the amount awarded a wife on divorce should not exceed from one-third to one-half of the husband's property, it is not improper, where the husband is practically the owner of an apothecary shop, to award the wife an insurance policy on which the husband had paid fourteen premiums averaging \$100, and to require him to continue payment of the premiums, and also to pay the wife three separate sums of money amounting to \$1,200; the stock of drugs and some other property being awarded the husband.

consin, defendant, as a rule, visiting her Saturday nights and remaining until Sunday night; but spending very little time with the family. He would, customarily, go fishing and then to a neighboring hotel and stay most all night drinking. In 1913 and 1914 he did not visit plaintiff and the family at all during their sojourn with her mother of some three months each season. (11) On Christmas, 1912, he refused to accept a Christmas present from her, or to dine with her and the family. He spent the day with his sister and there distributed presents to his children. (12) She possesses improved, income-yielding real estate for which she paid \$5,800. On account of necessary outlays for repairs, the net income therefrom has been less than two per cent. (13) She has household furniture in her possession worth about \$500 which was a gift from her parents. (14) He is a strong man of fair business capacity, a pharmacist by occupation, and has conducted a drug store, under an arrangement with his father, for years. The assets of the business are worth \$9,000 and he has some contingent interest therein. (15) He owns one-third of the \$60,000 par value of the stock of the Turbine Sewer Machine Renovating Company, the value of which is nominal. The stock has not all been paid for. (16) He owns a city lot worth \$100. (17) He owns a policy of life insurance on which he has paid, as the annual premium, \$100 per year for fourteen years. (18) For six years he has given her \$30 per week for household expenses, paid \$20 per month for rent of the home, and paid about \$15 per month for fuel bills, besides clothing the children. (19) She is a suitable person to have the custody of the children and it is for their interests that she should have such custody.

On such facts the court concluded as follows: Plaintiff is entitled to judgment of absolute divorce on the ground of cruel and inhuman treatment, and to be awarded custody of [174] the children. The policy of insurance should be assigned to her, defendant to pay the annual premium until maturity. He should pay her \$400 in six months, the same in twelve months, and the same in eighteen months. He should be divested of all interest in the household furniture. He should pay her attorneys' \$100 for attorneys' fees and pay the taxable disbursements of the action. He should pay, until further order of the court, \$80 on the first day of each month for the support of the minor children. He should have the corporate stock mentioned, and the contingent interest in the drug-store assets. Such distribution shall be a final division of property subject thereto.

Judgment was entered according to such conclusions except the provision for support

of the children was made payable in weekly instalments.

There was a retaxation of costs as to \$120 claimed by a court commissioner for service in the action for expenses incurred in listing and numbering checks. That was reduced to \$25.

Adolph G. Schwefel for appellant.

Lorenz & Lorenz for respondent.

MARSHALL, J.—It is considered that,—in the light of the rules governing the matter, particularly, that the findings are to be presumed correct unless against the clear preponderance of the evidence, giving due weight to the fact that the trial judge saw the witnesses and had a far better opportunity than is afforded by reading the printed history of the trial for weighing their testimony,—the conclusions of fact here cannot properly be disturbed.

It is contended that, though the facts found stand as verities, the divorce should not have been granted because of proof that the respondent was guilty of much matrimonial misconduct. That misconduct of one party to a marriage contract [175] would justify or require, under some circumstances, denial of judicial assistance to such party to nullify such contract, is well established by the decisions of this court. That rule, so far as it relates to an absolute bar to a guilty party successfully prosecuting an action for a divorce, is limited, in general, to cases where both parties have been guilty of a legal cause therefor (*Pease v. Pease*, 72 Wis. 136, 39 N. W. 133; *Hubbard v. Hubbard*, 74 Wis. 650, 43 N. W. 655, 6 L.R.A. 58; *Voss v. Voss*, 157 Wis. 430, 147 N. W. 634); though it has been sometimes extended by judicial discretion to situations where the wrongful conduct of the complainant did not constitute a ground for a divorce, but induced such conduct on the part of the defendant.

The doctrine of recrimination, in relation to divorce actions, is quite ancient, as indicated in 2 *Bishop on Marriage, Divorce and Separation*, secs. 372 to 376, inclusive. It was a question, as will be seen, for a time, whether fault of the plaintiff should bar a divorce unless of the same grade as the fault charged against the defendant, as for instance, whether, in case of the latter charge being adultery, cruel and inhuman treatment on the part of the complainant would bar a recovery. The negative has been held in some state courts (*Dillon v. Dillon*, 32 La. Ann. 643), but, in general, it has been held in this country that conduct of the plaintiff constituting any cause for a divorce is a bar to an action for a divorce by such party on any ground. 2 *Bishop, Mar. Div. & Sep.* §§ 377, 378. Such is the rule, as stated in

Pease v. Pease, *supra*. The prevailing doctrine is thus stated in 2 Bishop, § 340: "Recrimination in divorce law is the defense that the applicant has himself done what is ground for divorce. . . . It bars the suit founded on whatever cause, whether the defendant is guilty or not." On the same subject, §§ 349, 365, and 368. This court went no further in Pease v. Pease, *supra*. The gist of the decision is correctly stated in the syllabus thus: "Where it is shown that each party has been [176] guilty of an offense which the statute has made a ground for divorce in favor of the other, the court will not grant relief to either." It is said in the opinion that such is the law in jurisdictions having written laws similar to our own, citing many authorities.

In the cases here subsequent to Pease v. Pease, the doctrine of the latter was not extended, as will be seen when the facts of the later cases are understood, though this language quoted in Hubbard v. Hubbard, 74 Wis. 650, 43 N. W. 655, 6 L.R.A. 58, from the opinion in Otway v. Otway, L. R. 13 Prob. Div. (Eng.) 141, is otherwise suggestive: "A judicial separation can only be granted when the petitioner comes to the court with a pure character, and is free from all matrimonial misconduct;" but the case shows the court was dealing with a situation of mutual misconduct, each party being guilty of conduct constituting ground for a divorce. It was conduct of that character that the quoted language was addressed to and not to cases, in general, of want of "pure character" or of "matrimonial misconduct." In Voss v. Voss, 157 Wis. 430, 147 N. W. 634, there was mutual misconduct of the nature required by the rule stated in Pease v. Pease, *supra*. It is very certain that this court did not intend to otherwise state the law in Hubbard v. Hubbard, *supra*.

The result of the foregoing is that, unless respondent was guilty of matrimonial misconduct constituting good ground for an action for a divorce, there is nothing in the evidence barring her from maintaining her action, even if it does disclose conduct on her part which might, properly, have been, and probably was, considered on the question whether it so far provoked appellant to his misconduct as to justify or require a conclusion that it fails to satisfy the call of the statute for cruel and inhuman treatment. There are no findings on the subject of matrimonial misconduct of plaintiff. None seem to have been requested. We must assume the trial court was of the opinion that the evidence did not warrant any which would bar her from obtaining relief, in case she established [177] her charge of cruel and inhuman treatment against appellant, or excusing his

wrongful conduct. We are unable to see our way clear to disturb such conclusion.

The question is raised on behalf of appellant as to whether, in any event, the circumstances mentioned in the findings warranted the conclusion that appellant was guilty of cruel and inhuman treatment of respondent. There is no specific finding of fact on the subject, but we take the conclusion of law as inferentially finding that the long continued course of ill-treatment of respondent, mentioned, imperiled her health, made her marriage state intolerable, and rendered her incapable of performing the duties of a wife. This court has often held that treatment which does, or is well calculated to, produce such results, satisfied the "cruel and inhuman treatment" of the statute. Freeman v. Freeman, 31 Wis. 235, 248; Reinhard v. Reinhard, 96 Wis. 555, 71 N. W. 803, 65 Am. St. Rep. 66; Kohl v. Kohl, 143 Wis. 214, 125 N. W. 921; Banks v. Banks, 162 Wis. 87, 155 N. W. 916.

It does not seem, by the later authorities, that actual impairment of health, caused by ill-treatment without violence, actual, threatened, or probable, is essential to cruel and inhuman treatment. If the conduct of the guilty party is such as to naturally cause great mental suffering to the other, and render impairment of health probable, so that further efforts to perform the duties of the marriage state would be dangerous, that is sufficient. That is the effect of Kohl v. Kohl, *supra*. The wife need not submit to such treatment until actually broken down in health before being competent to successfully claim a judicial separation on the ground of cruel and inhuman treatment. This court has departed from the doctrine, which obtains in some jurisdictions, that personal violence, actual or so threatened as to reasonably produce a belief of its being probable, is essential to cruel and inhuman treatment, and adopted the more humane construction of the statute above indicated.

Our conclusion is that the decision of the trial court on the [178] subject above discussed should not be disturbed, though the findings would be much more satisfactory if they contained a specific decision that the wrongful conduct referred to imperiled the health of respondent and rendered continuance of living together by the parties as man and wife intolerable and dangerous to her. Ill-treatment of the character mentioned in the findings might or might not have that effect, according to the temperament of the wife and her surroundings. The court saw respondent and, doubtless, concluded that she could not be subjected to such treatment and be expected to preserve her health or be able to perform her duties as a wife. That, as

before stated, can well be read out of the conclusion as to appellant's guilt, presuming that the circuit judge was, as he must have been, familiar with the long established law here.

In the cost bill an item of \$25 was allowed as expenses incurred by a court commissioner before whom there was an examination of appellant under the statute. Complaint is made of such allowance, also of the amount appellant was required to pay respondent for support of the minor children and of the amount which was awarded as her share on a division of property.

We do not perceive any efficient merit in the complaint of the \$25 item. The expense seems to have been actually incurred by the court commissioner, and necessarily, in his judgment. We are unable to conclude that it was not so under the circumstances.

The allowance for support of the minor children, though quite liberal, does not appear to be so clearly excessive as to warrant overruling the trial court's judgment.

After a careful consideration of the disposition of the subject of division of property, it is considered that it should not be disturbed. The well established rule is that, in general, a liberal amount to be allowed to the divorced wife is one-third in money value of the husband's property. That may be increased to one-half or more for special circumstances. [179] *Edleman v. Edleman*, 125 Wis. 270, 104 N. W. 56; *Von Trott v. Von Trott*, 118 Wis. 29, 94 N. W. 798; *Lindenmann v. Lindenmann*, 118 Wis. 175, 95 N. W. 96. It does not clearly appear that there was a departure here from that rule. The court, doubtless, considered that the value of appellant's interest in the \$9,000 drug business was sufficient to warrant the award to respondent which was made and it is considered that the evidence does not clearly preponderate against that view. He had been allowed for a long time to deal with the property very much as if he were the owner and, evidently, the trial court came to the conclusion that he, substantially, was such.

By THE COURT.—The judgment is affirmed.

NOTE.

The reported case holds that a long continued course of neglect and petty indignities practiced by a husband on his wife constitutes cruel and inhuman treatment entitling her to a divorce though there is no physical violence and no finding of actual impairment of the wife's health. For a discussion of the habits or course of conduct by a spouse which will constitute cruelty warranting a divorce, see the note to *Cunningham v. Cunningham*, reported ante, this volume, at page 478.

ANDERSON

v.

SHOCKLEY.

Missouri Supreme Court—January 6, 1916

266 Mo. 543; 181 S. W. 1151.

Libel and Slander — Variance between Complaint and Proof — Time and Place.

Where the petition, in an action for slander, charges that the defamatory words were spoken at a certain place, on a certain date, in the presence and hearing of a certain witness, plaintiff cannot recover, unless the evidence shows that the words were spoken as charged, though it appears that the same words were spoken to other parties at different times and places.

Same.

The plaintiff, in an action for slander, should not be held to strict accuracy in his proof of the time of publication, so long as the variance between his proof and the allegation does not bring the case within the statute of limitations, or mislead defendant to his injury, or amount to a palpable fraud on the court.

Proof of Other Publications — Admissibility.

Where, in an action for slander, the court instructed that, to entitle plaintiff to recover, the evidence must show that the defamatory words stated in the petition were spoken by defendant of and concerning plaintiff at the time and place and in the presence of the witness alleged, the refusal of an instruction that evidence of defendant's having spoken concerning plaintiff, at a different time and place and in the presence of others, defamatory words similar to those charged, could be considered as tending to prove express malice, required reversal of a judgment for defendant.

Same.

Where the petition, in an action for slander, charges that the defamatory words were spoken at a particular time and place in the presence of a particular person, evidence that defendant, in the presence of persons other than this person, at a different time and place, spoke of and concerning plaintiff defamatory words of like import to those charged, is competent as tending to show express malice in augmentation of damages.

Sufficiency of Complaint — Allegation of Time and Place of Slander.

Rev. St. 1909, § 1837, providing that the petition in an action for slander need not state any extrinsic facts to show the application to the plaintiff of the defamatory matter, but it shall be sufficient to state generally that the same was spoken of or published concerning plaintiff, does not so change the common-law rule as to relieve plaintiff from the necessity of alleging when and definitely stating where the publication was made; and,

where the petition is defective in this respect, plaintiff may be required, on motion to make more definite and certain, to set forth when and where and to whom the alleged defamatory words were published.

[See note at end of this case.]

Suit in Several Publications — Necessity of Separate Counts.

Where plaintiff, in an action for slander, desires to rely on separate publications of defamatory words, he must separately plead every such publication in separate counts of the petition.

[See generally, Ann. Cas. 1917A 250.]

Same.

In an action for slander, there can be no recovery for a publication which is not pleaded.

Appeal from Circuit Court, Maries county: WILLIAMS, Judge.

Action by R. S. Anderson, plaintiff, against O. W. Shockley, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

C. C. Bland, J. J. Crites and L. B. Hutchison for appellant.

Frank H. Farris and W. D. Johnson for respondent.

[546] *FARIS, P. J.*—Plaintiff sued defendant in Pulaski County for slander. The venue was changed on the application of defendant to Maries County, where the case was tried, a verdict rendered for defendant and plaintiff appealed. The sum claimed as damages was ten thousand dollars; hence our jurisdiction. We may say in passing that this case has been tried before, wherein defendant mulcted in damages in the sum of \$1,250, appealed and obtained a reversal and a new trial. [Anderson v. Shockley, 159 Mo. App. 334, 140 S. W. 765.] To the latter case reference is made for such of the facts as we may not deem it necessary to set out herein.

Since upon the instant appeal no points are made except as to the action of the court in giving three instructions, [547] which we set out in our opinion, we need not here go very extensively into the facts. The petition upon which the trial below was had, contains but one count, the charging part of which and which alone is pertinent here, runs thus: "Plaintiff for his second amended petition herein states that the defendant on or about the 30th day of July, A. D. 1908, at the county of Pulaski, in the State of Missouri, wilfully, wantonly and maliciously spoke of and concerning the plaintiff, R. S. Anderson, certain false, defamatory and slanderous words, to wit: 'R. S. Anderson (meaning the above-named plaintiff) is a thief; that he (meaning plaintiff) stole a set of harrow

teeth from me and I can prove it by John Ormsby.'" Thereafter followed prayer for judgment in the ordinary form.

The evidence on the part of plaintiff tended to prove that about the latter part of July, 1908, at the railroad depot in the town of Crocker, in Pulaski County, defendant spoke to plaintiff in the presence of one Albert Manes sufficient of the words complained of to form substantially the statement set out in the petition. Testimony was also offered on the part of plaintiff that defendant at divers other times and places, particularly to one James F. Vaughan and to a certain J. M. Carmack, made statements of similar import, in which he charged plaintiff with having stolen his harrow teeth. The first instruction asked by plaintiff and given by the court made specific reference to the alleged defamatory words spoken in the presence of the witness Albert Manes.

The answer of defendant was, among other things not pertinent, a specific denial of the fact that he spoke the words charged. The proof of defendant tended to show that he had not spoken to plaintiff in the presence of witness Albert Manes the defamatory words alleged and shown by the testimony of said Manes, or in the presence of anyone else. The defense made a [548] very serious attack upon the general reputation of the witness Albert Manes for truth and veracity. In addition, the defense sought to impeach Manes by showing by other witnesses (who said they were present at the railroad station in Crocker at the time defendant is said by this witness to have uttered the words charged), that no such conversation was in fact had between defendant and plaintiff.

The three instructions complained of, the giving of one of which for defendant and the refusal of two of which for plaintiff constitute the only assignments of error, will be found set out in the opinion, together with such other facts as we may find to be necessary to make clear the discussion.

I. But three points are made by appellant, each of which as stated, has to do with instructions, either given or refused. At the request of defendant the learned trial court gave this instruction, to wit:

"No. 4. Unless you find from the evidence that the defendant spoke of and concerning plaintiff at Crocker, Missouri, on or about the 30th day of July, 1908, in the presence and hearing of witness Manes the alleged defamatory words stated in plaintiff's petition, you cannot find the issues for plaintiff, even though you may believe from the evidence that defendant spoke such words to other parties at different times and places."

Appellant contends that in this the learned judge *visi* erred. We disallow this point and hold the instruction correct in principle. If

it was adventitiously wrong, the fact was due to another error, which we hereafter discuss. It was the duty of plaintiff to confine himself to one publication as a basis of recovery; or else to have charged each separate and distinct publication upon which he sought recovery in a separate count. [Christal v. Craig, 80 Mo. 367.]

[549] II. Appellant contends that the court erred in refusing to give at his request instructions numbered eight and nine, which are as follows:

"No. 8. The court instructs the jury that if you believe and find from the evidence that the defendant in the presence and hearing of J. M. Carmack, or others, spoke of and concerning plaintiff slanderous and defamatory words similar and of like import to those charged in the petition, they may consider such evidence as tending to prove express malice on the part of the defendant.

"No. 9. The court instructs the jury that if you believe and find from the evidence that at any time within two years of the time of filing this suit, to wit, the 19th day of August, 1908, the defendant maliciously spoke of and concerning the plaintiff, R. S. Anderson, in the presence and hearing of James F. Vaughan the words alleged in the petition, to wit: 'R. S. Anderson (meaning the plaintiff) is a thief. That he (meaning plaintiff) stole a set of harrow teeth from me and I can prove it by John Ormsby,' you will find the issues for the plaintiff and assess his damages at such sum as you may believe and find he is entitled to recover, not to exceed the sum of ten thousand dollars."

We are of the opinion that instruction eight should have been given and that the refusal of the court to give it constituted error for which this case must be reversed and remanded. We are, however, of the opinion that the court did not err in refusing to give instruction nine. The reasons for all three of these rulings are germane to each other and are such that all points raised can for brevity and clarity well be considered together. This is so, for the reason that if appellant's contentions are each the law, divers publications to divers persons at different times and [550] places could be pleaded in one count, proved upon trial, and plaintiff could pick and choose the one on which he would stand; or even, stand upon all and failing and refusing to elect, leave the jury to pick from among them some one or more publications on which to bottom a verdict. We have said that this is not the law; the contrary is well settled. On the other hand if it is the law as respondent contends that said instruction four was properly given and instruction eight properly refused, then a plaintiff in a slander suit is bound to the one publication specifically counted on and

may not prove for any purpose whatever the fact of the publication, to others than those (if any) set out in his petition, of slanderous words of like or similar import to those charged in the petition. We think neither position is throughout correct; but since the rules of pleading and practice upon which a solution of these contentions turns, seem to have drifted away somewhat from both common law and the statute, we will examine them again briefly.

At common law it seems the pleader in a slander suit was required to allege when and where, and might if necessary to the defense be required to aver to whom, the publication was made. This is yet the law in England. [Odgers on Libel & Slander, 625.] Touching this rule the above learned writer says: "In cases of slander he [the plaintiff] must give the date of each slander, the names of the persons to whom, and the places where, each slander was uttered."

If such a bill of particulars could be required at common law in slander suits, or whatever the rule as regards definiteness and certainty in these behalfs was at common law, it is the law yet in this State unless we have changed it by statute. But it is said that our statute (Sec. 1837, R. S. 1909) has changed the rule at common law requiring certainty of allegation [551] as to time and place of publication. [Atwinger v. Feller, 46 Mo. 276; Johnson v. Bush, 186 Mo. App. 107, 171 S. W. 636.] Let us see if this is correct. The applicable part of our statute reads thus: "In an action for libel or slander, it shall not be necessary to state in the petition any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter . . . but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff," etc. (Italics ours.) [Sec. 1837, supra.] The query which arises in construing this statute is: Wherein and to what extrinsic facts does it apply and what facts does it obviate the necessity of alleging? Manifestly, to such extrinsic facts as this term was technically used in a common-law declaration for slander, to designate, viz.: Such extrinsic facts as serve to show the "application to plaintiff of the defamatory matter," and touching this purpose and this only, "it shall be sufficient (i. e., to show the application of the defamatory matter to plaintiff) to state generally that the same was published or spoken concerning the plaintiff." [Newell, Slander & Libel, 728, 838; Dias v. Short, 16 How. Pr. (N. Y.) 322; Pike v. Van Wormer, 5 How. Pr. (N. Y.) 171; Culver v. Van Anden, 4 Abb. Pr. (N. Y.) 375.] In the case of Pike v. Van Wormer, supra, discussing the effect of the New York statute on pleading in actions for slander and

libel, which statute we have carried bodily into our Code as section 1837, *supra*, Willard, J., said:

"The Code merely dispensed with the allegation of extrinsic facts, showing the application of the words to the plaintiff, in order to obviate the difficulty which was supposed to have been occasioned by the decision of the Supreme Court in *Miller v. Maxwell*, 16 Wend. (N. Y.) 9. It does not dispense with the necessity of an averment or innuendo when they become essential to show the meaning of the words themselves. In [552] these respects the rules of pleading remain unaltered."

Persuasive toward the correctness of this view is the fact that at common law a declaration for slander ordinarily contained, what was designated in the books on pleading as, an "averment of extrinsic matters," wherein it was set forth with much of sonorous phrase pending, or lately pending, matters in which plaintiff took part and likewise the part he took, which matters and acts were deemed to make clear, wherein and why the slanderous words applied to him. [Newell on Slander & Libel 838; Yates, Pleadings 388.]

We think it is obviously a strained construction to interpret this statute as so far changing the common-law rule as to relieve plaintiff from the necessity of averring when publication was made, or from stating definitely where it was made. It is easy to see the non-necessity of the rule of definiteness and certainty as regards libel. Because it is difficult to imagine a case wherein the defense to a libel suit would be that no such writing existed, and cases are reasonably rare wherein the question of publication *vel non*, would become an issue. There might be questions mooted in defense as to whether the matter was libelous, or, as to whether defendant had part in the publication, and rarely, but not ordinarily, as to the fact of publication. But touching defamatory words spoken, or alleged so to be, so crying a necessity to hold to the common law exists that it ought not to be lightly cast aside at the behest of a statute which, if it means what it has been said to mean, is so glaringly ambiguous. If the defense be that the words spoken were true, in short, justification, then obviously it makes no difference when, where or to whom these words were spoken, barring such objection as might arise from the Statute of Limitations. But if the defense be as here that defendant did not speak the words charged, it is apparent [553] that every rule of fairness demands that defendant be informed specifically if he desires the information for his defense, as to the time and place, at least, where the alleged defamatory words were spoken. Otherwise it is difficult to see how a defendant, being innocent of the publication, could

defend himself adequately in the action, or protect himself against conspiracy and perjury. Any other view smacks of the ambuscade and of lying in wait, privileges which we have long prided ourselves upon having abdicated when we abandoned common-law pleading.

It is obviously unthinkable that plaintiff under all circumstances may merely aver "that to wit: On or about one year from the date hereof, defendant at the city of St. Louis, wilfully, wantonly and maliciously spoke and published of and concerning the plaintiff," etc., without averring definitely when or where, or to whom of the six hundred and eighty-seven thousand inhabitants of that city the alleged defamatory words were spoken, and that he may, whatever the defense is, refuse on motion to that end, to make his petition more definite and certain. It is to be conceded of course that in practically every case of libel, from the very nature of the case, no necessity would exist for a so-called bill of particulars, and that in many actions for slander it would suffice to aver publication generally, as to persons and to aver time and place under a *videlicet*, but for the reasons stated it would not fairly or reasonably suffice, at least as against a motion to make more definite and certain, in a case of alleged slander wherein the defense is not guilty.

The case of *Atwinger v. Fellner*, *supra*, was correctly ruled upon the concrete facts up for judgment. While the petition under discussion in that case contained "no allegation that the words were uttered in [554] the presence of anyone," yet no attack was made upon that petition *till after verdict*. Clearly, a petition which merely averred the fact of publication generally, without descending into a bill of particulars, would not be fatally defective, or liable to successful assault after verdict, but would be cured by the Statute of Jeofails. [State v. Arkansas Lumber Co. 260 Mo. 283, 169 S. W. 145; 31 Cyc. 761, and cases cited; Sec. 19, p. 671, G. S. 1865.] No other cases have been found in this State which deal with this matter of sufficiency of pleading, except the *Atwinger* and *Johnson* cases, *supra*. In other American jurisdictions the rule as to definiteness of allegation as to the time and place at which, and the person or persons to whom, the slander was published, is thus stated by Cyc.:

"It is generally held sufficient in an action for slander to allege that the words were spoken or uttered by defendant in the presence of some third person or persons and the names of such person or persons need not be given. So it has been held that an averment that defendant 'published' the defamatory matter is good, as the word 'published' imports that the words were spoken in the pres-

ence of some third person. The petition should allege with exactness the time when and the place where the publication was made, and it has been held that any indefiniteness in these respects will render the petition insufficient as against a demurrer." [25 Cyc. 446.]

Touching the right of defendant, who may be otherwise wholly unable to prepare his adequate defense, to have the petition made more definite and certain, the rule in other jurisdictions is thus stated by Cyc.: "It is generally held that defendant is entitled to know definitely the time and place of the publication of the alleged slander or libel and the name of a party to whom publication was made, and if complaint [555] fails to show these particulars, a bill [of particulars] will be ordered." [25 Cyc. 467.]

From these authorities and reasons we think it should be ruled (a) that the plaintiff in an action for slander (and in libel as well where need arise) on motion to make more definite and certain, may be required to set forth when and where and to whom the alleged defamatory words were published; (b) that since each publication of defamatory words constitutes a separate cause of action, every such publication must be separately pleaded in separate counts of the petition, and (c) that no recovery can be had for the publication of a slander which is not pleaded, but (d) other publications of defamatory words of similar import to those pleaded may be shown by the evidence for the purpose of showing express malice in augmentation of damages, either actual or punitive. Of course, plaintiff ought not in his proof to be held always to strict accuracy as to time, so long as the variance may not bring him foul of the Statute of Limitations, or mislead defendant to his hurt, or amount to a palpable fraud upon the court.

From these conclusions it results that instruction four given for defendant, while stating correct principles of law, did not go far enough when standing alone and without the aid of instruction eight, offered by plaintiff and erroneously refused by the court. Both of these instructions were proper if given together, but the learned trial court having refused the instruction requested by plaintiff which correctly set out the office and effect of evidence of other publications, should then have modified instructions four by an apt statement of the purpose for which the jury could consider other publications of defamatory statements of like or similar import, or else refused it. For in the last analysis the concrete result of giving this instruction under the circumstances and in the [556] form as given was to let this testimony of other publications into the case and then at the end to remove it wholly from

the jury's consideration; to tell them in effect, that they need not consider it for any purpose. *Arguendo* we may say (though we would not and do not now write such a reason into the law) that the jury being more or less subject to the suspicions and frailties of other humans, might, but for this instruction, have argued the probability of defendant's having spoken the words complained of to the witness Manes from the fact that he had spoken them to so many other persons.

It follows that for the failure of the trial court to give instruction eight, *supra*, this case must be reversed and remanded for a new trial in a manner not inconsistent with the views herein set down. Let this be done.

All concur.

NOTE.

Sufficiency of Complaint in Action for Slander with Respect to Averments of Publication and of Time and Place.

Publication.

The declaration, petition, or complaint in an action for slander must show a publication of the slander, and is not sufficient unless it contains an allegation of the speaking of the words of and concerning the plaintiff, in the presence or hearing of some person or persons other than the plaintiff and the defendant. *Penry v. Dozier*, 161 Ala. 292, 49 So. 909; *Wiese v. Meissner*, 171 Ill. App. 597; *Hanning v. Bassett*, 12 Bush (Ky.) 361; *Chapin v. White*, 102 Mass. 139; *Downs v. Hawley*, 112 Mass. 237; *Loranger v. Loranger*, 115 Mich. 681, 74 N. W. 228, 4 Detroit Leg. N. 1042; *Atwinger v. Fellner*, 46 Mo. 276; *Dedrick v. Mallry*, 143 App. Div. 819, 127 N. Y. S. 1023; *Anonymus*, 3 How. Pr. (N. Y.) 406; *Hurd v. Moore*, 2 Ore. 85.

In *Hanning v. Bassett*, *supra*, the court said: "The appellee in his petition fails to aver that the slanderous words were published, or that they were spoken in the presence and hearing of anybody, and if the words were uttered in nobody's presence, the appellee could not have been injured. In order to make out a case of verbal slander, two things are indispensable—malice in the utterance of actionable words, and their publication. Indeed the gist of the action is the supposed injury to the plaintiff's character and feelings, by actionable words, maliciously published and set afloat among his acquaintances; and as the petition fails to aver a malicious publication of the words charged to have been spoken, it is too defective to support the judgment."

In *Penry v. Dozier*, 161 Ala. 292, 49 So. 909, it was said: "Allegation and proof of

the publication of the alleged defamatory words are essential to the maintenance of the action for libel or slander. There must be a communication to some person other than the plaintiff and defendant. It is not necessary that it be made known to the public generally. . . . It is sufficient if the complaint shows that the defamatory matter was communicated to others than the plaintiff or defendant by or through the agency of the defendant, and it is not necessary that the particular circumstances of the publication should be alleged."

The name of the person or persons to whom the slanderous communication or publication was made need not be given. *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489; *Penry v. Dozier*, 161 Ala. 292, 49 So. 909; *Warner v. Lockerby*, 28 Minn. 28, 8 N. W. 879; *Fitzgerald v. Young*, 89 Neb. 693, 132 N. W. 127; *Thacher v. Schaeffer*, 19 W. N. C. (Pa.) 566. See also *McCullum v. Langdon*, 165 Ky. 244, 176 S. W. 990. Compare *Shannon v. Spaid*, 39 Pa. Co. Ct. 567; *Weidman v. Kunsman*, 23 Pa. Dist. 336.

In *Warner v. Lockerby*, supra, the complaint was that, at a certain time and place, the "defendant, in the presence and hearing of Clement Schroeder and a number of other persons, maliciously spoke, of and concerning the plaintiff herein, the false and defamatory words following: 'You had better go and pay for that overcoat you stole;' whereby the plaintiff was injured," etc. In holding the complaint to be sufficient, the court said: "The material allegations in a complaint for slander, where the words are on their face slanderous per se, as in this case, and in the English language, are (1) that defendant, with malice or wrongfully, (2) spoke, in the presence and hearing of others, (3) of and concerning the plaintiff, (4) these false words (setting out the words spoken). We fail to see why this complaint does not come up to this standard, and, if it does, we think it good. We see no ground for the assumption, that the complaint alleges words spoken in the third person, when they are expressly stated in the second person. Neither do we know of any rule which requires the pleader to allege to whom the slanderous words were addressed. He is required to allege that they were spoken of and concerning the plaintiff, and in the presence and hearing of others. If the words were addressed to a third party, the pleader would not be required to state to what person they were addressed and we fail to see why a different rule of pleading should obtain, where the words are addressed to the plaintiff in the presence of third persons. But, if it be necessary to allege to whom the words were addressed, it would seem that the fact that the words are in the

second person, coupled with the allegation that they were spoken of and concerning the plaintiff, necessarily implies that the words were addressed to the plaintiff. Any layman, on reading this complaint, would so understand it, and, judging from his answer, the defendant himself so understood it."

It has been held that a complaint which did not allege the slanderous words to have been spoken "in the presence or hearing of any person" was clearly defective as not stating "facts sufficient to constitute a cause of action." *Wood v. Gilchrist*, 1 Code Rep. (N. Y.) 117.

So, a complaint for slander has been held to be bad on demurrer which did not state that the slanderous words were uttered, spoken or published by the defendant of the plaintiff. *Watts v. Morgan*, 50 Ind. 318.

In *Bradshaw v. Perdue*, 12 Ga. 510, it was held that a declaration in an action of slander was good which charged the defendant with having spoken certain slanderous words on a specified date, in one count alleging them to have been spoken in the presence and hearing of a named person and divers other good citizens of the state, and in the other count, alleging that they were spoken in a conversation with a named person, in the presence and hearing of divers good citizens of the state, without naming them.

In *Loranger v. Loranger*, 115 Mich. 681, 74 N. W. 228, 4 Detroit Leg. N. 1042, an allegation in a declaration that the slanderous words were used in the presence and hearing of divers persons besides the plaintiff was held to be sufficient.

In *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845, it was held that an allegation that the defendant had spoken the slanderous words "in the presence and hearing of divers good and worthy persons" was the formal averment of a publication, and was sufficient.

In *Valley Dry Goods Co. v. Buford*, 114 Miss. 414, 75 So. 252, it was held that a statement in the declaration that the defendant unlawfully and maliciously charged the plaintiff with stealing a sum of money in a store, and that the plaintiff was working as a partner in the theft with another saleswoman in the store, and that she was charged with being a "liar," "thick head," and "thief" by the manager and agents of the company, and that these statements were published to a named person, was a sufficient allegation as to the publication.

In *Burbank v. Horn*, 39 Me. 233, it was contended that the declaration in slander therein was defective, in alleging that the words were spoken in the presence and hearing of "divers persons," or of persons specifically named, where it should have been in the presence and hearing of "divers good

and worthy citizens." The court held that this distinction was immaterial under a general demurrer.

In *Townsend v. O'Keefe*, 18 Ont. Pr. 147, it was held that a statement of claim which, besides alleging that the slanders had been spoken and published to certain persons whose names were mentioned, added the words "and to others at present unknown to the plaintiff," was sufficient. But in the same case it was held that other paragraphs in the statement of claim in which the slanderous declarations were alleged to have been made to a number of different persons at different times, during a period of some five months, and in which the plaintiff had not stated which of the persons mentioned were present when the different statements were made and at what times and places they were made, were insufficient.

An averment in a complaint for slander that the words were spoken "in the presence of" divers persons, or of a named person, without stating that they were also spoken "in the hearing" of such persons, is good as against a general demurrer. 1 Chitty on Pleading 421; *Burbank v. Horn*, 39 Me. 233; *Brown v. Brashier*, 2 Pen. & W. (Pa.) 114. See also *Curtis v. Moore*, 15 Wis. 134. Especially is this true after the rendition of a verdict. *Smart v. Easdale*, Cro. Car. 199, 79 Eng. Rep. (Reprint) 775; *Hall v. Hennesley*, Cro. Eliz. 486, 78 Eng. Rep. (Reprint) 738, Noy 57, 74 Eng. Rep. (Reprint) 1025; *Kellan v. Manesby*, Cro. Jac. 39, 79 Eng. Rep. (Reprint) 32. So, it has been held that a statement of claim in an action in the municipal court "for damages on account of certain false and slanderous words uttered by the defendant, in the presence of divers persons," etc., was not insufficient, against the objection that the words were not alleged to have been spoken in the hearing of a third person, since that fact need not be shown in order to constitute a publication. *Wiese v. Meissner*, 171 Ill. App. 597.

It has been held that the word "publish" or "published," as used in a declaration or complaint, imports *ex vi termini* that the words were spoken in the presence and hearing of some third person. *Taylor v. How*, Cro. Eliz. 861, 78 Eng. Rep. (Reprint) 1087; *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489; *Penry v. Dozier*, 161 Ala. 292, 49 So. 909; *Shinloub v. Ammerman*, 7 Ind. 347; *Burton v. Burton*, 3 G. Greene (Ia.) 316; *Duel v. Agan*, 1 Code Rep. 134; *Watts v. Greenlee*, 13 N. C. 115; *Hurd v. Moore*, 2 Ore. 85. See also *McLaughlin v. Schnellbacher*, 65 Ill. App. 50; *Emmerson v. Marvel*, 55 Ind. 265. In *Burton v. Burton*, *supra*, the court said: "The defendant might have uttered the defamatory words in secret, but we are at a loss to know how he could have published them unless he did so to or in the

presence of some one or more persons. Publishing is defined, by an able lexicographer, to be, 'making known, divulging, proclaiming.' The very charge of publishing presupposes public utterance, and the additional allegation that the words were published in the presence of divers persons would have been surplusage. The count is good, and the demurrer should have been overruled."

In *Watts v. Greenlee*, 13 N. C. 115, the court said: "It is objected by the defendant, that it is not stated that he gave publicity to the charge; that the word 'publish' does not sufficiently convey that idea. But for my part, I can scarcely conceive a word in our language, which more definitely conveys the idea requisite in law, to support an action for speaking slanderous words. Publish is to proclaim, to make known generally."

In *Hurd v. Moore*, 2 Ore. 85, it was held that the terms "conversations," "discourses," and "publish," as used by the pleader in a complaint for slander, implied the presence of hearers, and sufficiently indicated that the declarations were public and notorious.

In *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489, an action for slander in imputing a want of chastity to the plaintiff, the only objection taken to the declaration was that in the portion of it in which the speaking and publishing of the slanderous words were averred, they were averred to have been spoken in the presence of a person whose name was left blank. The court held that as the words spoken were actionable in themselves, it was sufficient to have averred that they were spoken and published of and concerning the plaintiff, saying: "This averment necessarily implies the presence of some one, to whom, or in whose presence, publicity was given to the charge. The name of such person, if set forth in the declaration, would not render it necessary for the plaintiff to prove that the words were spoken to him, or in his presence, before she would be entitled to recover; but if the testimony showed that they were spoken to another and a different individual, it would suffice. The injury complained of is, not that the defamatory words were spoken to this or that individual, but that publicity had been maliciously given by the defendant to a false charge against the plaintiff."

In *Kyzer v. Grubbs*, 2 McCord L. (S. C.) 305, it was held that a count in a declaration for slander which stated that the defendant on a certain day, in a conversation which he had with divers citizens of and concerning the plaintiff, did falsely publish and declare, etc., was not open to the objection that it was not stated that the particular slanderous words were spoken or published of or concerning the plaintiff.

In *McKinney v. Roberts* (Cal.) 8 Pac. 3, an action for slander, it appeared that the allegation of the complaint was that on a

certain date, "as the plaintiffs are informed and believe," at a place specified, the defendant, in the presence of certain named persons, spoke the slanderous words. In holding that the language "the plaintiffs are informed and believe" that the defendant spoke certain words was not a sufficient averment of the speaking, the court said: "Plaintiffs might have been informed, and might have believed, the defendant to have spoken the words as charged, and yet it may not have been true. Would proof that they were so informed, and that they thus believed, be sufficient to sustain an action? We think not. If denied, the proofs should show the words to have been spoken by the defendant, or the action must fail. No amount of proofs that plaintiffs were informed defendant had thus spoken, and that they believed it, would suffice to establish the fact. The allegata and probata should concur. The averments of the complaint should be as precise and specific as the proofs are required to be. The language used does not exclude the hypothesis that defendant did not speak the words. It may all be true, and the defendant be entirely innocent. Had plaintiffs stated that, upon information and belief, they averred defendant spoke the words in question, quite a different proposition would be presented. Suppose defendant had failed to answer, what would have been the effect of admitting the allegations of the complaint? Why, simply that plaintiffs were so informed, and not that it was true, but that they believed it to be true. We think the defect goes to the sufficiency of the facts stated, and not to the mode of stating them, and therefore that it can be reached by a general demurrer, and that for this reason the demurrer was properly sustained."

In *Roberts v. Lovell*, 38 Wis. 211, it was held that a complaint in an action for slander which did not aver that the defendant spoke the slanderous words failed to state a cause of action. The court said: "This complaint alleges that the plaintiffs were husband and wife on a certain day, 'when the slanderous words hereinafter mentioned were spoken by the defendant,' and then proceeds to charge that certain slanderous words were spoken on that day of and concerning the plaintiff wife; but it fails to state, directly and positively, by whom they were spoken. The words above quoted are a mere recital, not an averment of fact. They show that the pleader had it in his mind, when he inserted them in the complaint, to aver in a subsequent portion of the pleading that on the day mentioned the defendant spoke certain slanderous words of and concerning the plaintiff Mrs. Roberts. Having failed so to aver, there is nothing in the pleading to which the recital can be referred. It is therefore inoperative, and neces-

sarily goes for naught. Suppose this complaint was verified by some person, and suppose it could be proved that the person who verified it knew that the defendant never uttered or spoke the slanderous words set out in the complaint. Could such person be convicted of perjury assigned on such verification? Clearly not. And the reason why he could not be so convicted is, that he has not sworn that the defendant spoke the words in question, but only that such words had been spoken. This is a very fair test of the sufficiency of the complaint, although perhaps it is not absolutely conclusive. We see no way of escape from the conclusion that the complaint is fatally defective, and that the circuit court properly excluded the evidence, and, on the refusal of the plaintiffs to amend, properly dismissed the action. We regret that we are forced to this conclusion, because, as we are informed, the omission to charge that the defendant spoke the words was a clerical mistake, not discovered until the action had been dismissed. But the omission is vital, and we cannot lawfully supply the averment by inference or presumption."

It is not sufficient merely to aver that the words were spoken, omitting the words "and published." 1 Chitty on Pleading 421; *Hanning v. Bassett*, 12 Bush (Ky.) 361.

The insufficiency of the averment as to publication in a complaint or declaration for slander is not available to the defendant after the rendition of a verdict in the cause. *Smart v. Easdale*, Cro. Cas. 199, 79 Eng. Rep. (Reprint) 775; *Hall v. Hennesley*, Cro. Eliz. 486, 78 Eng. Rep. (Reprint) 738, Noy 57, 74 Eng. Rep. (Reprint) 1025; *Kellan v. Manesby*, Cro. Jac. 39, 79 Eng. Rep. (Reprint) 32; *Allen v. Fincher*, 187 Ala. 599, 65 So. 946; *Schoepflin v. Coffey*, 162 N. Y. 12, 56 N. E. 502, reversing 25 App. Div. 438, 49 N. Y. S. 627; *Bedtkey v. Bedtkey*, 15 S. D. 310, 89 N. W. 479.

Where a count in a complaint for slander did not, with the technical accuracy required by good pleading, allege a publication of the slander, but it was not demurred to on that particular ground, it was held that, as it was plainly sufficient after plea and verdict, to support a judgment, the trial court could not be put in error for overruling the defendant's demurrer. *Allen v. Fincher*, 187 Ala. 599, 65 So. 946.

In an action for both slander and libel, where the complaint obviously contained no sufficient allegation that the defendant caused the printing or the publication of the words spoken, to constitute a cause of action against him for libel, the defendant could not avail himself of the insufficiency of the complaint on appeal. *Schoepflin v. Coffey*, 162 N. Y. 12, 56 N. E. 502, reversing 25 App. Div. 438, 49 N. Y. S. 627.

Likewise, it was held in *Bedtkey v. Bedtkey*, 15 S. D. 310, 89 N. W. 479, that the failure of the complaint to disclose the exact place where the slanderous words were uttered, thereby misleading the defendant, not having been objected to at the trial, was without merit on appeal.

Though a count in a complaint for slander does not, with the technical accuracy required by good pleading, allege a publication of the slander, in the event of a demurrer on that ground being sustained, the plaintiff may amend the count by setting up that the alleged slander was uttered in the presence of divers persons, or in the presence of certain named persons. *Allen v. Fincher*, 187 Ala. 599, 65 So. 946. See also *Hanning v. Bassett*, 12 Bush (Ky.) 361.

In *Wolfe v. Israel*, 102 Ga. 772, 29 S. E. 935, it was held that a declaration which alleged a time and place and the slanderous words spoken, but failed to allege that they were spoken in the presence of a third party, could be amended by adding thereto the name of the person to whom the slanderous words were spoken. See also *Weidman v. Kunsman*, 23 Pa. Dist. 336.

Under the *Indiana* statute (2 R. S. 45, § 86; 2 G. & H. 110, § 86) enacting that in an action for libel it shall be sufficient to state, generally, that the defamatory matter was published or spoken by the plaintiff, and if the allegation is denied, the plaintiff must prove, on the trial, the facts showing that the defamatory matter was published or spoken of him, the plaintiff in a complaint for slander may allege, generally, that the slanderous words were spoken of himself, without any averment as to their publication, and objection may not be made to the complaint on the ground that it does not allege that the words were spoken in the presence and hearing of any person. *Guard v. Risk*, 11 Ind. 156; *Hutts v. Hutts*, 51 Ind. 581; *Emmerson v. Marvel*, 55 Ind. 265; *Marks v. Jacobs*, 76 Ind. 216. In *Emmerson v. Marvel*, supra, the court said: "As the point in regard to publication of the slanderous words is made on the motion in arrest, we may observe that where the words charged in the complaint are actionable per se, it is not necessary to its sufficiency, as has been shown above, that it should contain an allegation that the words were spoken in the presence of some third person, though such fact would have to be proved on the trial; yet where the words are not actionable per se, and a colloquium, etc., is required to appear in the complaint, such colloquium will necessarily disclose the fact of the publication of the words to third persons."

The *Missouri* statute (2 Wagn. Stat. 1020, § 43; R. S. 1909, § 1837) provides that "in an action for . . . slander, it shall not be necessary to state in the petition any extrin-

sic facts for the purpose of showing the application to the plaintiff of the defamatory matter . . . but it shall be sufficient to state generally that the same was published or spoken of and concerning the plaintiff," etc. Thereunder it has been held that a petition in an action for slander which contained no allegation that the slanderous words were uttered in the presence of anyone, or that they were understood by those present, was sufficient, these averments being dispensed with under this statute. *Atwinger v. Fellner*, 46 Mo. 276; *Johnson v. Bush*, 186 Mo. App. 107, 171 S. W. 636. Both of the foregoing cases, however, are apparently overruled by the decision in the reported case.

Time and Place.

The complaint in an action for slander should allege with exactness the time when and the place where the publication of the alleged slanderous words was made, in the absence of a statute dispensing with such an averment. *Shannon v. Spaid*, 39 Pa. Co. Ct. 567; *Weidman v. Kunsman*, 23 Pa. Dist. 336; *Mainville v. Belair*, 6 Quebec Super. Ct. 331. And see the reported case.

In *Weidman v. Kunsman*, 23 Pa. Dist. 336, it was held that a statement in a suit for slander which averred that the slanderous words were spoken at a church entertainment held in the county, without mentioning the place, was defective in that respect.

In *Mainville v. Belair*, 6 Quebec Super. Ct. 331, the declaration stated the name of a person present, but neither the place nor the date where and when the slander charged was published. The court dismissed the action on exception à la forme as being "insuffisamment libellées."

In *Dubois v. Robbins*, 115 Ill. App. 372, a declaration which did not state fully the time and place of the speaking of the slanderous words, but expressed the time and place by the abbreviation, "on, etc., in, etc.," was held to be good after verdict.

The foregoing rule has apparently been changed in the state of *Alabama* because of the form prescribed by the code, and hence a count which substantially conforms to the code requirements in that state is sufficient. *Penry v. Dozier*, 161 Ala. 292, 49 So. 909. In *Allen v. Fincher*, 187 Ala. 599, 65 So. 946, it was held that the time of the slander alleged in the complaint was sufficiently stated in the counts thereof to meet the requirements of the law, where the counts showed under a videlicet the month in which the slanderous words were spoken, but the blanks in these counts referring to the day of the month in which the alleged slanderous language was used, had not been filled out.

With respect to the *Missouri* statute (2 Wagn. Stat. 1020, § 43; R. S. 1909, § 1837)

set out in the last paragraph of the preceding subdivision it is held in the reported case that this statute does not so far change the common-law rule as to relieve the plaintiff in an action for slander from the necessity of averring when publication was made, or from stating definitely where it was made. In *Johnson v. Bush*, 186 Mo. App. 107, 171 S. W. 636, it was held that, with respect to a motion to require the petition in an action of slander to be made more definite and certain by stating the place where the slanderous words were spoken, the averment seemed to be sufficient, for it was expressly alleged that the slander was uttered "at the city of St. Louis, Mo.," and the date was given as "on January 6, 1911."

It has been held that a complaint in an action for slander was sufficient though the time of the speaking of the words was in each count laid under a *videlicet*. *Thacher v. Schaeffer*, 19 W. N. C. (Pa.) 566. See also *Lee v. Crump*, 146 Ala. 655, 40 So. 609. Hence the omission of the day, when the time is immaterial, is only a fault in form, and is not a ground for a general demurrer. *Burbank v. Horn*, 39 Me. 233. Compare, however, *Cole v. Babcock*, 78 Me. 41, 2 Atl. 545, wherein it was held that the word "about" in a declaration for slander for words alleged to have been uttered "about the first of April, 1884," rendered the allegation of time indefinite and uncertain.

Likewise, where, in the counts of a declaration for slander, the place is stated with a *videlicet*, it indicates that the party does not undertake to prove the precise place, and its omission is only a fault in form, which is aided on general demurrer. *Burbank v. Horn*, 39 Me. 233. In that case it was further held that an allegation in all the counts of a declaration for slander that the words were spoken on days named, with a *continuo*, is not open to the objection that the time is too indefinite to enable the defendant to prepare his defense, the statement of the time being immaterial in actions *ex delicto*. The court said on that point: "The statement of the time of committing the injuries, *ex delicto*, is seldom material. It may be proved to have been committed either on a day anterior or subsequent to that stated in the declaration. When, however, the act complained of is single in its nature, as an assault, it would be bad on special demurrer, to state that it was committed on divers days and times."

In *Cummins v. Butler*, 3 Blackf. (Ind.) 190, the declaration alleged that on a certain date, "and at divers other days and times, to wit," etc., the defendant spoke scandalous words of the plaintiff; that mode of declaring was objected to, because the act charged was laid under a *continuo*. But it was held that the objection could not be sustained as

the words were not within the technical meaning of a *continuo*, but should be treated as surplusage. The court said: "In slander, to show the existence of malice, the plaintiff is permitted, after giving evidence of the words charged in the declaration, to prove the speaking of other distinct actionable words, both before and after the institution of the suit; and from analogy to assault, and on general principle, each of the acts being single in their nature, we should think that the mode of thus declaring, admissible in the one, should not be rejected in the other. We think, however, that the words objected to, as they do not amount to the substituted mode of declaring, much less to a *continuo*, must be regarded as surplusage."

In *Swinney v. Nave*, 22 Ind. 178, the court said: "Slandorous words spoken at a given time, including all such spoken at one time, constitute one cause of action. The same or other slanderous words, spoken at another time, constitute another cause of action; . . . and though in a suit for slander, the plaintiff should, according to the spirit of the code, include all causes of action for slander, against the defendant up to the commencement of the suit, yet each cause should be set forth in a separate paragraph, to avoid the vice of duplicity."

PEOPLE

v.

GIBSON.

New York Court of Appeals—April 25, 1916.

218 N. Y. 70; 112 N. E. 730.

Embezzlement — By Executor — Indictment.

An indictment charging that defendant, acting as an executor of a person named, and having in his possession certain moneys belonging to the estate, feloniously withheld and appropriated them to his own use, is sufficient.

Criminal Law — Harmless Error — Admission of Evidence.

Errors in admission of evidence, if technical and not affecting defendant's substantial rights, must be disregarded, under Code Cr. Proc. § 542, requiring judgment on appeal without regard to such errors.

Embezzlement — By Executor — Evidence — Revocation of Letters.

In a prosecution for larceny of estate moneys by the executor, the papers on which his letters were revoked should not have been received over his objection.

Same.

Although in a prosecution for larceny of estate moneys by the executor the papers on

which his letters were revoked should not have been received over his objection, the error is harmless, when the judge rules that they shall not be read to the jury without defendant's consent.

Witnesses — Privilege — Demand on Accused for Production of Papers.

There is no error in permitting counsel to demand of defendant, accused of larceny, that he produce papers alleged to be incriminating, where the judge instructed the jury to disregard it and the discussion of its propriety. [See note at end of this case.]

Same.

Since the defendant in a criminal case cannot be compelled to produce incriminating documents, counsel should not demand such production; the failure to produce giving rise to unfavorable inferences.

[See note at end of this case.]

Evidence — Secondary Evidence — Necessity of Demand for Document.

Since the defendant in a criminal prosecution cannot be compelled to testify against himself, or produce incriminating documents, the state may introduce secondary evidence as to the contents of such documents without previous notice to produce the original.

People v. Gibson, 169 N. Y. App. Div. 934, affirmed.

Appeal from Appellate Division of Supreme Court, First Judicial Department.

Criminal action. *Burton W. Gibson* convicted in Court of General Sessions of the Peace, New York county, of grand larceny in first degree. Judgment affirmed by Appellate Division of Supreme Court. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Burton W. Gibson and *Charles Goldzier* for appellant.

Edward Swann and *Robert O. Taylor* for respondent.

[72] **WILLARD BARTLETT**, Ch. J.—The indictment is good. It charges that the defendant, acting as executor of the last will and testament of *Ruzena Menschik Szabo*, deceased, and having in his possession certain moneys belonging to her estate, feloniously withheld the same, and appropriated the same to his own use. (Penal Law, § 1290, subd. 2.) This is sufficient.

Some errors in the admission of evidence were committed upon the trial, but as they were technical, and did not affect the substantial rights of the defendant, they must be disregarded. (Code Crim. Pro. § 542.) The papers upon which the Surrogate's Court made the order revoking the defendant's letters testamentary should not have been received over the objection of the defendant,

but the ruling of the learned trial judge that they should not be read to the jury except with the defendant's consent rendered their admission harmless.

The only question which we deem it necessary to discuss relates to the demand by the district attorney upon the defendant that he should produce a document alleged to have been served upon him. This document was a paper signed by the administrator with the will annexed of the estate of *Ruzena Menschik Szabo* authorizing the bearer to make a demand upon the defendant for all the money and property belonging to the decedent which came into his hands while acting as her executor. When the administrator was on the stand as a witness for the People the assistant district attorney who tried the case called for the production of this paper "under a notice to produce which was served upon counsel for the defendant on the 16th of March, 1914," and asked counsel for the defendant whether he had that paper. The defendant's counsel objected to the question and protested [73] against it, and when asked why, responded: "Because counsel has absolutely no right to address that question either to me or to the defendant; that he is attempting to transgress, and has transgressed, the constitutional rights of the defendant, and I ask in the light of that, that a juror be withdrawn. I protest against the question and I protest further against even its repetition." The court overruled the protest of counsel and said that if he denied the receipt of the notice to produce then the district attorney would have to prove service of it. Counsel for the defendant responded: "I neither deny nor affirm it and I deny the right either of counsel or court even to question in respect to it, and say that it is an infringement of the constitutional rights of this defendant, and upon that ground I protest and object." The assistant district attorney then said that he had the notice to produce with proof of service; whereupon counsel for defendant again objected as follows: "I object to that statement of the district attorney. I ask the court to direct the jury absolutely to disregard it. Will your Honor direct the jury to disregard it?" The court then remarked that the jury had nothing to do with this matter, saying to them: "Gentlemen of the jury, this has nothing to do with the merits of the case at all and you will disregard it."

In view of this direction by the learned trial judge and in view of the fact that there was uncontradicted proof of the service on the defendant of the demand for any property of the estate still in his possession, we think there was no error in this matter which requires a reversal of the judgment. Assuming that the demand upon the defendant for the production of the paper was improper, the

only manner in which the court could deal with the impropriety without ending the trial was to instruct the jury to pay no attention to the demand; and this was done. In other words, the error was cured in this particular instance. The practice, however, of calling [74] upon defendants in criminal cases to produce incriminating papers alleged to be in their possession is so frequently adopted by zealous prosecutors and is so objectionable that we take this occasion to express our disapproval thereof.

In *McKnight v. U. S.* 115 Fed. 972, 54 C. C. A. 358, the defendant was indicted for embezzling the funds of a national bank by causing the bank's money to be paid to persons known by him to be insolvent to be used for purposes of bribery. The government proposed to introduce in evidence a copy of a certain paper whereby the defendant and other aldermen of the city of Louisville agreed to caucus together in order to control legislation and municipal appointments. In the course of the trial, after evidence had been introduced to show that the original paper was last seen in the defendant's possession, the district attorney offered in evidence what purported to be a copy thereof. The trial judge then suggested that if the district attorney chose he could demand the production of the paper, whereupon the district attorney proceeded to demand it. Counsel for the defendant denied the right of the district attorney to make the demand, and furthermore declared that there was no such paper in the defendant's possession. There was a conviction which was reviewed by the Circuit Court of Appeals for the Sixth Circuit consisting of Circuit Judges Lurton, Day and Severens; and the court in a carefully considered opinion by Day, J., held that it was a violation of the immunity guaranteed by the Fifth Amendment to the Federal Constitution to permit the demand to be made upon a defendant in a criminal case in the presence of the jury to produce a paper containing incriminating evidence against him. This was one of the grounds upon which the judgment of conviction was reversed.

Referring to the leading case of *Boyd v. U. S.* 116 U. S. 616, 6 S. Ct. 524, 29 U. S. (L. ed.) 746, in which it was held that the compulsory production of books and papers in a case seeking a forfeiture [75] of estate was within the reasoning of criminal proceedings, Circuit Judge Day declared that this decision left no room for doubt that the compulsory production of a criminating document by the accused when on trial for crime was compelling him to testify against himself within the meaning of the Fifth Amendment to the Constitution. "Nor is it essential to the needs of justice," he added, "that the accused may

be thus called upon to produce evidence of a documentary character. The authorities seem very clear that in such a case where a criminating document directly bearing upon the issue to be proven is in the possession of the accused the prosecution may be permitted to show the contents thereof without notice to the defendant to produce it. As it would be beyond the power of the court to require the accused to criminate himself by the production of the paper as evidence against himself, secondary evidence is admissible to show its contents."

To allow a demand for the production of a document to be made upon an accused person in the presence of the jury is to require him to produce it or deny his possession thereof, or by reason of his silence to warrant injurious inferences against him. For this reason the practice is properly forbidden. Where an incriminating document appears *prima facie* to be in the possession of the accused the prosecution may give secondary evidence of its contents without previous notice calling upon the defendant to produce the original; and this rule is not restricted to papers which are the immediate subject of the indictment. See *U. S. v. Doeblir*, *Baldw.* 519, 25 Fed. Cas. No. 14,977.

We are asked not to follow the decision in the *McKnight* case because Professor Wigmore in his elaborate work on the Law of Evidence has pronounced the ruling to be "purely fallacious and wholly unsound." 4 Wigmore on Evidence, § 2273, n. The decision was rendered by a court two members of which subsequently [76] became associate justices of the Supreme Court of the United States. This court has frequently manifested the high respect which it entertains for the ability and learning of Professor Wigmore: but in the present case we are compelled to differ from him. We approve the rule laid down in *McKnight v. U. S.* *supra*, because it seems to us the only effective method of preventing a practice which virtually deprives the defendant in a criminal case of a right guaranteed him by the Constitution. The rule which we thus approve is not available to the defendant in the case at bar because, as has already been pointed out, the learned trial judge directed the jury to disregard the demand which had been made in their presence. This was equivalent to an instruction that the nonproduction of the paper demanded furnished no ground for an inference of guilt. In the *McKnight* case, however, no such instruction was given.

In the brief for the People the case of *Holt v. U. S.* 218 U. S. 245, 252, 20 Ann. Cas. 1138, 31 S. Ct. 2, 54 U. S. (L. ed.) 1021, is cited as expressive of views inconsistent with the decision in the *McKnight* case. We find

no inconsistency. A question arose as to whether a blouse belonged to the prisoner and testimony was given to the effect that the prisoner put it on and it fitted him. It was objected that he did this under duress and was thus compelled to give evidence against himself; but the court held that "the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." It can hardly have been supposed that this language of Mr. Justice Holmes was regarded as at variance with any of the views expressed in the McKnight case; inasmuch as the opinion was concurred in by Mr. Justice Day and Mr. Justice Lurton, both of whom had then become members of the Supreme Court of the United States. It is because we deem the demand upon a defendant to produce [77] alleged incriminating evidence in his possession to be precisely such moral compulsion as Mr. Justice Holmes mentions in the Holt case that we condemn the practice.

The judgment of conviction should be affirmed.

Hiscock, Collin, Cuddeback, Hogan and Pound, JJ., concur; Seabury, J., concurs in result.

Judgment of conviction affirmed.

Motion for reargument denied June 13, 1916.

NOTE.

In the reported case it is held that it is improper on the trial of a criminal case for the prosecuting attorney to call on the accused to produce a document in his possession. Such a demand, the court holds, amounts to a violation of the privilege against self-incrimination, since an inference adverse to the accused may be drawn by the jury from a refusal to produce the document. If a document is in the possession of the accused the prosecution may, it is said, prove its contents by secondary evidence without giving notice to produce it. The cases passing on the question whether a demand on the accused in the presence of the jury to produce incriminating evidence is a violation of his constitutional privilege are reviewed in the note to *Gillespie v. State*, Ann. Cas. 1912D 259.

BALDWIN

v.

VILLAGE OF CHESANING.

Michigan Supreme Court—September 28, 1915.

188 Mich. 17; 154 N. W. 34.

Payment — Payment to Secure License — Right to Recover Back.

Where a village council refused to issue licenses until the applicants had paid a certain sum to the village treasury under an invalid ordinance, and the applicant, without seeking redress in the courts, made the payment to protect the value of his property, there was no duress, and the payments cannot be recovered.

[See note at end of this case.]

Error to Circuit Court, Saginaw county: GAGE, Judge.

Action by Thad D. Baldwin, plaintiff, against Village of Chesaning, defendant. Judgment for defendant. Plaintiff brings error. The facts are stated in the opinion. **AFFIRMED.**

A. Elwood Snow for plaintiff in error.

Charles W. Cheeney and R. L. Crane for defendant in error.

[18] MOORE, J.—The plaintiff is a resident of the village of Chesaning, and has been for 34 years. He was engaged as a saloon keeper in partnership with one Sutter. Their license expired May 1, 1912.

On November 10, 1911, the plaintiff bought the Hotel Central property in the village, consisting of a hotel, barber shop, barroom, and livery, on contract, and agreed to pay therefor the sum of \$12,000. On March 6, 1912, the defendant village adopted an ordinance requiring all saloon keepers in said village to pay a license fee of \$500. We quote from the brief of appellant:

"In April, 1912, the plaintiff made application for a license to conduct a saloon in his said hotel, and filed his application and bond therefor with the village council. On the evening of April 8, 1912, and before the village council met to pass upon the liquor applications, said meeting night being fixed by statute, the plaintiff was approached by a Mr. Thompson, one of the members of the defendant village council, who said to the plaintiff: 'You had better get busy and pay in your money. If you don't get your money up to the council meeting tonight, you won't get any application; they won't accept your application at all.' The plaintiff was further

told at that time by Mr. Thompson that if he waited until May 1st to pay he would not get a license. Mr. Thompson said he had been authorized to say those things by the council and the village attorney. . . .

[19] "After the above conversation the plaintiff paid the sum of \$500 into the village treasury to obtain such village license in accordance with the village ordinance. The village council met that same night and approved of the plaintiff's application and bond. . . .

"In April, 1913, the plaintiff again made application to said defendant village for a license to conduct a saloon in his said hotel, and filed his application and bond therefor with the village council.

"On the night before the village council met to pass upon liquor applications the president of said defendant village called upon the plaintiff and said: 'Boys, there is no question of a doubt but what you have got to put up your money. The way I feel in regard to it, I am opposed to it. I don't want to see you put up your money, but the council has instructed me to come and tell you you have got to put it up or you won't have any application for license due this next year.'

"At about 5 o'clock in the afternoon of the day the council met the village treasurer called upon the plaintiff and said: 'Baldwin, this is your last chance. You have either got to put up your money or the boys won't act upon your application. I have been authorized by them to come down and tell you.' . . .

"After the above conversations the plaintiff paid the sum of \$500 into the village treasury to obtain such village license in accordance with the village ordinance. The village council met that same night and approved of the plaintiff's application and bond."

It is the claim of the plaintiff that the hotel property was worth the sum of \$12,000, and that, if the liquor license was refused the hotel, the property would not be worth to exceed the sum of \$5,000, and that to avoid this depreciation in the value of the property the money was paid, and that the action of the council amounted to duress. The circuit judge thought otherwise, and directed a verdict for the defendant. The case is brought here by writ of error.

It was conceded in the court below and is conceded here that the village ordinance was void, so that the only question is: Were the payments of \$500 each [20] of the two years made voluntarily? The defendant insists they were, while plaintiff insists that under the situation disclosed by the record the village subjected him to duress. Whether valid or not, the village had an ordinance requiring the fees which plaintiff paid as a con-

dition of doing business. It is fair to assume that counsel for appellant in their statement of facts will call attention to the strongest proof in favor of their clients, and an examination of the record shows they have done so. There is nothing in the record to indicate that the tax was paid under protest, and it may safely be assumed that, if the council failed to approve of the bond and application of the plaintiff for a license when he was legally entitled to it, the courts would grant him relief upon proper application. He did not appeal to the court. As before stated, he paid the fee without protest, and it was not until after he had sold the property that he brings this suit.

The question of duress has been before this court in *Hackley v. Headley*, 45 Mich. 569 (8 N. W. 511), and *Knight v. Brown*, 137 Mich. 396 (100 N. W. 602), and is there defined. The instant case does not come within the definition. We think the case is governed by *Betts v. Village of Reading*, 93 Mich. 77 (62 N. W. 940), and the cases cited therein. See also *Eslow v. City of Albion*, 153 Mich. 720 (117 N. W. 328, 22 L.R.A.[N.S.] 872.)

Judgment is affirmed.

Stone, Ostrander, and Steere, JJ., concurred with Moore, J.

This case was assigned to the late Justice McAlvay.

McAlvay, J. (dissenting).—Plaintiff brought suit against defendant in an action of assumpsit to recover the sum of \$1,000 claimed to have been paid by him to [21] the said defendant involuntarily and under duress. A trial had before the court with a jury resulted in a verdict directed by the court in favor of the defendant and against plaintiff. Upon this verdict a judgment was duly entered. Plaintiff has removed the case to this court for review, assigning errors upon the action of the court in directing a verdict against him.

Plaintiff had been a resident of defendant village for over 30 years, and from May, 1911, up to May 1, 1912, was engaged in business in said village as a retail liquor dealer, in partnership with a man named Sutter. In November, 1911, he purchased upon contract, for the sum of \$12,000, "the Hotel Central property," in said village, consisting of the hotel, barber shop, barroom, and livery. Defendant village is incorporated under the laws of this State, and as such exercises all the rights and privileges of incorporated villages and the power and authority to grant applications and approve the bonds of those intending to enter into the business of selling intoxicating liquors at retail within said village, as provided by the statutes of this State.

On March 6, 1912, defendant village adopted an ordinance entitled "An ordinance rela-

tive to saloons and saloon keepers," requiring every person desiring to keep a saloon within the village before entering upon such business to apply for and procure a license and to pay the sum of \$500 into the village treasury.

Plaintiff, intending to enter into the business of retail dealer in said village from and after May 1, 1912, in April of that year filed his application and bond therefor, as provided by the statute, with the village council for its approval, to conduct a saloon in his said hotel. On the evening of April 8, 1912, the date fixed by law for the village council to meet and pass upon liquor dealers' applications and bonds, and before such meeting, plaintiff was approached by Mr. Thompson, [22] one of the members of the village council, who said he had been authorized by said council to say to him that he could not get out of it; that it would be \$500 more this year than last; that if he did not get his money up to the council meeting that night his application would not be granted; that if he waited until May 1st he would not get a license. Plaintiff, on this threat, paid \$500 into the village treasury, and received the treasurer's certificate therefor, which was submitted to the council, with his application and bond for a State license, at the council meeting that evening.

The record of the council proceedings shows that all applications and bonds accompanied by the village treasurer's certificate of \$500 were approved unanimously by the council, and the application and bond of one person which were not accompanied by the treasurer's certificate for \$500 were rejected for that reason. Afterwards plaintiff paid to the county treasurer \$500, as required, to carry on the business of a retail liquor dealer for the ensuing year, and received his tax receipt therefor, and entered upon and conducted such business during that year at his hotel.

In April, 1913, plaintiff, desiring to continue such business at the same place, again made application to defendant village council, and filed his application and bond to carry on business as a retail liquor dealer in said village for granting and approval. At this time Dr. Elliot was president of the village. Plaintiff had several conversations with him, the last one on the day fixed by law for the approval of applications and bonds of liquor dealers by the village council, in which the president said to him that he must put up the \$500; that the council had instructed him to come and tell plaintiff that he must pay the money or he would not have any application for a license approved that year. Later, on the same day, plaintiff having delayed until 5 o'clock in the evening without making this payment, [23] Mr. Slack, village treasurer, came to him and told him that he must put up the money or the council would not act on

his application; also that he was authorized by them to come and tell him. Plaintiff then paid the money. Other witnesses testified as to these demands made upon the plaintiff by members of the council and officers of the defendant village both in 1912 and 1913. Plaintiff at this time owed a large amount upon this hotel property, for which he had agreed to pay \$12,000, and further testified that the action of the village in demanding this extra license money crippled him in his business.

The evidence on the part of the plaintiff is undisputed. Defendant village offered no testimony in the case; the verdict in favor of defendant having been directed on motion made in its behalf at the close of plaintiff's case. Upon the trial of the case it was conceded by the defendant village that the ordinance was invalid, and that it had no authority or power to pass it. The contention on the part of the defendant upon the trial was that these payments by plaintiff were voluntary, and therefore he was not entitled to recover.

The only question for the court to consider in this case is whether these payments so admitted to have been made by the plaintiff to the defendant village were voluntary or involuntary. In considering this question we are required to apply the rule so often invoked, in cases where a verdict has been directed, to give the evidence in the case on the part of the appellant its strongest probative force in his favor.

The court and counsel for defendant have relied upon the case of *Betts v. Reading*, 93 Mich. 77, 52 N. W. 940, and it is insisted that this case is controlling of the case at bar. If the instant case cannot be distinguished from the *Betts* Case, such contention must be conceded.

In the case we are considering the situation was [24] somewhat peculiar. The common council of defendant village, by the provisions of the general liquor law of this State, was the only body with authority and power to pass upon and approve the applications and bonds of all persons who desired to enter into the business of selling intoxicating liquors at retail within the village of Chesaning. They had passed this ordinance for the purpose of obtaining from every such applicant the sum of \$500 to be covered into its treasury for municipal uses, and they have succeeded. Upon each of the instances when these payments were made by plaintiff to defendant upon the day fixed by law when the council was required to act upon saloon applications and liquor bonds, members of the council authorized by it came to plaintiff and made these demands for \$500 to be paid to the village, coupled with the threat that, if such sum was not paid forthwith, plaintiff's appli-

cation and bond would not be approved. On the last of these occasions the performance of this duty was delegated to the president and treasurer of the village. The authority of these members of the council and officers of the village government to make these demands and threats is not only undisputed, but the ratification of their acts and threats and the adoption of what they did in the premises clearly appears from the records of the respective meetings of the common council read into the record in this case. It cannot be said in this case that this was not the act of the village council. When these applications and dealer's bonds were before the council for consideration, it appeared that the application and bond of plaintiff were accompanied by the receipt and certificate of the village treasurer and were approved, because it appeared that the \$500 extra had been paid. It further appeared that the application of another person was rejected because it was not accompanied by the treasurer's receipt and certificate for \$500. In this [25] respect it is apparent that the instant case is distinguishable from the Betts Case, where the court said that none of the officers of the village made any threats of prosecution, and there was only random talk by the village attorney; nor in the Betts Case does it appear that threats were made by village officers and their acts ratified by the village council, which was in a position to cripple a man in his business by refusing to approve his application and bond as a retail liquor dealer.

On examination of all of the cases which have been before this court relative to payments of this character to municipal officers, there is no one of them where the facts are similar to those in the instant case. The only thing in common between these cases and the case at bar is that a municipality has unlawfully taken money from a saloon keeper and been allowed to retain it.

It is apparent from the record that the only alternative plaintiff had when this illegal demand was made by members of the council of defendant village was to make the payment, or discontinue business. Such being the case, can it be said that the payments were made voluntarily? These payments made by plaintiff are admittedly illegal exactions, and it is apparent that they were made under apprehension of not being allowed to go on in his business if they were not paid. This being so, the case would come within that class where payments made to prevent apprehended injury to business are held to be involuntary and made under duress. This principle has been recognized by the Federal and several of our best State Supreme Courts.

The case of *Swift, etc. Co. v. U. S.* 111 U. S. 22, 4 S. Ct. 244, 28 U. S. (L. ed.) 341, is cited in *American Brewing Co. v. St. Louis*, 187

Mo. 367, 86 S. W. 129, 2 Ann. Cas. 821, and note, in support of the proposition that payments coerced under duress or compulsion, [26] though not made in ignorance of the facts, may be recovered. Within this rule are payments of illegal charges or exactions under apprehension on the part of the payers of being injured in their business if the money is not paid. In the reported case cited supra, the supreme court of Missouri said:

"It is . . . well settled that payments coerced under duress or compulsion may be recovered. What constitutes duress has been the subject of much discussion. The general rule was first laid down that: 'A payment is not to be regarded as compulsory unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid, or to prevent a seizure by a party armed with apparent authority to seize the property. The courts, however, have shown a tendency in the later decisions to extend the doctrine of the earlier common law with regard to compulsory payment, and at the present time, beyond a few . . . principles, they do not attempt to lay down any definite and exact rule of universal application by which to determine whether a payment is voluntary or compulsory.' 22 Am. & Eng. Enc. of Law (2d ed.) p. 613, and cases cited.

"Among the instances of the relaxation of the strictness of the original rule is the case of payments constrained by business exigencies; that is, payments of illegal charges or exactions under apprehension on the part of the payers of being stopped in their business if the money is not paid."

This view of the case was recognized by the trial court, when it said:

"There are courts in this country that hold that a payment made in the manner in which this one was made by the plaintiff in this case is a payment by compulsion."

We find that the supreme courts of the States of Massachusetts, Illinois, Ohio, Missouri, and other States, have so held. The learned trial judge gave as a reason for not so holding that, in his opinion, there was no evidence to show that the council, as a council, [27] did act. As we have already stated, the record shows without dispute that this was the action of the defendant village of Chesaning. It further shows that it received the money into its treasury without consideration. In our opinion, these payments made under these circumstances were not voluntary payments, and assumpsit will lie to recover the amounts unlawfully paid. Plaintiff was not, as is intimated in the brief of defendant, seeking to recover for damage to his business. He asks simply the return of his money, which defendant village has received unlawfully and without consideration.

The court was in error in directing a verdict against him.

The facts in this case are undisputed. We hold that these payments were involuntary payments. There is no defense which can be interposed to defeat plaintiff's claim.

Therefore the judgment of the circuit court is reversed, and a new trial ordered.

Brooke, C. J., and Kuhn and Bird, JJ. The foregoing opinion was prepared by the late Justice McAlvay. We are satisfied with his conclusions.

NOTE.

Payment to Prevent Apprehended Injury to Business as Payment under Duress.

Introductory, 516.

Payment Exacted by Private Person, 516.

Payment Exacted by Public Official:

In General, 519.

Excessive Amount, 520.

Introductory.

This note reviews the recent cases passing on the question whether a payment made to prevent an apprehended injury to business, constitutes a payment under duress. For a discussion of the earlier cases see the note to *American Brewing Co. v. St. Louis*, 2 Ann. Cas. 821, and also the note to *New Orleans, etc. R. Co. v. Louisiana Constr. etc. Co.* 94 Am. St. Rep. 395, wherein the subject of recovery of payments is discussed generally.

Payment Exacted by Private Person.

The actual or threatened exercise of power possessed or believed to be possessed by a private person, over the person or property of another who is thereby rendered apprehensive of injury to his business interests, and has no other means of immediate relief than by making a demanded payment, will ordinarily render the payment involuntary. *Rowland v. Watson*, 4 Cal. App. 476, 88 Pac. 495; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Matthews v. Williams Brewing Co.* 26 Misc. 46, 25 N. Y. S. 241; *Kamenitsky v. Corcoran*, 97 Misc. 384, 161 N. Y. S. 756; *Newland v. Buncombe Turnpike Co.* 26 N. C. 372; *Redford v. Weller*, 27 S. D. 334, 131 N. W. 296. See also *Rees v. Schmits*, 164 Ill. App. 250; *Hackley v. Headley*, 45 Mich. 569, 8 N. W. 511.

Where such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. *Burke v. Gould*, 105 Cal. 277, 38 Pac. 733.

"Moral duress consists in imposition, oppression, undue influence, or the taking of undue advantage of the business or financial stress or extreme necessities or weakness of another; the theory under which relief is granted being that the party profiting thereby has received money, property or other advantage, which in equity and good conscience he ought not to be permitted to retain." *Rees v. Schmits*, 164 Ill. App. 250.

In *Kamenitsky v. Corcoran*, 97 Misc. 384, 161 N. Y. S. 756, the complainant alleged that he was duly licensed by the city to maintain a news stand on the corner where the defendant's saloon was situated, but wholly on the property of the city. Thereafter the defendant unlawfully demanded rent for the place, threatening to have his license taken away and oust the plaintiff, with which demand the latter complied in order to prevent apprehended injury to his business. The plaintiff continued to pay rent for a period of about six years and then sued to recover the money paid as having been paid under duress. The court in reversing a judgment on the pleading for the defendant said: "The defendant contends that if we strip the complaint of its conclusions of law, there are no allegations of fact which show that the plaintiff has paid any money under the compulsion of threats of any unlawful acts on the part of the defendant. The complaint does, however, contain the following allegations: 1. That the defendant demanded of plaintiff the sum of fifteen dollars a month for the privilege of maintaining a news stand outside of his place of business. 2. The news stand was not situated on defendant's land, but was situated on the property of the city and the plaintiff was duly licensed by the city to maintain the news stand. From these allegations it seems a necessary conclusion that the plaintiff already had the privilege of maintaining his news stand and the defendant could not grant or withhold such a privilege and of course could not properly demand or receive money for a privilege he could neither grant nor withhold. Nevertheless, even though the defendant could not properly demand payment for a privilege he could not confer, yet if the plaintiff complied voluntarily with this demand he cannot recover the money paid in this action. The plaintiff is not complaining that he made a foolish bargain but is urging, in effect, that he made no bargain at all but that the defendant put him, by threats, in such fear that he felt compelled to make these payments in order to keep the defendant from wrongfully doing his property even greater harm. Upon this element the claimant alleges: 1. That the defendant threatened that if the said sum was not paid he would cause the license of the plaintiff herein to be taken away and would cause him to be ousted from

the said location. 2. That under duress of the aforesaid threat and in apprehension of injury to the plaintiff's business, the plaintiff regularly paid the sum of fifteen dollars per month. The allegation of the threat is of course an allegation of fact and not a conclusion of law and the allegation that the money was paid under duress of this threat is, I think, clearly an allegation of an ultimate fact and also not a conclusion of law. The only real question, therefore, in the case would seem to be, whether money paid under fear of a threat to cause the plaintiff's license to be taken away and to cause his news stand to be ousted from its location is money paid under legal duress. The defendant seems to maintain that, inasmuch as he is not a public officer and has no power to take away the plaintiff's license or to oust him from his location, there could be no duress. Duress, however, may be exercised by threats as well as by force and if the defendant represented that he had the power—legally or illegally—to take away the plaintiff's license and the plaintiff believed that he could make his threat good, then of course it becomes immaterial that defendant did not possess such power. It is true that the complaint does not expressly allege either that the defendant claimed such power or that the plaintiff believed such claim, but I think that such a claim can well be implied from the making of the threat and that the allegation that the plaintiff acted 'in apprehension of injury to his business' shows that he believed that the threat could be made good. It seems to me, therefore, quite clear that the complaint sets forth a good cause of action for money paid under duress if the threat is one which the defendant had no right to make. Our courts have held that a threat to appeal to the courts or to use the process of the courts even for a malicious and wrongful purpose cannot constitute duress and the defendant seems to rely largely on these cases. In the present case, however, the threat was not to appeal to the courts to use their process against the plaintiff. It was not a threat to bring the plaintiff into a tribunal where his legal rights could be tested but on the contrary was a threat to do the plaintiff an injury without any legal right so to do on defendant's part and without opportunity for plaintiff to receive an impartial hearing."

So in *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287, wherein it appeared that a labor organization threatened the plaintiff, who was an employer of labor, with taking away a number of his working people and deterring others from entering his employ unless he paid them a sum of money, it was held that the payment when made by the plaintiff, who was reasonably apprehensive of an injury to his business, was made under duress.

In *Niland v. Buncombe Turnpike Co.* 26 N. C. 372, a payment by the plaintiff, who had contracted to carry the public mail, of tolls illegally exacted by the defendant turnpike company, which threatened to close the gates against the plaintiff unless he paid the tolls, was held to have been made under duress.

To recover money paid under fear of an injury to business it must appear that the money received ought not in equity and good conscience to be retained. If the money was rightfully due, the fact that the elements of protest and duress were present when it was paid gives no right to recover it back. *Koenig v. People's Gas Light, etc. Co.* 153 Ill. App. 432.

In *Matthews v. Williams Brewing Co.* 26 Misc. 46, 55 N. Y. S. 241, it appeared that the defendant contracted with the plaintiff to supply the latter all the beer required by him for one year at a stated price per barrel. Prior to the expiration of the time the defendant refused to deliver any more beer unless he was paid a dollar per barrel in addition to the contract price, to cover a revenue tax which had been enacted since the parties entered into the contract. The plaintiff fearing that his business might suffer if he failed to comply with this demand, paid it each time under protest and brought an action to recover the total so paid. In dismissing the complaint, it was held that the business necessities of the plaintiff did not warrant his paying the overcharge and that the fact that he protested did not alter the voluntary character of such payments, the court saying that the plaintiff had the right to insist on the performance of the contract, and on the defendant's refusal to perform, had his action at law to recover damages for the breach, and if he chose to pay the illegal demand the payment was not under duress.

In *Rowland v. Watson*, 4 Cal. App. 476, 88 Pac. 495, it appeared that the plaintiff paid a sum far in excess of what was due from him to the defendant who knew of plaintiff's distress and who declined to release his lien unless he was paid the excessive amount demanded. A failure to pay would have forced the plaintiff into bankruptcy. It was held that the payment could be recovered back. To the same effect see *Redford v. Weller*, 27 S. D. 334, 131 N. W. 296. See also *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217, 32 Am. St. Rep. 581, 16 L.R.A. 376.

But in *Hackley v. Headley*, 45 Mich. 569, 8 N. W. 511, wherein it appeared that a debtor who had knowledge of his creditor's financial embarrassment refused to pay on demand a debt already due except on condition that the creditor should accept a lesser sum, which the latter believed he must accept in order to avoid his financial ruin, it was held that there

was no duress, the court saying: "In what did the alleged duress consist in the present case? Merely in this: that the debtors refused to pay on demand a debt already due, though the plaintiff was in great need of the money and might be financially ruined in case he failed to obtain it. It is not pretended that Hackley & McGordon had done anything to bring Headley to the condition which made this money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment except as they failed to pay this demand. The duress, then, is to be found exclusively in their failure to meet promptly their pecuniary obligation. But this, according to the plaintiff's claim, would have constituted no duress whatever if he had not happened to be in pecuniary straits; and the validity of negotiations, according to this claim, must be determined, not by the defendants' conduct, but by the plaintiff's necessities. The same contract which would be valid if made with a man easy in his circumstances, becomes invalid when the contracting party is pressed with the necessity of immediately meeting his bank paper. But this would be a most dangerous, as well as a most unequal doctrine; and if accepted, no one could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need."

In *Brown v. Worthington*, 162 Mo. App. 508, 142 S. W. 1082, it appeared that the plaintiff was given an option to buy a quantity of hogs at a stipulated price. Before the time within which he might exercise the option expired, the plaintiff entered into a contract with a third person for the resale of the hogs in question, after which the plaintiff tendered the amount agreed on, which the defendant declined to accept and demanded \$1500 in excess of the agreed price. Owing to the urgent necessities of the situation the plaintiff, in order to be able to fulfil his contract with the third party, paid the excessive demand, and sued for such excess on the ground that he paid same under duress and coercion. The court in deciding that whether he was coerced by business necessity to pay the money was a question for the jury, said: "It is argued plaintiff is not entitled to recover and the court should have directed a verdict for defendant because the \$1500 must be regarded as having been voluntarily paid to defendant, but we are not so persuaded. The strictness of the common-law rule touching the matter of duress has been much relaxed in the development of the law. Originally 'duress' meant only duress of the person, and nothing short of such duress, amounting to a reasonable apprehension of imminent danger to life, limb or liberty, was sufficient to enable the party to re-

cover back the money paid. Subsequently, in keeping with the principles of equity and good morals, the doctrine was extended so as to recognize duress of property as a sort of moral duress, which might, equally with the duress of the person, entitle the party to recover back money paid under its influence. While this view prevailed, some of the cases asserted the doctrine that, unless it appeared the money was paid to release the person or property of the payer from detention or to prevent a seizure of either by one having apparent authority in that behalf, a recovery was not to be allowed. But though such were the former rules of decision, the modern authorities go farther and generally declare that such pressure or constraint as compels a man to go against his will virtually takes away his free agency and destroys the power of refusing to comply with the unlawful demand of another constitutes duress, irrespective of the manifestation or apprehension of force. Under this view, it is said the real and ultimate fact to be determined in every case is whether or not the party paying the money really had a choice, that is, whether he had his freedom of exercising his will. Numerous authorities declare that if one is compelled by business necessity to surrender to the constraint involved in the unlawful demand and make the payment, moral duress appears. In other words, in such circumstances, it may be found as a fact that the party paying has not had his freedom of exercising his will and paid the money under moral duress, in which event, if it is against equity and good conscience for the money to be withheld from plaintiff, it may be recovered. Such is the undoubted rule of decision in this state. . . . Here it appears plaintiff was obligated under a written contract to deliver 1000 head of the hogs on Chesley Island to McPherson and that McPherson came from Omaha to St. Louis to receive them on the very day the \$1500 was so unlawfully exacted. Plaintiff parleyed with defendant over the matter and the only alternative to paying the money was to breach his contract with McPherson. Certainly such constitutes not only a business necessity but an urgent one, which tends to show that plaintiff did not have the free exercise of his will in the matter. Furthermore, the precepts of equity and good conscience suggest that money so obtained is wrongfully withheld from and should be returned to plaintiff. But though such be true, plaintiff's first instruction is erroneous, in that it omitted to submit the question as to whether or not he had the free exercise of his will or was constrained by the business necessity revealed to pay the money, that is, give the check and execute his note to defendant. This instruction hypothesizes the facts of the case very well, but it seems to assume

as a matter of law that if those facts were found to be true, then moral duress appeared. Such is not true unless the jury believed those facts and circumstances cast a restraint upon plaintiff sufficient to overcome the will of a person of ordinary firmness so as to destroy his free moral agency."

Payment Exacted by Public Official.

IN GENERAL.

Payment made to a public official to secure a right essential to the conduct of a business or to prevent an injury to business to which the party paying is entitled without payment but which right is withheld until the payment is made, is generally held to be involuntary and the money may be recovered back. *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320, 29 S. Ct. 671, 53 U. S. (L. ed.) 1013; *Garrison v. Tillinghast*, 18 Cal. 404; *Lewis v. San Francisco*, 2 Cal. App. 112, 82 Pac. 1106; *Seattle Brewing, etc. Co. v. Campbell*, 17 Hawaii 364; *LaSalle County v. Simmons*, 5 Gilman (Ill.) 518; *Chase v. Dwinal*, 7 Greenl. (Me.) 134, 20 Am. Dec. 352; *American Exch. F. Ins. Co. v. Britton*, 8 Bosw. (N. Y.) 148.

Thus the payment of money to the collector of customs of a port which was exacted by that official under an invalid order of the secretary of commerce and labor and was paid under protest, the defendant being coerced by the certainty that if it did not pay, clearance to its vessels would be refused which would entail serious pecuniary loss, is a payment under duress and may be recovered back. *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320, 29 S. Ct. 671, 53 U. S. (L. ed.) 1013.

Persons dealing with public officers, their deputies and agents do not stand on equal ground with them. *American, etc. Co. v. Britton*, 8 Bosw. (N. Y.) 148, wherein it appeared that the defendants who had examined the plaintiffs' books by order of the comptroller, threatened to telegraph to that official asking him to stop the issuing of a certificate requisite to the conduct of the business unless the plaintiffs paid an amount unlawfully demanded. Payment under those circumstances was held to be under duress.

In *LaSalle County v. Simmons*, 5 Gilman (Ill.) 518, it appeared that the county commissioners were authorized to grant licenses for ferries and to impose an annual tax of one hundred dollars on each ferry. The plaintiff was engaged in the ferry business and was an applicant for a license to continue the same; but the commissioners served notice that no license would be issued except to the person who would donate the largest sum of money to the county, and accordingly put

the privilege up at auction. After competitive bidding the plaintiff bid five hundred dollars which he paid to the county. In an action therefor it was held that the payment was under duress and might be recovered back, the court saying that "The illegal conduct of the commissioners put the plaintiff in their power; and taking advantage of his peculiar situation, they obtained money from him to which the county had not the shadow of right. The money was unlawfully and wrongfully obtained, and cannot in equity and good conscience be retained by the county. The fact that the commissioners chose to call it a donation does not change the real character of the transaction. It was merely a device to obtain money which the county had not the slightest right to demand. The money was exacted from the plaintiff under circumstances that strip the transaction of all the features of a voluntary payment. It was in law and fact a compulsory payment, as much so as the payment of usurious interest, which the lender exacts from the borrower; or the payment of illegal charges, which an officer demands as the condition of the performance of official services."

The payment by executors of an estate of illegal fees demanded by the county clerk who refused to file their inventory and appraisal except on such payment has been held to be under duress where a failure to file would have rendered the executors liable to removal from office, though they could have compelled the clerk by a writ of mandate to file the same without paying the fees demanded. *Lewis v. San Francisco*, 2 Cal. App. 112, 82 Pac. 1106. And so money demanded as a condition for liberating a raft of lumber, detained in order to exact illegal tolls, is a compulsory payment. *Chase v. Dwinal*, 7 Greenl. (Me.) 134, 20 Am. Dec. 352.

The reported case seems to take issue with the doctrine laid down in the foregoing cases. But see the dissenting opinion. See also in accord with the reported case *Betts v. Reading*, 93 Mich. 77, 52 N. W. 940; *Americus First Nat. Bank v. Americus*, 68 Ga. 119, 45 Am. Rep. 476.

Where a contractor employing convict labor under an agreement with the board of prison managers failed to pay for such labor, and was informed that on his further default he could not have the men, a payment thereupon made was held not to have been made under duress. *F. H. Mills Co. v. State*, 110 App. Div. 843, 97 N. Y. S. 676, affirmed in 187 N. Y. 552, 80 N. E. 1109.

A person who takes out a license on the mere statement of a police officer that the business cannot be conducted without one, cannot recover back the license fee though the licensing ordinance is void. *Conley v. Buffalo*, 65 Misc. 100, 119 N. Y. S. 87. See

also *Levy v. Kansas City*, 168 Fed. 524, 93 C. C. A. 523, 22 L.R.A. (N.S.) 862.

EXCESSIVE AMOUNT.

The exaction by a municipal officer of a fee of \$750 for a license, when the charter limited the fee to \$300, the licensee paying the excessive fee because he had already rented the premises, prepared to do business and paid for a state license, has been held to constitute duress. *Bruner v. Clay City*, 100 Ky. 567, 38 S. W. 1062.

Where a city exacted from a property owner water rents accruing before he became the owner, under threats that unless paid the water would be shut off, it was held that the excessive payment could be recovered back. *Chicago v. Northwestern Mut. L. Ins. Co.* 218 Ill. 40, 75 N. E. 803, 1 L.R.A. (N.S.) 770, wherein it was said: "Appellant and appellee did not stand upon the same footing, as appellant had the power and means to deprive appellee of its water supply, and had threatened to exercise this power, and had in some instances actually shut off the water. The various pieces of property were occupied as residences and stores, which required water, and to shut the water off from them would entail great damage to appellee, as it had no other means of supplying them. The bills were not contracted by appellee, and it was under no more obligation to pay them than it was to pay any other bills of any other person. The back tax was not a lien upon the premises, and appellee had in no way, as required by law, promised to pay the same. It is the well-settled rule of this state that where one is compelled to make payment of money which the party demanding has no legal right to receive, in order to prevent injury to his person, business or property, such payment is, in law, made under duress and may be recovered from the party receiving it; and it makes no difference that the payment was made with full knowledge of all the facts, provided it was made under duress. Appellee, at the time of payment, expressly stated that it was made under protest and to avoid trouble and damage to its property. The payment was illegally exacted and appellee had a right to recover in an action of assumpsit."

In *Doolittle v. Luzerne County*, 6 Kulp (Pa.) 495, payment of an excessive fee for a license, made in order to avoid a revocation of the license, was held to be involuntary though the licensee could have had relief by mandamus. And to the same effect see *Hazleton v. McGroarty*, 6 Kulp (Pa.) 533.

In *Gentry v. Lincoln*, 146 Ill. App. 60, it appeared that the plaintiffs who were the owners of a dog and pony show arranged to hold the show in the defendant city; and consulted the mayor as to the amount of the

fee to be paid under an ordinance of the city providing for different fees depending on the nature of the animals and the manner of exhibition. It appeared from the evidence that the mayor advised the plaintiffs to pay the ten-dollar fee as being the fee required by the ordinance for their show, which the plaintiffs paid, but refused to furnish the mayor and city clerk the number of complimentary tickets suggested by them. Afterward the chief of police at the mayor's suggestion refused to allow the plaintiffs to start their parade or hold their show unless they paid a fee of fifty dollars required under the said ordinance for the exhibition of a circus and menagerie combined, which the plaintiffs were compelled to pay in order to prevent further delay and loss. In an action against the city to recover the forty dollars it was held that the payment was compulsory and could be recovered back.

BOLLAND

v.

UNITED STATES.

United States Circuit Court of Appeals,
Fourth Circuit—July 6, 1916.

238 Fed. 520.

Army and Navy — Receiving Public Property in Pledge from Soldier.

On the trial of a defendant for knowingly receiving in pledge from a soldier an automatic pistol, the property of the United States, in violation of Pen. Code, § 35 (Act March 4, 1909, c. 321, 35 Stat. 1095 [Fed. St. Ann. 1909 Supp. p. 414]), the confession of the defendant that he received the pistol in pledge from a soldier was sufficiently corroborated to justify the submission of the case to the jury by evidence showing that the pistol was issued to a soldier, and that it was found in the possession of defendant, whose place of business was very near the reservation on which such soldier was stationed.

[See note at end of this case.]

Same.

Evidence that the pistol was found in defendant's possession was sufficient to sustain a verdict of guilty under Rev. St. §§ 1242 and 3748 (7 Fed. St. Ann. 1017; 6 Fed. St. Ann. 711), which make such possession by one not an officer or soldier of the United States prima facie evidence that it was obtained in violation of the statute.

[See note at end of this case.]

Same.

Evidence offered by defendant to show that the pistol had been charged to the soldier is properly excluded, where the evidence does

not show that he was the owner at the time it was pledged, but that the charge was made after its loss was known.

[See note at end of this case.]

Error to United States District Court, Eastern District of South Carolina, at Florence: SMITH, Judge.

Criminal action. J. W. Bolland convicted of violation of section 35 of Federal Penal Code of 1910 and brings error. The facts are stated in the opinion. AFFIRMED.

Geo. F. von Kolnitz, Jr., for plaintiff in error.

Francis H. Weston and J. Waties Waring for defendant in error.

Sitting: PRITCHARD and KNAPP, Circuit Judges, and JOHNSON, District Judge.

[529] PRITCHARD, J.—This is a criminal action instituted in the District Court of the United States for the Eastern District of South Carolina. The defendant was tried for a violation of section 35 of the federal Penal Code of 1910. The portion that relates to this case is in the following language:

" . . . And whoever shall knowingly purchase or receive in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person [530] called into or employed in the military or naval service, any arms, equipments, ammunition, clothes, military stores, or other public property, whether furnished to the soldier, sailor, officer, or person, under a clothing allowance or otherwise, such soldier, sailor, officer, or other person, not having the lawful right to pledge or sell the same, shall be fined not more than five hundred dollars, and imprisoned for not more than two years." (Fed. St. Ann. 1909 Supp. p. 414.)

The indictment charged the defendant with knowingly receiving in pledge from a soldier certain property of the United States, to wit, a certain Colt automatic pistol.

The witness for the government testified that the pistol in question was found in the store of the defendant, which is a small grocery store on Sullivan's Island, S. C., near the government reservation; that the pistol was government property; and that the defendant confessed to receiving the same in pledge from a soldier. It was sought to be proven by one of the witnesses that the pistol, when its loss was discovered, had been charged to and paid for the soldier to whom it was issued. The court excluded this testimony, to which defendant excepted. The defendant offered no further evidence, but moved the court to direct a verdict of not guilty on the ground that the corpus delicti had not been estab-

lished by evidence independent of the extrajudicial confession of the accused. The court below overruled this motion upon the ground that there were circumstances corroborative of the confession made by defendant, and that therefore the same should be submitted to the jury for its consideration, to which defendant excepted. The jury found the defendant guilty, and upon which judgment was entered. The case comes here on writ of error.

The first assignment of error is to the effect that the presiding judge erred in overruling and refusing a motion of defendant for the direction of a verdict of not guilty at the close of the government's evidence. This motion was based upon the contention that the corpus delicti of the crime had not been established by evidence independent of the confession of the accused. We think that this assignment is without merit for the following reasons: In addition to the defendant's confession, the government established the fact that the pistol in question was issued by the quartermaster sergeant to one Cartlidge, a musician and member of the 145 Company of the United States Coast Artillery. It was further shown that defendant's grocery store was located very near the government reservation on Sullivan's Island, where the company to which we have referred was stationed. It is true that some of these facts were only circumstantial, but, nevertheless, they tended to corroborate the confession of the defendant.

In the case of *U. S. v. Williams*, 1 Cliff. 28, 28 Fed. Cas. No. 16,707, the Supreme Court said:

"All that can be required is that there should be corroborative evidence tending to prove the facts embraced in the confession; and, where such evidence is introduced it belongs to the jury, under the instructions of the court, to determine upon its sufficiency."

We think the evidence offered to corroborate the confession of the defendant was such as to warrant the jury in inferring that the defendant knew that Cartlidge was a soldier, and also that the pistol was government property.

[531] This leaves the remaining point as to whether the pistol was actually pledged to the defendant. Section 1242 of the Revised Statutes is as follows:

"The clothing, arms, military outfits, and accoutrements furnished by the United States to any soldier shall not be sold, bartered, exchanged, pledged, loaned, or given away; and the possession of any such property by any person not a soldier or officer of the United States shall be prima facie evidence of such sale, barter, exchange, pledge, loan or gift. Such property may be seized and taken from any person, not a soldier or officer of the United States, by any officer,

civil or military, of the United States, and shall, thereupon, be delivered to any quartermaster or other officer authorized to receive the same." (7 Fed. St. Ann. 1017.)

Also, section 3748 is as follows:

"The clothes, arms, military outfits, and accoutrements furnished by the United States to any soldier shall not be sold, bartered, exchanged, pledged, loaned, or given away; and no person not a soldier, or duly authorized officer of the United States, who has possession of any such clothes, arms, military outfits, or accoutrements, so furnished, and which have been the subjects of any such sale, barter, exchange, pledge, loan, or gift, shall have any right, title, or interest therein; but the same may be seized and taken wherever found by any officer of the United States, civil or military, and shall thereupon be delivered to any quartermaster, or other officer authorized to receive the same. The possession of any such clothes, arms, military outfits, or accoutrements by any person not a soldier or officer of the United States shall be presumptive evidence of such a sale, barter, exchange, pledge, loan, or gift." (6 Fed. St. Ann. 711.)

In the foregoing it is provided that all clothes, arms, military outfits, etc., furnished by the United States to any soldier or officer is not to be sold, bartered, exchanged, etc., and that the "possession" of any such property by any person not a soldier or officer of the United States shall be *prima facie* evidence of such sale, barter, exchange, pledge, loan or gift. The fact that the pistol was found in the possession of the defendant, who was not a soldier or officer of the United States, was presumptive evidence that the same had been pledged to the defendant.

By the second assignment of error it is insisted that the court below erred in excluding the testimony sought to be adduced from the witness Green upon cross-examination. The defendant offered to show that the pistol had been charged to and paid for by the musician to whom it was issued. If the defendant had offered testimony tending to show that at the time the pistol was pledged the soldier had purchased the pistol from the government, and was therefore the owner of the same at the time he pledged it to defendant, then such testimony would have been very material to the issue. Indeed, if the defendant had established that fact, it would have been a complete defense, and he would have been entitled to acquittal. The defendant did not offer to show that the musician purchased, and was therefore the actual owner of the pistol at the time the same was pledged. He simply offered to show that the value of the pistol was charged to the musician when its loss was discovered, but this was only in the nature of a penalty upon the

soldier for his failure to observe the rules and regulations, and could not have the effect of vesting the title in the soldier, nor could it relieve the party who knowingly received it in [532] pledge from the penalty imposed by the statute. The fact that the title to the pistol was in the government at the time the same was pledged makes the offense complete under the statute, and to show that the value of the pistol had been charged to the soldier by the government could not in any wise affect the guilt or innocence of the defendant.

In the case of *Lobosco v. United States*, 183 Fed. 742, 106 C. C. A. 476, the Circuit Court of Appeals for the Second Circuit, in discussing a cause somewhat analogous to this, said:

"It seems entirely clear from these sections that, in supplying the recruit with all equipment suitable and necessary for the discharge of his military duties, the government has been very careful to retain title to the same. It would seem to be public property, whether it remains in depot or is put in the possession of the individual soldier. The circumstance that, when his trust expires, he is allowed to retain such articles of clothing as he has then in use, does not change the character of his holding while he is in the service of the government."

Also, in the case of *Ontai v. U. S.* 188 Fed. 310, 110 C. C. A. 288, where the defendant was charged with purchasing a shirt from a soldier, the Circuit Court of Appeals for the Ninth Circuit said:

"Error is assigned to the refusal of the court to instruct the jury to acquit the plaintiff in error on the ground that the property which he purchased of the soldier had been allowed to the latter under a clothing allowance, whereby it became his individual private property, held by him subject only to his contract with the United States not to dispose of the same, but with a tenure which permitted another to purchase the same without incurring any penalty for violation of the statute, and it is contended that the indictment having charged the purchase of public property of the United States, and the proof having shown that the purchase was an article of clothing which had been allowed to a soldier, the variance between the indictment and proof was fatal. The plaintiff in error cites *U. S. v. Michael*, 153 Fed. 609, a case in which the court, in construing section 5439 of the Revised Statutes (Fed. St. Ann. 1909 Supp. p. 414), held that a civilian did not commit a penal offense in purchasing from a soldier clothing issued to the latter during the term of his enlistment, and that clothing when issued to an enlisted soldier under the rules of the War Department was no longer public property, but was the soldier's private property. That decision, however, in our opinion

is not sustained by reason or by authority. The contrary was held in *U. S. v. Hart* 146 Fed. 202; *United States v. Koplik* (C. C.) 155 Fed. 919; *U. S. v. Smith*, 156 Fed. 859. It is true that one of the promises held out to the soldier about to enlist is the payment to him of a certain sum of money, and the allowance to him of certain specified clothing. But the clothing which he receives is held by a different tenure from the money. The latter is the soldier's to spend at his will. The clothing is part of his equipment for services which he is to render to the United States. He gets no property right in it other than the right to wear it. It is as much a portion of his equipment as is his gun or his ammunition. It remains public property of the United States. Section 1242 of the Revised Statutes (7 Fed. St. Ann. 1017) declares that the clothing furnished by the United States to any soldier shall not be sold, bartered, or exchanged, pledged, loaned, or given away. Section 3748 (6 Fed. St. Ann. 711) provides for the seizure of such public property which has been sold or bartered, pledged, loaned, or given away. The decisions above cited were all rendered prior to the enactment of the present statute as it is expressed in section 35 of the Penal Code. By that section the intention of Congress is made clear beyond question to declare all property secured by a soldier under his clothing allowance to be public property of the United States. That statute specifies 'any' arms, equipment, [533] ammunition, clothing, etc., 'or other public property,' and then follow the words: 'Whether furnished to the soldier, sailor, officer or person under a clothing allowance or otherwise'—thus expressing the will of Congress that a soldier shall acquire no right in any . . . property, and that one who, knowing him to be a soldier, shall purchase the same, shall incur the penalty denounced by the act."

From what we have already said we do not deem it necessary to discuss the third assignment of error.

It is insisted by the fourth assignment that the court below erred in charging the jury that under the statute in question the same presumption existed that existed by law in the case of stolen goods in the possession of a party, to wit, that one recently found in the possession of stolen goods was presumptively the receiver of stolen goods with knowledge of the fact that they were stolen. The reference by the court below to a case where one is charged with being the receiver of stolen property was obviously made for the purpose of illustrating the meaning of the statute which we have just quoted. The fact that the defendant had the pistol in his possession and that it was government property certainly

cast upon him the burden of showing that he purchased it from one who had title to the same.

We have carefully considered the fifth assignment of error and are of opinion that the same is without merit.

The sixth assignment of error is in the nature of an argument which could have, with propriety, been made by counsel for defendant in addressing the jury, except that portion of it which requested the court to charge that in order to find the defendant guilty the jury should be satisfied beyond a reasonable doubt. The court fully explained this rule to the jury, and therefore its action in refusing to grant this request was eminently proper.

The eighth assignment of error is untenable, and requires no discussion at our hands.

For the reasons stated, the judgment of the lower court is affirmed.

Rehearing denied November 28, 1916.

NOTE.

Liability of Civilian for Purchasing or Receiving in Pledge Public Property from Soldier or Sailor.

The purchase or receiving in pledge of public property from a soldier or sailor has been forbidden by federal statute from an early date. The provision in force prior to 1908 (Rev. St. § 5438) was as follows: "Every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than \$1000 nor more than \$5000." The foregoing act was re-enacted in the Penal Code (§ 35, Fed. St. Ann. 1909 Supp. p. 414) in the following form: "Whoever shall knowingly purchase or receive in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, whether furnished to the soldier, sailor, officer, or person, under a clothing allowance or otherwise, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall be fined not more than \$500, and imprisoned for not more than two years."

Under the foregoing statutes a civilian who knowingly purchases or receives public property of a soldier or sailor is liable to fine and imprisonment. *U. S. v. Hart*, 146 Fed. 202; *U. S. v. Koplik*, 155 Fed. 919; *U. S. v. Smith*, 156 Fed. 859; *Lobosco v. U. S.* 183 Fed. 742, 106 C. C. A. 476; *Ontai v. U. S.* 188 Fed. 310, 110 C. C. A. 288. And see the reported case.

In *U. S. v. Koplik*, 155 Fed. 919 (decided under Rev. St. § 5438) it was held that the word "knowingly" as used in the statute did not require actual knowledge, the inquiry being whether when the property was offered for pledge, the person receiving it took the precautions which a prudent and reasonable man would take to ascertain whether the soldiers were in the service. The court said: "The section under which the defendant is charged speaks of this particular matter in the following language: 'Any person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, clothes or other public property [I have left out the other words that do not apply to this particular matter], such soldier not having the lawful right to pledge or sell the same.' As to that last clause, 'not having the lawful right to pledge or sell,' the word 'knowledge' or 'knowing' does not apply. Whether the soldier had a right is a question of fact. If the soldier did not have the right, then the property could not be legally sold, and if a person buys that property he buys it with the prospect of its being seized. He buys it running the chances of being shown to have had knowledge that he was purchasing it from a soldier, or under such circumstances that the word 'knowledge' applies, and he takes his chances as to whether the person had the lawful right to pledge or sell the same. The word 'knowing' applies only to the question as to whether the man who purchased and receives in pledge the property knew that the person offering it was a soldier. You see, a soldier might be sent to sell something that might have been condemned, and having the lawful right to sell that, knowledge as to whether he was a soldier or not, if all the circumstances were understood, would have nothing to do with the case. But if he did not have the lawful right to sell (and I charge you these soldiers did not have, as a matter of law, any right to pledge or sell this clothing until their enlistment had been terminated by either court-martial or honorable discharge), if they did not have the right to sell, then the question comes down to the transaction with the person with whom they were dealing, and the sole question is whether he knew, or whether he acted with such disregard of the circumstances that he did not try to find out, whether the man was a soldier. To con-

vict the defendant, you must be satisfied as to this from the evidence beyond a reasonable doubt. Of course, there are two ways of looking at the matter to start with. It is possible for you to determine that the soldier's story is true, and that the defendant knew that these men were soldiers. It is possible as well for you to determine that the defendant's story is true, and that he in good faith believed that they were discharged soldiers. Those are the two extremes. Whichever way you make up your mind, if you arrive at either one of those conclusions, that way your verdict will go. But if you should believe, as told by the soldiers, that they went in and offered their clothing to be pawned, that they said nothing as to whether they were discharged soldiers, or whether they said that they were discharged soldiers, and the defendant knew better, or, whatever you find as to the facts of that, if the defendant had reason, as a reasonable man, to know that he was dealing with a soldier, or to make further inquiry, if he had no regard for whether the soldier had been discharged or not, if he disregarded taking the precautions a reasonable man would, so that he could be charged with knowing (if he had attempted to find out) that he was dealing with a soldier, then he is responsible under this statute."

In *U. S. v. Smith*, 156 Fed. 859, wherein the defendant was found guilty of purchasing or receiving in pledge an army blanket, the court said: "You will observe that the provisions of this statute apply to persons who knowingly purchase or receive in pledge any of the kinds of property described here from a soldier, officer, or sailor in the service of the United States. The elements of the crime are guilty knowledge and the actual purchase of and receiving in pledge the kind of property named and receiving it from a person in the military service of the United States. All those things are necessary to be proven in order to make it a criminal case. The guilty knowledge that is a necessary element of the crime is not knowledge that the act is unlawful. The law does not permit ignorance of the provisions of the law to avail as a defense in any case, but the knowledge must be knowledge of the facts, knowledge that the property offered for sale or pledge is the military stores or property of the United States—that is, arms, clothing, or property that is provided by the United States for use in the military service, and knowledge that the person offering to sell or to pledge it is a person in the military service at the time. It will be necessary, therefore, to warrant a verdict finding this defendant guilty of the crime charged in this indictment in either one of the counts, for the jury to find that the evidence convinces beyond a reasonable doubt that this defendant did knowingly purchase or

receive in pledge the blanket specified in the indictment from a person who was then in the service of the United States as a soldier."

In *Lobosco v. U. S.* 183 Fed. 742, 106 C. C. A. 476, it was held that the equipment of a soldier or sailor in the service is public property, the title remaining in the government, whether it is in the possession of the soldier or in a depot. See to the same effect *U. S. v. Hart*, 146 Fed. 202. Therefore, the fact that the goods purchased or received in pledge were issued as part of the clothing allowance of a soldier or sailor is no defense to a prosecution under the statute. *U. S. v. Hart*, 146 Fed. 202; *Lobosco v. U. S.* 183 Fed. 742, 106 C. C. A. 476; *Ontai v. U. S.* 188 Fed. 310, 110 C. C. A. 288. Compare *U. S. v. Michael*, 153 Fed. 609. In *Lobosco v. U. S.* supra, it was said: "It is assigned as error that the court did not dismiss the indictment on the ground that the goods purchased were not a part of the equipment of the marines, because they were furnished to them under their clothing allowance. There are two conflicting decisions, both in district courts, as to the status of articles issued to the soldier or sailor under his clothing allowance, viz., *U. S. v. Michael*, 153 Fed. 609, and *U. S. v. Hart*, 146 Fed. 202. We concur with the conclusion in the *Hart* case, for reasons which are sufficiently set forth in the earlier part of this opinion. The circumstance that in re-enacting section 5438 or part of the Federal Penal Code (section 35) Congress has added the words, 'whether furnished to the soldier, sailor, officer or person under a clothing allowance or otherwise,' is not important. It was a mere matter of precaution in view of the two conflicting decisions last above cited."

In *U. S. v. Brown*, 1 Mason 151, 24 Fed. Cas. No. 14,669, arising under an early act (Act of March 16, 1802 c. 9, § 19), which provided that any person purchasing the arms, uniform, or clothing from a soldier should be liable to fine or imprisonment, it was held that in order to render the purchaser liable it must be shown that the soldier had a special property right in the equipment by reason of his service and that if his possession was unlawful the person purchasing the property would not be held guilty as the property would not be in the lawful possession of the soldier within the meaning of the act.

COMMONWEALTH

v.

FIRST CHRISTIAN CHURCH OF
LOUISVILLE.

COMMONWEALTH

v.

STARKS.

Kentucky Court of Appeals—March 24, 1916.

169 Ky. 410; 183 S. W. 943.

Taxation — Exemptions — Property
Used for Religious Purposes.

The trustees of a congregation entered into a contract reciting that, pursuant to a vote of the congregation, they sold and agreed to convey to defendant the property of the church in consideration of the sum of \$350,000, \$100,000 to be paid in cash upon execution of the agreement, the remainder to be paid as it might be needed to make payments upon the contract for a new church, the congregation to retain possession of the property sold until the new church was completed. It is held that title to the premises passed to defendant, and he became at least the equitable owner, and so under Ky. St. § 4023, declaring that it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not, defendant was liable for taxes on the property.

[See note at end of this case.]

Same.

In such case, as defendant received compensation for all moneys paid to the church, he cannot escape taxation on the theory that the premises being used for religious worship were exempt under Const. § 170, and Ky. St. § 4026, exempting property used for religious worship from payment of taxes.

[See note at end of this case.]

Same.

Where defendant entered into a contract to purchase the property of a church congregation paying about one-third of the consideration in cash and agreeing to pay the remainder on demand, and the congregation retained a lien on the property, possession of which it was to retain until its new building was completed, the contract was valuable "property" subject to taxation.

[See note at end of this case.]

Same.

Exemption from taxation is a privilege which does not follow the property. Therefore on disposition of property used for religious worship the exemption from taxation does not follow the property.

[See note at end of this case.]

Same.

Under Const. § 170, exempting from taxation places actually used for religious wor-

ship and parsonages occupied as a home for the minister, a church congregation desiring a more suitable place for religious worship will not be taxed on funds to be invested in a new place of worship, which were derived from the sale of its old premises, notwithstanding the contract of sale, which provided for payments by the purchaser as needed, allowed the congregation to retain possession of its original property until the new church should be ready for occupancy; it being within the spirit of the constitution to exempt from taxation moneys intended to be devoted to acquiring a place of religious worship as well as the place itself.

[See note at end of this case.]

Appeal from Circuit Court, Jefferson county, Chancery Branch, Second Division.

Consolidated actions by Commonwealth of Kentucky, plaintiff, against First Christian Church of Louisville, Ky., and against John P. Starks, defendants. Judgments for defendants. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

Rowan Hardin for appellants.

H. L. Stone, Henry M. Johnson and M. S. Barker for appellees.

[411] HURT, J.—These two causes were, by the parties, agreed to be heard and determined together.

On the 4th day of February, 1909, the appellee, First Christian Church, of Louisville, Kentucky, which is a corporation created by a special act of the General Assembly for religious purposes, by its trustees, entered into a contract with the appellee, John P. Starks. The contract was reduced to writing and subscribed by the parties and delivered. The contract is in words and figures as follows:

This Article of Agreement, made and entered into by and between the First Christian Church of Louisville, Kentucky, by its trustees, Joseph P. Torbitt, Henry L. Stone, William S. Caldwell, Thomas J. Minary, and William E. Grinstead (duly authorized and empowered by a vote of the congregation of said church to sell the property of said church as hereinafter described) and John P. Starks, of the said city and state.

Witnesseth: That the said trustees have this day sold and by these presents do sell and agree to convey to said Starks the property of said church, located in the city of Louisville, Kentucky, on the northeast corner of Fourth and Walnut streets, fronting eighty-two (82) feet on Walnut street, and running back of that front between parallel lines and binding on Fourth street one hundred and sixty (160) feet to an alley, in con-

sideration of which said Starks agrees and promises to pay to said trustees the sum of three hundred and fifty thousand (\$350,000.00) dollars, as follows, to wit: He will pay one hundred thousand (\$100,000.00) dollars, in cash, upon the execution of this agreement, upon which the church will allow him interest at the rate of 3% per annum from the date of said payment until the delivery to him of the possession of said property, as hereinafter provided; and in addition to said one hundred thousand (\$100,000.00) dollars, he will pay upon demand from [412] time to time such sums of money in amounts of five thousand (\$5,000.00) dollars, or multiples thereof, as shall be needed from time to time by said church to make payments upon the construction of the new church which is to be built, upon which payments, in excess of said one hundred thousand (\$100,000.00) dollars, the said Starks shall be credited with interest at the rate of 5% per annum from the date of each such payments until the delivery to him of the possession of said property, as hereinafter provided; and when possession of the property herein provided for is delivered to said Starks he will pay the balance of the purchase price in cash, or in equal payments due in one and two years, respectively, from the date said church is vacated and possession thereof is surrendered and deed made therefor to said Starks by said trustees, with interest thereon from that date at the rate of 6% per annum until paid, for which notes will be given by said Starks to said trustees with a lien retained on said property to secure the payment thereof; said balance of the purchase price to be ascertained by deducting from three hundred and fifty thousand (\$350,000.00) dollars the said sum of one hundred thousand (\$100,000.00) dollars with interest at the rate of 3% per annum from the date of its payment to the date of ascertaining said balance, and deducting further such additional sums as shall have been paid by said Starks prior to said settlement, with interest on each of them at 5% per annum from the date of its payment to the date of said settlement, and deducting further the amount of the present usual real estate agent's commission for the sale of said property.

It is further agreed between the parties aforesaid, that the said church property shall remain in the possession of said trustees to be actually used for religious worship until the permanent new church, which is to be built by the said First Christian Church, shall be sufficiently completed for religious worship to be held therein, at which time they will vacate the property covered by this contract and deliver possession thereof and a good and sufficient deed therefor to said John P. Starks, and at which time the bal-

ance of said purchase price will be ascertained and paid, or notes given for the same, in the manner hereinbefore stated. Should the church building now on said property be wholly or partially destroyed by fire or otherwise before the time possession [413] is to be delivered, as hereinabove provided for, such loss shall be sustained by said Starks, but meantime he shall have the right to insure said building from loss by fire for his own benefit.

It is also agreed that said trustees shall have the right to remove from said property all the stone work in front of the church building thereon, including the stone columns, and to remove all furniture, the organ, seats, carpets, and any other movable articles that may be classed as furniture.

In Testimony Whereof, the said parties hereunto confirm this agreement by subscribing their names hereto in triplicate, this February 4, 1909.

First Christian Church of Louisville, Ky.

By J. P. Torbitt,

Henry L. Stone,

William S. Caldwell,

Thomas J. Minary,

William E. Caldwell,

Trustees.

John P. Starks.

By J. P. Torbitt, Atty.

The property, the sale of which was evidenced and made by this contract, was a church and attached grounds, which had been in use as a place of religious worship, by the congregation of the First Christian Church, for many years. The First Christian Church, under the terms of the contract, remained in possession of the property and used it for a place of religious worship until in October, 1911, when it executed a deed to it to appellee, Starks, and delivered the possession of the property to him, and at that time he paid the remaining balance of the purchase price, which he had agreed to pay for it. Although, according to the terms of the contract, he was to pay \$100,000.00 of the agreed purchase price upon the execution of the contract, he paid only \$90,000.00 of it between that time and September 1st, 1909. The \$90,000.00 was made in two payments, one of which was \$85,000.00 and the other \$5,000.00. Between September 1st, 1909, and September 1st, 1910, \$5,000.00 more was paid, and between the latter date and October 16th, 1911, and on the latter date the balance of the purchase money was paid. On the latter date the First Christian Church, by its trustees, executed and [414] delivered a deed of conveyance to Starks for the property.

The church building and its attached grounds, which had been purchased by Starks, was not listed nor assessed for taxation, in

the name of anyone, for the years 1910, 1911, and 1912. The appellant, by one of its revenue agents, instituted a proceeding in the county court for Jefferson county against the appellee, Starks, wherein it was sought to have the property assessed for taxation for state and county purposes for the said years, as the property of appellee, Starks. He resisted the effort and the county court sustained a demurrer to the proceeding and it was dismissed. Thereafter appellant appealed to the circuit court, where the demurrer was again sustained and the statement and proceedings dismissed, and an appeal was had to this court.

The contention made by appellee is, that during the years 1909, 1910, and until October 16th, 1911, the property was owned by the First Christian Church and that he did not become the owner of it until the deed was delivered to him for it, on the last mentioned date, and not having an interest in it, which was taxable, on the dates for the assessment of property for purposes of taxation, on the first day of September of the years 1909, 1910, and 1911, respectively, he cannot be made liable for the taxes upon it. An examination of the terms of the contract between the appellees does not leave much space for this contention to stand upon. When the writing undertakes to state the chief purposes of the parties to it, the following language is used:

"That the said trustees have this day sold and by these presents do sell and agree to convey to said Starks the property of said church, located, etc. . . . in consideration of which said Starks agrees and promises to pay to said trustees the sum of three hundred and fifty thousand dollars, etc."

The contract likewise provides, that in the event the building should be wholly or partially destroyed by fire or otherwise, before the possession of it should be delivered to Starks, the loss should fall upon him, and that he might insure it for his benefit, and, further, provided that the trustees should have the right to remove from the property all the stone work in front of the church building thereon, including the stone columns, and all the furniture, including the organ, seats, carpets, [415] and other movable articles, which might be classed as furniture. The purchase price was to be paid as follows: \$100,000.00 upon the execution of the contract, and the remainder in sums of \$5,000.00 and multiples of that sum, upon demand of the trustees, as it might be needed from time to time to make payments upon the construction of a new church to be built, and upon the execution of the deed and the delivery of the property to him, Starks was to pay any balance of the purchase price remaining unpaid or execute his notes for

same, with a lien upon the property to secure their payment. The possession was to be given, when a new church building, to be erected by the trustees, should be ready for use for religious worship, when the property purchased by Starks should be vacated. These provisions negative the contention that it was not a sale of the property, or that the parties had any other thing in contemplation. There was no condition provided for upon which either of the parties could escape the obligations imposed by the contract, and there was no event provided for, upon the happening of which, that either of the appellees could be released from performing the obligations which it imposed upon them. Either of the appellees could enforce the terms of the contract as against the other. The transaction, so far as vesting the equitable title to the property in appellee, Starks, is not distinguishable from the ordinary sale of real estate by the execution and delivery of a title bond. It made Starks the real or equitable owner of the property. The legal title was left to the church, which, under the terms of the contract, it could be compelled to transfer to Starks.

Section 4023, Kentucky Statutes, provides:

"The holder of the legal title, and the holder of the equitable title, and the claimant or bailee in possession of the property on the first day of September of the year the assessment is made shall be liable for taxes thereon, but, as between themselves, it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of the payment, etc."

Construing this statute, this court held, in the case of *Bond v. Brand*, 115 Ky. 634, 115 Ky. 632, 74 S. W. 673, that the purchaser of real estate at a decretal sale, made before the period for assessing the property for taxation, and where the report of the sale was not filed until thereafter, and [416] its confirmation did not occur until after the assessing period, and possession was not given until after the period for assessment, nevertheless the purchaser became the equitable owner of the property upon the date of his bid, and the execution of his bond for the purchase money, and the property was properly assessed against him at the assessing period, which intervened between his bid and the confirmation of the sale and delivery of the possession.

In *Hughes v. McCreary*, 86 S. W. 522, 27 Ky. L. Rep. 666, McCreary sold to Hughes a tract of land in July, 1902, and the transaction was evidenced by a writing, which stated the amount of money to be paid for the land, the time when it was to be paid, and when the deed was to be made and the possession of the land delivered. The first payment of

the purchase money was to be made on March 1st, after the making of the contract, and notes were then to be executed for the balance of the purchase price, and the deed was then to be executed and delivered, and possession given of the property. It was held, that being the equitable owner of the land from the date of the contract, it was the duty of Hughes to list the land for taxation at the assessing period following the making of the contract, and to pay the taxes thereon. The court, in that case, said:

"By the terms of the section (section 4023, supra), the holder of the equitable title should list the property and pay the taxes thereon. On the 15th of September (the then assessing period) the legal title to the property was in the appellee, S. C. McCreary, and the equitable title was in Hughes. In equity he had the right to compel the appellee to convey the property to him by a compliance upon his part with the terms of the sale. Hughes did not have the legal title to the property, and the effect of the transaction was to vest him with the equitable title thereto. It is our opinion that Hughes held the equitable title to the property, and he should have listed it for taxation and paid the taxes thereon."

In the light of the plain terms of the statute, and the decisions of this court, supra, it does not seem that there could be any doubt of the liability of the appellee, Starks, for the taxes upon the property for the years sued for, but the contention is made, that at each of the assessing periods for taxation, for the years sued for, Starks was not in the possession of the property, but that it was in [417] the possession of the First Christian Church at said times, and was "a place actually used for religious worship," and hence was exempt from taxation for state and county purposes, under the provisions of section 170, of the constitution, and section 4026, Ky. Statutes. It will be observed, that in accordance with section 4023, supra, and *Hughes v. McCreary*, &c., supra, and *Bond v. Brand*, supra, the possession of the property is not a controlling factor in determining the liability of an equitable owner of property for the taxes thereon. The statute, in fact, expressly provides, that the equitable owner shall pay the taxes, whether the property be in possession or not. However, in *Louisville v. Werne*, 80 S. W. 224, 25 Ky. L. Rep. 2196, this court held, that it was the use of the property, and not the ownership, which determined, under section 170, of the constitution, whether or not it was exempt from taxation. By section 170, supra, among other things, the following property is exempt from taxation:

"Places actually used for religious worship with the grounds attached thereto and used

and appurtenant to the house of worship, not exceeding one-half acre in cities and towns, and not exceeding two acres in the country."

In *Louisville v. Werne*, supra, Werne was the owner of a lot, which he had leased to a church for a period of twenty years, free from the payment of rents for its use, to be used as a place for religious worship. The church used it as a "place actually used for religious worship." Werne nor anyone else received anything for its use, in the way of rent or any gain. It was attempted to make him liable for the taxes upon it. It was held, that as its use was for religious worship, alone, it was exempt from taxation. The court, in the case, supra, said:

"It is the use of the property and not the ownership which determines the question of exemption. To hold that the congregation must be the absolute owner of the property used exclusively for religious worship, in order to create the exemption, would be to inject words into the constitution and to narrow the exemption which it expressly makes. . . . It is shown that Werne gets no rent from the property, and it is therefore not held for corporate or private profit nor used nor employed for gain by any person or corporation."

[418] The foregoing opinion is fully concurred in, but in the language of the opinion, if the property had not been used "exclusively" for religious worship, or if Werne had received rent for it, would it have been exempt from taxation, within the letter or spirit of the constitution? If property, which is owned by an individual, and which is "a place actually used for religious worship" one day in the week, and the remaining six days should be used by the owner in a gainful occupation, would it be exempt from taxation? If property is owned by a religious sect, or for that matter owned by anyone, and is actually used for religious worship, and no one receives any rent or compensation for its use, and no one gets any gain or profit for its use, there is no doubt of its being exempt from taxation, but a reference to the provisions of section 170, supra, in which are set out the different properties which are exempt from taxation, it will be found that there runs through it a purpose not to exempt from taxation any property which is employed or used for gain, by any person or corporation, except the household goods of persons with families, and crops produced in the year of the assessment and in the hands of the producer.

No one would seriously insist that the constitutional exemption from taxation would apply to property which the owner uses to let to rent to a religious body, to be used for religious worship, and the mere state-

ment of such a proposition is sufficient to show that the constitutional provision has no application to such a state of case, and that such was not in the contemplation of the makers of the constitution. So, it seems that if appellee, Starks, employed or used the property purchased by him for gain, by entering into such an arrangement with the trustees of the First Christian Church, that he was remunerated by the church for its use of the property for religious worship, the use he made of the property was one by which he received compensation for its use, and the use to which he put it was not for religious worship. When one lets his property for rent the use, which he is making of it, as the owner cannot be said to be a use for religious worship. The contract by which he purchased the property provided, that the church should remain in possession and use it for a place of religious worship until a new church, to be erected by it, should be ready for occupancy, but it, also, provided that the price to [419] be paid for the property should be \$350,000.00; that \$100,000.00 of this amount should be paid at once, and the remainder was to be paid in sums of \$5,000.00 and multiples thereof, upon demand, as it might be needed in the erection of the new church. Upon the first \$100,000.00 to be paid, at once, the church was to pay Starks three per centum per annum from the date of its payment until the final settlement, when the new church could be occupied, and the property delivered, and five per centum per annum was to be paid upon all the other sums paid before the final settlement, up to the time of such settlement. At such settlement, Starks, was, also, to be credited by the usual real estate agent's commission for making a sale of real estate. At the settlement made on October 16th, 1911, the three per centum per annum on the \$100,000.00, and the five per centum per annum on the other sums paid before that time amounted to the sum of \$11,332.31, and the amount credited for the usual real estate agent's commission was \$7,125.00, making in all the sum of \$18,457.34, by which Starks received credit upon the contract price. He says that he considered that he was only giving \$342,875.00 for the property, which was the contract price less \$7,125.00, the amount of the usual agent's commission. However, the proof shows that the church was refusing to consider any price for the property less than \$350,000.00, and that was the agreed price stated in the contract. It is difficult to conclude that the sum by which he was given credit was for any other purpose than to compensate him for the use of the property while the church remained in possession of it, since the sums paid by him were not loans, but each of them was due

and owing by him to the church, at the time they were paid, and his obligation to the church to pay the purchase price did not bear interest. It therefore appears that the circuit and county courts were in error in sustaining the demurrer to the statement of appellant.

The proceedings in the county court against the First Christian Church to assess the value of the contract between the appellees for the sale of the church buildings and grounds, for taxation, as against the church, resulted in a judgment of the county court to the effect, that the contract was property subject to taxation, and that the value of it on September 1st, 1909, was \$210,745.98, and on September 1st, 1910, its value was [420] \$220,576.04, and adjudged that the church be assessed with said sums for taxation as of those dates, respectively. The circuit court, upon appeal, reversed the judgment of the county court and dismissed the statement of appellant, and it has appealed.

The contention on the part of appellant is, that the contract is property; that all property is taxable, which is not exempt therefrom by reason of section 170, of the constitution; and that the contract is not exempt under the provisions of that instrument.

The contention of appellee, First Christian Church is, that the contract is for the sale of a place actually used for religious worship, and being then used for religious worship, and is, therefore, exempt from taxation; that out of the first \$100,000.00 paid upon the contract, it had purchased a site for the new church building, which it mentioned in the contract as being in contemplation, and had, at the time of the filing of its answer, been engaged about one year in erecting the new church building to be used by it as a place of religious worship, but which was then not completed, and that the new place it was preparing for worship had been assessed for taxation as of September 1st, 1909, and September 1st, 1910, and it had fully paid the taxes thereon; that the property covered by the contract was, at the time of the sale, worth only \$325,000.00 and that the consideration received by Starks, for execution of the contract being worth only \$325,000.00, and he having agreed to pay \$350,000.00 therefor, and that the church building and grounds being exempt from taxation, that the contract was worth only \$18,000.00 to the church; that the church property, for the sale of which the contract was made, being exempt from taxation, it was as if taxes had been paid thereon, and a taxation of the contract would, therefore, be double taxation; that the contract was really not property subject to taxation. That the contract was valuable property, and that property of such kind is ordinarily subject to

taxation, there is no doubt. It was the obligation of a solvent man, secured by a lien upon the property to pay the church the sum of \$350,000.00—\$100,000.00 of which was immediately due and the remainder was due upon demand. It was an obligation which was capable of enforcement by legal proceedings, if necessary.

In *Com. v. Kentucky Distillers, etc. Co.* 143 Ky. 323, 136 S. W. 1032, this court said:

[421] "Any existing, enforceable, collectible demand that one person has against another or against property upon which it is a lien, or out of which it can be collected, is property."

The same doctrine was held in *Gish v. Shaver*, 140 Ky. 647, 131 S. W. 515.

Exemption from taxation is a privilege which does not follow property when it is sold and goes into the hands of persons or is applied to uses, for whom or for which no constitutional provision provides for it an exemption from taxation. The contention that the property being exempt from taxation, that such state would be the same as if the taxes had been paid upon it, and that to tax the obligation given for the sale price of it would therefore be double taxation, does not seem to be meritorious. It is not different from the every-day transactions, where an individual purchases property and gives his note for it, and thereafter the property is liable for taxation in his hands, and his obligation for the price of it is liable for taxation in the hands of the holder.

It can only be inferred from the terms of the contract that the sums of money which Starks paid in settlement of the purchase price of the property sold him was used by the church authorities in the purchase of a lot and the erection thereon of another place to be actually used for religious worship. The answer alleges, only, that out of the first \$100,000.00, paid on the contract, that a lot was purchased for the erection of a place of worship, and that the church had been engaged in the erection of the buildings upon it for that purpose during a year before the filing of the answer, and that the building had not yet been completed. The averment that the church had been assessed for taxation with the value of the proposed new place of worship for the years 1910 and 1911, and had paid the taxes thereon, is denied by the reply, and there is no proof in the record to support the averment. This, however, does not seem to be a material question for consideration, as the county court did not assess, as against the church, for taxation, the value of any portion of the obligation which had already been paid to the church, at either of the two assessing periods.

The exemption of property from taxation, which is owned by religious societies, and provided for by section [422] 170, of the con-

stitution, in addition to the exemption heretofore quoted, is the following:

"All parsonages or residences owned by any religious society and occupied as a home, and for no other purpose, by the minister of any religion, not exceeding one-half acre of ground in towns and cities, and two acres of ground in the country, appurtenant thereto."

Thus, it appears that the constitution makes selected the property owned by religious societies, to be exempt from taxation, consists of only two items: (1) Places actually used for religious worship, etc.; and (2) parsonages occupied as a home by the minister, etc. While it is true that the property owned by religious societies, and which is exempt from taxation, must not be confounded with that of institutions of "purely public charity," as it has been held by this court that the property of a church is not included within the exemption allowed for institutions of "purely public charity," and while it had been held by this court, in *Com. v. Thomas*, 119 Ky. 208, 83 S. W. 572, 6 L.R.A.(N.S.) 320, 26 Ky. L. Rep. 1128; *Broadway Christian Church v. Com.* 112 Ky. 448, 66 S. W. 32; and *Calvary Baptist Church v. Milliken*, 148 Ky. 580, 147 S. W. 12, that the only property of a religious society, which is exempt from taxation, are the two kinds mentioned in section 170, *supra*, yet the precise question in this case has never been determined by this court, and the construction to be placed upon the provision as applied to the facts of this case should be one supported by the light of reason, and not one, which would lead to a defeat of the purpose for which the constitutional provision was adopted.

The contract between the appellees, and the proof shows that the property which was sold to Starks by the First Christian Church had theretofore been exempt from taxation as a place actually used for religious worship." While there is no merit in the contention that the proceeds of the sale of the property, which is exempt from taxation, is, on that account, exempt when it is sold and the proceeds held or applied to other purposes, but it is a matter of common knowledge, that religious bodies, seeking to establish places for religious worship, are obliged to secure funds for the purpose of purchasing the grounds and erecting the necessary buildings thereon, and that the negotiations necessary for the consummation of such a project require time for their doing. The evident purpose of the constitution makers was to exempt [423] "places actually used for religious worship," and it does not appear to be consistent with the letter or spirit of section 170, *supra*, to impose taxes upon funds, which have been donated or otherwise secured by the members of a religious sect which hold some other obligations to pay

same with the present, in good faith, purpose to presently purchase the necessary grounds and erect the necessary buildings thereon for the purposes of religious worship, and in pursuance of such intention are presently applied to such purpose. To hold that such funds are liable for taxation would be to rest the constitutional exemption upon a very narrow and inconsistent basis.

In *Louisville v. Werne*, 80 S. W. 224, 25 Ky. L. Rep. 2196, Werne leased his lot to the Walnut Street Baptist Church to be used for a place of religious worship, on March 31st, 1890. The lot had no building upon it, but the trustees of the church took possession of the lot in May or June, 1891, and moved a house upon it and began holding services in it. An attempt was made to subject it to taxation for the year 1891, the assessing period for the year 1891 being September, 1890, at which time there was no building on the lot, and it was not actually used for religious worship until August, 1891. This was before the adoption of the present constitution, and the statute upon the subject of exemptions from taxation exempted "public schools, churches, and all property of seminaries, asylums, hospitals, infirmaries, colleges, and all other funds devoted to charitable purposes and church parsonages, . . . provided that nothing herein shall be construed as exempting any property which is used or employed for the gain of any person." In that case the court held that the word "funds," as used in the statute, was used in the sense of capital, and held, that, although the lot did not have a church upon it at the assessing period of September 1st, 1890, the lot being at that time in the hands of the trustees of the church and under their control and with no right to use it for any other purpose, except for a church, that it was exempt from taxation under that statute.

In *Com. v. Gray*, 115 Ky. 665, 74 S. W. 702, this court, in construing that portion of section 170, of the constitution, which exempts "institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the [424] cause of education," held that the word "institution," as there used, was not simply a building or a plant or a body corporate, but it was that which might be set up, provided, ordained, established, or set apart for a particular end, and that a devise in a will, which set apart sums of money and the income of it to be used exclusively, for the education of four indigent children, was an "institution" within the meaning of the constitutional provision, without regard to the particular form of its investment.

In the instant case, the fact that the contract sought to be taxed was an obligation

for the price of exempted property does not seem to be material. The proceeds of the sale of the exempted church property were set apart by the church by the contract, for the present purpose of securing the necessary lot and erecting the necessary buildings thereon to make "a place actually used for religious worship."

In *Com. v. Lebanon Water Works*, 130 Ky. 61, 112 S. W. 1128, 20 L.R.A. (N.S.) 224, there was a sinking fund in the hands of the commissioners for the purpose of liquidating bonds which were issued to purchase the water works. The water works, under section 170, of the constitution, were exempt from taxation, as public property. The sinking fund commissioners invested the fund in their hands, which was to be held and used for the purpose of liquidating the bonds, in taxable bonds, and this court held that the fund, nor the bonds in which it was invested, could be lawfully taxed.

Applying the principles of these cases to the facts of the instant case, the spirit and meaning of section 170, *supra*, would exempt from taxation funds held by a church for the present, in good faith, purpose of securing for itself a place actually to be used for religious worship, and which are presently invested in such property. In the instant case, the obligation of Starks was for the payment to the church of the price of the property, which was exempt from taxation, the sale was made for the purpose at once of securing a more desirable place for religious worship with the proceeds of such sale. When a new place of actual religious worship was secured, and the funds arising from the sale invested therein, it would, without question, be exempt from taxation. To the extent that the proceeds of the obligation of Starks was invested in another place of religious worship, it was [425] simply the changing of the proceeds of the sale from one piece of exempted property to another, and a reasonable construction of the constitutional provisions, *supra*, would not render such proceeds liable for taxation, because the assessing period should catch the funds designed to provide a place of religious worship between the exempted piece of property, out of which they came, and the one into which they are to be presently invested. Such funds are the representative of a "place actually used for religious worship," and without such funds, the religious body could not acquire a place for worship. To tax such funds would defeat the purpose of the exemption. If the church made use of any of the funds, for which it sold its church building and grounds, for any purpose, other than providing it with another place of religious worship, such funds were liable for taxation for the year, at the assessing period of which the church had such

funds on hand or held such obligation for them.

Neither the judgment of the county nor the circuit court is in accord with the views herein expressed. The county court was in error in holding that the entire value of the contract was taxable, at each of the assessing periods at which it was sought to be assessed, and the circuit court in holding that no part of the value of the contract was assessable, without any proof as to whether the proceeds of the obligation were invested in another place for religious worship, or were otherwise used by the church.

For the reasons indicated the judgment in each of the causes is reversed, and they are remanded for proceedings consistent with this opinion.

The whole court sitting, Chief Justice Miller dissenting.

ON PETITION FOR REHEARING.

171 Ky. 62; 186 S. W. 880.

(June 16, 1916.)

[62] HURT, J.—The petition for rehearing calls attention to the fact, that the proceeding by the Commonwealth against the appellee, John P. Starks, was an appeal from a judgment by which a demurrer was sustained to the petition of appellant, and expresses a fear that under [63] the terms of the opinion, upon the return of the case to the court, below, the appellee would be precluded from filing an answer and offering any valid defense, that he may have, based upon the facts of the controversy. This court did not overlook the fact, that the question before it was simply whether or not the petition stated a cause of action. The opinion was written, bearing in mind, the elementary rule, that for the purposes of the demurrer the truth of the allegations of the petition was admitted, and the conclusions of the opinion are based upon that presumption, as in any other case. The opinion expressly holds, simply, that the demurrer should have been overruled. It was in no wise intended to make a final adjudication of the case or to preclude any valid defense, based upon the facts of the controversy. The petition for rehearing is therefore overruled, and if any expressions in the opinion are susceptible of the construction, that the appellee is precluded from offering an answer and presenting any valid defense, based upon the facts of the controversy, the opinion is modified to the extent herein stated.

NOTE.

The reported case involves the application of a constitutional provision exempting from

taxation "places actually used for religious worship" to a transaction whereby a church edifice was sold, the price, paid in installments, was devoted to the erection of a new church, and the religious society remained in possession of the property sold and used it for church purposes until the new church was completed. It appearing that the grantee of the church property received some pecuniary return from the transaction during the period after the sale and while the building was occupied for church purposes, it is held that the property was taxable during that period. But with respect to the funds derived from the sale it is held that they were not taxable either during the time when they stood as a legal obligation due to the religious society or after their payment and before they were devoted to the purchase of the new church, it appearing that the design was at all times so to use them. The question what is included in the exemption of a religious institution from taxation is discussed in the note to *St. Paul's Church v. Concord*, Ann. Cas. 1912A 350. See also the recent case of *Cole v. State*, Ann. Cas. 1916D 1256, as to the effect of a contract of sale on the exemption of church property from taxation.

BRAEUEL ET AL.

v.

REUTHER ET AL.

Missouri Supreme Court—February 17, 1917.

270 Mo. 603; 193 S. W. 283.

Wills — Contest — Persons Entitled to Contest — Interest.

A will contest as authorized by an interested person under Rev. St. 1909, § 555, can be brought only by one having a direct pecuniary interest in the final determination.

Abatement of Will Contest — Death of Contestant.

If a will contest is no different from an ordinary civil proceeding, it will survive and may be revived under Rev. St. 1909, §§ 1916-1925, in the name of the successor to the parties plaintiff, in view of section 1916, providing that no action shall abate by the death, marriage, or other disability of a party if the cause of action survives.

Same.

A proceeding to contest a will is peculiar, in that, when filed, the proponents have the burden of proving affirmative facts essential to validity of the will, and therefore, after the contest is filed, the court will determine the validity of the will, and no reviver is necessary if the contestants die.

Same.

Rev. St. 1909, § 101, authorizing the administrator to commence and prosecute all actions which may be maintained and are necessary in the course of his administration, and defend all such as are brought against him, does not warrant the administrator's revival of a will contest which is not in any sense a property right, but only a mere right of action.

Right of Administrator of Heir to Contest.

Under Rev. St. 1909, § 104, providing that executors and administrators shall prosecute and defend all actions commenced by or against the deceased at the time of his death, and which might have been prosecuted or maintained by or against such executor or administrator, the administrator cannot prosecute or maintain actions unless he might have done so had the action not been brought by the deceased.

[See note at end of this case.]

Same.

Under Rev. St. 1909, § 105, authorizing administrators to prosecute actions for torts, there is no authority in the administrator to prosecute a will contest.

[See note at end of this case.]

Statute Authorizing Contest — Strict Construction.

The right of action to contest a will, being purely statutory, is in derogation of common law, and subject to the rule that its provisions must be strictly construed.

Right of Administrator of Heir to Contest.

Conceding that Rev. St. 1909, § 555, in regard to will contests is remedial, and should be liberally construed, it permits contest only by persons interested in the probate; so that the administrator of a deceased contestant is not entitled to revival of the action in his name.

[See note at end of this case.]

Appeal from St. Louis City Circuit Court: FISHER, Judge.

Petition for revocation of will of Anna Zwingmann, deceased. John William Braeuel et al., plaintiffs, and John F. Reuther et al., defendants. Judgment for defendants. Plaintiffs appeal. On motion to revive by administrators of plaintiffs, and on motion to abate. The facts are stated in the opinion. **MOTIONS OVERRULED.**

Safford & Marsalek for appellants.

Morton Jourdan for respondents.

[604] WALKER, P. J.—Anna Zwingmann died in the city of St. Louis in April, 1912, leaving personal property therein. On April 23, 1912, there was admitted to probate in the probate court of said city a paper purporting to be her last will. In May, 1912, the plaintiffs herein, brothers of the deceased, brought suit in the circuit court of said city

to set aside the will on the grounds of fraud, duress and mental incapacity of the testatrix to make a will. At the April term, 1913, of the circuit court of said city a trial was had therein resulting in a finding and a judgment that the paper so admitted to probate was the last will and testament of the said Anna Zwingmann. Thereafter plaintiffs perfected an appeal from said judgment to this court. The case was set for hearing on said appeal on the 19th day of October, 1916, and on that day was taken as submitted. It now appears that both of said plaintiffs are dead, one having died in May, 1915, and the other in July, 1916. On the 7th day of November, 1916, the deaths of the plaintiffs were suggested to this court and a motion was made to revive in the name of their administrator, who, as stated in said motion, had been appointed by the probate court of the city of St. Louis in October, 1916, but was not one of plaintiffs' former counsel in the contest proceedings. A motion to abate the action has been filed by counsel for respondent. These motions will receive consideration in their order.

It is necessary, under the statute (Sec. 555, R. S. 1909) to authorize an action to contest at will, that those who instituted same shall have a direct pecuniary interest in the final determination of the question as to whether the instrument is the last will of the decedent. We said this much in *Watson v. Alderson*, 146 Mo. l. c. 343, 48 S. W. 478, 69 Am. St. Rep. 615, and expressive of the same conclusion but in different terms, it was said in *State v. McQuillin*, 246 Mo. l. c. 691, Ann. Cas. 1914B 526, 152 S. W. 341, that the statutory interest referred to must be a financial interest in the estate and one which would be benefited by setting aside the will; also in *Teckenbrock v. McLaughlin*, 246 Mo. l. c. 719, 152 S. W. 38, it was held that generally a direct pecuniary interest at the time of the probate of the will is a condition precedent [605] to the right to contest; and in *Gruender v. Frank*, 267 Mo. 713, 186 S. W. 1004, the latest expression of this court on the subject, the language of the preceding cases as to what constitutes an interest within the meaning of the statute is quoted with approval.

The plaintiffs were the sole contestants. So far as the record discloses they were the only persons capable of inheriting from the decedent had she died intestate. The setting aside of the will, therefore, would have injured to their pecuniary benefit and as a consequence they were interested in the devolution of the property of the decedent to such an extent as to authorize them to institute the pending action. Plaintiffs' right to institute the action having been determined, what effect has their death pending the ap-

peal upon this proceeding? If this action is in no wise different in its material features from the ordinary civil proceeding it will survive or continue, and may, upon compliance with our rules of procedure (Art. 10, chap. 21, R. S. 1909) applicable in such cases, be revived in the name of the party entitled to succeed plaintiff in the prosecution of the action. This follows from the language of the statute (Sec. 1916, R. S. 1909), which provides that "no action shall abate by the death, marriage or other disability of a party, if the cause of action survive or continue."

A proceeding to contest a will, however, is possessed of peculiar features; after the will has been probated an action questioning its validity casts upon those who claim under it the burden of proving it. Although the contestants who have brought the action may introduce no evidence and may even abandon the contest, the burden of proving the will still devolves upon those who would maintain it. While they are not required to prove a negative, they must prove the affirmative facts essential to the execution of a valid will. [*Bradford v. Blossom*, 207 Mo. l. c. 228, 105 S. W. 289.] From this ruling, which is but a reiteration of a like doctrine announced in many preceding cases, it follows that the question as to the survival or continuance of actions of this character in the event of the death of parties thereto is eliminated from [606] the equation. Upon the action being brought the parties thereto become of minor importance, the prime purpose of the proceeding being to determine whether there is a will or not. The importance of this concrete question being paramount, we might well content ourselves with the course that having regularly acquired jurisdiction we will, regardless of the parties and with indifference to the motions filed herein, review the record and render judgment thereon; but it is meet and proper that other questions submitted pro and con in regard to these motions be determined.

The appointment of the administrator of the estates of plaintiffs made below, and the motion filed here to revive in his name, was evidently upon the assumption or theory that in the absence of this course the action would abate. This result would not have followed, as we have shown, on account of the nature of the action and the purpose it seeks to effect. There being no abatement, the motion to revive was therefore without merit.

But viewed from another vantage than that which presents itself on account of the nature of the action, are there other reasons existent for the nominal substitution of the administrator for the plaintiffs?

The purpose of the appointment of an administrator is that he may manage and settle

the estate of the intestate. The limit of his power is to be found in the statutes which authorize his appointment. An analysis of these statutes is pertinent. Under section 101, Revised Statutes 1909, the administrator is authorized "to commence and prosecute all actions which may be maintained and are necessary in the course of his administration, and defend all such as are brought against him." A will contest is clearly not within this class. It is in no sense a property right and is therefore not such an action as is authorized to be maintained by the administrator in the course of his administration within the meaning of the section quoted. Being a mere right of action a judgment in the administrator's favor would result in the recovery of nothing more than the establishment of the right. Such is the character of this right [607] that it is neither assignable nor descendible (*Storrs v. St. Luke's Hospital*, 180 Ill. 368, 54 N. E. 185, 72 Am. St. Rep. 211), and as the administrator, if successful in maintaining it, would recover nothing tangible, it was not contemplated by the statute that he bring suit to establish it. As was aptly said by the Supreme Court of Ohio in discussing a correlative question: "An executor or administrator is not a necessary party where there are no debts and no personal property." [*Andrews v. His Administrators*, 7 Ohio St. 143.] This conclusion accords with reason and it was so held in *Ligon v. Hawkes*, 110 Tenn. 1. c. 21, 75 S. W. 1072, in construing a statute of that state similar in all of its material features to that under review. An Illinois statute upon the same subject has received a like construction. [*Stauder v. Tscherner*, 187 Ill. 19, 58 N. E. 317.]

Section 104, Revised Statutes 1909, provides that "executors and administrators shall prosecute and defend all actions commenced by or against the deceased, at the time of his death, and which might have been prosecuted or maintained by or against such executor or administrator." This section simply means that executors and administrators may prosecute and defend such actions as may have been brought by or against the decedent at the time of his death which might have been prosecuted or maintained by or against such executors or administrators. In other words, the class of personal representatives mentioned cannot under this statute prosecute and maintain actions unless they were in a condition to bring a like suit if it had not been brought by the deceased. [*Ferrin v. Kenney*, 10 Metc. (Mass.) 294; *Schreiber v. Sharpless*, 110 U. S. 76, 3 S. Ct. 423, 28 U. S. (L. ed.) 65.]

Section 105, Revised Statutes 1909, cited by the movers of the motion to revive, has no application to the power of administrators in a case of the character here under consid-

eration. This section authorizes administrators, under the conditions therein named, to prosecute and defend actions for torts to the property, rights or interests of the decedent.

There is therefore neither in the nature of the action to contest a will nor the statutes defining the power of administrators [608] any express authority conferred upon them to institute or maintain this character of action. In *Teckenbrock v. McLaughlin*, 246 Mo. 1. c. 719, 152 S. W. 38, we said that the right to contest a will is statutory and that an interest in the probate of same is essential to the existence of this right. This has ever been the rule in this State. *Gantt, J.*, speaking for this court, said in effect in *Stowe v. Stowe*, 140 Mo. 1. c. 604, 41 S. W. 951, that "wills are creatures of the statute and that proceedings to set them aside are vested exclusively in courts of law and that this rule of construction has been adhered to by this court from *Lyne v. Marcus*, 1 Mo. 410, down to and including the case then under consideration." There has been no variance since in this conclusion. Courts elsewhere have reached the same conclusion. [*U. S. v. Perkins*, 163 U. S. 625, 16 S. Ct. 1073, 41 U. S. (L. ed.) 287; *Kochersperger v. Drake*, 167 Ill. 122, 47 N. E. 321, 41 L.R.A. 446.] The right of action to contest a will being purely statutory, it is therefore in derogation of the common law and hence subject to the rule that its provisions must be strictly construed. Thus construed the procedure prescribed, or in other words the rights granted and the powers conferred, must be limited to the express terms of the statute. Thus limited there is an absence of authority in an administrator to either institute or maintain a suit to contest a will.

If, however, another well established rule of statutory construction be invoked, viz., that remedial statutes are to be liberally construed (*Rozelle v. Harmon*, 103 Mo. 339, 15 S. W. 432, 12 L.R.A. 187) and it be conceded that the statute in regard to the contest of wills is within this class, then upon a reference to its express terms we find that "only persons interested in the probate of wills" can be made parties to contests of same, and bearing in mind the character of this interest, as frequently defined by this court, the conclusion follows that although the statute may be remedial in its nature and hence subject to liberal construction, such construction cannot extend beyond its plain terms (*Caldwell v. Renfro*, 99 Mo. App. 376, 73 S. W. 340), which limit the right of action to those named.

A persuasive ruling in support of this conclusion is to be found in the determination of an analogous question [609] in the case of *In re Soulard*, 141 Mo. 642, 43 S. W. 617. There the court, in passing upon the question as to the liability of an estate for expenses

incurred in a will contest, said in effect that "the executor of a will is entitled to be reimbursed out of the estate for necessary expenses incurred by him in having the will probated, but expenses incurred in the circuit court growing out of a contest of the will should be paid by the parties interested in that proceeding, viz., the heirs or the legatees." If the estate is not to be burdened, as is held in this case, with expenses of litigation of this character, it would seem to follow that the executor or administrator should not be made even a nominal party. His presence in the proceeding adds nothing to its progress or purpose; and, to employ a homely simile, he would constitute "a fifth wheel" in the chariot of procedure.

The rulings of courts of last resort in other jurisdictions in similar cases add force to the correctness of the conclusion here announced. In *Diffenderfer v. Griffith*, 57 Md. 81, the court held, in a case involving the validity of a will, that the trial court upon the suggestion of the death of one of the contestants had no power to substitute a new party in the place of the deceased, but that the survivor could effectively proceed in the trial of the issue; that the right to prosecute a suit to contest a will did not devolve upon the executor or personal representative of the deceased, because the latter's right in this regard was purely personal and died with him; and that it was not incumbent upon the personal representative to participate in the proceedings, so far as any duty to the estate of the deceased was concerned. This ruling was based on the absence from the Maryland code, as is the case here, of any authority for substituting parties to suits in proceedings of this character. In California various phases of the question here involved have received consideration. In *Roach v. Coffey*, 73 Cal. 281, 14 Pac. 840, it was held that an administrator cannot represent either side of a contest between heirs, devisees or legatees contesting the distribution of the estate. In the case of *In re Sanborn*, 98 Cal. 103, 32 Pac. 865, and [610] that of *In re Hickman*, 101 Cal. 609, 36 Pac. 118, the court held that an administrator, as such, has no interest in the estate other than to discharge the duties devolving upon him under the law. In *Bates v. Ryberg*, 40 Cal. 463, which is cited with approval in the *Matter of Marrey*, 65 Cal. 287, 3 Pac. 806, the court held that an executor cannot maintain an appeal from an order of distribution of the assets of an estate on the ground that the property was improperly divided between the legatees. In the case of *Storrs v. St. Luke's Hospital*, 75 Ill. App. 152, it was held that the right to contest a will should be limited to persons interested therein; that this was a personal privilege and when they died the effective force of the statute, so far

as they were concerned, died with them; that it did not descend to their heirs nor survive to their administrators (citing cases).

Our conclusion being evident that the substitution of an administrator is not necessary in the event of the death of a contestant in cases of this character, the question naturally arises as to who will represent the interests of such contestants in the event of their death pending a proceeding, as in the case at bar. We have heretofore indicated in discussing another phase of this matter that such representation is not necessary. The purpose of the proceeding is to determine whether or not there is a will. The contestants under our law are mere instruments in effecting this purpose, and the suit having been brought by them cannot be dismissed, but must be finally determined although the contestants acted voluntarily in the first instance in bringing the action. Having so acted their powers cease except to see that the proponents establish the will. Whether, however, they see to this or not is a matter of indifference, because the action having been begun the duty devolves upon the trial court to see that it is finally determined, and this rule has a like application when cases of this character reach this court upon appeal. From this it follows that the motion to revive in the name of the administrator should be overruled.

The reasons stated in support of this conclusion are a sufficient answer to the motion filed by respondents herein [611] that the action should abate. Even if the action had been improperly brought so far as the parties plaintiff were concerned, we have held that proper parties in interest might be substituted therefor on the ground that such substitution did not change the nature of the action but simply properly submitted the issues for the court's consideration. It was so ruled in the case of *Lilly v. Tobbein*, 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 887. The motion to abate is therefore overruled.

Under the ruling in the *Lilly-Tobbein* case others who have such an interest in the probate of the will herein as is defined by the statute may, upon proper application therefor embodying a satisfactory showing of such interest, be made parties plaintiff hereto; but whether such application is made or not the court having acquired jurisdiction will finally determine the matter at issue.

All concur.

NOTE.

Power or Duty of Administrator, Guardian, or the Like, to Contest Will.

Generally, 537.

Executor or Administrator, 537.

Guardian or Guardian ad Litem, 538.

Generally.

As a general rule no person is entitled to maintain a will contest who has not a direct interest in having the will set aside, and the right of a fiduciary to contest is determined by that rule. In the case of *In re Stewart*, 107 Ia. 118, 77 N. W. 574, it was said: "We have no statute defining the qualifications of those who may contest the probate of a will, but we understand the general rule to be that such action can be taken only by one who would have a beneficial interest in the estate, if there was no such will." So in *Matter of Davis*, 182 N. Y. 468, 75 N. E. 530, it was said: "The statute in authorizing a person 'who is otherwise interested in sustaining or defeating the will' to appear and at his election to support or oppose its probate, means only a person who has a pecuniary interest to protect, either as an individual or in a representative capacity. An interest resting on sentiment or sympathy, or on any basis other than the gain or loss of money or its equivalent, is not sufficient, but any one who would be deprived of property in the broad sense of the word, or who would become entitled to property by the probate of a will, is authorized to appear and be heard upon the subject."

A receiver appointed in supplemental proceedings is not entitled to contest the will of the debtor's wife. In *re Brown*, 47 Hun 360, 14 N. Y. St. Rep. 622, wherein it was said: "The last will and testament of M. Louise Brown, the wife of George W. Brown, so disposed of her property as to deprive him of all interest in her estate. The receiver of the property of the husband, appointed in supplementary proceedings instituted by his creditors, filed objections to the will, and desired to contest the same before the surrogate. The surrogate struck out the objections and refused to permit the receiver to appear and contest the probate of the will, because he was not interested in the estate of the deceased. If the will was set aside and declared invalid, its destruction would afford the creditors of the husband no interest in his wife's estate. They would still have a claim against the husband and they would have nothing more."

Executor or Administrator.

In the reported case it is held that the personal representative of a deceased heir who was entitled to contest a will has no right to initiate or continue a contest. In *Selden v. Illinois Trust, etc. Bank*, 239 Ill. 67, 87 N. E. 860, 130 Am. St. Rep. 180, a similar ruling was put on the ground that the right to contest is personal and does not survive. Compare *Crawfordsville Trust Co. v. Ramsey*, 178 Ind. 258, 98 N. E. 177. In New York the personal representative of a

deceased heir is entitled to contest the ancestor's will. *Judson v. Staley*, 163 App. Div. 62, 148 N. Y. S. 733; *Matter of Herrmann*, 91 Misc. 464, 154 N. Y. S. 957. In the case first cited it was said: "The complaint shows that in the absence of a will Adam Frederick would have been entitled to a share of the real and personal property of the alleged testatrix. He having survived her, his interest in her real estate, if any, would go to his heirs, and in her personal estate to his personal representatives. The plaintiffs therefore are interested and may maintain the action." In *Matter of Milliken*, 32 Misc. 317, 66 N. Y. S. 724, it was held that there was no right of contest by the personal representative of a person who was entitled to but a life interest in the testator's property.

In two jurisdictions it has been held that where an administrator has been appointed under the supposition of intestacy, the person so appointed is entitled to resist the probate of a will subsequently produced. In *re Cornelius*, 14 Ark. 675; *Matter of Davis*, 182 N. Y. 468, 75 N. E. 530. In the case last cited it was said: "As was said by the learned surrogate in his opinion, 'the right to administer the estate is a sufficient interest in this state to entitle the person in whom it is vested to contest the probate of a will.' The administrator in California was authorized by a decree of the proper court in that state to take possession of the assets of the deceased in his county, to convert them into money and to distribute the proceeds according to law. That decree was granted before any application had been made to prove the will. The assets were of great value and the administrator had a personal interest to the extent of his fees for services already rendered, and a much more important interest as the representative of others, for if there was no will, he had exclusive jurisdiction and control of all the personal property of the decedent in the county of Fresno, California, for the purpose of administration. He represented the beneficiaries, who were the substantial owners of the property. Probate of a will, however, would deprive him of power to administer and leave the validity of all his acts before he heard that there was a will open to question. He had an interest to protect and the right to become a party to the proceeding, so as to see that no paper purporting to be a will of the decedent was admitted to probate unless it was genuine and executed by a competent person according to law."

The contrary view has been taken in other jurisdictions. Thus in *Storrs v. St. Luke's Hospital*, 180 Ill. 368, 54 N. E. 185, 72 Am. St. Rep. 211, the court said: "The other appellant, the Chicago Title and Trust Company, administrator *de bonis non* of the estate of George M. Storrs, was not a proper

party complainant here, because it had not such an interest, as is contemplated by the statute. The administrator *de bonis non* merely holds his title in *autre droit*, as trustee, for the purpose of distribution." So in Parsons's Estate, 65 Cal. 240, 3 Pac. 817, in denying to an administrator an allowance for his expenses in making a contest it was said: "This item is not a charge against the estate; it was the affair of the heirs, as such, to contest, if they wished, the probate of the document—not of the administrator. The latter is an officer to administer the estate for the benefit of those interested, leaving interested parties to settle their own differences."

A like conflict exists as to the right of an executor named in one will to oppose the probate of an alleged later will. In the case of *In re Stewart*, 107 Ia. 117, 77 N. W. 574, it was held that the executor named in the prior will had no right to maintain a contest. But in *Matter of Greeley*, 15 Abb. Pr. N. S. (N. Y.) 303, it was said: "The executors named in the will of 1871 have clearly, by statute, an express right to have that will proved, if they can establish the fact that it is the last will, and they may rightfully contend against the validity of any alleged subsequent will as an obstacle in the way of establishing the will under which they claim. Their interest in this regard is very apparent. For, if they can succeed in establishing their will, the title to the movable goods of the testator, though in ever so many different and distinct places, vests in them, in possession, etc.—indeed, did so vest presently upon the testator's death." And see *Connely v. Sullivan*, 50 Ill. App. 627; *In re Coursen*, 4 N. J. Eq. 403.

It has been held that the public administrator has no right to contest a will to secure for himself the right to administer. In *re Sanborn*, 98 Cal. 103, 32 Pac. 865; In *re Hickman*, 101 Cal. 609, 36 Pac. 118; *State v. District Ct.* 34 Mont. 226, 85 Pac. 1022. In the case first cited it was said: "The probate of a will can be contested only upon 'written grounds of opposition' filed by a 'person interested'—that is, interested in the estate, and not in the mere fees of an administration thereof. (Secs. 1307–1312, Code Civ. Proc.) A public administrator has no interest in an estate, or in the probate of a will; that is a matter which concerns only those to whom the estate would otherwise go. . . . If a public administrator could legally assume the character of a standing contestant of wills, notwithstanding the wishes of heirs and devisees, he would certainly enlarge the sphere of his activities; but the limitations of the statute do not allow such inflation." In *State v. Superior Ct.* 148 Cal. 55, 82 Pac. 672, 2 L.R.A. (N.S.) 643, it was held that the public administrator was not entitled to contest a will because of a remote

chance that an escheat of the property to the state would result. The court said: "The only ground upon which the state can claim that it has an interest sufficient to authorize it to maintain the contest is, that, although the deceased did leave surviving heirs in whom, if the will is invalid, the title to his property has vested, and who are not aliens whose title will be forfeited by escheat if they do not claim the property within five years, yet there is a possibility that all the heirs, or some one of them, may fail to appear and claim the property, that thereupon proceedings may be instituted under section 1269 of the Code of Civil Procedure to declare an escheat, and that no heir entitled may then, or within twenty years after judgment therein, appear to claim the property or its proceeds, and thereupon the state may take as absolute owner. (Code Civ. Proc. secs. 1271, 1272.) We do not think this remote and contingent possibility, or series of successive possibilities, constitutes an interest which will authorize the party, having nothing more substantial, to maintain a contest of a will." And see *Hopf v. State*, 72 Tex. 281, 10 S. W. 589. But in *Gombault v. Public Administrator*, 4 Bradf. (N. Y.) 226, it was held that the public administrator might contest in order to produce an escheat. In the case of *Matter of Davis*, 45 Misc. 306, 92 N. Y. S. 392, it was held that after the public administrator has been appointed to administer an estate he may contest a will subsequently produced. The court said: "I am referred to *In re Hickman*, 101 Cal. 609, 36 Pac. 118, in which it was held that the public administrator in that state had not such an interest as would entitle him to appear and oppose the probate of a will. In view of the cases I have mentioned, it may be doubted if this California case is in harmony with the policy of the probate practice of this state; but that case differs from the present. In that case the interest of the public administrator was simply his right to letters of administration upon the estate of the decedent. In the present case, letters of administration upon the decedent's estate have been issued to the public administrator, and he comes before the court, not as one seeking to enforce his right to administer, but as one to whom letters of administration have in fact issued, and who is clothed with the power and authority of an administrator of that part of the decedent's estate in his county. He is not seeking to be made a trustee, but he is a trustee coming to vindicate his right and authority over the trust estate."

Guardian or Guardian ad Litem.

The father of a minor heir though he is by a divorce decree given the custody of the minor is not entitled to maintain a contest

of a will whereby the heir is given less than he would inherit. *Halde v. Schultz*, 17 S. D. 465, 97 N. W. 369, wherein it was said: "What relation the father sustains to his child after a divorce in favor of the wife on the ground of his failure to support her is not entirely clear. The relation existing between parents and children while the marriage relation exists is clearly defined by sections 107 to 127, inclusive, of the Revised Civil Code. By section 111 it is provided that the father of the minor child is entitled to its custody, services, and earnings, and if the father be dead, or be unable or refuse to take the custody, or has abandoned his family, the mother is entitled thereto. By section 114 it is provided that the parent, as such, has no control over the property of the child. And section 127 provides that the husband and father, as such, has no rights superior to those of the wife and mother in regard to the care, custody, education and control of the children of the marriage, while such husband and wife live separately and apart from each other; and the circuit court is authorized, as aforesaid, in such a case, to make such regulations in regard to the minor children as the circumstances may require. It will thus be seen that the father, as such, even in case there has been no divorce, has no control over the property of the child. If Halde, in this case, had no control over the property of his daughter prior to the divorce proceedings, he could certainly have none thereafter as such father. Whatever rights, therefore, he may have retained as the father of the child, would not be affected by the proceedings to probate the will. It is quite clear, therefore, that having no interest in the property of the testatrix, and no right to control the property of the minor child as such father, he had no interest in the proceedings to probate the will that entitled him to contest the same."

A person who in the absence of a will is entitled to the guardianship of an infant may contest a will appointing another as guardian. *Taff v. Hosmer*, 14 Mich. 249.

While in one jurisdiction it has been held that there is no statutory authority for the appointment of a guardian ad litem in a will contest, *State v. District Ct.* 34 Mont. 220, 85 Pac. 1022, the more usual practice is to require in a proceeding to probate a will that all minor heirs adversely interested shall be represented by a guardian ad litem. *White v. Kilmartin*, 205 Ill. 525, 68 N. E. 1086; *Shelby v. St. James Orphan Asylum*, 60 Neb. 40, 92 N. W. 155; *Middleditch v. Williams*, 47 N. J. Eq. 585, 21 Atl. 290; *Matter of Haynes*, 82 Misc. 228, 143 N. Y. S. 570; *Cooper's Estate*, 2 How. Pr. N. S. (N. Y.) 38; *O'Dell v. Rogers*, 44 Wis. 136. See also *Peters v. Peters*, 8 Cush. (Mass.) 529. Failure to appoint a guardian ad litem is not

however jurisdictional. *Shelby v. St. James Orphan Asylum*, supra. And see *Cooper's Estate*, supra. In *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682, it was said: "Her children, who were the heirs, who would have taken the entire property after the widow's share was taken out, had the undoubted right by their mother as next friend to take the appeal from probate, and if they could, prevent the probate of the will."

The guardian ad litem of an infant heir whose interests are injuriously affected by a will may and should contest it. *Shea v. Bergen*, 59 Misc. 294, 110 N. Y. S. 572, wherein it was said: "It is unnecessary to recite the facts set up in opposition to the motion upon which the defendant executor charges collusion between the guardian ad litem and the plaintiff's attorney to harass the estate. It was the duty of the guardian ad litem, in order to protect the interests of the infant, to interpose an answer joining in the prayer of the complaint, and, if the present motion is authorized by the practice and procedure of the court, it was the duty of the guardian ad litem to make it for like reason. It matters not what the motive of the guardian ad litem may have been in so acting, if the acts themselves were lawful and proper." So in *Greene v. Mabey*, 35 R. I. 11, Ann. Cas. 1915A 1290, 85 Atl. 118, holding that it was improper for the guardian ad litem of an infant heir to stipulate with the proponent facts admitting the will to probate, the court said: "If the will of Charles N. Mabey should be held to be a good and valid will, the estate of said decedent would pass to his widow, Mabel T. Mabey; otherwise it would pass, subject to dower and the widow's interest in the personal estate, to the three minor children before mentioned. The questions therefore submitted to this court, under the statement of facts, involve the disposition of the bulk of the decedent's property; that is, whether it shall go to the widow under the will, or to the children as heirs at law. We think that it is clear, under the authorities cited, that a guardian ad litem cannot lawfully enter into an agreement stating facts upon which the decision of the court and its decree must be based, and that full proof of all the facts which do not clearly appear to the court as advantageous to the infants must be established by proper testimony."

In the case of *Chittenden's Will*, 1 Tuck. (N. Y.) 251, it appeared that the heir was twenty years of age and very intelligent, and that out of respect for the memory of the testator, her father, she wished the contest initiated on her behalf by a guardian ad litem to be discontinued. On an application by the guardian to the surrogate for instructions the guardian was instructed to dismiss the contest.

CARROLL

v.

KNICKERBOCKER ICE COMPANY.

New York Court of Appeals—July 11, 1916.

*218 N. Y. 435; 118 N. E. 507.***Workmen's Compensation Acts — Accident Arising Out of Employment — Evidence Excluding Presumption.**

Evidence that a helper of the injured servant and two other witnesses were present at the time and place of the alleged injuries to the servant, and that they did not see any accident happen to him, and that they did not see a cake of ice fall upon him, and of physicians who examined decedent that there were no bruises, discolorations, or abrasions on the surface of his body, is sufficient to overcome the statutory presumption of Workmen's Compensation Law (Laws 1914, c. 41), § 21, which provides that it shall be presumed, in the absence of substantial evidence to the contrary that the claim comes within the provisions of the law.

[See Ann. Cas. 1913A 4; Ann. Cas. 1914B 498; Ann. Cas. 1916B 1293; Ann. Cas. 1918B 768.]

Review of Finding.

Where decision of appellate division affirming award of the compensation commission was not unanimous, the court of appeals may consider whether there was any evidence to sustain the finding.

[See Ann. Cas. 1916B 475; Ann. Cas. 1918B 647.]

Evidence — Hearsay.

In general, hearsay testimony is inadmissible.

Proceeding before Compensation Commission — Rules of Evidence.

Under Workmen's Compensation Law, § 68, providing that technical rules of evidence or procedure are not required, but the commission in making an inquiry, or conducting a hearing, shall not be bound by common law or statutory rules of evidence, hearsay testimony is admissible, and the award of the commission cannot be overturned on account of any alleged error in receiving evidence.

[See Ann. Cas. 1915A 741.]

Same.

Such statute does not, however, affect the probative force to be given such testimony, but, as further therein provided, the commission must ascertain the substantial rights of the parties, and to sustain an award there must be legally sufficient evidence.

Declaration of Employee as to Cause of Injury.

Hearsay testimony of statements of deceased servant while in nervous condition suffering from delirium tremens in hospital that he was injured when a heavy cake of ice fell upon him is insufficient to overcome

positive evidence of witnesses that no ice fell upon him, being in fact no evidence.

[See note at end of this case.]

Evidence — Res Gestae — Subsequent Declarations in Delirium.

Statements of deceased while in hospital suffering from delirium tremens some hours after alleged accident as to nature of accident are not admissible as res gestae, but are narratives of past events.

Workmen's Compensation Acts — Change in Law — Effect on Pending Proceedings.

That after appeal is taken from the award of the workmen's compensation commission such commission is superseded by the industrial commission does not affect any of the questions involved.

Carroll v. Knickerbocker Ice Co. 169 N. Y. App. Div. 450, reversed.

Appeal from Appellate Division of Supreme Court, Third Judicial Department.

Claim for compensation under workmen's compensation act. Bridget Carroll, claimant, and Knickerbocker Ice Company, defendant. Claim allowed by Workmen's Compensation commission. Decision affirmed by Appellate Division of Supreme Court. Defendant appeals by permission. The facts are stated in the opinion. **REVERSED.**

Frederick M. Thompson, David G. McConnell and Frank R. Savidge for appellant.

Egbert E. Woodbury and E. C. Aiken for respondent.

[437] CUDEBACK, J.—This is an appeal by the Knickerbocker Ice Company from an order affirming the decision and award of the workmen's compensation commission in the matter of the claim of Bridget Carroll for compensation [438] for the death of her husband, Myles Carroll, which was occasioned as it is alleged by injuries received while he was in the employ of the appellant. The Knickerbocker Ice Company is a self-insurer under the Workmen's Compensation Law. The decedent was employed by the ice company as driver on an ice wagon, and the claim is that he suffered an injury on September 22, 1914, while delivering ice. The commission made certain findings of fact upon which it based an award to the claimant. One of such findings of fact is as follows:

"2. On said date while said Carroll was putting ice in the cellar of a saloon at 20 East Forty-second street, borough of Manhattan, city of New York, the ice tongs slipped and a 300-lb cake of ice fell upon him, striking him in the abdomen, causing an epigastric hemorrhage and a rigidity of the abdomen. He was taken to a hospital and there devel-

oped delirium tremens and died on the 28th day of September, 1914."

Section 21 of the Workmen's Compensation Law (L. 1914, ch. 41) provides that in any proceeding upon a claim for compensation under the law, "it shall be presumed in the absence of substantial evidence to the contrary (1) that the claim comes within the provisions of this chapter," etc. There was in this case substantial evidence to overcome this statutory presumption. A helper on the ice wagon and two cooks employed in the saloon where the ice was delivered, testified before the commission that they were present at the time and place when it was alleged the plaintiff was injured, and that they did not see any accident whatsoever happen to him, and that they did not see any cake of ice fall. The physicians who subsequently examined the decedent testified that there were no bruises, discolorations or abrasions on the surface of his body.

The finding of the commission is basely solely on the testimony of witnesses who related what Carroll told them as to how he was injured. Carroll's wife testified that when he came home from his work he told her that [439] he was putting a 300 pound cake of ice in Daley's cellar and the tongs slipped and the ice came back on him. The physician who was called to treat the injured man at his home, a neighbor who dropped in, and the physicians at the hospital, where he was taken later in the day, testified that he made like statements to them.

The question is presented whether this hearsay testimony is sufficient under the circumstances of the case to sustain the finding of the commission. The decision of the Appellate Division which affirmed the award was not unanimous, and, therefore, there is open in this court the question whether there was any evidence to sustain the finding.

It is a question with text-book writers whether the rules of evidence which exclude hearsay testimony are wise and well founded or not. It is argued by some that though such testimony is not supported by an oath, and is not subject to the test of cross-examination, it is, nevertheless, valuable. There are some jurisdictions in which it has been held that hearsay testimony is admissible (*Travelers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 U. S. (L. ed.) 437), but the contrary has always been the rule of the courts in this state which have steadfastly resisted any innovation in the rule. *Waldele v. New York, Cent. etc. R. Co.* 95 N. Y. 274, 47 Am. Rep. 41. But we are not concerned here with any abstract question as to the wisdom or lack of wisdom in the law which excludes hearsay testimony.

We have only to consider whether the law of this state excluding such testimony has

been changed in cases coming within the Workmen's Compensation Law by section 68 of that law. That section is as follows:

"Section 68. Technical rules of evidence or procedure not required. The commission or a commissioner or deputy commissioner in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in [440] this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties."

This section has plainly changed the rule of evidence in all cases affected by the act. It gives the workmen's compensation commission free rein in making its investigations and in conducting its hearings and authorizes it to receive and consider not only hearsay testimony, but any kind of evidence that may throw light on a claim pending before it. The award of the commission cannot be overturned on account of any alleged error in receiving evidence.

This is all true, but, as I read it, section 68 as applied to this case does not make the hearsay testimony offered by the claimant sufficient ground to uphold the award which the commission made. That section does not declare the probative force of any evidence, but it does declare that the aid and end of the investigation by the commission shall be "to ascertain the substantial rights of the parties." No matter what latitude the commission may give to its inquiry, it must result in a determination of the substantial rights of the parties. Otherwise the statute becomes grossly unjust and a means of oppression.

The act may be taken to mean that while the commission's inquiry is not limited by the common law or statutory rules of evidence or by technical or formal rules of procedure, and it may in its discretion accept any evidence that is offered; still in the end there must be a residuum of legal evidence to support the claim before an award can be made. As was said by Justice Woodward in his able dissenting opinion at the Appellate Division: "There must be in the record some evidence of a sound, competent and recognizedly probative character to sustain the findings and award made, else the findings and award must in fairness be set aside by (the) court."

It is not necessary to consider in this case the constitutional limitations upon the power of the legislature to [441] change the rules of evidence. It is sufficient to say that the intention of the legislature as revealed in the Workmen's Compensation Law was not so revolutionary in character as to declare that an award can be sustained which is dependent altogether on hearsay testimony where the

presumption created by section 21 of the statute is overcome by substantial evidence.

The only substantial evidence before the workmen's compensation commission was to the effect that no cake of ice slipped and struck the decedent, and there were no bruises or marks upon his body which indicated that he had been so injured. The findings to the contrary rest solely on the decedent's statement made at a time when he was confessedly in a highly nervous state, which ended in his death from delirium tremens. Such hearsay testimony is no evidence. In re Case, 214 N. Y. 199, 108 N. E. 408.

It is suggested that the hearsay testimony was admissible as part of the *res gestae*; but, according to the rules of the courts of this state, the statements of the injured man in this case were not part of the *res gestae* but were simply narratives of an event past and gone. Greener v. General Electric Co. 209 N. Y. 135, 102 N. E. 527, 46 L.R.A. (N.S.) 975.

Since this appeal was taken the workmen's compensation commission has been superseded by the industrial commission, but that change does not affect any of the questions that have been considered.

I recommend that the order appealed from be reversed and the claim for compensation be dismissed, with costs against state industrial commission, and that the question certified to this court be answered in the negative.

WILLARD BARTLETT, Ch. J.—I think that the Workmen's Compensation Law permits the state industrial commission to base an award upon hearsay evidence, in the absence of substantial evidence to the contrary; but where, as in the present case, the hearsay evidence is directly contradicted by the testimony of eye-witnesses [442] to the event, it does not suffice to raise any issue of fact. This view accords with the liberal spirit of the enactment without giving to hearsay evidence a sanction which I cannot believe the legislature intended to give it.

I vote for reversal on the ground stated.

SEABURY, J. (*dissenting*).—This case presents the question whether hearsay evidence, which the workmen's compensation commission after examination deem to be credible, may furnish a sufficient basis to sustain an award made by that commission. The award that was made rests upon the declaration of the injured man to his wife and physician and to another witness shortly before his death. These declarations related to the manner in which he sustained the injury from which he subsequently died. The learned Appellate Division has sustained the award. I think the decision which is now the subject of review is correct. To sustain this award does not mean that the commission are obliged

to act upon all hearsay evidence that is presented, but only that it may act upon it where the circumstances are such that the evidence offered is deemed by the commission to be trustworthy. The Workmen's Compensation Law is an insurance scheme by which compensation is received for personal injuries or death happening in the course of employment. The fund out of which compensation is paid is created by means of contributions which employers are required to pay. Liability under the law is dependent upon injury in the course of employment, not upon contract or fault. Jensen v. Southern Pac. Co. 215 N. Y. 514, 519, Ann. Cas. 1916B 276, 109 N. E. 600, L.R.A.1916A 403. It was because liability was not made to depend upon contract or fault that a prior law designed to accomplish a similar purpose was declared unconstitutional by this court on the ground that the liability sought to be imposed was unknown to the common law. Ives v. South Buffalo R. Co. 201 N. Y. 271, 294, Ann. Cas. 1912B 158, 94 N. E. 431, 34 L.R.A. (N.S.) 162. Since the decision in the Ives case, the [443] Constitution of the state has been amended, and ample power to enact such a law has been conferred upon the legislature. (Art. I, sec. 19, New York Constitution.) In view of this constitutional provision it is unnecessary to determine whether the liability imposed under this law is based upon common-law principles or whether it is based upon principles derived from other systems of jurisprudence. Legislation similar in character seems to have been first successfully applied in Germany. The spirit in which legislation of this character has been applied in Germany is set forth in a pamphlet entitled "The German Workmen's Insurance as a Social Institution," prepared by Dr. Ludwig Lass, imperial government counselor at the imperial insurance office, and compiled and published under the order of that office. In that pamphlet Dr. Lass says: "While the arrangements of the administration and jurisdiction have been made with a view to further social interests, as has been shown above, the question of the interpretation of the workmen's insurance laws has also been settled not only from juridical, but also social points of view, in accordance with the spirit of these laws. In the interpretation of the laws an earnest endeavor is shown, above everything, to give material justice its due, while formal jurisprudence has to stand back. In cases where any legal provision is susceptible of several constructions, that interpretation is preferred, when doubts arise, which corresponds to the intentions of the legislator from the social point of view. There is no anxious clinging to the dead letter; on the contrary, the interpretation is liberal and in keeping with the spirit of the legislation. In this

respect, for instance, the interpretation may be mentioned which has been given by Imperial Insurance Office to the words 'accident,' 'work' and 'industrial accident.' Further, mention must be made of the fact that in workmen's insurance matters not the same severe standard is applied by the Imperial Insurance Office to proof, as is customary for disputes in [444] common law. Thus, proof of probability is often considered sufficient. This is important, for instance, with deaths the causes whereof are not cleared up. If a workman is found dead on the working premises and the cause of his death cannot be ascertained, the claims of his survivors, according to strict law, ought to be declined. But according to the jurisdiction of the Imperial Insurance Office the claims for compensation are admitted in cases of this kind, if there is a probability—especially on account of the position of the body—that the death has been caused by anything belonging to the work. A similar view is taken by jurisdiction in the numerous doubtful cases where the accident itself, or the connection between the injury or death of an injured person and the accident, cannot be sufficiently proved." (page 29.)

I think the passage just quoted is significant as revealing the method of interpretation which must be applied if the social benefits which the law was designed to promote are to be substantially realized. It is in this spirit rather than in a spirit of devotion to common-law methods of proof that the legislature enacted this law. That this is the case appears from the whole purpose of the legislation and particularly from section 68 of that law. In that section it is stated that the commissioners in making the "investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence, . . . but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties." In this statute we have not only explicit sanction for a departure from common-law methods of proof, but a direct legislative command that the commission "shall not be bound by common law or statutory rules of evidence." In the face of this legislative provision I think there is no justification for rendering the Workmen's Compensation Law subject by judicial interpretation to the technical common-law [445] system of evidence. That the common-law classification of the rules relating to hearsay evidence is far from satisfactory is well pointed out in the extract from the work of Prof. Thayer, which my brother Pound has quoted in his opinion. The Workmen's Compensation Law is a new step in the field of social legislation. We should interpret it in accordance with the spirit which called it into existence. Our reverence for the traditional rules of our common-law system shall not lead

us to restrict it by subjecting it to the operation of these rules. This court is under no obligation to see to it that laws enacted to remedy abuses arising from new industrial and social conditions shall be made to square with ancient conceptions of the principles of the common law. Indeed, if the common law had not had woven into it by judicial construction the doctrines of assumption of risk and fellow-servant, and the doctrine of contributory negligence, it is doubtful whether the legislation now under consideration would have been rendered necessary. While judges and text writers have often made sweeping generalizations condemnatory of hearsay evidence, the many "exceptions" to the rule prohibiting such evidence show that we have not been able to get along without a frequent resort to it. In cases of homicide dying declarations as to the cause of death are received in evidence, and it is quite within the legislative power to sanction the admission of evidence of a similar kind in cases arising under the Workmen's Compensation Law. The difficulty in proving the cause of death in cases where the person injured dies as a result of the injury has long been recognized, and even in ordinary actions based on negligence the rules requiring proof of freedom from contributory negligence on the part of the deceased are relaxed to some extent. In the case now under consideration the injured man was taken from the place where he was working to his home, and into the presence of his wife and physician. The wife and physician naturally inquired as to how the [446] accident happened, and the injured man told them. The evidence of these persons is now the only evidence available which can explain the cause of death. The commission examined and cross-examined these witnesses, and was satisfied that they correctly reported what the injured man had related shortly before his death and believed that the narrative which the injured man gave was correct. I think that the commission were justified in basing an award upon this testimony and that the language of section 68 of the Workmen's Compensation Law expressly authorized them so to do.

If it were necessary to do so the award made could well be sustained upon the ground urged by my brother Pound in his opinion. I think, however, that it is more in harmony with the spirit of this legislation and with the express provision of section 68 that we should frankly recognize that the commission are not limited by the common-law methods of proof and that if they were satisfied that the so-called hearsay evidence that was offered was credible they were justified in basing their award upon that evidence.

It is said in the prevailing opinion that "this section does plainly permit the introduction of hearsay testimony in all cases affected

by the act, but still it does not, . . . make hearsay testimony, unsupported by other evidence, sufficient ground to sustain such a finding of fact as the commission made in this case." The distinction sought to be made between admitting such evidence and basing an award upon it seems to me to be unreasonable and not to find support in anything contained in section 68. In conceding that § 68 sanctions the introduction of hearsay evidence the argument of the appellant is left without any foundation upon which to rest. If the legislature sanctioned the admission of this evidence it follows by necessary implication that it intended to authorize the commission to act upon it. In resting the judgment about to be rendered upon this [447] ground the court concedes that the evidence upon which the commission acted was legal evidence, but holds that it was insufficient to sustain an award. If section 68 sanctions the reception of hearsay evidence there was legal evidence before the commission and if there was any legal evidence before the commission to sustain the award this court has no power to reverse the determination that was made.

I vote in favor of affirming the judgment of the Appellate Division.

POUND, J. (*dissenting*).—I think this case should not be disposed of by deciding that all evidence held to be objectionable as hearsay in the courts of this state is without probative force. Our law of evidence is largely a product of the jury system. The purpose of its exclusionary rules is to keep from the jury not only all that is irrelevant, but also much that although relevant is remote, or collateral, or non-probative, and, therefore, tends to mislead or confuse. I assume that the industrial commission, although not "bound by common law or statutory rules of evidence" (W. C. L. § 68), must, in exercising its functions, for the sake of system and simplicity, apply certain principles of the law of evidence based on experience as well as authority, the chief being that witnesses should, as far as practicable, testify from their own knowledge of relevant facts, orally, publicly, under oath or affirmation and subject to the test of cross-examination. Yet we cannot overlook the obvious fact that "the changing experience of mankind" may dictate that these fundamental principles be modified and liberalized in their application, when the hearing is before tribunals which adjudicate both on law and fact, and not before a jury summoned temporarily from the vicinage and untrained in the discriminating art of deciding causes on evidence. The ascertainment of truth rather than the integrity of the rules being the foremost consideration, [448] we find that when the jury is absent the rules are less

strictly enforced, it being assumed that the court will not be easily confused or misled by that which is irrelevant and inconclusive.

Hearsay is said by the old writers to be "of no value in a court of justice" (Bull. N. P. 294), and "no evidence" (Gilbert on Evidence [2d ed.] 152), yet the rule against hearsay, even at common law, is subject to many exceptions, and is not inelastic either in statement or application. Thayer in his luminous and philosophic "Preliminary Treatise on Evidence at the Common Law" (pp. 522, 523) suggests that "a true analysis would probably restate the law so as to make what we call the rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible. . . . No doubt, in point of reason, hearsay statements often derive much credit from the circumstances under which they are made, say for example, from the fact of being made under oath, or under impressive conditions as being against interest, or made under strong inducements to say the contrary, or as part of a series of statements or a class of them which are usually careful and accurate, and the like; credit amply enough in point of reason to entitle them to be received in evidence, when once the absence of the perceiving witness is accounted for; and it would in reason have been quite possible to shape our law in the form that hearsay was admissible as secondary evidence, whenever the circumstances of the case were alone enough to entitle it to credit, irrespective of any credit reposed in the speaker."

The rule and its exceptions are not always and everywhere the same. The decisions are not in harmony. What is admissible in one jurisdiction is sometimes excluded in another. In the same jurisdiction the exception as first formulated is sometimes limited or extended by later cases. In *Travellers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 U. S. (L. ed.) 437, the question was whether the assured died from the [449] effects of an accidental fall down stairs in the night or from natural causes. Assured had left his bed between 12 and 1 o'clock at night and it was held that his declarations to his wife when he came back that he had fallen down the back stairs and hurt himself badly were competent and sufficient proof of the fall because they were made so soon thereafter as to be in the nature of *res gestae*—declarations contemporaneous with the main fact and part thereof. The evidence was, none the less, *the narrative by a person since deceased of a past, although a recent event*. This court in *Waldele v. New York Cent. etc. R. Co.* 95 N. Y. 274, 278, 47 Am. Rep. 41, therefore, very properly characterized the *Mosley* case as "an extreme case," and in *Greener v. General Electric Co.* 209 N. Y. 135, 138, 102 N. E. 527, 46 L.R.A.

(N.S.) 975, said "the distinction to be made (in such cases) is in the character of the declaration; whether it is so spontaneous, or natural, an utterance as to exclude the idea of fabrication; or whether it be in the nature of a narrative of what had occurred." The force of this rule lies somewhat in the application of it. *People v. Del Vermo*, 192 N. Y. 470, 483, 85 N. E. 690, and cases cited. Can we say that evidence which the Supreme Court of the United States held competent and sufficient, i. e., the declarations of a deceased person made soon after the alleged accidental injury and under circumstances entitling them to credit is not competent and sufficient proof before the industrial commission under the rule of section 68 of the Workmen's Compensation Law which says that the commission shall not be bound by common-law rules of evidence? May not the commission, under this statute, adopt the rule of the Supreme Court of the United States and in its discretion give it an extremely liberal application and reject the stricter rule laid down by this court without being open to the charge of making an award on no evidence whatever? Could not "the substantial rights of the parties" be thereby ascertained? If it may go so far, we need only hold that where the common-law rule against hearsay is [450] not uniformly stated or applied, the commission may base an award upon evidence received under the exceptions to the rule most favorable to the claimant, without being bound by the decisions of this court thereon. I think that the evidence of Carroll's declarations to his wife when he came home from work and to the physician called to treat him might, without too violent a wrench to our established ideas, be held competent under the exception to the rule against hearsay applied to the *Mosley* case. In any event as pointed out by my brother Seabury in his opinion the evidence was legal and admissible. If it had any probative force, its weight was for the commission as triers of fact and their decision thereon was final. (Workmen's Compensation Law, § 20.) I think that we cannot say as matter of law that it had no probative force under section 68 of the act, but I do not thereby conclude that all hearsay has probative force or that awards in contested cases may be allowed or disallowed on rumor or report to which the circumstances give no weight. It is not to be anticipated that the commission will become confused, waste time, lose sight of the main issue and base awards or refuse them on haphazard hearsay, as our convention is that a jury might if it were permitted to hear everything relevant.

I vote for affirmance.

Hiscock, Collin and Hogan, JJ., concur with Cuddeback, J., and Willard Bartlett, Ch. J., concurs in result in memorandum; Seabury, Ann. Cas. 1918B.—35.

burv and Pound, JJ., read dissenting opinions, each of whom concurs in the opinion of the other.

Order reversed, etc.

NOTE.

In the reported case the judges are agreed that under a provision in a workmen's compensation act that the commission "shall not be bound by common law or statutory rules of evidence" the hearsay rule is not applicable to a proceeding under the act and a self-serving declaration of an injured workman as to the cause of his injury may after his death be admitted in support of a claim by his dependents. The majority of the court holds however that evidence of that character is not sufficient to sustain an award but "there must be a residuum of legal evidence to support the claim." The earlier cases discussing the admissibility in proceedings under a workmen's compensation act of a statement by the injured workman as to the cause of the injury are discussed in the note to *Reck v. Whittlesberger*, Ann. Cas. 1918C 771.

NORTHCUT ET AL.

v.

CHURCH ET AL.

Tennessee Supreme Court—August 9, 1916.

135 Tenn. 541; 188 S. W. 220.

Mines and Minerals — Effect of Severance of Mineral and Surface Rights.

Possession of the surface of land by one who has by his conveyance of the mineral interest severed the latter from the surface, is not a possession of the underlying severed mineral interest, nor does such possession inure to the owner of the mineral; distinct estates being created by the severance.

[See note at end of this case.]

Adverse Possession — Mineral Lands.

Acts of possession required for the surface and those for the minerals are different; the latter requiring some form of mining or activities directly related thereto.

[See 6 Ann. Cas. 142; Ann. Cas. 1912D 1199; 140 Am. St. Rep. 951.]

Same.

Where the grantee of an adverse possessor takes possession, he may unite his subsequent possession with his grantor's prior possession to make out adverse possession for the seven-year period.

Same.

Where the grantee of mineral rights of an adverse possessor takes immediate and appropriate possession thereof, he may unite his subsequent possession with his grantor's prior possession to make out statutory title by adverse possession.

Courts — Rules of Decision — Following Other Jurisdictions.

The courts of a state may refuse to follow even a consensus of authority in all other states, or a well-recognized rule of common law, on the ground that it is not suited to the genius of the state or is opposed to its public policy; the public policy of a state being shown by its statutes and decisions.

Mines and Minerals — Effect of Severance of Mineral and Surface Rights.

The grantor of minerals by implication of law conveys the right to obtain access to them through the surface, and against such purpose does not hold the surface adversely.

[See note at end of this case.]

Appeal from Chancery Court, Grundy county: ALLEN, Judge.

Action by L. H. Northcut et al., plaintiffs, against Lewis W. Church et al., defendants. Judgment for defendants. Plaintiffs appeal. The facts are stated in the opinion. AFFIRMED.

Robinson & Fancher for appellants.

Fulks & Schnoon and *L. V. Woodlee* for appellees.

[543] NEIL, C. J.—Complainants L. H. Northcut, and the heirs of H. L. Raulston, deceased, claim the mineral interest in 177 acres of a tract of 200 acres, and the whole interest in twenty-three acres, the residue of the 200 acres. The defendants claim under one Francis Church to whom a grant of 5,000 acres of land was made in 1831. This grant included within its boundaries, but excluded from its operation, "100 acres belonging to one A. Higginbotham entered June 25, 1831, by No. 3083." The [544] complainants claim under one W. R. Nunnely, through a deed made by him to one J. M. Nunnely, and by the latter to complainant Northcut, and H. L. Raulston, the ancestor of the other complainants. W. R. Nunnely's deed describes the land conveyed therein, as made up partly of the above-mentioned Higginbotham tract, but the bill charges that the whole 200 acres lies within the Church grant. Assuming that the complainants are bound by the deed which they have filed, then it is impossible to say how much of the 200 acres lies within the Church grant, and how much within the Higginbotham entry. However, the complainants do not derange their title either to the Church or the Higginbotham grant, if the latter ever procured a grant, on his entry, which is not shown. They trace title only to W. R. Nun-

nely, and it is not shown that he had any kind of title. An effort was made to prove that the land was sold for taxes due from Church, and that W. R. Nunnely had bought the land at tax sale, and received a tax deed, but this failed utterly. So, the complainants had no other recourse than to rely on the statute of limitations of seven years.

The facts applicable to this feature of the case are as follows:

The deed which W. R. Nunnely made to J. M. Nunnely, purporting to convey the 200 acres, was executed on the 24th day of July, 1884. The evidence shows that there were several settlements on the land, running back more than seven years prior to that deed, but no color of title is shown covering them, nor are the [545] bounds or descriptions of such settlements shown. All of these must therefore go for naught. It is also shown that J. M. Nunnely divided the land among his children, and put them in possession of parts of it, but the deeds are not exhibited, nor are the descriptions of the holdings of the children given. In view of this fact the defendants insist that since the burden of proof to make out a claim under the statute of limitations rests upon one who relies thereon, and that the evidence must be substantial and clear (*Coal, etc. Co. v. Coppinger*, 95 Tenn. 526, 530, 32 S. W. 465), the complainants' case breaks down under the uncertainty thus created as to how long J. M. Nunnely, under whom they claim, in fact held possession of the land.

But passing this, we shall assume that inasmuch as no deeds appear as made by J. M. Nunnely to his children, their various holdings were under and for him, after he received his color of title on the 24th of July, 1884.

He did not hold this land, however, under his color of title for as much as seven years before he made his conveyance to the complainant Northcut, and H. L. Raulston. This latter deed was made on the 7th of June, 1890, showing an interval of less than six years.

Perhaps we might stop at this point and refuse further to consider complainants' claim under the statute of limitations, on the ground that it does not appear that all of the land sued for, or how much of it, was land that had been granted by this State or the State of North Carolina; the Act of 1819, chapter 28, [546] section 1, requiring such fact to be shown as a necessary groundwork on which to erect a title acquired under the statute of limitations (*Sh. Code*, section 4456), but we shall waive this question, and proceed to determine the controversy on the point chiefly argued by counsel, at the bar of the court, and in the briefs and written arguments filed.

That question arises on the fact that J. M. Nunnely, had held the land under color of title less than seven years when he conveyed the mineral interest in the 177 acres to Northcut and Raulston, and the further fact that neither vendor nor vendees exercised any acts of ownership appropriate to indicate possession of such mineral interest. The contention of the complainants is that J. M. Nunnely continued to hold possession of the surface for a period longer than seven years from the date of his deed from W. R. Nunnely, and that this possession inured to the benefit of the persons to whom he had conveyed the mineral interest, and that thus seven years' adverse possession was made out for them. Adding his possession of the surface before his conveyance to Northcut and Raulston and his possession after that time, Nunnely had, prior to the bringing of this action, held the surface of the land more than seven years; but there is no evidence that any mining was attempted, or any effort made to take possession of the minerals as such. So, we have the question: Is the possession of the surface of land by one who has by his conveyance of the mineral interest severed the latter from the surface a possession of [547] the underlying severed mineral interest, and does such possession inure to the owner of the mineral?

The negative of this question is so well settled in other jurisdictions that we should have no hesitancy in answering in the same manner but for the fact that there is a conflict on the subject in our own decisions.

The first case is *Murray v. Allred*, 100 Tenn. 100, 43 S. W. 355, 39 L.R.A. 249, 66 Am. St. Rep. 740. The facts of that case were viz.: On the 24th of October, 1853, one Rodgers conveyed to Matthias Wright a tract of land lying in Fentress county, reserving all minerals. Wright subsequently conveyed the same land to another without making any reservation, and through a series of conveyances the land passed to Allred, each of the deeds by Wright and those claiming under him, purporting to pass an estate in fee. Facts were agreed upon in the case to the effect that Allred, and those through whom he claimed, had been in the actual, open, and continuous adverse possession of the land, under color of title, for more than seven years before action brought, but that neither he nor any one under whom he claimed had done any mining on the land, or attempted anything of the kind.

Murray claimed the mineral interest under Rodgers, who, as stated, had reserved this interest when he conveyed to Wright. Allred having refused to permit Murray to enter on the land to explore for minerals, the question was brought before one of the chancellors of the State by an agreed case to settle the

rights of the parties. He decided against Murray, and on appeal [548] Murray's third assignment of error was that the mineral interest by the reservation referred to, having been severed from the surface, possession of the latter was not inconsistent with the rights of the owner of such mineral interest, not adverse, and therefore that the statute of limitations had not run against him, and the chancellor erred in not so decreeing.

The court sustained this assignment, basing its decision on the following principles: That the owner of real estate may sell the land to one man, the coal, iron, gas, or oil to another, or others, giving to each purchaser a deed in fee simple for his particular deposit or stratum, while he retains the surface for agricultural purposes precisely as he held it before; the severance being complete for all legal and practical purposes, each separate layer or stratum becoming a subject of taxation, incumbrance, levy, or sale, precisely like the surface; and the possession of the soil by its owner for the purpose of tillage, giving him no possession of the underlying minerals; that in order to make a holding adverse to one who has reserved, or had granted to him, minerals in place, there must appear to have been some denial of his right, or assertion of a claim inconsistent therewith, and that the use of the surface for agricultural purposes is not the assertion of a right inconsistent with the right of the owner of minerals to mine under the surface for the purpose of extracting them. 100 Tenn. 100, 102, 119, 120, 43 S. W. 355, 39 L.R.A. 249, 66 Am. St. Rep. 740.

[549] These principles are supported by a practically solid array of authorities in all the other States where similar questions have arisen, and also by the text-books. *Westmoreland*, etc. *Natural Gas Co. v. De Witt*, 130 Pa. St. 235, 18 Atl. 724, 5 L.R.A. 731; *Louisville*, etc. *R. Co. v. Massey*, 130 Ala. 156, 33 So. 996, 96 Am. St. Rep. 17; *Gordon v. Park*, 202 Mo. 236, 100 S. W. 621, 119 Am. St. Rep. 802; *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216; *Kiser v. McLean*, 67 W. Va. 294, 67 S. E. 725, 140 Am. St. Rep. 948, and note, pp. 951-969; *Wallace v. Elm Grove Coal Co.* 58 W. Va. 449, 52 S. E. 485, 6 Ann. Cas. 140, and note; *J. R. Crowe Coal, etc. Co. v. Atkinson*, 85 Kan. 357, 116 Pac. 499, Ann. Cas. 1915D 1196, and note; *White on Mines and Mining*, 32; *Barringer & Adams on the Law of Mines and Mining*, pp. 36, 59 and 60; 1 *Cye*. 994, 995; 2 *Corpus Juris*, 147, sec. 258; 1 *Ruling Case Law*, pp. 738, 739, sec. 57.

In the subsequent case of *McBurney v. Glenmary Coal, etc. Co.* 121 Tenn. 275, 118 S. W. 694, the existence of these principles is fully recognized, but it is said in the opinion

that the better rule is that possession of the surface by one who has conveyed to others the underlying minerals in place is a possession in the interest of the latter, as well as for himself; that is, it is also a possession of the minerals. The facts of that case were: Julian F. Scott, claiming ownership of the land, conveyed it, in 1851, to one Duncan, reserving [550] the underlying coal. Duncan thereafter, between 1851 and 1856, conveyed this land to Edward R. Diden, in several parcels or tracts, by four separate deeds. The question relating to the controversy now before us arose in respect of a certain tract of 342 acres, part of one of the original tracts. Claiming this tract under his father's will, John S. Diden, the son of Edward R. Diden, took possession of it in 1870, and resided upon it continuously, openly, and adversely for twenty-eight years, or until the bringing of the action by McBurney. In 1884, when he had held this land in possession for a period not longer than five years, he conveyed the mineral interest to J. H. Parker & Co. In 1890 Parker & Co. conveyed the mineral interest to Chandler, and the latter, on the same day, conveyed it to the Glenmary Coal & Coke Company. Although, as previously stated, when Julian F. Scott conveyed the land to Duncan he reserved the mineral interest in all the land, the latter, when he conveyed to Edward R. Diden, did not reserve the mineral in the tract of which the 342 acres was a part; but, as just stated, John S. Diden, son of Edward R. Diden, who was the vendee of Duncan, purported to convey such mineral interest in his deed to Parker & Co. It does not appear that either Parker & Co. or the Glenmary Coal & Coke Company ever attempted any mining operations on the 342 acres, nor that they, or either of them, ever did any act indicating a purpose to take possession of the minerals as such, nor does it appear that John S. Diden, the vendor of Parker & Co., during his twenty-eight years' possession of the [551] surface of the land, ever did or attempted any such act. It is said that no actual possession of the coal itself was claimed. The decision of the court was, simply, that John S. Diden's possession of the surface for more than seven years, claiming the land under color of title (his father's will), openly, continuously, and adversely, inured to the benefit of his conveyee, Parker & Co., and through them to the Glenmary Coal & Coke Company, and that he had thus perfected the title of the latter to the underlying coal, by the statute of limitations before suit brought. It should be stated that McBurney claimed the mineral not under Julian F. Scott, but under Thomas B. Eastland, who had the true title. The fact that the parties were claiming under different chains

of title was referred to in the opinion as having an influence in the solution of the question.

The court adopted the opinion of the court of chancery appeals, from which court the case had been brought by appeal. It is said in that opinion:

"In this case the conflict is not between parties claiming under the same chain of title, but between parties claiming under entirely separate and distinct chains of title. It appears to us that the better, safer, and most sensible rule would be to adopt the rule established in those cases where there is a joint or mixed possession by heirs and life tenants, or by mother and child, guardian and ward, etc., where the possessions are held to be consistent, and in harmony, and all under the same title. . . . We think the better rule and principle is to hold that such possession by a man who [552] has conveyed the mineral rights to others is a possession in their interest, and in harmony with them, as well as for himself. If it be not so held in this case, we have this peculiar condition of matters presented: Diden by his deed conveyed to Parker & Co., and through them to the defendant Glenmary Coal & Coke Company, the mineral rights and mining rights: that is, the right to go upon this land and take out these minerals, and to use the necessary timber on the land for mining purposes. Now, these parties are claiming under him and under his warranty, and if they be ousted therefrom, can hold him liable on his warranty, and the loss will be occasioned by the entry of a party against whom he has been asserting an adverse right for a period of more than a quarter of a century. In addition to that, Diden has certainly been holding the land for all purposes as against the complainants, and is entitled to hold all of it for all purposes, unless it be held that the coal has been severed, so as not to protect it; and if it should be decided under this holding that the complainants have not lost their title to the coal, by what right or on what principle could it be held that they can enter upon the surface in order to reach the coal, and can it be held that they have the right to use the timber upon the land for mining purposes? We think, in a case of this kind, as heretofore said, the better holding would be that the possession of Diden inured to the benefit of his grantee, to whom the mineral and mining rights were transferred. . . . We are of opinion, as stated, that the better and more [553] sensible rule, and the rule which will best promote and carry out the purpose and policy of the statute of limitations, by quieting titles, etc., will be to hold that the possession by a grantor (of a mineral interest and mining rights in property) of the surface will inure to the benefit

of the grantee of such rights as against third parties; and such is our holding."

This court after setting out the foregoing added:

"We are of opinion that the court of chancery appeals announces a better rule than that indicated in the authorities we have cited from other States. We are the better contented with this rule in view of the fact that there would be no way of putting complainant in possession of those minerals if his title thereto should be established. The adverse possession of the defendants has deprived the complainant of an easement to remove this coal from defendants' premises, even if it belonged to complainant. Complainant could not assert a way of necessity over the land of defendant Diden to remove the minerals."

After very careful reflection and a re-examination of the authorities, we are convinced this decision is unsound.

When John S. Diden conveyed the mineral interest to Parker & Co. he severed it (if not already severed by the reservation in Julian F. Scott's deed) from the surface as completely as if the land had been cut into two distinct tracts. *Catlin Coal Co. v. Lloyd*, 176 Ill. 275, 52 N. E. 144; *Ames v. Ames*, 160 Ill. 599, 43 N. E. 592; *New Jersey Zinc Co. v. New Jersey Franklinite* [554] Co. 13 N. J. Eq. 322, 341-343; *Gill v. Fletcher*, 74 Ohio St. 295, 78 N. E. 433, 113 Am. St. Rep. 982; *Lillibridge v. Lackawanna Coal Co.* 143 Pa. St. 293, 22 Atl. 1035, 13 L.R.A. 627, 24 Am. St. Rep. 544; *Gordon v. Park*, supra; *Wallace v. Elm Grove Coal Co.* supra. Possession of the surface thereafter could not be possession of the severed mineral. *Gordon v. Park*, supra; *Wallace v. Elm Grove Coal Co.* supra; *Louisville, etc. R. Co. v. Massey*, 136 Ala. 156, 33 So. 896, 96 Am. St. Rep. 17; *Catlin Coal Co. v. Lloyd*, supra; *Manning v. Kansas, etc. Coal Co.* 181 Mo. 359, 377-379, 81 S. W. 140; *Caldwell v. Copeland*, 37 Pa. St. 427, 78 Am. Dec. 436; *Armstrong v. Caldwell*, 53 Pa. St. 284; *Huss v. Jacobs*, 210 Pa. St. 145, 59 Atl. 991; *Virginia Coal, etc. Co. v. Kelly*, 93 Va. 332, 24 S. E. 1020. This is bound to be true, if, as all the authorities hold, distinct estates are created by the severance. And it also follows from the undoubted rule that the acts of possession required for the surface, and those for the minerals are different; the latter requiring some form of mining, or activities directly related thereto.

"The surface owner setting up the statute must establish a possession of the mine, as such, independently of his possession of the surface. Such a possession must be actual, notorious, exclusive, continuous, peaceable, and hostile for the statutory period. And in these respects the surface owner is in no

better position than a stranger. . . . Actual possession is taken by the opening of mines and carrying on mining operations." [555] *Gordon v. Park*, supra; *Barringer & Adams on the Law of Mines and Mining*, p. 569.

It is true, as held in *Finnegan v. Pennsylvania Trust Co.* 5 Pa. Super. Ct. 124, that the true owner cannot by executing and recording a deed purporting to convey the mineral, so sever it as to interfere with an adverse possession already begun on the whole tract, or use such deed, as a substitute for a possessory action. The case is altogether different, however, when the person in possession himself surrenders that possession to another. No one doubts that if one in adverse possession of land should convey a distinct part of the tract to another, and place him in possession, or after his conveyance should abandon that possession, he could no longer claim that part of the land under the statute. It is true his vendee might receive the possession, and his subsequent possession, united with the prior possession of his vendor, might make out the seven years' adverse possession for him. So, too, if the land should be divided, by the supposed vendor, into two estates by severance of the mineral, the vendee might unite the possession existing before the severance with an immediate and continuous possession of the mineral after the severance, and so make out title to the mineral under the statute, but there would have to be appropriate possession of the latter; the statute could not be satisfied merely by the vendor's possession of the surface.

When it is said in the opinion in the *McBurney Case* that the court should not follow the decisions of other States on the point, but should hold as the better rule [556] that the possession of the surface was likewise possession of the severed mineral lying within the earth, not only was the uniform rule prevailing in all other jurisdictions disregarded, but our own prior case of *Murray v. Allred* as well, and something declared possession which, assuming the existence of a severance of the mineral from the surface, could not, in the nature of things, be possession, any more than one could be said to be in possession of the surface of land which he had conveyed to another, and on which his foot no longer rested. The decision in *McBurney v. Coal, etc. Co.* on the point stated is therefore unsound, and on that point must be overruled.

The decision could have been based only on one or the other of these two propositions, viz.: that a conveyance of the mineral did not sever it from the surface, or that if the conveyance did effect such severance, still the possession of the surface was also a posses-

sion of the severed mineral. Both propositions are without doubt in conflict with all the authorities, and against the common law. The common law binds courts only less firmly than statutes. Its rules are gradually, almost imperceptibly, enlarged or contracted by the courts, by construction, in the course of their application to new States of fact, to meet the needs of a progressive civilization, but it is not allowable to change them *per saltum*. This can be done only by legislation. It is true the courts of a State may refuse to follow even a consensus of authority in all other States, or even a perfectly well-recognized rule of the common-law, [557] on the ground that it is not suited to the genius of the State, or is opposed to its public policy. We know of no public policy of this State, however, which makes the settled rule of other mining States on the subject referred to inapplicable here. The public policy of a State is shown by its statutes and decisions. We have no applicable statute, but *Murray v. Allred*, *supra*, is evidence that we have no public policy which forbids the rule therein applied. That case has been approved in other States, and cited in their decisions, also in the text-books, and it was not in terms overruled, or dissented from, in *McBurney v. Glenmary Coal, etc. Co. supra*.

In respect of the point in the case last mentioned, to the effect that the question should be settled on the theory of a joint or mixed possession, we say such possession is always actual, and the matter for decision always is, to which one of several so in actual possession shall the law impute the legal or true possession, and the answer is, to that one who owns the legal title. *Welcker v. Staples*, 88 Tenn. 49, 12 S. W. 340, 17 Am. St. Rep. 869; *Ramsey v. Quillen*, 5 Lea (Tenn.) 184. In the first-cited case, the persons in actual possession were the husband and wife, and their children, with the legal title in the wife and children, and in the second, the husband and wife, with the title in the wife. In *McBurney v. Glenmary Coal, etc. Co.* there was no one in possession of the surface except John S. Diden; so the theory of joint or mixed possession could not be applicable. The only theory left is that Diden being [558] in possession of the surface, he was by force of that fact also in possession of the underlying coal, and held it as a trustee for the vendee thereof. But this is but another form of the theory which we have already shown is inadmissible, since it assumes that possession of the surface is possession of mineral severed from the surface.

We add one more observation. It was said in that case that it would be futile to give *McBurney* a recovery for the mineral because the statute had run against him as to the surface, and he could not therefore reach the mineral. This was not a sound reason for

refusing to declare his right. Moreover there could be no obstacle to his reaching such minerals by mining or tunneling under the land in question from adjoining lands obtained by purchase or lease. But this would have been unnecessary, because when John S. Diden conveyed the minerals, he, by implication of law, conveyed the right to obtain access to them through the surface, and as against that purpose no longer held the surface adversely. That was an incident to the conveyance of the mineral right, and became a part of that right when severed.

As to the point that *McBurney's* claim was under another chain of title, we think undue importance was attached to it. The severance was made by Diden himself, thereby depriving himself of the possession of the minerals, and it was at last only a question of possession. Another view of the matter is, that inasmuch as John S. Diden claimed ultimately under Julian F. [559] Scott, and he had reserved the mineral interest in the deed which he made to Duncan, there was a severance of the mineral at the beginning of John S. Diden's title, with the incidental right of access reserved, but he never had color to the mineral interest, and therefore no sort of possession of it.

The result is that, *Murray v. Allred, supra*, is reinstated as authority, and following that case, and the authorities on which it is based, and others in accord, we hold that complainants did not acquire the mineral interest in the 177 acres, under the statute of limitations, or otherwise.

We are constrained to the same conclusion, in respect of the twenty-three acres, on the grounds stated in the early part of the opinion, that it does not appear that the land in question, or how much of it, was ever granted by this State or the State of North Carolina, as required by section 1 of chapter 28 of the Acts of 1819.

Therefore the whole bill must be dismissed at complainants' cost.

NOTE.

Resulting Rights of Mine Owner after Severance of Surface and Mineral Estates.

Introductory, 550.

Right in General, 551.

Right to Construct Railroad, 552.

Right to Use Surface and Openings to Remove Minerals from Adjoining Lands, 552.

Right to Deprive Surface of Support, 553.

Introductory.

It is the purpose of this note to review the recent cases passing on the resulting rights

of a mine owner after a severance of the surface and the mineral estates. For a discussion of the earlier cases, see the note to *Schobert v. Pittsburgh Coal, etc. Co.* Ann. Cas. 1913B 1104.

The presumption that the person having the possession of the surface has the possession of the subsoil also does not exist when those rights are severed; and possession of the surface owner is not adverse to the title of the owner of the coal and minerals. *Shrewsbury v. Pocahontas Coal, etc. Co.* 219 Fed. 142, 135 C. C. A. 40.

"After severance of the mineral in situ from the surface, the possession of the latter is not possession of the former. The effect of the severance is to create two closes adjoining but separate." *Birmingham Fuel Co. v. Boshell*, 190 Ala. 597, 67 So. 403. The mineral after severance is a corporeal hereditament, and mere nonuser will not affect the owner's title, and to lose his right, by adverse possession, the owner must be dispossessed. The effect of severance is to create two distinct estates. *Hooper v. Bankhead*, 171 Ala. 632, 54 So. 549. And see to that effect *McBeth v. Wetnight*, 57 Ind. App. 47, 106 N. E. 407; *Hoilman v. Johnson*, 164 N. C. 268, 80 S. E. 249.

The surface ownership of land may be in one man, and the minerals in another, in which case both are landowners. The owner of land may convey the surface to one and reserve to himself an estate in fee in the minerals, or vice versa, or may convey the surface to one and the minerals to another; and the effect of such a conveyance will be to create an estate separate and distinct in the sundered properties, the one from the other, entire and complete in fee simple. *Ball v. Clark*, 150 Ky. 383, 150 S. W. 359. And see the reported case.

Rights in General.

Because a mine may not be worked practically without other facilities, a grant of the minerals implies the right to construct and operate roads, tram and railway tracks on the surface for the use of the mine, to build air shafts, erect machinery, store water for the use of the engines, and in general to do that which is reasonably necessary for the use of the thing granted. *Himrod v. Ft. Pitt Min. etc. Co.* 220 Fed. 80, 135 C. C. A. 648 (238 Fed. 746, 151 C. C. A. 596), wherein it was said: "There are obvious degrees of necessity for the use of the surface in the conduct of subterranean mining operations, from the absolute necessity of sinking shafts or making other entrances to the minerals, to the practical necessities of business operations, such as the placing of steam engines and machinery at the mouth of the en-

trances, of constructing ponds of water to supply the engines, of laying and operating rail or tram ways to bring in supplies and to carry out the ore, of storage of minerals on the surface pending sales, of assembling houses, stores, and shops for the use of the miners; but such uses . . . [are] to be implied in the grants, if found to be necessary by the triers of fact. . . . It is equally obvious that a grant of the right to bore a tunnel or to sink a shaft may imply the right, as a reasonable necessity, to use the surface for the deposit of waste and debris brought from the tunnel or shaft, such necessity to be determined as a question of fact from the circumstances of the case."

One who has the exclusive right to mine coal on a tract of land, has the right of possession even as against the owner of the soil, so far as is reasonably necessary to carry on his mining operations. *Bagley v. Republic Iron, etc. Co.* 193 Ala. 219, 69 So. 17.

The right to coal deposits, when separated by grant or reservation in a deed, is as much of an estate inlands as the right to the surface of the same lands; and such an estate carries with it the right to use so much of the surface estate as may be reasonably necessary for the proper use of the mineral estate. *Gordon v. Million*, 248 Mo. 155, 154 S. W. 99. And see the reported case.

The grantee of a right to explore for oil and gas has a right to drill the surface of the land together with such right of ingress and egress on the surface as may be necessary for that purpose. He also has the right to a reasonable use of the surface to place derricks and other necessary machinery for drilling its wells. *Chartiers Oil Co. v. Curtiss*, 34 Ohio Cir. Ct. 106, judgment affirmed 98 Ohio St. 594, 106 N. E. 1053. See also *Barker v. Campbell-Ratcliff Land Co.* (Okla.) 167 Pac. 468.

It has been held that while there was no question as to the right of a mine owner to remove coal from around an iron casing which protected an artesian well and was driven through the mineral strata by the owner of the surface, where there was evidence that the casing was negligently destroyed by the mine owner in his mining operation and that he refused to admit the owner of the surface to enter the mine and repair it, he was liable in damages in an action of trespass. *Pennsylvania Central Brewing Co. v. Lehigh Valley Coal Co.* 250 Pa. St. 300, 95 Atl. 471.

A grant of a right to mine coal giving the grantee "all the usual mining privileges for the removal of same and every part thereof from under and in said parcel of land, etc.," will not permit the grantee to mine coal within five feet of the dividing line in violation of a statute. *Darby v. Davis Coal, etc.*

Co. 74 W. Va. 295, Ann. Cas. 1916A 226, 81 S. E. 1124.

The fact that mining operations have been discontinued for a period of fifteen years does not prevent the mine owner from again using the surface to remove the remaining mineral. *Sorg v. Frederick*, 255 Pa. St. 617, 100 Atl. 481.

Right to Construct Railroad.

The right to construct tram roads or other means of transportation across the surface of the land for the purpose of mining and producing the minerals from other tracts of land is an easement appurtenant to the ownership of the minerals. *Jones v. Island Creek Coal Co.* (W. Va.) 91 S. E. 391. And see *Himrod v. Ft. Pitt Min. etc. Co.* 220 Fed. 80, 135 C. C. A. 648 (238 Fed. 746, 151 C. C. A. 596). But a right given to construct buildings, railroads and wagon roads, and such other facilities as may be necessary to a successful operation of the mine, does not entitle the owner of the mining right to construct a railroad for the purpose of general traffic which has no relation to the shipment of ore from the land. *Howell v. Cuyuna Northern R. Co.* 127 Minn. 480, 149 N. W. 942. And see *Farrow v. Vansittart*, 1 Eng. Ry. & C. Cas. 602, wherein a grant of land reserving in the grantor the mines and quarries with the right to mine, dig and carry away, etc., and particularly the right to lay down, make and grant wagon ways over the conveyed premises, was held not to enable the grantors or their lessees to construct a railway for the purpose of conveying passengers and general merchandise.

Right to Use Surface and Openings to Remove Minerals from Adjoining Lands.

A grantee of coal in place with irrevocable and perpetual license to mine and remove the coal from the land in which it is located, has the right, as an incident of the license to use the space made by mining the coal, for the purpose of removing coal taken from other and adjoining mines. This rule does not apply of course to mere lessees of land or of the surface, where the lease or grant is for the express purpose of transporting only the coal on or under such land; nor does it apply to cases where the time during which the right so to use the land is limited. *Bagley v. Republic Iron, etc. Co.* 193 Ala. 219, 69 So. 17, wherein the following facts appeared: "Appellants or their predecessors in title conveyed to appellee or its predecessors in title all the coal and minerals of whatever kind that lie on or below the surface of certain lands described, 'together with the right to mine said coal and other min-

erals, the right to use all necessary timber and water for such mining purposes, the right of way for all necessary roads, and all other rights and privileges which may be necessary for the proper mining and transportation of said minerals.' Appellee acquired from other parties lands adjoining those as to which appellants had conveyed the minerals and mining rights above described. Appellee opened an air shaft on the lands in question, constructed a fan thereon for the purpose of ventilating its coal mines which ramified the lands in question as well as other lands owned by appellee and acquired from third parties. The openings to the coal mines were on lands other than the ones in question, but the entries, following the seams of coal, had been extended to the lands in question, and a part of the coal thereon had been mined; and these underground entries which occupied the space from which the coal had been taken were used for laying tram tracks over which coal, not only from the lands in question but from other lands, was hauled to the tippie. Appellant Bagley filed this bill against Isaacs and appellee, to enjoin appellee from further using these entries on the lands in question, for transporting coal from other lands, and to enjoin the use of the air shafts, fans, etc., constructed thereon, for the purpose of facilitating the mining of coal from lands other than the ones in question; and to prevent the dumping of slate and refuse from such other lands upon the surface of the lands in question." The court said: "The question to be decided is: Does the use by appellee of the air shaft and fans, on the surface, and of the tram lines under the surface of the lands in question, for the purpose of mining coal from other lands, in connection with their use for mining coal from the lands in question, entitle the plaintiff to the injunctive relief sought? The learned chancellor held that plaintiff was not entitled to such relief, and we concur with him in his holding and opinion. He says: 'By virtue of its deed from Isaacs and Bagley defendant owns the coal thereby conveyed and the right to possession of the haulageway and the air shaft used in the mining of that coal. Having such right of possession, it could not while it continues the mining of that coal be guilty of a trespass or other wrong to complainant by mere occupancy of the haulageway or the shaft or by any use thereof which does not injure or interfere with the use of the nominal part of the land containing that coal. That such injurious interference results from the haulage of coal by defendant from its other lands through the passageway, or from the ventilation through the shaft of mines on such other lands, does not appear from the evidence. From such use of the haulageway and shaft

defendant could have been restricted by contract, and this irrespective of whether the use is injurious; but there was express contract on the subject, nor is there in the terms of the deed by which the coal was conveyed to defendant anything from which such restriction can be implied. The expression of rights given defendant in that deed was of such rights only as were incident to the mining of the land therein mentioned. As to what use might be made of that land or of the haulageway or the shaft in the mining of other land, the deed is silent, and therefore the doctrine whereunder the expression in a contract of some rights is sometimes held to imply the exclusion of other rights does not here apply. Under these considerations, the court is brought to the conclusion that neither the complainant in the original bill nor the complainant in the cross bill is entitled to relief, and in this it is supported by the decisions in *Lillibridge v. Lackawanna Coal Co.* 143 Pa. St. 293, 22 Atl. 1035, 24 Am. St. Rep. 544, 13 L.R.A. 627; *Schobert v. Pittsburgh Coal, etc. Co.* 254 Ill. 474, 98 N. E. 945, 40 L.R.A. (N.S.) 628, Ann. Cas. 1913B 1104, and other authorities there cited."

Right to Deprive Surface of Support.

In the absence of a contract waiving surface support, the right of the owner of the surface to such support is absolute, and is not dependent on the degree of care that may be exercised in the operation of the mine. *Chamber Colliery Co. v. Twyerould* [1915] 1 Ch. (Eng.) 268; *West Pratt Coal Co. v. Dorman*, 161 Ala. 389, 18 Ann. Cas. 750, 49 So. 849, 135 Am. St. Rep. 127, 23 L.R.A. (N.S.) 805; *Bibby v. Bunch*, 176 Ala. 585, 58 So. 916; *John Hill Coal, etc. Co. v. Bales*, 183 Ind. 276, 108 N. E. 962; *Collins v. Gleason Coal Co.* 140 Ia. 114, 115 N. W. 497, 18 L.R.A. (N.S.) 736, *affirmed* in 140 Ia. 123, 118 N. W. 36, 18 L.R.A. (N.S.) 740; *Walsh v. Kansas Fuel Co.* 91 Kan. 310, 137 Pac. 941, 50 L.R.A. (N.S.) 686; *Graff Furnace Co. v. Scranton Coal Co.* 244 Pa. St. 592, 91 Atl. 508; *Gordon v. Delaware, etc. Co.* 253 Pa. St. 113, 97 Atl. 1033; *Com. v. Clearview Coal Co.* 256 Pa. St. 328, 100 Atl. 820, L.R.A. 1917E 672; *Penman v. Jones*, 256 Pa. St. 416, 100 Atl. 1043; *Stonegap-Colliery Co. v. Hamilton*, 119 Va. 271, Ann. Cas. 1917E 60, 89 S. E. 305. See also *Robinson v. Boynton Coal Co.* 58 Pa. Super. Ct. 176.

The great weight of authority, both English and American, undoubtedly supports the rule that where the ownership of the surface of the land has been severed from the ownership of the minerals under it, unless the matter has been otherwise determined by contract or conveyance, the owner of the surface has an absolute right to necessary support

for his land. And if the owner of the minerals removes them entirely, so that injury results from the subsidence of the soil, he will be liable for the resulting damage, no matter how carefully or skilfully he may conduct his mining operations. He must either leave pillars or ribs of the mineral itself, or put in artificial supports sufficient to sustain the soil above. *Collins v. Gleason Coal Co.* 140 Ia. 114, 115 N. W. 497, 18 L.R.A. (N.S.) 736, *affirmed* in 140 Ia. 123, 118 N. W. 36, 18 L.R.A. (N.S.) 740. One who takes out the coal without leaving proper support is liable for damages to the owner of the surface, if the same subsides by reason of his failure to support it properly. *John Hill Coal, etc. Co. v. Bales*, 183 Ind. 276, 108 N. E. 962.

But the right to surface support may be waived, in which event the mine owner or those claiming under him may mine and remove all the coal underlying the surface lands, without thereby incurring liability for any damage done to the surface or the improvements erected thereon. *Com. v. Clearview Coal Co.* 256 Pa. St. 328, 100 Atl. 820, L.R.A. 1917E 672. The owner of the fee of the entire estate may grant the mineral estate and by apt words in the deed part with or release his right to surface support, in which event his grantee or those claiming under him may mine all the coal even though it results in the surface falling in. *Graff Furnace Co. v. Scranton Coal Co.* 244 Pa. St. 592, 91 Atl. 508.

In the absence of an express waiver or the use of words from which the intention to waive clearly appears, the grantee of mineral rights takes the estate subject to the burden of surface support; and the right to surface support is not affected by a clause providing that the owner of the coal in mining and removing it shall "do as little damage to the surface as possible." *Penman v. Jones*, 256 Pa. St. 416, 100 Atl. 1043.

The rule laid down by the authorities and sustained by the reason of the matter is that the right to mine is servient to the right of the owner of the surface to have it perpetually sustained in its natural state. *Bibby v. Bunch*, 176 Ala. 585, 58 So. 916, wherein it was said: "Where there has been a horizontal division of the land, the owner of the subjacent estate, coal or other mineral, owes to the superincumbent owner a right of support. This is an absolute right arising out of the ownership of the surface. Good or bad mining in no way affects the responsibility; what the surface owner has a right to demand is sufficient support, even, if to that end, it be necessary to leave every pound of coal untouched under his land. . . . 'I do not mean to say that all the coal does not belong to the defendants, but they cannot get

it without leaving sufficient support." We have followed rigidly this rule, as thus tersely suggested, in all our decisions on the subject, and they have been many. Of course, defendant had a right to all the coal under this lot, but, he had no right to take any of it, if thereby, necessarily, the surface caved in. The measure of his enjoyment of his right must be determined by the measure of his absolute duty to the owner of the surface.' . . . Where the parties draw a

dividing line, the law of the courts, following the logic of the facts of nature, gives first consideration to the ownership of the surface of the earth, the soil, from which the human family draws sustenance and on which it lives and moves, and declares, in the absence of special covenant to a contrary effect, the absolute right to its use and enjoyment, subject only to those rights in the owner of the underlying minerals which are necessarily implied by a severance of the two estates, and which are conceded by appellee in this cause. This court has considered land as per se property of peculiar value, and has made it the subject of protection against trespasses destructive to its substance without regard to the question whether, in the particular case, it really has any peculiar value or not, just as in cases of contract it is made a subject for specific performance without regard to its quality, use, or value. Where a threatened wrong would destroy the substance of the inheritance, ruin the estate, or permanently impair its future use in the manner in which the owner is entitled to use and enjoy it, pecuniary compensation is inadequate, the injury is irreparable at law, and the interference of equity is demanded."

But where the right to mine coal is specifically granted or reserved without responsibility for surface support, the owner of that right is not liable to the surface owner for a subsidence of the surface and this even though the municipality is the owner of the surface. *Scranton City v. Phillips*, 57 Pa. Super. Ct. 633.

A grant of land with a reservation of the coal mines and a right to work the mines according to the best and most approved mode of working similar mines in the district, and a provision that "reasonable recompense and satisfaction being made for any injury done to the said demised premises by reason of the exercise of any of the rights aforesaid whether by letting down the surface or otherwise," has been held to be a clear implication of the right to cause subsidence and of a waiver by the owner of the surface of his right to surface support. *Jones v. Consolidated Anthracite Collieries* [1918] 1 K. B. (Eng.) 123, 85 L. J. K. B. 465, 114 L. T. N. S. 288. And see *Beard v. Moira Colliery Co.* [1915] 1 Ch. (Eng.) 257, 112

L. T. N. S. 227, [1914] W. N. 420. So a conveyance of land which reserved the mines and minerals with the right to work the mines "in as full and ample a manner to all intents and purposes as if these presents, etc., had not been done and made" has been held to give the grantor the right to work the mines so as to cause the surface to subside. *Davis v. Powell, etc. Co.* [1917] 1 Ch. (Eng.) 488, 86 L. J. Ch. 298, 116 L. T. N. S. 520, [1917] W. N. 58.

The onus is in all such cases on the mineral owner who proposes to withdraw support, to show that the right to do so has been conferred on him, either expressly or by plain implication in the instrument by which the severance of the two estates was effected. *Chamber Colliery Co. v. Twyerould* [1915] 1 Ch. (Eng.) 268.

POSTAL TELEGRAPH-CABLE COMPANY

v.

CITY OF MONTGOMERY.

Alabama Supreme Court—June 17, 1915.

193 Ala. 234; 69 So. 428.

Actions — Moot Case — What Constitutes.

A moot case is one which seeks to determine an abstract question, not resting upon existing facts or rights, and such case will not be determined by the court merely to determine who is liable for costs.

[See note at end of this case.]

Same.

Where a telegraph company was enjoined, during the year 1914, from carrying on intrastate business within the state because it had not paid the city license fees, and the city had given the statutory bond to secure the injunction, the case will not, after the expiration of the year, be deemed moot, so as to preclude a review of the question by the court, for a dismissal of the appeal would result in leaving the question of whether the issuance of the injunction was wrongful undetermined, and would not give the telegraph company any rights under the bond; this being true, even though it might be maintained that the city, as an arm of the state, was not required to give bond.

[See note at end of this case.]

Licenses — Failure to Pay License Fee — Injunction against Continuing Business.

Where it appeared that the manager of the defendant telegraph company had been convicted for not paying the city license as

required, and it was not shown wherein an action at law to recover the license would prove ineffective, a bill to enjoin the company from carrying on intrastate business from that office until payment of the license is without equity, and should be dismissed.

Appeal from City Court of Montgomery:
GUNTER, Judge.

Action by City of Montgomery, plaintiff, against Postal Telegraph-Cable Company, defendant. Judgment for plaintiff. Defendant appeals. **REVERSED.**

[234] The City of Montgomery filed this bill against the Postal Telegraph-Cable Company, alleging in substance as follows: That the respondent is engaged in business in Montgomery; that the city commission of [235] Montgomery on December 2, 1913, adopted an ordinance prescribing the amount of license to be paid for certain businesses, vocations, etc., for the fiscal year beginning January 1, 1914, and ending December 31, 1914, of which ordinance section 188 had to deal with the business of telegraph companies, fixing their license tax, and confining same to intrastate business, excluding business done for the United States government; that subsequently, on July 21, 1914, said commission amended said section 188, which amendment is set up in paragraph 4 of the bill, but as to which we deem further reference unnecessary. Paragraph 5 of the bill sets forth section 985 of the City Code of Montgomery, which it is alleged is still in force and effect, and which section prescribes a penalty against any person, firm, or corporation who shall engage in any business, etc., for which a license is required by any ordinance of the city, without first obtaining such license, and fixes a punishment for each day such business is so carried on, and a fine to be imposed upon conviction. In the sixth paragraph it is alleged that at all times during the year 1914, and up to the time of filing the bill, on October 3, 1914, the respondent has been operating a telegraph office in this city, and has never paid any license to the city of Montgomery for the year 1914. It is further alleged that on June 23, 1914, the complainant caused the arrest of the manager of the respondent's business in the city of Montgomery for the unlawful act of doing business as aforesaid without having procured the license required, making for each day's business a separate and distinct charge; and it is further alleged that the said manager was tried before the city recorder on several of the said charges, and convicted, and that he has appealed from said conviction [236] to the city court of Montgomery, where each of the said appeals is still pending, and that notwithstanding the said arrest of the manager the respondent continues to do busi-

ness in this city without a license. In the ninth paragraph complainant avers that it is without an adequate remedy at law, for the reason that notwithstanding the arrest and conviction of its manager the respondent continues to carry on its business, and that, if complainant elected to bring an action at law for the amount of the license due it, such action would offer no adequate relief from the continued violation of said ordinance, but that such violation would, in the belief of complainant, continue from day to day, notwithstanding any action at law which it might bring. The prayer of the bill is for a perpetual injunction against the respondent's maintaining and operating a telegraph office in the city of Montgomery without complying with the ordinance requiring the procurement of a license for such business. A temporary injunction was asked for, during the pendency of the suit. The application for a fiat was set down for hearing as authorized by section 4528 of the Code; and on December 11, 1914, the judge of the city court entered the order for a temporary injunction as prayed, "effective during the year 1914," upon condition of the complainant's entering into a bond in the sum of \$500, conditioned as prescribed by law. The temporary injunction was issued in compliance with this order, and thereby the respondent company, its officers, agents, and employees, were enjoined from having, maintaining, or operating a telegraph office in the city of Montgomery for any other purpose than the doing business for the United States government, or interstate business, without compliance with the ordinances of said city relating [237] to such companies, which said writ of injunction was duly served on December 12th. From the order granting the temporary relief of injunction, the respondent prosecutes this appeal, and the cause was argued and submitted on January 4, 1915.

Rushton, Williams & Orenshaw and Martin & Martin for appellant.

Edward S. Watts for appellee.

ON MOTION TO DISMISS APPEAL.

GARDNER, J.—(1) Counsel for appellee moved to dismiss the appeal, upon the ground that the same is prosecuted from an order granting a temporary writ of injunction which by its terms was effective only during the year 1914, and that as that time had expired prior to the submission of the cause, although not at the time the appeal was in fact taken, therefore the appeal presents only an abstract question for determination and is a moot case. In *Adams v. Union R. Co.* 21 R. I. 134, 42 Atl. 515, 44 L.R.A. 273, cited also in 27 Cyc. 911, it is said: "A moot case is one which seeks to determine an abstract

question, which does not rest upon existing facts or rights."

In *Agee v. Cate*, 180 Ala. 522, 61 So. 900, it was said by this court: "Nor is it customary to decide questions of importance, after their decision has become useless, merely to ascertain who is liable for the costs."

We are unable to agree that this appeal does not affect the existing rights, and that the question involved is only one of costs.

(2) The complainant in the court below sought and obtained an injunction against the respondent's transacting [238] intrastate business in the city of Montgomery, and the writ issued prohibited the transaction of any such business from December 12, 1914, to January 1, 1915. As a condition precedent to the issuance of the writ the court below required the complainant to enter into bond payable to the respondent as required by law, and which condition reads as follows: "Now, if the said city of Montgomery and its sureties, or either of them, shall pay or cause to be paid all damages and costs which any person may sustain by the suing out of said temporary injunction or restraining order, if the same is dissolved, then this obligation to be void; otherwise, to remain in full force and effect."

The right of the city to thus prevent the respondent from engaging in intrastate business for this period of time is clearly a question which the respondent had a right to have determined by the court of last resort. The injunction bond was required for its protection against damages which it might sustain by the suing out of the temporary writ of injunction, should same be dissolved. The condition of liability upon the bond is the dissolution of the injunction. A dismissal of this appeal would result in leaving the question of whether or not the issuance of the injunction was wrongful, and the consequent question as to whether or not the injunction should be dissolved, undetermined, and therefore leave without adjudication the question touching the very condition of the bond, and, of consequence, that of liability thereon. To hold that merely because the year 1914 had passed before this cause was submitted would deprive this respondent of the right to have adjudicated to its final conclusion the right of the city to close its place of business for intrastate business would, in effect, be to close the door of the [239] court to this appellant to have determined the question as to the liability of the city upon the said injunction bond. This latter is clearly an existing right, which the respondent is entitled to have adjudicated in the courts of last resort.

The suggestion of counsel that the city (it being a part of the state government) should not have been required to make the bond and the argument that therefore the city would

not be liable upon said bond, is beside the mark and premature. These are matters with which we are not concerned, for the question upon the motion is the right of the respondent to have the matter of liability tested and adjudicated in a due and orderly manner should it be held that the injunction was improperly granted. The dismissal of an appeal for the reason urged (that it is a moot question), and where only the question of costs is involved, is a matter which must largely rest in the discretion of the court, and while, as stated in *Agee v. Cate*, supra, it is not customary to decide questions of importance after their decision has become useless, merely to ascertain who is liable for the costs, yet in our case of *Comer v. Bankhead*, 70 Ala. 136, the court did not dismiss the appeal, but determined the question and reversed the cause, at the cost of the appellee. Nor is our conclusion in conflict with what was said in the case of *Montgomery County v. Montgomery Traction Co.* 140 Ala. 458, 37 So. 208. There the injunction issued was merely directed against the board of revenue of Montgomery county to prevent its interference with the railway tracks of the complainant, or, in other words, to hold the property of the complainant in statu quo pending the determination of the issue by the court. Indeed, the situation was the reverse of what we have here, [240] and the opinion stated that it was apparent there was nothing to be accomplished by a decree on the merits of the issue, and no reference was made therein to the injunction bond or any liability thereon. Quite a different situation is presented when conditions are reversed, and when the business of the respondent has been materially interfered with and property rights are involved.

We are of the opinion that this record does not present what is called a moot case, but that in fact existing rights of the parties are involved which it is the duty of this court to determine. The motion to dismiss the appeal will therefore be denied.

ON THE MERITS.

(3) The bill, in substance, merely seeks injunctive relief against the violation by respondent of the ordinance of the city relating to the payment of a revenue license. It is not alleged that the respondent is insolvent, nor indeed is it disclosed why the relief at law is not adequate and complete. That the jurisdiction of a court of equity is exclusively civil is well established in this state, and a few brief quotations from our own authorities will suffice to demonstrate that the bill is without equity. In *Moses v. Mobile*, 52 Ala. 198, this court, speaking through Chief Justice Brickell, said: "At one time the Court of Chancery in England, exercised a jurisdiction partak-

ing of a criminal character, but it was not without objection and protest from the Commons and the common-law courts. It was excused, rather than justified, because of the inability of other tribunals to maintain internal peace and order, and because it was exercised for the defense of the poor and helpless. It passed away, when [241] the necessity for its exercise ceased, and the common-law tribunals were restored to power sufficient for the repression of violence and wrong. 1 Spence, Eq. Jur. 341, c. 4. Since, the jurisdiction of a court of equity has been purely and exclusively civil."

And in *Brown v. Birmingham*, 140 Ala. 590, 37 So. 173, is the following language: "We discover nothing in the case made by the bill to take it out of the well-settled general doctrine that the jurisdiction of courts of equity is purely and exclusively civil; that, of consequence, they are without power to enjoin the commission of threatened crimes on the one hand, and to enjoin threatened prosecution for the commission of alleged crimes on the other; that violations of state laws and violations of penal municipal ordinances, and prosecutions for both, stand upon the same footing in this connection; and that it is wholly immaterial that the statute or ordinance, for an alleged violation of which prosecution is threatened, is absolutely void."

The case of *Pike County Dispensary v. Brundige*, 130 Ala. 193, 30 So. 451, is an authority directly in point, and is conclusive against the equity of this bill. The facts of the case and purpose of the bill are to be easily ascertained by reference thereto. The town of Brundige sought to enjoin the operation of a dispensary for the sale of liquors within its corporate limits, not only upon the ground that the dispensary corporation had not procured a county license therefor, but upon the ground that a local prohibition law was in force, covering the place where the dispensary was proposed to be operated, and which would, therefore, be in violation of said local prohibition law and constitute a public nuisance. The following [242] quotation from the opinion is sufficient for the purposes of this case: "If it be conceded that the Pike County Dispensary has no right to engage in the liquor business without paying the county license tax, and may not legally engage in such business in Brundige under any circumstances because of the local prohibition statute referred to, the present bill is yet without equity, since chancery courts have no jurisdiction, to enjoin the commission of offenses against the criminal laws of the state; and the proposed acts of the respondent, however illegal they may be, would not constitute a nuisance."

Numerous authorities cited by counsel for appellee have been examined, but the diligence

of learned counsel has not been rewarded with "a case in point," and we find among those to which our attention has been directed none which militates against the conclusion here reached. We are referred, among our cases, to *Bryan v. Birmingham*, 154 Ala. 447, 45 So. 922, 129 Am. St. Rep. 63; but that case supports, rather than conflicts with, the conclusion reached in this case. At the outset of the opinion it is recognized that: "The jurisdiction of equity is purely and exclusively civil, and such courts are without power to enjoin or restrain threatened . . . prosecutions under municipal ordinances as well as state laws. . . . Applying this rule, the courts should not lost sight of the fact that a court of equity can and should interfere by injunction to restrain any act or proceeding whether connected with crime, or not, which tends to the destruction or impairment of property or property rights."

It is thus seen that case is in harmony with our other decisions, and that what was really involved therein was the right of injunctive relief against the destruction [243] or impairment of property rights. This was also the principle involved in the case of *Mobile v. Louisville*, etc. R. Co. 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342, which involved the invasion of a vested franchise right. The case of *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564, also cited by counsel for appellee, involved the obstruction of a public highway in the city of Mobile, and clearly has no bearing on the instant case.

The general rule, as stated in the above authorities, and which appears to be well-nigh universally recognized, seems to be conceded as correct by counsel for appellee; but the insistence is made that the continuation of the business of the respondent without payment of the city license is a nuisance, and jurisdiction is sought to be rested upon this theory. As above shown, the authorities from our own jurisdiction will lend no color whatever to this argument, nor, indeed, does it find support in any of the cases cited from other jurisdictions. That of *Mugler v. Kansas*, 123 U. S. 623, 8 S. Ct. 273, 31 U. S. (L. ed.) 205, involved the question of the Kansas liquor law, the violation of which was made a nuisance by the statute and its abatement as such provided for. Somewhat similar is the case of *Carleton v. Rugg*, 149 Mass. 550, 22 N. E. 55, 5 L.R.A. 193, 14 Am. St. Rep. 446, which involved a statute giving jurisdiction in equity to abate by injunction as a common nuisance any place used for the sale of intoxicating liquors. The case of *State v. Cauty*, 207 Mo. 439, 105 S. W. 1078, 15 L.R.A. (N.S.) 747, 123 Am. St. Rep. 393, 13 Ann. Cas. 787, was one in which the state sought injunctive relief against a form of entertainment, such as "bull-fighting," and where it

was alleged that it was an offense against public order, common [244] good, and public decency, and tended to corrupt the morals of the people and to disturb the peace. The case of *Columbian Athletic Club v. State*, 143 Ind. 98, 40 N. E. 914, 28 L.R.A. 727, 52 Am. St. Rep. 407, was of a somewhat similar character, involving the question of prize fighting. That of *Atty. Gen. v. Chicago, etc.* R. Co. 35 Wis. 435, involved a question of railroad rates. *State v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182, involved a statute of the state of Kansas pronouncing saloons in which liquors are sold to be nuisances and providing for their abatement. *Kansas v. Lindsay*, 85 Kan. 79, 116 Pac. 207, 35 L.R.A. (N.S.) 810, involved the right to maintain a hospital for the insane for compensation, without a license; the law providing that license should be issued only upon a showing of plans and facilities such as the board deemed adequate and suitable for such an important undertaking. The bill in that case also charged that insane patients in such asylum shrieked, made outcries, exposed their persons, and escaped or attempted to escape, and that defendants, in persistently violating the laws of the state in keeping the asylum, inflicted an injury upon the public and created a common nuisance.

A review of the authorities to which we have here referred sufficiently demonstrates that they are without application in the case at bar and lend no support to the contention that this case presents an exception to the general rule. The rule is recognized by Mr. Pomeroy (5 Eq. Jur. § 476) that: "A Court of equity is in no sense a court of criminal jurisdiction. Its primary province is the protection of property rights."

In section 478, speaking to the question of nuisances and of violations of city ordinances, he says: "But the [245] mere violation of the ordinance is no ground for relief, unless the acts themselves actually constitute a nuisance."

Here the bill seeks to enjoin the respondent from conducting its intrastate business because of its failure to procure the revenue license required by the city. The business conducted by the respondent is recognized as not only entirely legitimate and in no manner injurious to the commercial world. Nothing appears in the bill to show why the relief sought at law for the recovery of the amount of the revenue license is not an adequate remedy; and the bill shows that the manager of the respondent corporation has been prosecuted for a violation of the ordinance, and convicted in the recorder's court, and that his case is now pending on appeal in the city court. Further discussion, however, we deem unnecessary. We are clearly convinced that the bill is wholly wanting in

equity. The only decree, rendered in the cause, from which this appeal is prosecuted, is that granting the temporary injunction as prayed for in the bill; the demurrers on file not having been passed upon by the judge of the city court. The judgment here rendered, therefore, can only relate to this order, and the cause will be remanded to the city court, for disposition there in accordance with the views here expressed.

Our conclusion is, therefore, that there was error in ordering the temporary injunction to issue in this cause, because of want of equity in the bill. A decree will be here entered, reversing the order to that effect in the court below, and dissolving the temporary injunction; and the cause will be remanded for further proceedings in that court in conformity to this opinion.

Reversed, rendered, and remanded. All the Justices concur, except Sayre, J., who dissents in part, as he [246] entertains the view that the record presents a moot case, and that therefore the motion to dismiss the appeal should prevail.

NOTE.

What Constitutes Moot Case.

Generally.

"It has long been settled law that, if one of the litigating parties, by purchase or otherwise, extinguish the claim of the opposite party, or if the parties, by collusion, endeavor to obtain from a court a decision upon a moot question, having no substantial right in actual controversy between them for determination, the court will refuse to take further cognizance of the matter and dismiss the proceeding, if pending, or decline to take jurisdiction if the status of the parties and object of the proceeding appear, when the aid of the court is invoked." *State v. Lambert*, 52 W. Va. 249, 43 S. E. 176. And see 1 R. C. L. tit. *Actions*, p. 317.

In *Adams v. Union R. Co.* 21 R. I. 134, 140, 42 Atl. 515, 44 L.R.A. 273, a moot case was defined as follows: "A moot case is one which seeks to determine an abstract question, which does not rest upon existing facts or rights. Where a concrete case of fact or right is shown, we know of no principle or policy of law which will deprive a part of the determination simply because his motive in the assertion of such right is to secure such determination. It is a matter of common practice." The following cases have approved the foregoing definition: *Ex p. Steele*, 162 Fed. 694, 702, 20 Am. Bankr. Rep. 575; *State v. Dolley*, 82 Kan. 533, 108 Pac. 846; *Winslow v. Gayle*, 172 Ky. 126, 188 S. W. 1059; *Bunning v. Com.* 177 Ky. 155, 197 S. W. 542; *State v. Lincoln*

First Catholic Church, 88 Neb. 2, 128 N. W. 657. And see the reported case.

In *State v. Dolley*, 82 Kan. 533, 537, 108 Pac. 846, it was said: "It is universally understood by the bench and bar . . . that a moot case is one which seeks to get a judgment on pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. . . . When there is an actual, bona fide contest as to a legal right, an agreement to put the case, when made, by actual exercise of the right and resistance to it, in such shape that the right can be readily determined by the court, especially when the dispute concerns a matter of public moment, which should be speedily settled, has never been condemned by the courts. It is a common, every day practice in every state of the Union. The noted Legal Tender Cases were made up in that way." Ex p. Steele, 162 Fed. 694, 701."

In *Sherod v. Aitchison*, 71 Ore. 446, 142 Pac. 351, Ann. Cas. 1916C 1151, the court said: "A case in which a party seeks to have determined in a judicial proceeding an abstract question which does not arise upon existing facts or involve conflicting rights, so far as he is concerned, presents a moot inquiry."

Illustrations.

In *State v. Lincoln First Catholic Church*, 88 Neb. 2, 128 N. W. 657, the suit was brought by the attorney general at the direction of the board of public lands and buildings to quiet title to some land which had previously been conveyed to trustees for a religious organization under the authority conferred by a statute, it being claimed that the religious organization took no title because it was not incorporated. A decree being rendered in favor of the defendant, the plaintiff appealed, and on the appeal a brief was filed by friends of the court who represented clients of theirs who they claimed were interested in the result of the action for the reason that the defendant claimed to have made a contract within them for the sale of the property in dispute. The brief contained the following statement: "There is nothing in controversy between the plaintiff and the defendants. It is purely a moot case, brought by the direction of the board of public lands and buildings, at the instance and request, as we think, of Bishop Bonacum. It is not even a moot case, so far as the plaintiff and the defendants are concerned, because in such a case there is something submitted for decision, while in this case there is nothing to submit for decision,

as far as they are concerned. Yet, if this court should permit this case to be maintained, its action will be presented in the ecclesiastical tribunal, we fear, as a decision adverse to our clients of the points involved between them and the bishop, and we respectfully submit that this court should not be used to serve such a purpose." Holding that the case was not a moot one, the court said: "We frankly admit that, if it were shown that the suit does not present conflicting interests between the parties to it, we would hesitate to take jurisdiction, even on appeal, but we are unable to find any evidence in the record that such is the case. The action is brought by and under the direction of the board of public lands and buildings, and it was evidently their intention to procure a settlement of the question of the title to the property. It is clear from the issues presented that the demands of the parties are adverse. The fact that the suit may be a friendly one, if true, would not of necessity render the suit a moot case."

In *Empire Coal Co. v. Bowen*, 195 Ala. 348, 70 So. 283, an action to recover damages for personal injuries, it appeared that after the recovery of a judgment in favor of the plaintiff and an appeal therefrom the plaintiff, without the consent of his counsel, for a valuable consideration executed a release of any damages to which he might be entitled by reason of the judgment, and transferred to the defendant all his right, title and interest therein. On the hearing of the appeal the defendant moved for a dismissal on the ground that the case was moot. Overruling the motion, the court said: "It appears without contradiction, however, that counsel for appellee who make this motion were the counsel representing the plaintiff in the recovery of said judgment, and that as such counsel they are interested in the judgment, claiming a lien thereon for their attorney's fee, and are claiming a liability on the part of appellant to the extent thereof. Subdivision 2 of section 3011 of the Code of 1907, which deals with the question of the lien of an attorney upon a judgment for money, was given consideration in the recent case of *Fuller v. Lanett Bleaching Co.* 186 Ala. 117, 65 So. 61. The question there determined is, in our opinion, decisive of the motion in this case against contention of counsel for appellee. This is not, therefore, a 'moot case.' See *Postal Tel.-Cable Co. v. Montgomery*, 193 Ala. 234, 69 So. 428, where some of the authorities in question of what is a moot case are reviewed. The motion to dismiss is overruled."

In *Bokel, etc. Co. v. Costello*, 22 App. Cas. (D. C.) 81, a judgment debtor who had made a fraudulent conveyance of his property was proceeded against under a writ of *capias ad*

satisfaciendum. On a trial of the case a verdict was directed in favor of the debtor although his insolvency and the fraudulent conveyance were proven by undisputed testimony. On an appeal being taken by the plaintiff, it was contended that it was immaterial whether or not the trial court erred. Answering this contention the appellate court said: "The contention of the appellee that the question before us is in any event no more than an academic case, since, as he claims, the defendant having been discharged by the judgment of the court below cannot again be arrested, is substantially an argument to the effect that, in this class of cases, an erroneous decision by the trial court is sufficient, by reason of its very error, to oust this court of jurisdiction in such cases on appeal. We do not think that this contention need to be here seriously considered."

In *re Gering*, 88 Neb. 192, 129 N. W. 430, an appeal was taken from an order dismissing an appeal from the overruling of a remonstrance against the issuance of a druggist of a permit for the sale of intoxicating liquors. A motion was made by the applicant for the permit to dismiss the appeal on the ground that as he had disposed of his drug store, the record presented only a moot question. Answering this contention, the court said: "The contention that the record presents only a moot question cannot be sustained. When the district court dismissed the plaintiffs' appeal the defendant was entitled to his permit, and it appears that for some time thereafter he enjoyed its benefits. If it be a fact that defendant has disposed of his stock of drugs to another who is conducting the business in the same building formerly used by him for that purpose, that fact does not prevent him from repurchasing the stock or again engaging in the business in the same building and making sales of intoxicating liquors under the terms of his permit. It is not shown that the permit has been relinquished, nor has it been canceled by the city council. It further appears that this case was advanced under the rule in order to secure the plaintiffs the benefit of their appeal; that the permit in question will not expire until April, 1911, and therefore it cannot be said that in deciding this case we would only be deciding a moot question."

In *Funk, etc. Co. v. Stamm*, 85 N. J. L. 301, 88 Atl. 1050, a foreign corporation brought an action to recover the unpaid portion of the purchase price of a set of books which the defendant had bought. The suit was defended on the ground that the contract was made within the state and consequently could not be sued on by the plaintiff because it had not obtained a certificate authorizing it to do business in the state. It was admitted by the agreed facts that the contract was made

within the state, but the facts actually showed that it was not made within the state. Discussing the effect of the admission and holding that the question sought to be raised was a moot one, the court said: "The apparent purpose of this concession by the plaintiff was to obtain the opinion of the court upon an assumed situation, otherwise unnecessary, as to the effect of the statute above mentioned upon interstate business conducted as was that of the plaintiff, for the entire argument in this court is directed to that question. The conclusion we have reached is, that the undisputed facts submitted permit but one inference and that is, that this contract was not made in this state. The admission of a contrary result by the plaintiff is a conclusion, not of fact, but of the legal consequence of the facts stated, which is not binding upon a court, for parties to a litigation cannot, by agreement, deprive a court of its undoubted right to determine the legal effect of the uncontradicted facts appearing in a cause, by an admission inconsistent with the legal conclusion arising therefrom. The case sought to be presented seeks the determination of an abstract question which does not arise upon existing facts, a situation which falls within the definition of a moot case (Bl. L. Dict. (2d ed.) 791), but is based on an erroneous conclusion of the legal effect of existing facts."

In *Potter v. Younts*, 172 Ky. 130, 188 S. W. 1059, it was held that where on an appeal it appeared that a reversal of the judgment would accomplish nothing and an affirmance would not benefit the appellee, the appeal presented a moot question and would be dismissed.

AXTON FISHER TOBACCO COMPANY

v.

EVENING POST COMPANY ET AL.

Kentucky Court of Appeals—March 9, 1916.

169 Ky. 64; 183 S. W. 269.

Pleading — Demurrer — Admission of Averments.

General demurrers to the petition and amended petition admit the truth of all material averments therein.

Libel and Slander — Pleading — Necessity of Alleging Special Damage.

Where publications are libelous per se, it is not essential to a good cause of action that special damage should be alleged; but, if the publication is not so obviously defama-

tory that the inference of injury may be drawn, it can only be made actionable when the complaining party pleads and proves that it has in fact damaged him.

What Constitutes Libel — Person Inaccurately Designated.

When a publication as a whole is plainly directed at a person or corporation, the person or corporation so assailed may maintain an action for libel as if he or it were particularly named or described, though the name has not been accurately designated in the publication.

Words Libelous per Se.

If a written or printed publication tends to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or to render him odious, ridiculous, or contemptible, it is "libelous per se," though spoken words are "slanderous per se" only if they falsely impute the commission of a crime involving moral turpitude, an infectious disease, or unfitness to perform duties of an office or employment, prejudice him in his profession or trade, or tend to disinherit him.

Libel or Slander of Corporation.

The distinction between libel and slander obtains as fully with respect to corporations as to individuals.

Same.

A corporation may maintain an action for slander or libel, but only when the words complained of injure it in a business way, since it is only in respect to business that a corporation can be affected or injured.

Same.

To render a publication concerning a corporation "libelous per se," it must reasonably and naturally appear that it was of a nature to deprive the corporation of patronage or trade, or to render it odious and contemptible in the estimation of those with whom it did have or might reasonably expect to have business dealings, but it is not necessary that the publication misrepresent the character or condition of the corporation's marketable products, the methods by which its internal affairs are conducted, its capacity, or business dealings toward the public, or its products, its attitude, its business, or its stability, so as to affect its credit.

Libelous Words — Charge of Unfair

Treatment of Labor.

A publication, charging that a tobacco company paid an average wage less than its competitors, required its employees to work a greater number of hours per day, and that the sanitary conditions of its rivals were better than those of the company, is not libelous per se.

Same.

A publication, charging that a tobacco company placed a negro foreman over white girls, that they quit work and reported the trouble to the union, was libelous per se.

Charge that Name of Employer Was on "Unfair List."

A charge that, on refusal of a tobacco company to remove a negro foreman placed over

white girls, the company was placed on the unfair list by the local union, and this action was ratified by the tobacco workers' international union, and that the advertising cards of the company were printed in "scab" shops, so as to display its contempt for organized labor, in connection with matter of inducement that the company employed only union labor, that it received from the union the right to place its label on its products, and had obligated itself to patronize only union shops, that it dealt fairly with its employees and had a good reputation with organized labor and wage-earners, and innuendo that the effect of these publications was to destroy the company's good reputation with organized labor and the public, as the operator of a union factory, is libelous.

[See note at end of this case.]

Same.

The court will take notice that union labor constitutes a large, influential, and well-organized body of the laboring people of the state and country, that the wage-earners, including those who are members of the union, compose a large part of the population, and that labor unions have adopted and promulgated rules and regulations for the protection and guidance of labor, which are carefully observed by the members.

[See note at end of this case.]

Same.

In determining whether a publication charging that a tobacco company was placed on the unfair list and had its advertising printed in scab shops, is libelous per se, the court will consider matter in the petition set out by way of inducement and innuendo.

[See note at end of this case.]

Appeal from Circuit Court, Jefferson county, Common Pleas Branch, First Division.

Action by Axton Fisher Tobacco Company, plaintiff, against Evening Post Company et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **REVERSED.**

J. E. Wise, W. J. Boles and Burton Vance for appellant.

Humphrey, Middleton & Humphrey and Gibson & Crawford for appellees.

[66] CARROLL, J.—This is a libel suit brought by the Axton Fisher Tobacco Co., a corporation engaged, in Louisville, Ky., in manufacturing and selling smoking and chewing tobacco and especially in the manufacture and sale of the brands known as "Old Hill Side" and "Booster Twist." The defendants are the Evening Post Co., the publishers of the Evening Post, a daily newspaper in the city of Louisville having a wide circulation in that city and elsewhere, and Richard W. Knott, editor, and Lewis C. Humphrey, associate editor of the paper.

To the petition and amended petition of the plaintiff general demurrers were filed by the

defendants and sustained, and, declining to plead further, the petitions were dismissed, and the plaintiff brings the case to this court.

The demurrers admit the truth of all the material averments in the petition and amended petition, and so the only question before us is, did these pleadings, assuming the averments to be true, state a good cause of action against the defendants?

The petition, after averring that the plaintiff was engaged in manufacturing and selling smoking and chewing tobacco, further averred that it "had been for many years prior thereto especially engaged in the manufacture and sale of its brands of smoking and twist tobacco widely [67] and favorably known as 'Old Hill Side' and 'Booster Twist,' and it had, on and prior to said dates, acquired, enjoyed and deserved a good reputation with the trade and the public as a manufacturer of tobacco, and especially of said brands of tobacco, and had built up, enjoyed and deserved an extensive demand for, and sale of, its said products and brands of tobacco, from which it received a valuable and ever increasing profit.

"That in the introduction of its said brands of tobacco 'Old Hill Side' and 'Booster Twist' to the trade and the public throughout the United States, and in establishing their said good reputation and in acquiring said good reputation with, and good will of the trade and public, as a manufacturer of tobacco, and as the manufacturer of said brands of tobacco, it expended a great many thousands of dollars, and said brands, and plaintiff's reputation and good will therein, constituted plaintiff's most valuable asset, and was on said several dates fairly and reasonably worth the sum of three hundred thousand dollars.

"That it had for many years, at all times operated a union factory and employed union labor in the manufacture of its said tobacco, and had at all times paid its employees engaged in its manufacture the union scale of wages, and in many instances largely in excess of the union scale, and at all times and in all ways dealt fairly and justly with its employees; and by reason of these facts it had on said dates acquired and enjoyed a good reputation with, and the good will of, organized labor and wage earners in Kentucky and throughout the United States, and had especially acquired with them a valuable reputation and good will as the manufacturer of, and for 'Old Hill Side' and 'Booster Twist' as union made tobaccos, and had built up and enjoyed an extensive demand for, and sale of said tobacco to them, which constituted the larger part of the demand for said brands.

"That at all the times hereinbefore and hereinafter mentioned or referred to plaintiff was conducting and operating its said business and its said factory as a unionized fac-

tory pursuant to the terms of a contract existing between it and the Tobacco Workers' International Union, a corporation organized and existing under an act of the Congress of the United States of America, by which said union granted to it the right to place on tobacco manufactured by it the label of said union and bound itself to [68] furnish all the said labels required by plaintiff for said purpose, and in consideration of which plaintiff obligated and bound itself to said union, among other things, 'That all persons employed by it in the manufacture of tobacco should be members of the Tobacco Workers' International Union exclusively,' and 'That it would pay to its said employees the scale of wages approved of and agreed to between it and said union.' That at all said times a scale of wages was in force between it and said union under said contract which had been approved and agreed upon between it and said union.

"That the right granted it by said contract to affix said union label to tobacco manufactured by it was a very valuable asset to it in its said business, and by the terms of said contract a failure upon its part to strictly comply with its obligations to pay to its employees wages according to the said scale of wages agreed upon would operate to deprive it of the further use of said union label."

In paragraph 1, it was averred:

"That in several editions of the Evening Post printed, published and circulated by the defendants on October 4, 1913, 'they wilfully, knowingly and maliciously published of and concerning the plaintiff and its business of manufacture of tobacco; of and concerning the wages paid by it in its factory to its employees; of and concerning its methods of conducting its business, and of and concerning the character and kind of men it employed as foremen in its factory, the following false and defamatory statements:

"'Axton (meaning plaintiff) has a negro foreman over white men. That official figures furnished the State Labor Department show that Mr. Axton (meaning plaintiff) pays an average wage considerably less than that paid by the American Tobacco Co. Official record: Here is what the official record of the State Department of Labor and Statistics shows about the Axton's corporation's tobacco factory (meaning plaintiff's factory) compared with other factories: The tobacco trust pays many of its employees wages as high as \$14.95 per week; the Burley Tobacco Company pays as high as \$12 per week; while the highest wage the Axton factory (meaning plaintiff) pays to any of its employees is \$8.75 per week.

"'The sanitary conditions provided by the other factories are also shown by the records to be much better [69] than those furnished

by the corporation (meaning this plaintiff) of which Mr. Axton is the head.

"Here are official figures: Axton Fisher Tobacco Factory, Thirteenth and Rowan: Number of hours per day, 10; number of hours per week, 59; highest wages, \$8.75; average wage, \$7.00.

"American Tobacco Company, Eighteenth and Broadway: Number of hours per week, 55; highest wage, \$14.95; average wage \$7.50.

"Burley Tobacco Company, Jackson and Caldwell: Number of hours per week, 50 to 55; highest wage \$12.00; average wage, \$8.00.

"Think of even the tobacco trust paying better wages and giving shorter hours and better sanitary conditions than the Axton corporation's factory (meaning plaintiff).

"In his (meaning plaintiff's) factory he (meaning plaintiff) puts negro foreman over white men. It is another example of his (meaning plaintiff's) double dealing with laboring men. He (meaning plaintiff) don't dare deny it.

"A negro named Brown was foreman on the third and fourth floors of Axton's factory (meaning plaintiff's factory) and that he had many white men under him. This is the same Wm. H. Brown, colored, whose name appears in the city directory, page 230, as foreman of the Axton Tobacco Factory.

"For three years prior to March, 1913, during the entire three years, a negro named Brown was foreman on the third and fourth floors of the Axton Fisher Tobacco Factory, and many white men worked under him at the factory.

"Among the number employed upon the third floor under Brown were a large number of white men."

In paragraph 2, it was averred that in several editions of the paper printed, published and circulated on October 5, 1913, the defendants "wilfully, knowingly and maliciously published of and concerning the plaintiff and its business of manufacturing tobacco, and of and concerning the wages paid by it to its employees in its factory, the following false and defamatory statements:

"Axton's (meaning plaintiff's) average wage is lowest. Records of all factories. Official proof is given. Mr. Ben J. Sand, the State Labor Inspector, made a statement Monday morning.

[70] "Mr. Sand states that the records of the State show that the charges made by Dr. Buschmeyer are entirely correct, and that Mr. Axton (meaning plaintiff) does not permit the eight hour rule in his (meaning plaintiff's) factory, and pays wages less even than those of the American Tobacco Co. There are in Louisville only four tobacco factories where smoking tobacco is manufactured. They are located as follows: American Tobacco Co. Eighteenth and Broadway,

employing two hundred and sixty-three females; Burley Tobacco Co., employing thirty females in the manufacture of smoking tobacco; American Tobacco Co., Jackson and Finzer streets, employing one hundred and thirty-six females; Axton Fisher Tobacco Co., Thirteenth and Rowan streets, employing sixteen females. The Axton Fisher Tobacco Co. works fifty-nine hours a week, while the American Tobacco Co. works but fifty-five, with a Saturday half holiday throughout the year. The Axton Fisher Tobacco Co. does not give its employees a half holiday. The only other union tobacco factory, which is the Burley Tobacco Co., works its employees fifty and fifty-five hours each week and affords its employees a half holiday.

"The highest wages earned by any workers are: American Tobacco Co. (West End), high, \$14.95; low, \$4.00; average \$7.50. Burley Tobacco Co., high, \$12.00; low, \$7.00; average, \$8.00. Axton Fisher Co. (meaning plaintiff), high, \$8.75; low, \$6.00; average, \$7.00.

"In addition to the one hundred and fourteen day workers at the East End branch of the American Tobacco Co., there are twenty-two females employed under the piece system. High wages paid in this instance is \$12.35, and the low wage is \$7.00. The average is \$7.50.

"The average weekly wage for a female in the employ of the Axton Fisher Tobacco Co. is \$7.00. The average weekly wage for males and females employed by the company is \$9.14."

In paragraph 3 it was averred that in several editions of the paper printed, published and circulated by the defendants on October 16, 1913, "they wilfully, knowingly and maliciously published of and concerning the plaintiff and its business of manufacturing tobacco, and of and concerning the wages paid by it to its employees in its factory, the following false and defamatory statements:

[71] "Women workers paid scant wage by Axton (meaning plaintiff). Average of \$5.40 a week for ten hours a day revealed by the records.

"The printed report of former Labor Inspector Filburn showing that the official records show that the average wage for women operatives in his (meaning plaintiff's) factory was only \$5.40 a week.

"Now Mr. Axton (meaning plaintiff) has a legal right to work his (meaning plaintiff's) employees as long or as short as he (meaning plaintiff) wants to and to pay them as little or as much as he (meaning plaintiff) wants to. But he (meaning plaintiff) has no right while he (meaning plaintiff) is paying wages far below those paid by other factories, and working men and women long hours, to claim that he (meaning plaintiff) is a friend of labor.

"Get a copy of Mr. Filburn's report of 1910, when he was labor inspector, and turn to page 75 of that report and read what the official figures show were the conditions in Mr. Axton's (meaning plaintiff's) factory. Those official figures—they are all down on page 75—show that the average wage paid by Mr. Axton (meaning plaintiff) to his female employees was 90 cents a day for ten hours work. Think of it. A total of \$5.40 a week, or 9 cents an hour. And remember that this was an average wage. It does not mean that \$5.40 a week was the lowest wage Mr. Axton (meaning plaintiff) paid. It means that some got below \$5.40 a week and that his (meaning plaintiff's) average wage for these workers was \$5.40 a week.

"Get a copy of Labor Inspector Filburn's report of 1910 and turn to page 75. If what I tell you is not a public record and if it had not been true it would have been denied long ago."

In paragraph 4 it was averred that in several editions of the paper printed, published and circulated by the defendants on October 18, 1913, "they wilfully, knowingly and maliciously published of and concerning the plaintiff and its business of manufacturing tobacco; of and concerning the character and kind of foreman or boss it had placed over its girl employees in its factory, in Louisville; and of and concerning the wages paid by it to its employees in its said factory, the following false and defamatory statements:

"Negro foreman was placed as boss over white girls in Axton (meaning plaintiff's) factory. The negro foreman [72] Will Brown was then placed in charge of machines where the girls were employed and as a boss over them. The girls then quit work and refused to work under a negro foreman. They reported the whole trouble to local Union No. 16.

"The union appointed a committee to look into the matter and report as to the merits of the grievance of the girls.

"This same Charles T. Hardy, tobacco worker, employed at Strater Bros. Tobacco Factory, was made chairman of the grievance committee.

"Mr. Hardy and the grievance committee investigated and found that the charges of the girls against Mr. Axton's factory (meaning plaintiff's factory) were true and so reported back to the union. Axton (meaning plaintiff) would not remedy the matter, and upon Mr. Hardy's recommendation the union, after a number of fruitless conferences with Mr. Axton (meaning with Mr. Axton as the president of plaintiff), withdrew the use of the union label from the Axton factory (meaning plaintiff's factory) and placed him and his factory (meaning plaintiff's factory) upon the unfair list. This action was ratified by the International Union of Tobacco Workers.

"The wages of the Axton factory (meaning plaintiff's factory) have never been raised to the basis of other factories in the same line of business, and are now only barely enough to keep the factory from being again placed upon the 'unfair list.'"

In paragraph 5, it was averred that in several editions of the paper printed, published and circulated by the defendants on October 23, 1913, "they wilfully, knowingly and maliciously published of and concerning the plaintiff and its business of manufacturing tobacco, and of and concerning its advertising cards and where they were printed, and of and concerning its relation to and attitude and feeling towards organized labor, the following false and defamatory statements:

"Axton's (meaning the plaintiff's) advertising cards printed in scab shops, and Axton (meaning the plaintiff) displays his (meaning the plaintiff) contempt for organized labor,' comprising the opening and closing lines of said false and defamatory publication, to be printed in said newspaper in a most prominent and conspicuous manner and in letters three-quarters of an inch high and heavily underscored."

[73] In paragraph six it was averred that in several editions of the paper printed, published and circulated by the defendants on October 27, 1913, "they wilfully, knowingly and maliciously published of and concerning the plaintiff and its business of manufacturing tobacco, the following false and defamatory statements:

"More proof of conditions in Axton (meaning plaintiff's) factory. Proof that white men had been required to work under a negro foreman at Mr. Axton's (meaning plaintiff's) factory.

"First as to Mr. Axton's (meaning plaintiff's) negro foreman, Will Brown: This negro was the floor boss over white men and girls. It is proved by Brown's own written statement as well as the affidavits of reputable witnesses.

"She was one of the girls who went on a strike some years ago with this negro Brown was made a boss over the white girls."

Summarizing this lengthy pleading, it will be noticed that in the matter set out by way of inducement it is averred that the tobacco company was engaged in the manufacture and sale of union made smoking and chewing tobacco and especially the brands known as "Old Hill Side" and "Booster Twist," and that it had built up and acquired a good reputation with the trade, the public generally and especially labor organizations and laboring people as a manufacturer of tobacco, and had acquired an extensive and lucrative demand for its products.

That it had for many years conducted and operated its business and factory as a unionized factory pursuant to a contract between

it and the Tobacco Workers' International Union, by the terms of which contract it was authorized to place on all of its products the union label, which was a guarantee to organized labor that the tobacco on which it was placed was manufactured in a factory employing only union labor. And by virtue of the terms of the contract between it and the Tobacco Workers' Union it agreed to and did pay to its employees a scale of wages agreed upon between it and the union and in many instances largely in excess thereof.

That by its course of fair dealing with the trade, its employees, the public generally organized labor and wage earners, it had acquired the good will of the public generally; and its sale to organized labor and wage earners constituted the largest part of its sale of tobacco. That the good will of union labor and wage earners towards [74] it and its right to place on its products the union label, constituted valuable assets in its business, and if it failed to comply with the terms of the contract between it and the tobacco workers' union, such failure would operate to deprive it of the union label and result in the union placing its factory on the unfair list, thereby depriving it of the patronage of union labor.

The false and defamatory publications complained of, it is averred by way of innuendo, were maliciously intended to injure and destroy its business, its good reputation and its good will with the public and especially with organized labor; to destroy the demand for its products with the public generally and especially with organized labor and wage earners, and to render it contemptible and odious to them as a manufacturer of tobacco, thereby injuring the value of its business and brands.

The alleged defamatory matter may be divided into four classes. (1) That it employed a negro as foreman or boss over white girls, and the white girls were required in its factory to work under a negro foreman.

That on account of this the girls quit work and reported the trouble to a local labor union, which appointed a committee to look into the matter, and this committee found that the charge of the girls that they were required to work under a negro foreman was true, and the tobacco company failing to correct or remove this cause of complaint, the union withdrew the use of the union label from the factory and placed the factory on the unfair list, which action was ratified by the International Union of Tobacco Workers.

(2) That the advertising cards were printed in "scab shops" and its advertisements were placed in street cars without the union label, to show its contempt for organized labor.

(3) That it paid less wages to its employees and required them to work more hours per day and week than the American Tobacco Co.

or the Burley Tobacco Co., its only rivals located in Louisville in the manufacture and sale of tobacco, and never raised its wages to the basis paid in these factories.

(4) That the sanitary conditions in the American Tobacco Co. and Burley Tobacco Co. factories and other factories were much better than those in its factory.

Each of these classes will be dealt with separately, but before applying the questions of law that we think controlling [75] in the disposition of the case it may be well to here state that no special damage was alleged; nor was it essential to a good cause of action that special damage should have been alleged if, as contended by counsel, the publications were libelous *per se*, as a matter that is libelous *per se* is actionable without averment of special damage. As said in Newell on Slander and Libel, page 181:

"When language is used concerning a person or his affairs which from its nature necessarily must, or presumably will as its natural and proximate consequence, occasion him pecuniary loss, its publication *prima facie* constitutes a cause of action and *prima facie* constitutes a wrong without any allegation or evidence of damage other than that which is implied or presumed from the fact of publication; and this is all that is meant by the terms 'actionable *per se*.' Therefore the real practical test by which to determine whether special damage must be alleged and proven in order to make out a cause of action for defamation is whether the language is such as necessarily must or naturally and presumably will occasion pecuniary damage to the person of whom it is spoken."

In such a case the complainant may rely upon the inference of damage raised by the law, and is not required to plead or prove that the publication has injured him. But when the publication is not so obviously defamatory that the inference of injury may be drawn, it can only be made actionable when the complaining party pleads and proves that it has, as a matter of fact, damaged him.

It might also be here further noticed that frequent references in the publication are made to "Axton" and to "Axton's corporation," but the fair and reasonable inference from the context of the published matter is that all references to "Axton" and to the "Axton corporation" were intended to and did apply to the Axton Fisher Tobacco Co. And when a publication, reading the whole of it, is plainly directed at a person or corporation, as the case may be, the person or corporation intended to be and that is in fact assailed by the publication may maintain an action for libel as freely as if he or it were particularly named or described in the publication, although neither the name of the person nor the style of the corporation has been

accurately designated or described in the publication. And so we may treat these publications as referring to the Axton Fisher Tobacco Co.

[76] Another elementary rule in the law of libel and slander is the difference between the actionable nature of alleged slanderous words and the actionable nature of alleged libelous words. In *Riley v. Lee*, 88 Ky. 603, 11 S. W. 713, 21 Am. St. Rep. 358, in speaking of the general rule as to what publications may be treated as libelous, it was said:

"So it may be regarded as thoroughly settled, that if the written or printed publication tends to degrade the person about whom it is written or printed—that is, if it tends to reduce his character or reputation in the estimation of his friends or acquaintances or the public, from a higher to a lower grade, or if it tends to disgrace him—that is, if it tends to deprive him of the favor and esteem of his friends or acquaintances or the public, or tends to render him odious, ridiculous or contemptible in the estimation of his friends or acquaintances of the public, it is *per se*, actionable libel."

In slander the rule as stated in *Williams v. Riddle*, 145 Ky. 459, 140 S. W. 661, is that in the following cases only would words be slanderous or actionable *per se*: "(1) Words falsely spoken imputing the commission of a crime involving moral turpitude, for which the party might be indicted and punished: (2) Words imputing an infectious disease, likely to exclude him from society: (3) Words imputing unfitness to perform the duties of an officer or employment: (4) Words prejudicing him in his profession or trade: (5) Words tending to disinherit him. In all other cases spoken words are either not actionable at all, or only actionable on proof of special damage."

It will thus be seen that many words are actionable when written or printed and published which would not be actionable if merely spoken. And so, in determining whether words are libelous *per se* or not, it is unnecessary to consider whether they impute to the person concerning whom they are published the commission of a crime involving moral turpitude, or an infectious disease, or unfitness to perform the duties of an officer or employment, or prejudice him in his profession or trade, or tend to disinherit him. It is only essential to inquire whether or not they have a natural and reasonable tendency to degrade and disgrace the person of whom they are written, or to render him odious, ridiculous or contemptible. If they do, they are libelous *per se*, although they might not naturally or reasonably have any meaning that would make them actionable *per se* if spoken.

[77] This distinction between libel and slander obtains as fully with respect to cor-

porations as it does to individuals. And as a corporation like an individual may have a good reputation and enjoy the good will of its customers and the public, and this good reputation and good will are as valuable to it as good will would be to an individual or partnership, a corporation may maintain an action for slander or libel. But it can only do so when the effect of the words or publication complained of is to injure it in a business way, because it is only in respect to its business that a corporation in its corporate capacity can be affected or injured.

Therefore when the action is for an injury to a trade or business, there seems to us no room for a distinction in respect to what is libelous as between corporations, traders and merchants. If a publication would be libelous if it concerned a merchant or trader in his business, so would it be libelous if it concerned a corporation in its business. In either case it is an injury to the business that constitutes the gravamen of the offense, and in either case the effect is the same. What difference then can there be so far as the effect on business is concerned between the publication that brings the business of the trader or merchant into disrepute and that which brings the business of the corporation into disrepute? The corporation is as much concerned to have its business good will and reputation protected for the benefit and promotion of its trade as is a partnership or the merchant or trader.

And so when a corporation, such as the Axton Fisher Tobacco Co., charges that a publication respecting it is libelous *per se*, it is essential that it should reasonably and naturally appear from the publication complained of that it was of such a nature as to deprive it of the patronage or trade it enjoyed in a business way, or to render it so odious and contemptible in the estimation of those with whom it did have or might reasonably expect to have business dealings or connections as to injuriously affect its business.

We do not agree with the learned judge of the lower court that "to constitute a libel *per se* of which a corporation may complain, the publication must (1) misrepresent the character or condition of its marketable products, or, (2) misrepresent the methods by which its internal affairs are conducted, its capacity, or its business dealings [78] toward the public in such a way as to alienate customers, or (3) misrepresent it, its products, its attitude, its business, or its stability, so as to affect its credit."

We think these limitations on what would constitute a libel *per se* are rather too narrow, as a publication respecting a corporation might injure very seriously its business and do it great damage in a business way without misrepresenting the quality of its marketable products, or the methods by which its

business was conducted, or its attitude in its business dealings towards the public. If the publication is of such a nature as to reasonably and naturally render the corporation odious and contemptible in the estimation of the public or its patrons, and thereby deprive it of the favor and esteem of the public and the patronage and trade of its customers, its business may be as grievously injured and as seriously affected in a pecuniary way as if it were directly charged with misrepresenting the quality of its products or the method by which its business was conducted. And so if the publication reasonably and naturally has the effect of bringing the business of the corporation into public contempt, and of making it odious in the estimation of those with whom it has business dealings or connections, then the law will presume that the publication was actionable *per se* without either pleading or proof of special damage. It will be inferred that the publication did injure it in a business way for it is only in a business way, resulting in pecuniary loss, that a corporation can be damaged by an alleged libelous publication: Newell on Slander and Libel 3rd ed. p. 84; Townshend on Slander and Libel, 3rd ed. p. 279, 25 Cyc. p. 337; 18 Am. & Eng. Enc. of Law (2d ed.) p. 954; note to Brayton v. Cleveland Special Police Co. 63 Ohio St. 83, 57 N. E. 1085, 52 L.R.A. 525; Marino v. Di Marco, 41 App. Cas. (D. C.) 76, 48 L.R.A. (N.S.) 1214; Gross Coal Co. v. Rose, 126 Wis. 24, 5 Ann. Cas. 549, 105 N. W. 225, 2 L.R.A. (N.S.) 741; St. James Military Academy v. Gaiser, 125 Mo. 517, 28 S. W. 851, 46 Am. St. Rep. 502, 28 L.R.A. 667; Pennsylvania Iron Works Co. v. Henry Vogh Mach. Co. 139 Ky. 497, 96 S. W. 551, 139 Am. St. Rep. 504, 8 L.R.A. (N.S.) 1033.

It will, therefore, be seen that in testing the sufficiency of the publication on demurrer, the question to be determined is, can it be said as a matter of law that the publications were not of such a nature as to reasonably and naturally injure the corporation in a business way?

Having in mind these general principles, we come now to consider with more particularity the publications complained [79] of, with a view of deciding whether they were of such a nature as to reasonably and naturally tend to make the Axton Fisher Tobacco Co. odious or contemptible in a business way, thereby depriving it of the good will and patronage of its customers and the public generally, which deprivation of the good will and patronage of the public generally injured it in its property rights and caused it to suffer pecuniary loss. If the publications did have this tendency, then the petition, as a matter of law, stated a good cause of action.

The publications charging that the Axton Fisher Tobacco Co. paid an average wage less

than that paid by the American Tobacco Co. and the Burley Tobacco Co. and required its employees to work a greater number of hours per day than either of these companies, and that the sanitary conditions of the American Tobacco Co. and the Burley Tobacco Co. were better than those of the Axton Fisher Tobacco Co., may be treated as publications of a like nature and disposed of together. These publications we do not consider libelous *per se*. The publication relating to wages did not charge that the wages paid by the Axton Fisher Co. were grossly or at all inadequate. It merely made a comparison of the wage scale of the other tobacco companies with its wage scale, and charged that it paid less than its competitors.

A publication charging that a business concern paid less wages than its rival or required its employees to work more hours per day or per week than its rival is nothing more than a comparison of conditions, and is not of such a nature as to reasonably or naturally make the employer odious or contemptible, and injure him in a business way. Employers of labor have the right unless regulated by contract or statute to pay their employees what they please and fix the hours of labor as they choose; and employees have the right to accept such wages as are offered them and to work such hours as the employment demands. There are doubtless many employers of labor who pay their employees less wages and require them to work more hours per day than other employers of like labor, and yet this might be entirely satisfactory to the employees. There are so many different conditions and so great a variety of circumstances surrounding the employment of labor in establishments carrying on the same lines of business that it would be going far beyond the reason of the thing to hold libelous *per se* a publication merely because [80] it charged that the complaining employer had a different wage scale or different hours of labor from his competitor.

And so with respect to the publication concerning the sanitary conditions. The publication did not charge that the conditions in the other factories were bad, or that those in the Axton Fisher Company's establishment were worse. It merely said that the sanitary conditions in the other factories were better than those prevailing in the Axton Fisher Company's factory; and the fact that they might have been better did not necessarily or at all convey the meaning that the sanitary conditions in the Axton Fisher Company's factory were hurtful or injurious to its employees, or that the sanitary conditions in its factory were such as to make it dangerous or unhealthful to use its products.

In short, the publication in respect to these matters, would not, we think, naturally and

reasonably have a tendency to affect the business standing of the Axton Fisher Co. or to render it so odious or contemptible in the estimation of the public or its customers as to injure its business or cause it to suffer pecuniary loss.

So much of the publications, however, in paragraphs 4 and 6 as charged that "a negro foreman was placed as boss over white girls. . . . The girls then quit work and refused to work under a negro foreman. They reported the whole trouble to the union and the union appointed a committee to look into the matter and report as to the merits of the grievance, . . . and found that the charges of the girls were true; and the company would not remedy the matter and the union withdrew the use of the label and placed the factory upon the unfair list, and this action was ratified by the International Union of Tobacco Workers; this negro was the floor boss over white girls. . . . She was one of the girls who went on a strike some years ago when this negro Brown was made a boss over the white girls," was, in our opinion, libelous *per se*.

It is very true that in *Williams v. Riddle*, 145 Ky. 459, Ann. Cas. 1913B 1151, 140 S. W. 661, 39 L.R.A. (N.S.) 974, this court held that it was not slander *per se* to say of and concerning a white man that he "was a damn negro and his mother was a mulatto." But in that case the court was very careful to say that there is a marked distinction between slander and libel and that many things are actionable when written and published which would not be [81] actionable if merely spoken, and the opinion was confined to the conclusion that these words did not constitute slander *per se*. There is no intimation in the opinion that if these words had been written or printed and published of and concerning Williams, they would not have been libelous *per se*. On the contrary we have no doubt that it would be libelous *per se* to write or print and publish of a white man that "he was a negro and his mother a mulatto."

It would hardly be possible to publish of a white person matter that would more certainly tend to degrade or disgrace him or to render him odious and contemptible in the estimation of his friends and acquaintances than to charge him with being a negro and that his mother was a mulatto. Perhaps there are some parts of the United States in which a publication of this nature would not tend to disgrace or degrade the white man of whom it was published, or render him odious and contemptible in the estimation of his friends and acquaintances. But in this State we are sure there could not be two opinions on this subject. It is not worth while here to undertake to set out the reasons why this is so. Sufficient is it to say that from inheritance,

tradition, training, education and custom the difference recognized by all to exist between the white race and the negro race is so pronounced as that no greater disgrace could be put upon a white man than to publish a charge like this concerning him.

In *Chiles v. Chesapeake, etc. R. Co.* 125 Ky. 299, 101 S. W. 386, 11 L.R.A. (N.S.) 268, where legislation requiring common carriers to have separate coaches for the colored race was upheld, in speaking of the distinction between the two races, the court said: "It had its origin in the creation of the races, and is firmly established as a part of the social and domestic order and economy of the country, and the man or set of men of either race who attempts to ignore or obliterate these distinctions and differences undertakes an impossible task. This racial distinction, and the resulting classification, is recognized by legislature, authorized by courts, sanctioned by custom, and approved by an enlightened public opinion. It is not confined to any community, state or nation, but is found wherever the two races abound in sufficient numbers to make noticeable the impassable chasm that separates them. In the home, school, the church, the public place—in truth, everywhere—it exists."

[82] In *Berea College v. Com.* 123 Ky. 209, 13 Ann. Cas. 337, 94 S. W. 623, 124 Am. St. Rep. 344, where legislation prohibiting white and colored persons from being taught in the same school was upheld, the court said: "The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature."

In *Harris v. Louisville*, 165 Ky. 559, Ann. Cas. 1917B 149, 177 S. W. 472, where a city ordinance making it unlawful for colored persons to establish or maintain a residence on certain streets occupied as residence streets by white people was sustained, the court said: "It needs no extended argument at this time to demonstrate that this State is fully committed to the principle of the separation of the races whenever and wherever practicable and expedient for the public welfare."

The legislation before the court in these cases merely gave statutory expression to a firmly established and deep-seated public opinion that demanded practical and enforceable recognition.

It is also beyond dispute that the sentiment reflected in this legislation and in these opinions does not find the ends or the perfection

of its purpose in mere race separation alone. It goes much further than that, as is shown in the general feeling everywhere prevailing that the negro, while respected and protected in his place, is not and cannot be a fit associate for white girls or the social equal of the white race. To conditions like these that are everywhere about them as a part of the social order and domestic economy of the State, courts cannot shut their eyes. They must take notice of the long established and uniform custom and usage of the country in respect to the position of the races and the attitude of the white race toward the negro race.

And so we think the publication that a negro man was placed as a boss over white girls was surely calculated to arouse the hostility not only of organized labor and wage earners, but of all right-thinking people, to such an extent as to influence numbers of them to withdraw their patronage from a concern publicly and widely [83] charged with employing business methods so offensive to the sentiment and good judgment of all classes of decent white people.

That this conduct was calculated to create hostility toward the tobacco company and to injure it in a business way, is, we think, further shown by the fact stated in the publication, that the labor unions, as a result of the charge, placed this factory on the "unfair list."

The other publications relate to the charge in paragraph four, that the tobacco company, on account of its failure and refusal to remedy or remove the complaint lodged against it, that it employed a negro foreman as a boss over white girls, was placed on the "unfair list" by the local union; and this action was ratified by the International Union of Tobacco Workers, and to the charge in paragraph five that the advertising cards of the tobacco company were printed in "scab" shops so as to display its contempt for organized labor.

Accompanying this last charge there is made a part of the petition a page of the Evening Post showing that this matter was printed in large, black type, calculated to attract attention, and with it a picture of the sack containing "Old Hill Side" tobacco with the comment that "The Axton tobacco brands are being advertised in street cars with display cards like the photographic facsimile here shown. Note the absence of the union label of either the International Typographical Union or the International Lithographers' Union."

In connection with the publication in reference to the "unfair list" and advertising in "scab" shops, it should be kept in mind that it was expressly averred as inducement that the tobacco company employed only union

labor in the manufacture of its tobacco. That it had received from the union the right to place its label on its products, which was a very valuable asset in its business, and had obligated itself to patronize only unionized shops. That it had always dealt fairly and justly with its employees and had acquired and enjoyed a good reputation with and the good will of organized labor and wage earners in Kentucky and throughout the United States; and had especially acquired with them a valuable reputation and good will on its union made tobacco, and had built up and enjoyed an extensive sale of its tobacco to them, which constituted the larger part of the demand for its brands.

[84] It should be further kept in mind that it was averred by way of innuendo that the effect of these publications was "to destroy its said good reputation and good will with organized labor and the public, as the operator of a union factory in the manufacture of tobacco; to destroy the demand for its products which it enjoyed from organized labor; to especially destroy the valuable reputation of 'Old Hill Side' as a union made smoking tobacco with organized labor and its sympathizers, and the demand therefor for them, and to incite the enmity and ill will of organized labor and its sympathizers towards plaintiff, its business and its products."

We may further take notice that union labor constitutes a large, influential and well organized body of the laboring people of this State and country, and that the wage earners, including those who are members of the union, compose a large part of our population. And also take notice, as a part of the history of the country, that labor unions have adopted and promulgated rules and regulations for the protection and guidance of labor, which are carefully observed by the members.

Coming now to consider the effect on the business of the tobacco company of the publications charging that it had been placed on the "unfair list" by union labor and that it had its advertising cards printed in "scab" shops, we may turn to the matter in the petition set out by way of inducement and to the matter set out by way of innuendo for the purpose of estimating and ascertaining the meaning and effect of the words "unfair list" when applied to a business establishment by organized labor, as well as the attitude of organized labor in a business way towards establishments that have been put by it on the "unfair list" or that have work done in "scab" shops.

Ordinarily to say that a business house had been put on the "unfair list" or that it had its printing done in "scab" shops, would convey but little meaning of the effect such a charge might have on the business of the concern so designated. In the usual and cus-

tomary use of the words and according to their ordinary and natural meaning, it could hardly be said as a matter of law that a publication charging that a business establishment had been put on the "unfair list" or charging that it had its printing done in "scab" shops, would affect the business referred to in such a way as to cause it to suffer pecuniary loss thereby making the publication libelous *per se*.

[85] It appears, however, from the publications themselves that these words have a special and significant meaning when applied by labor unions to business concerns that have been guilty of such conduct as to arouse the enmity of these organizations. But aside from and independent of this, we may look to the matter set out as inducement in the petition for the purpose of showing the relation, in a business way, between the tobacco company and union labor; and to the innuendo for the purpose of showing the defamatory meaning and application of the publications as manifested by their effect upon members of labor unions in business dealings with the tobacco company and the consequent business injury suffered by the tobacco company.

The authority for referring to the inducement as well as the innuendo for the purposes mentioned is found in well established rules in the law of libel and slander. Thus it is said in Newell on Slander and Libel, 3rd ed. pages 735 and 736, respecting the inducement: "In all cases where the alleged defamatory words, whether spoken, written or otherwise expressed, do not naturally in themselves convey the meaning the plaintiff would assign to them, or whether they are ambiguous or equivocal, and require explanations by reference to some outside or extrinsic matter to show that they are actionable, it must be expressly stated that such matter existed, and that the defamation related thereto. . . . Where the matter complained of in the declaration as a libel does not upon its face apply to the plaintiff and impute a libel, the pleading must state, by way of inducement, such facts as will support such a meaning and show the libelous application of the matter to the plaintiff."

And in Townshend on Slander and Libel, 3rd ed. page 554, it is said: "It is the office of the inducement to narrate the extrinsic circumstances which, coupled with the language published, affect its construction and render it actionable; where standing alone and not thus explained, the language would appear either not to concern the plaintiff, or if concerning him, not to affect him injuriously. This being the office of the inducement, it follows that if the language published does not naturally and *per se* refer to the plaintiff, nor convey the meaning the plaintiff contends for, or if it is ambiguous or equivocal, and requires explanation by some extrinsic matter

to show its relation to the plaintiff, and make it actionable, [86] the complaint must allege, by way of inducement, the existence of such extrinsic matter."

It is also laid down in Townshend, page 586, that "Where the language is ambiguous, and is as susceptible of a harmless as of an injurious meaning, it is the function of an innuendo to point out the meaning which the plaintiff claims to be the true meaning, and the meaning upon which he relies to sustain his action. This applies whether the ambiguity be patent or latent, and whether or not there are any facts alleged as inducement."

And also laid down in Newell, page 754, that "Where a defamatory meaning is apparent on the face of the libel itself, no innuendo is necessary; though even there the pleader occasionally inserts one to heighten the effect of the words. But where the words *prima facie* are not actionable, an innuendo is essential to the action. It is necessary to bring out the latent injurious meaning of the defendant's words; and such innuendo must distinctly aver that the words bear a specific actionable meaning."

We find therefor that although these words standing alone would not be libelous *per se*, they are made so by the inducement and the innuendo, both of which must be read and considered in connection with the words, not for the purpose of enlarging their meaning but to show that under the circumstances they had a special meaning that was hurtful to the business of the tobacco company.

We also think that if words are published of a business concern that have a direct tendency to alienate from it the good will and patronage of a large class of its customers, although others of its patrons may not take offense at them or withdraw their patronage, an action will lie and the words will be treated as libelous, *per se*: Adolf Philipp Co. v. New Yorker Staats-Zeitung, 165 App. Div. 377, 150 N. Y. S. 1044.

Wherefore, upon the whole case, we think the demurrer to so much of the publications as charged that the tobacco company employed a negro boss over white girls, and had been put on the "unfair list" by labor unions, and as charged that its advertising matter had been printed in "scab" shops, should be overruled.

The judgment is reversed, with directions to proceed in conformity with this opinion; the whole court sitting.

NOTE.

Publication that Employer Has Been Placed on "Unfair List" of Labor Union as Libelous.

In Labor Review Pub. Co. v. Galliher, 153 Ala. 364, 15 Ann. Cas. 674, it was held that

a publication charging that an employer was on the "unfair list" of a labor union amounted only to a declaration of his refusal to conform to the regulations of the union and did not impute any illegal or immoral conduct, and was accordingly not libelous. The reported case, which appears to be the only recent case passing directly on the question, takes the contrary view, holding that since the members of labor unions constitute a large and influential part of the population a false charge tending to bring an employer into disfavor with them and calculated to cause them to discriminate against his products is actionable. That decision finds some support in the recent case of Cyclohexam Amusement Co. v. Hayward-Larkin Co. 93 Wash. 367, 160 Pac. 1051, wherein a poster described by the court as follows, was held to be libelous per se: "At the top in large letters is the word 'Danger.' Following this in smaller letters are these words, 'Do you know that a theater that employs incompetent operators endangers your life? Do you know that the theaters that employ competent help display this card in the box office?' Then follows a copy of a union card. Following the card are these words, 'Do you know that the Arcade and the Majestic Theaters cannot show this card?'"

In *United Mine Workers v. Cromer*, 159 Ky. 605, 167 S. W. 891, the publication of a list of "strikebreakers" referring to them as "detestable scabs and black legs whom we want you to be continually on the lookout for" was held to be libelous.

**SILVER KING COALITION MINES
COMPANY OF NEVADA**

v.

**SILVER KING CONSOLIDATED MINING
COMPANY OF UTAH.**

(Two cases)

United States Circuit Court of Appeals,
Eighth Circuit—April 5, 1913.

204 Fed. 166.

**Tenants in Common — Accounting —
Parties — Effect of Assignment.**

The K. Co. and the C. Co. were equal owners and tenants in common of a mining right. The K. Co. secretly extracted ore therefrom, failed to account therefor, and conveyed its property to the M. Co., which, in consideration of that conveyance, assumed and agreed to pay all the debts and obligations of its grantor.

Held, a suit in equity can be maintained by the C. Co., or its assignee, against the M. Co., without the presence of the K. Co. to

enforce the contract of the M. Co. to pay the obligation of its grantor to account to the C. Co. for the latter's share of the value of the ore the K. Co. extracted from the common property.

Same.

When a grantee contracts with his grantor to pay the latter's debt or obligation in payment, or in part payment, for the conveyance, the creditor may accept and appropriate that contract to himself, and maintain a suit in equity upon it. In equity, the grantee then becomes the principal debtor, the grantor the surety, and the creditor is substituted for the promisee or grantor.

It is immaterial in equity whether or not the contract was made or intended for the benefit of the creditor.

Parties — Effect of Omission of Party.

In the federal courts, a suit in equity may proceed without any necessary or proper party, who is not an indispensable party, if his presence would oust the jurisdiction of the court.

An "indispensable party" is one who has such an interest in the subject-matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience.

The original debtor is not an indispensable party to a suit in equity by his creditor on the promise of the grantee of the debtor to pay the creditor's claim.

Contracts — Interpretation — Promise to Pay "All Debts."

A promise to pay all the "debts and obligations" of another includes the promise to pay its obligation to account and pay to a cotenant the latter's share of the proceeds of ore which the grantor has extracted from the common property and sold.

Appeal and Error — Review of Facts — Conflicting Evidence.

Where a court has considered conflicting evidence, and made a finding or decree, it is presumptively correct, and unless some obvious error of law has intervened, or some serious mistake of fact has been made, the finding or decree must be permitted to stand.

Mines and Minerals — Extraction of Ore by Cotenant — Measure of Damages.

The measure of damages for the reckless, wilful, or intentional taking of ore or timber from the land of another without right is the enhanced value of the ore or timber when it is finally converted to the use of the trespasser, without allowance to him for the labor bestowed or expense incurred in removing it and preparing it for market.

[See note at end of this case.]

Same.

The basic principle of an accounting by a trustee in equity is that the account should be so stated that the trustee shall make no profit by his use of the property of the cestui

que trust and the latter shall receive the value of his property and its income.

A cotenant has the right to extract ore from the common property and sell it, accounting for the proceeds, less the reasonable expense of mining and marketing.

Where the fundamental rule of an accounting can be complied with by allowing to the cotenant, who is a trustee for his fellow, the expenses of mining and marketing the ore, the measure of damages for a wilful trespass is not necessarily applicable to the case, although the cotenant who extracted the ore intended to appropriate all of it to himself, concealed his acts, kept no accounts, caved the stope, and made it difficult and expensive to ascertain the volume and value of the ore taken.

[See note at end of this case.]

Interest — Compounding — Accounting by Trustee.

Where the basic principle of an accounting by a trustee can be given effect without charging him with compound interest on the amount which he has held for his cestui que trust, it is not error to refuse to make such a charge.

(Syllabus by court.)

Appeals from United States Circuit Court, District of Utah: MARSHALL, Judge.

Action by Silver King Consolidated Mining Company of Utah, plaintiff, against Silver King Coalition Mines Company of Nevada, defendant. From judgment rendered, both parties appeal. The facts are stated in the opinion. MODIFIED.

Andrew Howat, Edward B. Critchlow, Herbert R. Macmillan and William J. Barrette for plaintiff.

W. H. Dickson, A. C. Ellis, Jr., and Russell G. Schulder for defendant.

Sitting: SANBORN and CARLAND, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

[168] SANBORN, J.—The Silver King Mining Company, a corporation of the state of Utah, and the Silver King Consolidated Mining Company, a corporation of the state of Wyoming, were equal owners and tenants in common of the Vesuvius mining claim, which was situated in the state of Utah, from 1901 until June 19, 1907. During that time the King Company secretly extracted from that claim and sold a large amount of valuable ore without accounting to its cotenant for any of it, and on June 19, 1907, it sold and conveyed all its property to the Silver Coalition Mines Company, a corporation of the state of Nevada and the defendant below, and in part payment for that conveyance the Coalition Company agreed to pay all the out-

standing debts and obligations of its grantor, the King Company. The Coalition Company then secretly extracted ore from the Vesuvius claim and sold it, without accounting to its cotenant for this ore or its proceeds. On February 24, 1908, the Consolidated Company of Wyoming conveyed all its title and interest in the Vesuvius mining claim, and in its cause of action against the Coalition Company on account of the extraction of the ores by the King Company and by it, to the Silver King Consolidated Mining Company of Utah, a corporation of that state and the complainant in this suit. On May 26, 1908, the latter company exhibited its bill in equity in the court below against the Coalition Mines Company of Nevada, and prayed, among other things, for an accounting and recovery of one-half of the value of the [169] ores extracted by it and by its grantor, the King Company. The defendant demurred, it subsequently answered, issues were joined, evidence was taken, and upon final hearing a decree was rendered that the defendant was indebted and should pay to the complainant \$735,045.87 on account of the ores taken from the Vesuvius claim by the defendant and by its grantor. Both parties have appealed from that decree and specified many alleged errors.

(A) The defendant insisted by demurrer and motion in the court below, and still insists, that the King Company was an indispensable party to the cause of action to recover the value of the ore which its grantor, prior to the latter's conveyance on June 19, 1907, extracted and sold; but the Circuit Court overruled that contention, and its ruling is specified as error.

When a grantee contracts with his grantor to pay the latter's debt or obligation in payment, or in part payment, for the conveyance, the creditor or obligee may accept and appropriate that contract to himself and maintain a suit in equity to enforce it. In that event the grantee becomes the principal debtor and the grantor the surety, and the creditor's suit stands on the equitable doctrines that the creditor may have the benefit of any security or obligation given by the principal debtor to the surety, and that to avoid circuity of action—that is to say, an action by the creditor against the original debtor and a subsequent action by the latter against his grantee—the creditor may be, and is in equity, substituted for the promisee, the grantor. *Keller v. Ashford*, 133 U. S. 610, 623, 625, 626, 10 S. Ct. 494, 33 U. S. (L. ed.) 667, 673, 674; *Johns v. Wilson*, 180 U. S. 440, 447, 21 S. Ct. 445, 45 U. S. (L. ed.) 613, 617; *Thompson v. Cheesman*, 15 Utah 43, 48, 49, 48 Pac. 477; *Blackmore v. Parkes*, 81 Fed. 899, 900, 54 U. S. App. 123, 26 C. C. A. 670, 671.

In this case the complainant, the creditor, has accepted the promise of the defendant,

the grantee, to pay the obligations of the King Company, the grantor, and standing by substitution in the shoes of the King Company, the grantor, has brought this suit to enforce the covenant of the grantee.

It is contended that this suit cannot be maintained for the value of the ore extracted by the King Company, because it was a necessary party to the suit for the value of the ore which it extracted, and it has not been made a party to this suit. But necessary parties, who are not indispensable parties, may be dispensed with in suits in equity in the national courts. An indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or subject-matter which is separable from the interest of the other parties before the court, so that it will not necessarily be directly or injuriously affected by a decree which does complete justice between them, is a proper party to a suit. But he is not an indispensable party, and if his presence would oust the jurisdiction of the court the suit may proceed without [170] him. *Rogers v. Penobscot Min. Co.* 154 Fed. 606, 610, 83 C. C. A. 380, 384; *Sioux City Terminal R. etc. Co. v. Trust Company of North America*, 27 C. C. A. 73, 75, 82 Fed. 124, 126, 49 U. S. App. 523. The King Company, the grantor, is a corporation of the same state as the complainant, and its presence in this suit would oust the jurisdiction of the federal courts.

Why is that corporation an indispensable party to this suit? Counsel for the defendant answer: Because the amount of the claim for the extraction of the ore taken by the grantor, the King Company, was unliquidated. But how can its liquidation in a suit between the creditor and the grantee alone radically and injuriously affect the interest of the grantor? Because, say counsel, in separate actions against a grantor and grantee, founded on the obligation of the former, different juries or courts might find different amounts recoverable, and because the grantor could not maintain an action against the grantee alone to enforce the latter's promise. Let the propositions that different courts and juries might find different amounts recoverable, and that the grantor could not maintain an action against the grantee alone to enforce the latter's promise, be conceded. Nevertheless the grantor cannot be injuriously affected by the creditor's suit and recovery against the grantee. The

grantor was liable to a suit by the creditor on its obligation before the creditor's suit against the grantee was instituted, and if it is still subject to such a suit its liability is no greater since the suit and the decree against the grantee than it was before that suit was commenced. Counsel argue that if the creditor first recover a judgment of \$100,000 against the grantor on its obligation, and subsequently recover a judgment of \$200,000 against the grantee in an action on the grantee's promise to pay the grantor's obligation, the grantee would be subject to two judgments on the same promise—one for \$100,000 in favor of the grantor on a suit which it might bring against the grantee, and one in favor of the creditor for \$200,000. But the grantee could suffer no legal injury from the judgment for \$100,000, because its payment of the judgment of \$200,000 against it in favor of the creditor would discharge it from all liability on the judgment for \$100,000 on the same obligation, on the ground that a party is required to make but one satisfaction of the same claim.

Counsel say that if the plaintiff, the creditor, should subsequently bring an action against the King Company, the grantor, and recover one-half the amount awarded by the final decree herein, the grantor could not recover of the grantee more than one-half the amount which the grantee is adjudged to pay to the creditor, and yet the creditor could recover of the grantee twice as much as it could from the grantor. But the creditor would not recover, nor would the grantee be required to pay, more than the just amount of its liability, and no one would be injuriously affected; for, against the mere supposition of counsel that a subsequent judgment for one-half the amount fixed by the decree in this case may be recovered by the creditor against the grantor, the amount adjudged by the decree of the court below in this suit, after full hearing, must be presumed to be right and just. Counsel contend that if the creditor should subsequently recover a judgment against the grantor on its obligation for double the amount fixed by [171] the decree herein, the grantor would be entitled to a judgment for that amount against the grantee. The supposition is too improbable for serious consideration. If the creditor subsequently sues the grantor, it is probable that it will be met by the answer that by the present suit the creditor elected to substitute itself for the grantor and in the latter's right to litigate with the grantee, whom it thereby made the principal debtor, while the grantor became the surety in this suit to determine the amount of the grantor's original obligation, that the grantee has obeyed the decree of the court and paid the amount thus adjudged due to the creditor,

for the presumption is that it will promptly obey the decree, and that, as the creditor can have but one satisfaction of the same claim, it is estopped by these facts from recovering any judgment or decree whatever against the grantor. And the probability that the creditor will overcome such an answer and recover such a judgment or decree is so remote as to be negligible. Moreover, these hypotheses of counsel present nothing but moot questions. It is improbable that they will ever rise to the dignity of living issues, and the argument based upon them is neither convincing nor persuasive.

On the other hand, the facts disclosed by the record satisfy that the grantor, the King Company, has no such interest in the subject-matter of the controversy in this suit that a final decree cannot be rendered between the creditor, the plaintiff, and the grantee, the defendant, without radically and injuriously affecting the interest of the grantor, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. They convince that a decree between the creditor and the grantee, just and equitable to the latter, can be made and ought to be made in this suit, which will not in any way injuriously affect the interest of the grantor, the King Company, and that the latter is not an indispensable party to this suit. There was no error in the ruling of the court below to this effect. *Keller v. Ashford*, 133 U. S. 610, 626, 10 S. Ct. 494, 33 U. S. (L. ed.) 667, 674; *Barker v. Pullman's Palace Car Co.* 124 Fed. 555, 559, 570; *Dancel v. Goodyear Shoe Machinery Co.* 137 Fed. 157, 158, 159, 160, 161; *Dancel v. Goodyear Shoe Machinery Co.* 144 Fed. 679, 680, 75 C. C. A. 481, 482.

(B) It is specified as error that the court below held that the defendant grantee was liable to account to the creditor, the plaintiff, for the one-half of the value of the ore extracted by the grantor from the common property of the grantor and the Consolidated Company of Wyoming prior to June 19, 1907. The promise of the defendant, evidenced by the deed of all the property of the grantor which the grantee accepted, was to pay therefor, among other things, \$3,760,000, and "all the outstanding debts and obligations of the grantor." The grantor owed its cotenant and creditor one-half of the value of the ore it had extracted from their common property. It was under a legal obligation to account for and pay to its cotenant one-half of that value, and without the aid of the ingenious arguments of counsel it would be difficult to perceive any reason why this obligation did not fall within the terms of the grantee's contract.

Counsel contend, however, that it does not do so because the word "debt" is without

definite meaning in the law, and in this contract it [172] means a debt for a sum certain, and does not include one for an unliquidated amount, and because the word "obligation" is of the same character, and in this contract has the same meaning. In support of this position definitions of these words are quoted from text-books and opinions of courts; but after a thoughtful consideration of the authorities cited, and many others, an abiding conviction still remains that in this contract these words are so plain and their meaning is so clear and certain that there is no doubt that they include, and must be held to have been intended to include every liability of the grantor of such a nature as that here in suit. The use of the words "debts" and "obligations" is so common that an exhaustive review of opinions concerning their meaning is impossible within the limits of the opinion of a court, and a partial review might be confusing or misleading. The conclusion which has been reached, however, is readily deducible from the terms of the contract and from familiar rules of construction.

Words and phrases should be given their popular sense and meaning, unless there is a clear indication that they were used in a different sense. The popular sense of a word or phrase is that sense which people conversant with the subject-matter with which the contract is dealing would attribute to it. When a word which has a known legal meaning is used in a contract, it must be assumed that it was used in its legal sense, in the absence of a clear indication of a contrary intent. The legal presumption is that words in a contract are used in their usual sense, unless it clearly appears that the parties intended to use them in a different or more restricted sense. Apply these indisputable canons of interpretation to the words and terms of this contract. The popular, the customary, and the legal sense of the word "debt" in a contract to pay all the debts of a party is not, in our opinion, limited to obligations to pay certain sums of money; and, if it is so limited, the popular, the customary and the legal sense of the broader word "obligation" includes every duty "which has a binding operation in law and which gives to the obligee the right of enforcing it in a court of justice." 2 *Bouvier's Law Dictionary*, page 534. The contract of the defendant is to pay all the debts and obligations of the grantor. The word "obligations" may not be ignored, nor may it be restricted to the more limited meaning of the word "debts;" for in the construction of the agreement tautology must be avoided, and all the words of the contract must be given meaning and legal effect (*Keith v. Haggart*, 4 *Dak.* 438, 33 *N. W.* 465, 468; *Ullman v. Chicago*, etc. *R. Co.* 112 *Wis.* 150, 88 *N. W.* 41, 47, 88 *Am. St. Rep.* 949, 56 *L.R.A.* 246; *Fitz-*

gerald v. Rapid City First Nat. Bank, 114 Fed. 474, 52 C. C. A. 276), and the grantor was certainly bound, by operation of law, to account for and to pay to its cotenant one-half of the value of the ore it had extracted from their common property, and the cotenant had the right to enforce that obligation in a court of justice.

The grantee was a new corporation, formed apparently to succeed to the rights of the grantor, to take all its property, and to acquire other interests. Most, if not all, of the stockholders of the grantor received stock of the grantee in payment of their respective shares of the \$3,750,000 paid by the grantee for the grantor's property [173] and surrendered their stock in the grantor. Keith was the president, and Kearns was the vice president and manager of the grantor, and they were also stockholders and directors of the grantee, when the conveyance to it was accepted, and they voted for the resolution which authorized the grantee's contract to pay all the debts and obligations of the grantor. There were seven other directors in the board of the grantee. Keith and Kearns had conducted the grantor's extraction of the ore from the common property, and necessarily knew all about it; but they claim that they thought that the grantor was not indebted to its cotenant, because they believed that the expense of finding and taking the ore out of the ground exceeded the proceeds obtained from it. The other seven directors testified substantially that they were aware of three or four other obligations contracted by the grantor, but that they were ignorant of the extraction of this ore and of the grantee's liability therefor, and that they never intended to authorize a contract by the grantee to pay for it. The foregoing facts were proved by counsel for the grantee, and they rely upon them to reach the conclusion that the parties to the contract never intended that the grantee should agree by its promise to pay the grantor's obligation to account for the ore thus extracted. They contend that their evidence proves that the grantee was ignorant of the obligation arising out of the taking of the ore, and, while this is not admitted, it is conceded for the purpose of the discussion and determination of the question here at issue.

Counsel invoke the general rule that the purpose of all interpretation of the words and terms of a contract is to ascertain the sense or meaning in which the parties to it used them when their minds met upon the stipulations of the agreement, and they then argue that inasmuch as the grantee was aware of three or four other obligations contracted by the grantor, and was ignorant of this one, the parties to the contract intended to exclude it from the meaning of the words

"all the debts and obligations of the grantor." But the words and terms of this agreement are clear, and their meaning is not doubtful. It is ambiguous words and terms of doubtful meaning in a contract only that are susceptible to interpretation by the situation of the parties and the circumstances surrounding them when they made them. The secret intentions of parties to a contract, the words and terms of which are clear, free from ambiguity, and inexpressive of the intention, may not be imported into it by construction. *Cold Blast Transp. Co. v. Kansas City Bolt, etc. Co.* 114 Fed. 77, 80, 52 C. C. A. 25, 28, 57 L.R.A. 696. And:

"Where, without fraud, accident, or mutual mistake (and none of these has been pleaded or proved in this case), the written contract purports to be a memorial of the transaction, it supersedes all prior representations, proposals, and negotiations, and is conclusive evidence that it embodies such of these as were ultimately intended to become parts of the agreement, and that all others were rejected as not expressing the final intention of the parties. . . . The law controlling the operation of a contract is deemed to be, and usually is actually, within the contemplation and intention of the parties, as much as the words in which it is expressed, and becomes equally an [174] essential part of it. . . . For this reason the rule that a written contract cannot be varied by parol extends to the legal import or intentment of the contract, as well as to the terms or words in which it is written." *Union Selling Co. v. Jones*, 128 Fed. 672, 676, 63 C. C. A. 224, 228; *Elliott on Evidence*, pp. 646, 647.

By the plain terms of the contract the grantee agreed to pay all the debts and obligations of the grantor. It was not a contract to pay all the debts and obligations of the grantor listed or named in the agreement for none was listed or named, nor all except those unknown to the grantee, nor all the debts and obligations of the grantor except the obligation to pay for one-half of the ore which the grantor extracted from the Vesuvius claim; and because the grantee, at the time it made the contract with the grantor, had the opportunity to require the insertion of any of these limitations and exceptions it desired in its contract, and it did not do so, but permitted and induced the grantor to join in and perform it in reliance upon the grantee's promise to pay all its debts and obligations without exception, it is now estopped from importing into its promise by construction any of these limitations or exceptions. *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544, 547, 24 U. S. (L. ed.) 674, 676. This is a natural, reasonable, and righteous conclusion. This agreement by the grantee to pay all the debts and obligations of the

grantor was a natural and reasonable requirement of the grantor, which was parting with all its property, with all its means to pay its debts and obligations; and the evidence of the situation, knowledge, intention, and circumstances of the parties which counsel for the grantee have produced, if admissible and carefully considered, as it has been, would fail to convince that these parties ever intended that the conveyance should be made without such a contract. The obligation of the grantor to account for and pay to the predecessor of the complainant the value of one-half of the ore extracted by the grantor from the Vesuvius claim fell far within the terms, and meaning of the agreement of the grantee to pay all the debts and obligations of the grantor.

The next contention is that the creditor, the complainant, cannot maintain this suit on the contract of the grantee, because the grantor itself could not have maintained it. But for the reasons already stated the grantor could have maintained a suit upon the contract of the grantee, in the absence of fraud, mutual mistake, accident, or rescission, and none of these has been pleaded or proved in this case. Moreover, while the general rule is that the suit of a creditor against the grantee, founded on the latter's promise to the grantor, is subject to the same defenses as the suit of the grantor would have been, the exceptional facts of this case place the creditor in a much stronger position than the grantor itself would have had. The assignor of the complainant was a creditor of the grantor when the conveyance of all its property to the grantee was made, and the complainant has succeeded to all the rights of its assignor. A "transfer of property by a debtor with the reservation of an interest therein to himself" is always fraudulent and voidable by his creditors as [175] against a debtor and all claiming under him with notice of his act, and a transfer by stockholders of a corporation of all its property to another corporation, in consideration that they receive stock or bonds of the grantee in exchange for their stock in the grantor, is equally fraudulent in law as to the unpaid creditors of the grantor, and renders the grantee liable for their claims. *Northern Pac. R. Co. v. Boyd*, 177 Fed. 804, 101 C. C. A. 18; *Luedcke v. Des Moines Cabinet Co.* 140 Ia. 223, 118 N. W. 456, 32 L.R.A. (N.S.) 616; *Hurd v. New York, etc. Steam Laundry Co.* 167 N. Y. 89, 60 N. E. 327; *Montgomery Web Co. v. Dienelt*, 133 Pa. St. 585, 596, 19 Atl. 428, 19 Am. St. Rep. 663; *Chicago, etc. R. Co. v. Howard*, 7 Wall. 392, 409, 19 U. S. (L. ed.) 117, 120; *Central of Georgia R. Co. v. Paul*, 93 Fed. 878, 884, 35 C. C. A. 639.

In the case at bar, most, if not all, of the stockholders of the grantor took stock of

the grantee in exchange for their stock in the grantor, and in consideration of this exchange caused all the property of their corporation to be conveyed to the grantee. If, therefore, as counsel for the grantee argue, the grantee did not make a valid agreement with the grantor to pay its obligation to the assignor of the complainant, the conveyance of the grantor's property to the grantee was fraudulent as to the assignor and is fraudulent as to the complainant, and on that ground the grantee is liable to pay the claim of the complainant, for the property of the grantor which the grantee received was worth much more than the amount of this claim. The contention that the grantor may escape liability here, either because the grantor could not maintain an action upon its promise, or because the obligation of the grantor to account and pay for the ore was not within the terms of the promise, cannot be sustained.

Finally, it is insisted that the creditor has no right of action on the grantee's promise to the grantor to pay the creditor's claim because it does not appear that this contract was made for the creditor's benefit, and that it was the party intended to be benefited thereby. The following language of Judge Folger is quoted from *Simson v. Brown*, 68 N. Y. 355:

"It is not every promise made by one to another, from the performance of which a benefit may inure to a third, which gives a right of action to such third person; he being neither privy to the contract, nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited."

Many authorities are cited that have repeated or approved this statement of the law. *Austin v. Seligman*, 18 Fed. 519, 522; *Sayward v. Dexter*, 72 Fed. 758, 764, 765, 44 U. S. App. 376, 19 C. C. A. 176; *Constable v. National Steamship Co.* 154 U. S. 51, 74, 14 S. Ct. 1062, 38 U. S. (L. ed.) 903, 914; *American Exch. Nat. Bank v. Northern Pac. R. Co.* 76 Fed. 130; *Central Trust Co. v. Berwind-White Coal Co.* 95 Fed. 391; *Electric Appliance Co. v. U. S. Fidelity, etc. Co.* 110 Wis. 434, 85 N. W. 648, 53 L.R.A. 609, 613; *Parker v. Jeffrey*, 26 Ore. 186, 37 Pac. 712; *Burton v. Larkin*, 36 Kan. 246, 250, 13 Pac. 398, 59 [176] Am. Rep. 541; *Howsmen v. Trenton Water Co.* 119 Mo. 304, 308, 24 S. W. 784, 23 L.R.A. 146, 41 Am. St. Rep. 654; *Wright v. Terry*, 23 Fla. 160, 2 So. 6. But none of these cases was a suit in equity and in none of them were the equitable doctrines that a creditor may have the benefit of any security or obligation given by the principal debtor to the surety, and that, to avoid circuity of action, the creditor may be, and is, when he sues upon the contract of the grantee.

to pay the latter's indebtedness to the creditor, in equity substituted for the grantee and promisee, upon which this suit stands, either invoked or available. Authorities are conflicting upon the proposition that it is essential to the maintenance of an action at law by the creditor of a grantor upon the contract of his grantee to pay the grantor's debts that the contract should be made for the creditor's benefit as its object and that he should be the party intended to be benefited. *Coster v. Albany*, 43 N. Y. 399, 411, and cases there cited; *Arnold v. Nichols*, 64 N. Y. 117, 119.

That, however, is a moot question in this case. It is unnecessary to consider or discuss it, and it is here dismissed, because this is a suit in equity, and not an action at law. In such a suit it is sufficient that the grantee has agreed with the grantor to be primarily liable for the latter's obligation to the creditor, so that, as between the parties to the agreement, the first is the principal and the second the surety. The creditor of the surety is then entitled in equity to be substituted in his place, and to maintain his suit against the grantee to the same extent as the grantor could have maintained it, and it is immaterial whether the contract was made and intended for the benefit of the creditor or of the grantor, for the creditor has all the rights of both to enforce the obligation of the grantee. *Keller v. Ashford*, 133 U. S. 610, 623, 10 S. Ct. 494, 33 U. S. (L. ed.) 667, 673, and the authorities there cited; *Barker v. Pullman's Palace Car Co.* 124 Fed. 555, 568, 569; *Willard v. Wood*, 164 U. S. 502, 519, 520, 17 S. Ct. 176, 41 U. S. (L. ed.) 531, 538, 539; *Johns v. Wilson*, 180 U. S. 440, 447, 448, 21 S. Ct. 445, 45 U. S. (L. ed.) 613, 617. There was no error in the decision of the court below that the grantee, the defendant, was liable to account and pay to the creditor, the complainant, for the half of the value of the ore extracted by the grantor from the Vesuvius claim prior to June 19, 1907, and that the complainant could maintain this suit in equity to enforce that accounting and payment on the promise of the grantee to the grantor to pay all the latter's debts and obligations.

(C) The court below found that the value of one-half of the ore extracted from the Vesuvius claim by the defendant and its grantor was \$516,264.47, and that the complainant was entitled to recover from the defendant this sum and interest thereon at 8 per cent per annum from January 1, 1906, which amounted in the aggregate to \$735,045.87 on April 17, 1911, when the decree for that amount was rendered. The complainant and defendant complain of this amount, the former that it is too small, the latter that it is too large, and by numerous specifications

of error challenge the controlling facts which the court found and used to ascertain it. As the defendant [177] stands in the shoes of the grantor in this accounting, the acts, omissions, and intent of the latter will henceforth be treated as those of the former, and the grantor will be ignored. The defendant secretly entered the Vesuvius claim beneath its surface by means of a deep shaft, which it sunk from adjoining claims, which it owned in severalty, and, working by means of levels running from this shaft, extracted the ore, mixed it with the ores it took from the claims it owned in severalty, sold the combined product, and kept all the proceeds. It kept no account of the ore which it took from the Vesuvius claim, and gave no notice to the complainant's grantor that it was extracting it, and that grantor was in ignorance of that fact until the ore was gone.

The court below was compelled to ascertain the amount and value of this ore from more than 4,000 printed pages of evidence. It found from this evidence these facts: The extent of the excavation in the Vesuvius claim was 573,937 cubic feet. After the excavation was made there remained in the cavity 435,350 cubic feet of caved and waste material, and 31,551 cubic feet of like material had been removed, so that the entire amount of this material was 466,901 cubic feet. This material, when it was in place in the cavity, occupied only one-half of the space which it filled after it was extracted, or only 233,450 cubic feet. Deducting this amount from the 573,937 cubic feet in the excavation, there remained 340,487 cubic feet of the cavity which must have been originally occupied by the ore which the defendant removed. This ore was of two classes: There were 18,916 tons of ore of the first class, from which the defendant realized \$60.07 per ton, in all \$1,136,284.12. The cost of mining, tramming, and smelting this ore was \$6.33 per ton, or \$119,738.28, which left the net proceeds from it \$1,016,545.84. There were 14,187 tons of second-class ore, whose net value was \$3.53 per ton, in all \$50,080.11. The sum of \$1,016,545.84 and \$50,080.11 is \$1,066,625.95. The cost of the work done by the defendant within the Vesuvius claim in developing the ore was \$34,097. Deducting this amount from \$1,066,625.95, there remains \$1,032,528.95, the total net value of the ore taken from the Vesuvius claim by the defendant. One-half of this amount, or \$516,264.47, and the interest thereon, is the amount which the court found from these facts the defendant owed the complainant for its share of this ore.

Each of the findings of fact from which the court deduced this conclusion is vigorously assailed by each of the parties to this suit in oral argument and in briefs which contain

many hundreds of printed pages. Each of them has been carefully examined, with the aid of these arguments and briefs, and in the light of the evidence to which they refer, and has been found to have been deduced from conflicting testimony, and many of them from evidence very evenly balanced. These findings, therefore, fall far within the familiar rule that, where a court has considered conflicting evidence, and made a finding or decree, it is presumptively correct, and unless some obvious error of law has intervened, or some serious mistake of fact has been made, the finding or decree must be permitted to stand. *Coder v. [178] Arts*, 152 Fed. 943, 946, 82 C. C. A. 91, 94, 15 L.R.A. (N.S.) 372; *Tilghman v. Proctor*, 125 U. S. 136, 8 S. Ct. 894, 31 U. S. (L. ed.) 664; *Kimberly v. Arms*, 129 U. S. 512, 9 S. Ct. 355, 32 U. S. (L. ed.) 764; *Furrer v. Ferris*, 145 U. S. 132, 134, 12 S. Ct. 821, 36 U. S. (L. ed.) 649.

An exhaustive consideration of the record and the briefs relating to the defendant's specifications of error in regard to these findings has failed to convince that through any mistake of fact or error of law the court below has made any finding or reached any conclusion too favorable to the complainant. Turning to the specifications of the complainant, there is convincing evidence that there was a space in the openings out of and directly connected with the excavated stope in the Vesuvius claim which contained 22,168 cubic feet that was not included in the 573,937 cubic feet of excavation on which the finding of the court below is based, and one of complainant's specifications is the exclusion of these 22,168 cubic feet. But because there is persuasive evidence that there was only a small percentage of the material taken from these openings which contained any ore, that these openings were made in the course of the work of developing the ore body and determining its extent, and not in the work of stoping for ore, and that the larger part of the material taken from them was never placed in the stoped cavity, but was taken to the surface and thrown away before the cavity was made, the record fails to prove that the court below made any mistake in this exclusion.

The complainant specifies as error the addition by the court of 31,551 cubic feet of waste material removed from the cavity in 1909 to the 435,350 cubic feet of filled material which the court found in the cavity, on the ground that this added material was removed after the measurement of the filled material on which the court relied had been made, so that this addition gave the defendant credit for it twice. This specification is well founded. The evidence convinces that the court fell into the mistake here charged, and on account of it the amount which the

court found the defendant owed the complainant should be increased \$23,908.07.

The complainant specifies as error: (1) The allowance by the court to the defendant below of one-half the cost of mining, tramming, and sampling the first-class or shipping ore, and one-half the cost of mining, milling, tramming, and sampling the second-class or milling ore, which amounted in the aggregate to about \$117,000.00; and (2) that it failed to charge the defendant with compound interest upon the amount found due. In support of the first specification, its counsel invoke the rule that the measure of damages for the reckless, willful, or intentional taking of ore or timber from the land of another without right is the enhanced value of the ore or timber when it is finally converted to the use of the trespasser, without allowance to him for the labor bestowed or expense incurred in removing and preparing it for market. *Wooden-Ware Co. v. U. S.* 106 U. S. 432, 434, 1 S. Ct. 398, 27 U. S. (L. ed.) 230, 231; *U. S. v. Homestake Min. Co.* 117 Fed. 481, 482, 54 C. C. A. 303, 304; *Durant Min. Co. v. Percy Consol. Min. Co.* 93 Fed. 166, 167, 35 C. C. A. 252, 254; *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.* 129 Fed. 668, 679, 64 C. C. A. 180, 191. They argue that this rule is applicable to the [179] case at bar, and cite in support of their contention *Sweeney v. Hanley*, 126 Fed. 97, 103, 61 C. C. A. 153, 159; *Foster v. Weaver*, 118 Pa. St. 42, 12 Atl. 313, 4 Am. St. Rep. 573; *Walker v. Walker*, 9 Wall. 743, 757, 19 U. S. (L. ed.) 814, 820; *Milwaukee, etc. R. Co. v. Soutter*, 13 Wall. 517, 519, 520, 523, 524, 20 U. S. (L. ed.) 543, 545; *Blank v. Aronson*, 187 Fed. 241, 246, 109 C. C. A. 327, 332; *Guckenheimer v. Angevine*, 81 N. Y. 394, 396, 397; *Goble v. O'Connor*, 43 Neb. 49, 61 N. W. 131, 133, 134; *Lynch v. Burt*, 132 Fed. 417, 67 C. C. A. 305.

These and other authorities have been examined, but they fail to disclose any settled rule of law to the effect that a cotenant, who lawfully extracts the ore from the common property and sells it, is deprived, in his accounting with his cotenant, by his preconceived intent to appropriate all the proceeds thereof to himself, of any allowance for the necessary and reasonable expense of extracting, preparing, and marketing the ore. In *Sweeney v. Hanley*, 126 Fed. 97, 103, 61 C. C. A. 153, 159, and *Foster v. Weaver*, 118 Pa. St. 42, 12 Atl. 313, 4 Am. St. Rep. 573, cotenants who had first fraudulently obtained from their fellows conveyances of their shares of the common property, and thereafter had extracted the mineral from it, were denied an allowance for their labor and expense. The courts held that the complainants were entitled to the enhanced value of their shares of the mineral extracted and sold

by the defendants while the complainants were fraudulently dispossessed by them, without any deduction or allowance for the labor and expense of mining or marketing. In those cases the intentional and fraudulent dispossession of the defendants was first effected, and it characterized and rendered unlawful the subsequent acts of the defendants. In the case in hand, however, the intent of the defendant to appropriate all the proceeds of the ore to its own use did not render its entry upon the common property, or its extraction and preparation of the ore for market, unlawful. In this extraction, preparation, and sale it was not a trespasser. It was not acting without right. It was the owner of one half of every particle of the ore in its own right, and of the other half when extracted as trustee for its cotenant. It had the right to extract and sell the ore, in order that it might obtain its share of its value; and if it had accounted for and paid over to its cotenant in due time its part of the proceeds of the sales, no one would be so bold as to claim that it was not entitled to a just allowance for the reasonable expense of mining it, preparing it for the market, and selling it.

In an accounting by a trustee in equity, the basic principle is that the account should be so stated that the trustee shall make no profit from his use of the property of the cestui que trust, and that the latter shall receive the just value of his property and its income. Other equitable rules and principles inform and guide the conscience of the chancellor; but their application to the particular facts of each case is necessarily and wisely left largely to his discretion, to use them in such a manner as to work out the fundamental principle that governs the accounting.

It is conceded that there is convincing evidence in this record that the defendant had the intent, before it extracted any of this ore, to appropriate it all to itself; that it entered secretly, and carefully concealed [180] its extraction and sale of the ore for many years; that it mixed the ore with its own taken from other mines, which it owned in severalty; that it kept no separate account of this ore, or of its proceeds; and that it caved the stope from which it extracted it, so that it was difficult and expensive to ascertain the amount or value of the ore it took. But an evil intent does not make a rightful act wrongful, or an owner of property in its lawful possession a trespasser thereon (*Stevenson v. Newnhan*, 13 C. B. 285, 297, 76 E. C. L. 285; *Allen v. Flood* [1898] App. Cas. (Eng.) 114, 123), or necessarily subject a cotenant who extracts ore from the common property to the measure of damages for a willful trespass. It was a trustee for the complainant of its share of

the ore it took, and of the proceeds thereof. As such trustee it violated its duty to notify its cotenant of its entry and taking of the ore, its duty to keep the ore separate, its duty to keep an account of it and of its proceeds, and its duty promptly to account for and pay to its cotenant its just share of the proceeds of the ore. Nevertheless, when this matter came to an accounting in the court below, the duty still rested upon the chancellor so to apply the rules and principles of equity jurisprudence to this accounting that the complainant should receive its just share of the value of the ore, or of its proceeds, and the defendant should make no profit by its breaches of trust.

The general and just rule is that a cotenant, in exclusive possession of mining property, who extracts and sells the ore, may charge against its proceeds the reasonable and necessary expense of its extraction and marketing. *Lindley on Mines*, § 790, p. 990; *Fulmer's Appeal*, 128 Pa. St. 24, 18 Atl. 493, 15 Am. St. Rep. 662. The chancellor below was of the opinion that the application of this rule to the accounting in this case would yield a just and equitable result, and our review of the evidence and the arguments has led to the same conclusion. There was neither error nor mistake in allowing to the defendant the reasonable expense of mining, tramming, milling, and sampling the ore.

Did the court err by its refusal to allow compound interest? Compound interest is generally allowed to give effect to the equitable rule that a trustee may not derive profit from the property of the cestui que trust, and that the latter should receive the full value of his property and its income. *Walker v. Walker*, 9 Wall. 743, 757, 19 U. S. (L. ed.) 814, 820; *Heath v. Waters*, 40 Mich. 457, 472; *Schieffelin v. Stewart*, 1 Johns. Ch. (N. Y.) 620, 627, 7 Am. Dec. 507. The defendant stood in a fiduciary relation to its cotenant. It held the complainant's share of the ore and its proceeds in trust for it. It violated its duty to keep an account of the ore and its proceeds, to keep the ore separate from other ores it mined, to account for and promptly pay over to the defendant its share of the proceeds of the ore, and to inform the defendant of its acts and omissions. But if the payment of the amount adjudged will deprive the defendant of all profit from the complainant's share of the ore, and will yield to the complainant the full value of its share and of the interest or income therefrom that it would probably have derived if the defendant had not extracted the ore, the reason for the allowance of compound interest does not exist.

The defendant took this ore from the mine between 1902 and May, 1908. It extracted the larger part of it between 1904 and 1908.

The [181] testimony fails to disclose the amount taken each month, or each year, and the court below fixed January 1, 1906, as the mean time when the entire debt of the defendant for the complainant's share of the proceeds of all the ore should be deemed due, and charged it with interest thereon from that date at 8 per cent per annum. The evidence left the value of the ore uncertain. For the first-class ore the court charged the defendant with the highest monthly price it had received for ore of that class during the extraction of this ore, and it stated its account by the rule that the defendant should be made to bear the burden of any uncertainty in the proof due to its fault. This was the state of the case when the request for compound interest was considered, and the chancellor said that the lawful rate of interest to be allowed by the decree, 8 per cent per annum, was above the current rate, that the method of calculation of the amount adjudged due had been sufficiently unfavorable to the defendant, and refused to grant the request. The evidence in this case is so persuasive in support of many of the findings of the court on the material issues of fact, and so conflicting and uncertain upon the others, that the record fails to convince that the amount adjudged due, with interest at 8 per cent per annum, will not yield to the complainant the full value of its share of the ore extracted, and of the income that it probably would have derived from it, if the extraction had not been made, or that it will not deprive the defendant of all profit therefrom. There is no rule of law which requires the allowance of compound interest under such circumstances, and no mistake of fact or error of law is discovered in the refusal to charge it.

There are many specifications of error of each of the parties to this suit which have not been discussed in this opinion, but there is none which has not received examination and reflection. This is a suit in equity, and the consideration and decision of the questions this appeal presents is a trial of this case de novo. Upon a review of the entire case, the conclusion of this court is that the decree below, modified by the correction of the slight mistake which has been noted, is well sustained by the evidence, reasonable, and just.

Let the case, therefore, be remanded to the court below, with directions to modify the decree by increasing the amount of the adjudged recovery by \$34,034.46, which is the sum of \$23,908.07 and interest thereon from January 1, 1906, to April 17, 1911, and let the decree, so modified, be affirmed.

NOTE.

Right of Tenant in Common to Remove Minerals from Soil.

Generally, 580.

Rights and Remedies of Cotenant:

In General, 583.

Measure of Recovery, 584.

Generally.

By the common law of England a tenant in common in possession of the property was not liable to his cotenant for waste committed by him on the common estate, but such a liability was imposed by an early statute which is generally deemed to have been adopted as part of the common law of the United States, and similar statutes have been enacted in most American jurisdictions. See the note to *Hoolihan v. Hoolihan*, 15 Ann. Cas. 269. Such acts of depletion of the freehold as the quarrying of stone from the common lands have been deemed waste within statutes of that character. *Childs v. Kansas City*, etc. R. Co. 117 Mo. 414, 23 S. W. 373; *Cosgriff v. Dewey*, 21 App. Div. 129, 47 N. Y. S. 255, affirmed 164 N. Y. 1, 58 N. E. 1, 79 Am. St. Rep. 620.

But where the common property consists of a mine it is obvious that it is capable of no other use than that of extracting the minerals therein contained and that the tenant in possession cannot in the nature of things avail himself of that use without depleting the mineral deposit in which his cotenant has an equal interest. It is accordingly held by the weight of authority that a tenant in common of a mine has a right to work the mine, and is not guilty of waste in so doing. *Job v. Potton*, L. R. 20 Eq. (Eng.) 84; *Dettering v. Nordstrom*, 148 Fed. 81, 78 C. C. A. 157; *McCord v. Oakland Quicksilver Min. Co.* 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686; *Russell v. Merchants' Bank*, 47 Minn. 286, 50 N. W. 228, 28 Am. St. Rep. 368; *Vervalen v. Older*, 8 N. J. Eq. 98; *Blewett v. Coleman*, 40 Pa. St. 45; *Coleman's Appeal*, 62 Pa. St. 252. See also *Paul v. Craguaz*, 25 Nev. 295, 59 Pac. 857, 60 Pac. 983.

The reason of the rule was tersely stated in *Vervalen v. Older*, supra, as follows: "Quarrying is the only use that can be made of the ground described in the bill; and the complainant sold to the defendant the undivided half of it as a quarry lot. The proper use of it as such cannot be considered waste."

In the leading case of *McCord v. Oakland Quicksilver Min. Co.* 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686, it was said: "Is it not also true from the very nature of mining property

in this state, valuable only because of the mineral it is supposed to contain, that each of the cotenants may use it in the only way it can be used? The cotenants out of possession may at any time enter into an equal enjoyment of their possession; their neglect to do so may be regarded as an assent to the sole occupation of the other. This is but another application of the principle announced in *Pico v. Columbet*, 12 Cal. 414. True the cotenants will not be held to assent to the commission of waste by the sole occupant, but the question returns, what acts done by him are waste? It cannot be doubted that on the part of a mere trespasser it is a wrong in the nature of waste to remove any ore from a mine. The cases cited by appellants fully sustain this proposition. But it is not a just inference that as between tenants in common the rule is the same. Section 732 of the Code of Civil Procedure does not relate to trespasses committed by those who have no interest in the property. Nor does it define 'waste,' or declare what acts committed by a guardian, tenant for life or years, or joint tenant, or tenant in common, as the case may be, shall be waste. For the appropriate meaning of the word, as applicable to acts done by these several classes of persons, we are relegated to the principles of the common law, and to various considerations of policy arising out of different conditions which the common law recognizes and approves. The word 'waste' is not an arbitrary term to be applied inflexibly without regard to the quantity or quality of the estate, the nature and species of the property, or the relation to it of the person charged to have committed the wrong. As was said by Roane, J., in *Findlay v. Smith*, 6 Munf. (Va.) 134, 'in considering what is waste in this country, it is to be remarked that the common law by which it is regulated adapts itself in this as in other cases to the varied situations and circumstances of the country. . . . The law on this subject must be applied with reasonable regard to circumstances.' In the mining regions of this state where title to a lode can be acquired from a United States government only after work of certain value has been done upon it, can it be, that if one of several locators or owners shall assume the sole risk of developing the mine, he shall become liable to those who have taken no chance of possible loss, not only for an accounting as to net profits—supposing him to be fortunate enough to secure any—but also as a tortfeasor, for three times the value of the whole, or for a proportionate share of the ore taken out? It will be observed, upon the facts herein, no question arises as to unnecessary damage done to the mine or its works, by reason of reckless or unskilful management of the business by the tenant conducting

it. There may be cases in which the courts will impose damages for an abuse of his right by a cotenant in occupation, or interpose to prevent such abuse. But here the theory of plaintiffs is that defendant could not extract ore from the mine without committing waste, because such extraction is a destruction of the very substance of the estate; an irreparable injury to the inheritance. In view of the character of the property, and of plaintiffs' implied assent to its sole occupation by defendant for mining purposes, we regard the right of the latter to the proceeds of its operations as partaking of the nature of an usufruct, the appropriation of the net returns as a legitimate participation of the profits, and its acts of mining as not impairing or consuming the estate to any greater extent than must be presumed to have been intended to be allowable by each of the parties in interest."

In *Job v. Potton*, L. R. 20 Eq. (Eng.) 84, the Vice Chancellor said: "Now, no authority has been referred to, and I believe none can be found, to say that the rights of tenants in common in a mine are not as extensive as can be suggested for each of those tenants to do what he wills with the undivided property, provided always that he does not take more than his share. The statute of Anne has recognized that principle, and every decision which I know of has adopted it as a principle. What difference is there between a tree growing, which the court refuses to prevent a tenant in common from cutting at his pleasure, although it is a part of the inheritance, and a tree which by some operation of nature has become carbonised and turned into cannel coal? How is a tenant in common to enjoy his share (if that is the right expression) of the common property in a coal mine, if he is not at liberty to dig and carry away the coal? The only restriction upon him is that he must not appropriate to himself more than his share."

A majority of the co-owners of a mine may work the mine against the objection of a minority owner. *Sweeney v. Hanley*, 126 Fed. 97, 61 C. C. A. 153; *Hawkins v. Spokane Hydraulic Min. Co.* 3 Idaho 241, 650, 28 Pac. 433, 33 Pac. 40. In *Dougherty v. Creary*, 30 Cal. 291, 89 Am. Dec. 116, it was said: "As the property can only be used in entirety, it is indispensable to the conducting of the business of mining that those owning the major portion of the property should have the power to control, in case all cannot agree, otherwise the work might become wholly discontinued."

It is held in at least two jurisdictions that a tenant in common, whatever may be his rights as to mines in existence on the common property, has no right to open new mines, and is guilty of waste if he does so. Danger-

field v. Caldwell, 151 Fed. 554, 81 C. C. A. 400 (applying West Virginia rule); Murray v. Haverty, 70 Ill. 318; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L.R.A. 694; Paxton v. Benedum Trees Oil Co. (W. Va.) 94 S. E. 472. And see Goodenow v. Farguhar, 19 Grant. Ch. (U. C.) 614.

In Murray v. Haverty, supra, it was said: "No principle is better settled, than that one tenant in common cannot lawfully commit waste or destroy the common property, or do any act that will work a permanent injury to the inheritance. Our statute has authorized one tenant to maintain trespass or trover against his cotenant, who shall take away, destroy, lessen in value or otherwise injure the common property. Mining coal or excavating and removing earth, would tend to injure, destroy and lessen in value the estate. Notwithstanding the fact, in contemplation of law, tenants in common are all seized of each and every part of the estate, still, neither one is permitted with impunity to do acts deemed prejudicial or destructive of the interests of the other cotenants."

In Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L.R.A. 694, the court said: "Having seen that Jones, as life tenant, could not take this oil, we shall next inquire whether his right as owner in fee of three-tenths gave him right to do so. Jones was a tenant in common with the owners of the seven-tenths. By the old law one tenant in common was not liable to another for waste; but our Code of 1891 (chapter 92, sec. 2) has remedied this unreasonable rule by making tenants in common, joint tenants and parceners liable for waste. 1 Lomax, Dig. 499; 2 Minor, Inst. 620. Then we have simply to inquire whether the extraction of oil is waste, and under authorities above given we must answer that it is. Those acts which would be waste in a tenant for life would be between tenants in common.

. . . If oil wells had been already opened, Jones, as cotenant, might set up claim under his three-tenths interest to work them, and take all profits under some cases [McCord v. Oakland Quicksilver Min. Co. 64 Cal. 134, 27 Pac. 863]; though I should think he would have to account under section 14, chapter 100, Code. Rust v. Rust, 17 W. Va. 901. That would be no wrong; not waste. His life tenancy would give him the right to take all the oil. But there were no oil wells on it, nor any precedent authority to open any. He first pierced the soil in quest of this fluid of fabulous wealth. He had no right to pierce it to get even his three-tenths of the oil. If he chose to do so, of every gallon seven-tenths belonged to the owners of the seven-tenths in the land, because it had been part of their soil."

But in Smith v. Sharpe, 44 N. C. 91, 57 Am. Dec. 574, it was said: "There is no remainderman or reversioner to be injured, or to bring any action—the whole property in fee simple being in the plaintiff and defendant; the marl lying in the earth is valuable to no one: can it be that the plaintiff, through obstinacy, or any other cause, can deprive the defendant of all benefit to be claimed from it? Or, that by converting the property to its general and profitable use, he commits a wrong to his cotenant, and subjects himself to an action of waste? Suppose A and B are tenants in common of a tract of land which is in woods—can either of them, without the consent of the other, clear a portion of the land, and put it in cultivation, without becoming a tortfeasor? In the case we are considering, we hold that the plaintiff cannot maintain the action, because as a fishery, the land is neither injured in value nor destroyed, but improved. For the value of the marl removed by the defendant, he is no doubt bound to account to the plaintiff, but not in this action."

It has been held that a tenant in common may not transfer his right to extract minerals. Thus, in Boston Franklinite Co. v. Condit, 19 N. J. Eq. 394, it was said: "So, if the ores in one undivided half be conveyed as in this case, the cotenant will not be affected by it, but would be entitled to a partition of the whole between him and his original cotenant, without regard to the rights of the grantee. The whole tract must be divided into two shares equal, not in quantity, but in value; the ores and mines on one part would be valued as against the meadows, waterpower, or buildings, on the other part. And if the part containing the mines or minerals were allotted in partition under the acts requiring partition by lot, or assigned on other proceedings to the cotenant, he would have the right to retain it, although the grantee of the ores should thereby lose all right. His title as against such cotenant is void." So in Kansas City Southern R. Co. v. Sandlin, 173 Mo. App. 384, 158 S. W. 857, it was said: "The lessee of one tenant in common has no right to mine and take mineral ores from a tract of land against the will and without the consent of the other cotenant. [17 Am. & Eng. Enc. of Law (2d ed.) 673, 674; Zeigler v. Brenneeman, 237 Ill. 15, 86 N. E. 597, 599; Moreland v. Strong, 115 Mich. 211, 73 N. W. 140; Jackson v. O'Rourke, 71 Neb. 418, 98 N. W. 1068; Martens v. O'Connor, 101 Wis. 18, 76 N. W. 774; Adam v. Briggs Iron Co. 7 Cuah. 361, 368; St. Louis v. Laclede Gas-Light Co. 96 Mo. 197, 9 S. W. 581; McBeth v. Trabue, 69 Mo. 642.]"

In Montana a statute of 1895 provided that "if any person shall assume and exercise ex-

clusive ownership over or take away, destroy, lessen in value or otherwise injure or abuse any property held in joint tenancy or tenancy in common the party aggrieved shall have his remedy for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist." Under that act it was held that one tenant in common of a mine was entitled to enjoin the other from operating the same. *Anaconda Copper Min. Co. v. Butte, etc. Min. Co.* 17 Mont. 519, 43 Pac. 924; *Red Mountain Consol. Min. Co. v. Esler*, 18 Mont. 174, 44 Pac. 523; *Connole v. Boston, etc. Consol. Copper, etc. Min. Co.* 20 Mont. 523, 52 Pac. 263. The right to an injunction rested wholly on the statute, since the operation of the mine was held not to constitute waste. *Anaconda Copper Min. Co. v. Butte, etc. Min. Co.* 17 Mont. 519, 43 Pac. 924. Accordingly the right to injunctive relief was held not to be affected by the fact that the value of the mine was enhanced by its operation. *Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642. In 1899 the act was amended so as to give to a tenant in common the right to mine the common property, subject to a liability to account to his cotenant for the latter's share of the profits. That amendment, while it has been held to be unconstitutional as to cotenancies previously created (*Butte, etc. Consol. Min. Co. v. Montana Ore Purchasing Co.* 24 Mont. 125, 60 Pac. 1039, *rehearing denied* 25 Mont. 41, 63 Pac. 825) is apparently the law of that jurisdiction as to those created after its enactment.

Rights and Remedies of Cotenant.

IN GENERAL.

In case the removal of minerals by a tenant in common constitutes waste his cotenant is entitled to an injunction. See the cases cited in the preceding subdivision. Likewise a tenant in common in possession of mining property has been enjoined from converting the minerals to his own use. *Binswanger v. Henninger*, 1 Alaska 509. In case of waste by the removal of minerals the tenant out of possession may sue for damages. *Murray v. Haverty*, 70 Ill. 318. But in such an action he cannot have an accounting. *McCord v. Oakland Quicksilver Min. Co.* 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686.

A tenant in common excluded from participation in the operation of a mine is not entitled to bring trespass, *Coleman v. Grubb*, 23 Pa. St. 393, or forcible entry and detainer, *Henderson v. Allen*, 23 Cal. 519.

Though the circumstances are such as to warrant an injunction, the tenant out of possession need not thus proceed, but may sue for an accounting. *Sweeney v. Hanley*, 126 Fed. 97 61 C. C. A. 153.

The general rule that a tenant in common out of possession is entitled to an accounting of the rents and profits (see the note to *Schuster v. Schuster*, 18 Ann. Cas. 1078) is applicable to a case where a mine owned in common is operated by one of the tenants. *Kahn v. Central Smelting Co.* 102 U. S. 641, 26 U. S. (L. ed.) 266; *Barnum v. Landon*, 25 Conn. 137; *Huff v. McDonald*, 22 Ga. 131, 68 Am. Dec. 487; *Russell v. Merchants' Bank*, 47 Minn. 286, 50 N. W. 228, 28 Am. St. Rep. 368; *Gregg v. Roaring Springs Land, etc. Co.* 97 Mo. App. 44, 70 S. W. 920; *Cosgriff v. Dewey*, 164 N. Y. 1, 58 N. E. 1, 79 Am. St. Rep. 620; *McCabe v. McCabe*, 18 Hun (N. Y.) 153; *Abbey v. Wheeler*, 32 N. Y. S. 1069, *affirming* 10 Misc. 61, 30 N. Y. S. 874; *Early v. Friend*, 16 Grat. (Va.) 21, 78 Am. Dec. 649; *Curtis v. Coleman*, 22 Grant. Ch. (U. C.) 561.

As was said in *McCord v. Oakland Quicksilver Min. Co.* 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686: "We have said that the net proceeds from the working of the mine were rather in the nature of profits from the use than the result of the destruction of the inheritance. But it may be conceded, for the purposes of this decision, that the relation of the tenants in common, under the circumstances disclosed, is *sui generis*, and their rights peculiar. That while the extraction of ore from the mine by one tenant, who does not exclude his cotenants, is not waste, and the neglect of the latter to enter should be held an assent on their part to the exclusive occupation by the former; yet, because the effect of the exclusive working by one may be to exhaust the mineral, and the uncertainty of the prospective value of the property may render it impossible to make a just partition of it, a court of equity should order an accounting; holding that, while it must have been contemplated by the parties that the tenant in occupation should not be held for waste, nor prohibited from proceeding with his work by the cotenants who do not seek to enter, yet it must also have been contemplated that the tenant in occupation should not appropriate to himself the entire profits."

In *Irvine v. Hanlin*, 10 Serg. & R. (Pa.) 219, it was held that assumpsit would not lie to recover the share of an excluded cotenant in the profits of a mine. But in *Winton Coal Co. v. Pancoast Coal Co.* 170 Pa. St. 437, 33 Atl. 110, it was said: "Defendant has not sold the title claimed by plaintiff to the coal in place, but has mined, sold and disposed of the coal itself in such manner that the same cannot be recovered by ejectment. Nor is the present an action for the use and occupation of the land, but merely for the proceeds of coal sold, plaintiff's title to which has been legally divested; and, from the nature of the transaction, the coal thus

mined and sold cannot be recovered in specie, in any form of action. By sustaining this action, defendant is not deprived of any legal right, nor prevented from setting up any defense that might otherwise be interposed. On the contrary, circuity of action is avoided, and the rights of both parties may be fully protected. No conflicting title to the coal that still remains in place or right of inheritance will be tried, inasmuch as the coal mined, etc., has been converted into money."

If the person in possession of a mine asserts sole ownership thereof, one claiming to be a tenant in common must establish his right at law before he may have an accounting of profits. *North Pennsylvania Coal Co. v. Snowden*, 42 Pa. St. 488, 82 Am. Dec. 530; *Frisbee's Appeal*, 88 Pa. St. 144.

MEASURE OF RECOVERY.

Where a cotenant is excluded from the premises and his ore is extracted and disposed of, it constitutes a trespass and the tenant working the mine is liable for the gross value of the ore. See the reported case.

In *Sweeney v. Hanley*, 126 Fed. 97, 61 C. C. A. 153, it was said: "We are unable to perceive any force in the suggestion that, where the excluded tenant in common knows of the wilful trespass and does not apply for a preliminary injunction on commencing suit, he should be allowed only the net proceeds appertaining to his interests."

So in *Foster v. Weaver*, 118 Pa. St. 42, 12 Atl. 313, 4 Am. St. Rep. 573, it was said: "The relation of the parties to each other, as cotenants of the lease, and the fact that two of them after fraudulently dispossessing the other may have continued to use the property as it probably would have been used if they had all remained in possession, does not mitigate the tort, nor qualify the ordinary rule of damages. Cotenants are bound to respect the rights of each other quite as much as if they were strangers in title."

But in *Dettering v. Nordstrom*, 148 Fed. 81, 78 C. C. A. 157, it was held that the act of a cotenant in possession in denying his cotenant's title and breaking a verbal agreement to do no mining did not bring him within the rule just stated.

Where the acts of a tenant in common with respect to mining property do not make him a tortfeasor as to his cotenant, he is bound to account only for the cotenant's aliquot part of the net proceeds of the mining operation. The rule as to the amount recoverable has however been variously stated. In *Edsall v. Merrill*, 37 N. J. Eq. 114, it was said generally that a share of the "net profits" was recoverable. So in other cases it has been held that the tenant out of possession is entitled to his share of the value of the mineral extracted less the expense of mining

and the cost of the improvements necessary thereto. *Job v. Potton*, L. R. 20 Eq. (Eng.) 84; *McCord v. Oakland Quicksilver Min. Co.* 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686; *Wolfe v. Childs*, 42 Colo. 121, 94 Pac. 292, 126 Am. St. Rep. 152; *Graham v. Pierce*, 19 Grat. (Va.) 28, 100 Am. Dec. 658; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L.R.A. 694; *McNeeley v. Smith Penn Oil Co.* 58 W. Va. 438, 52 S. E. 480; *Tipping v. Robbins*, 71 Wis. 507, 37 N. W. 427.

In *Newman v. Newman*, 27 Grat. (Va.) 714, the court referred to the case of *Graham v. Pierce*, supra, and said: "That was the case of a lead mine, while this is the case of an iron mine; and there seems to be no difference in principle between them on the subject we are now considering. A tenant of such property necessarily uses a part of the subject itself, and may by such uses render the residue of the subject of little or no value. It may be discovered by explorations and operations that the property is of great value, or the contrary. To rent it for a certain sum, is to make a bargain of speculation and hazard, which is always objectionable in such cases, as it is almost sure to operate unequally on the parties. Whereas to carry on operations upon it for the joint and equal benefit of all the owners in proportion to their respective interests in the subject, and by the agency of persons (whether they have an interest therein or not) who may be amply compensated for their trouble, complete justice will be done to all parties concerned. It may be said that to carry on the business required a capital, which one of the parties did not have. But that matter may be adjusted by allowing interest to the party who advances the capital."

In *Mallett v. Uncle Sam Gold, etc. Min. Co.* 1 Nev. 188, 90 Am. Dec. 484, it was said: "If one partner or tenant in common, after having become associated with his cotenants in the development of the claim, voluntarily leaves it in the possession of his companions, and refuses to bear his proportion of the expenses incurred by them in development of the same, and should afterwards bring his action to recover his interest, undoubtedly, upon a proper application, the equity side of the court would defer his recovery until he has paid his full proportion of the expense incurred in the development and improvement of the claim; and on the other hand, if he had been wrongfully ousted from his possession or rights, the persons so ousting him, or those claiming under them, can acquire no title in the claim adverse to him short of the statute of limitations, and of course could not ask the interposition of equity."

In other cases the value of his share of the mineral in place has been allowed to the tenant out of possession in case of a rightful

operation of the mine by his cotenant. *Clowser v. Joplin Min. Co.* 4 Dill. 469, note, 5 Fed. Cas. No. 2,908a; *Johnson v. Kansas Natural Gas Co.* 90 Kan. 565, Ann. Cas. 1915B 549, 135 Pac. 589; *McGowan v. Bailey*, 179 Pa. St. 470, 36 Atl. 325. The value of the mineral in place is arrived at by deducting from its value at the pit mouth the cost of severance and hoisting. *Keys v. Pittsburg*, etc. Coal Co. 58 Ohio St. 246, 50 N. E. 911, 65 Am. St. Rep. 754, 41 L.R.A. 681.

So in *Coleman's Appeal*, 62 Pa. St. 252, it was said: "Here a tenant in common exercises his undoubted right to take the common property, and he has no other means of obtaining his own just share than by taking at the same time the shares of his companions. The value of the ore in place is, therefore, the only just basis of account. This is the same as the value of what is called ore-leave—that is, what the right to dig and take the ore is worth. Indeed all parties, as well as the master and court below, seem eventually to have settled upon this basis. But how is the value of ore-leave to be ascertained? It is evident, in the nature of things, that it can have no general market price. It will depend necessarily upon the position and circumstances of each particular mine, as well as on the character of the ore. The value of it at the pit's mouth depends upon its quality and its proximity to the furnace where it is to be used, and on the means of transportation. In addition to this the price of the ore-leave will be influenced by the expense and risk of the process of mining, or of taking it from its place to the pit's mouth. It is evident that the price given for ore-leave in other mines or beds can afford no safe criterion, unless they should be precisely similar in all these respects to the one in question. As to the Cornwall ore-banks no sales had ever been made of ore-leave. No evidence was laid before the master as to what, in the opinion of experts, ore-leave in these banks would have commanded in the market. The master arrived at it by ascertaining the market value of the ore at the pit's mouth, and then deducting from that the cost of mining. We cannot see that under all the circumstances any more just and equitable mode could have been adopted. We do not mean to say that it would hold in any other case than the one now before the court—certainly not where the mining is expensive and hazardous. While the tenant in common of a coal mine, for example, must with great outlay of capital construct expensive machinery, and incur all the risks of such an undertaking, the value of ore-leave or coal in place could not be ascertained by so simple a calculation. The usual profits on capital embarked in such a hazardous enterprise with the proper allowance for personal skill and

superintendence would seem to be no more than fair and reasonable deductions. Certainly any business man, sitting down to calculate what he ought to give for ore-leave, would take all these elements into consideration. Otherwise, with his own capital and at his own risk, he would separate the ore from its natural position, and place it on the surface enhanced in value, for the benefit of a stranger. We leave the rule in such a case to be determined when it arises. But the case of the Cornwall ore-banks is very different and very peculiar. Very little outlay of capital was required—the wages of day laborers and the pick-axe and shovel, with occasional charges of powder for blasting, made up all that was to be provided. The returns were immediate: the ore was removed to be used or sold as soon as it loosened. No personal skill or superintendence by the tenants in common was shown, and whatever was necessary was hired and allowed in the cost of mining. Besides upon the determination of the master and the court below on the subject of interest, and which for this and other reasons we think was right, the proceeds of value of the ore in the hands of the defendants, who took more than their proportion, remained in their possession to be employed by them as capital without charge." *Compare Barton Coal Co. v. Cox*, 39 Md. 1, 17 Am. Rep. 525, wherein the value of the mineral as severed was apparently allowed without deduction.

In several *Pennsylvania* cases it has been held that under some circumstances the royalty currently paid for the privilege of working similar mines in that vicinity affords the measure of the allowance to which the tenant in common out of possession is entitled. Thus in *Fulmer's Appeal*, 128 Pa. St. 24, 18 Atl. 493, 15 Am. St. Rep. 662, the court, distinguishing the decision in *Coleman's Appeal*, supra, said: "The whole tendency of the opinion was to show that there was no substantial difference between the value of the ore in place and its value at the pit's mouth, except the mere cost of digging and of removing it from the one place to the other. This, added to the fact that there never had been any sales of ore-leave at the Cornwall banks, and no proof of the opinions of experts as to what such ore-leave was worth, impelled the adoption of the principle upon which the value of the ore-leave was determined. There was in fact no other method which could have been adopted in that case under the evidence on the record. In the present case, it is only necessary to note the fact that abundant evidence was given as to the value of the royalty or slate-leave in this particular quarry, by very experienced persons who knew it well and had long been engaged in the same business; and

the further fact that the value of the slate on the bank included, in addition to the cost of severance and removal, the cost also of splitting, dressing and piling the roofing slate, and splitting the school slate and mantel and blackboard stock. In addition to this, personal skill and superintendence were required. As to the roofing slate the whole profit of manufacture thus enters into its cost on the bank, and a portion of that profit enters into the cost of the school slate and other stock. It follows, that if the method adopted by the master is pursued, the plaintiff would recover, in addition to the real value of the slate in place, a share of the profits of carrying on the business without being subject to the risks or possible losses which might accrue, and this we think would not be just and equitable." See to the same effect *Schreiber v. National Transit Co.* 21 Pa. Co. Ct. 657; *McIntosh v. Ropp*, 233 Pa. St. 497, 82 Atl. 949.

A tenant in common out of possession seeking an accounting for his share of mineral removed by a person prospecting under a contract with the cotenant is not bound by the royalty contract made with the prospector or limited to a recovery of his share thereof. He is entitled to recover to the same extent as if the mining had been done by the cotenant in person. *Dettering v. Nordstrom*, 148 Fed. 81, 78 C. C. A. 157; *Chase v. Savage Silver Min. Co.* 2 Nev. 9; *Mercur v. State Line, etc.* R. Co. 171 Pa. St. 12, 32 Atl. 1126; *Tipping v. Robbins*, 71 Wis. 507, 37 N. W. 427.

In the application of the rule heretofore discussed allowing to a cotenant out of possession the net value of his share of the ore, the burden is on the tenant in possession to show the amount of the expense of mining. *Dettering v. Nordstrom*, 148 Fed. 81, 78 C. C. A. 157; *Johnson v. Kansas Natural Gas Co.* 90 Kan. 565, Ann. Cas. 1915B 549, 135 Pac. 589.

The tenant out of possession is chargeable with those expenses only by way of set-off against his share of the ore produced. He cannot be held to a personal liability. *Fro-wenfeld v. Hastings*, 134 Cal. 128, 66 Pac. 178; *Neuman v. Dreifurst*, 9 Colo. 228, 11 Pac. 98; *Stickley v. Mulrooney*, 36 Colo. 242, 87 Pac. 547, 118 Am. St. Rep. 107; *Wolfe v. Childs*, 42 Colo. 121, 94 Pac. 292, 126 Am. St. Rep. 152. And see *Rico Reduction, etc. Co. v. Musgrave*, 14 Colo. 79, 23 Pac. 458.

WEAR ET AL.

v.

STATE OF KANSAS EX REL BREWSTER.

United States Supreme Court—November 26, 1917.

245 U. S. 154; 38 S. Ct. 55.

Waters and Watercourses — Riparian Rights — Ownership of Bed of Stream.

A territorial statute enacted in 1859 (Laws 1859, c. 121), adopting the common law of England, did not give a subsequent patent from the United States covering riparian lands the effect of a grant to the thread of the stream, and created no constitutional obstacle to a subsequent decision of the state court that the fact of navigability, rather than the ebb and flow of the tide, excluded riparian ownership of river beds.

Judicial Notice — Navigability of Stream.

Whether a state supreme court in a mandamus proceeding should take judicial notice that the principal river of the state is navigable at the capital of the state is a question of state law, and the Federal Supreme Court cannot pronounce its action in taking judicial notice thereof erroneous; there being no constitutional right to a trial by jury.

[See 12 Ann. Cas. 928.]

Waters and Watercourses — Right to Take Sand from Bed of Stream.

That sand in the bed of a navigable stream is migratory, or liable to be shifted, does not change its character while at rest upon the river bed, as respects the right of the state to require payment from persons taking sand from the bed of the stream.

[See note at end of this case.]

Same.

That there is a public right to take sand from a navigable stream does not hinder the state from collecting for the good of the whole public a charge from those individuals taking sand and thereby withdrawing it from public access.

[See note at end of this case.]

Error to Supreme Court of Kansas.

Action for mandamus. S. M. Brewster, Attorney General, relator, and State Treasurer, defendant. Norman S. Wear, impleaded as Wear Sand Company, and F. D. Fowler made parties. Judgment for relator. Wear and Fowler bring error. The facts are stated in the opinion. **AFFIRMED.**

Francis O. Downey for plaintiffs in error.
J. L. Hunt for defendant in error.

[155] HOLMES, J.—This is a petition for mandamus to require the Treasurer of the State to transfer certain funds from a special account to the general revenue funds of the State, so that they can be used for paying the expenses of government. The money in question was collected under the State Laws of 1913, c. 259, requiring payment of ten per cent of the market value on the river bank of sand taken by private persons or corporations from the bed of streams subject to the control of the State. It was paid by the plaintiffs in error for sand taken from the Kansas River at Topeka, and it was kept as a separate fund because the plaintiffs in error paid it under duress and protest and claimed the right to recover it before it should lose its identity by the transfer demanded. Under the state procedure the plaintiffs in error were made parties and came in and set up title to the fund. The Supreme Court of the State overruled [156] the claim and directed the issue of the peremptory writ.

This case was decided on a motion to quash the answers; the allegations of which, so far as now material, may be summed up as follows. In 1859 the Territorial Legislature of Kansas enacted that the Territory should be governed by the common law of England, which still remains the law of the State. On October 1, 1860, the United States conveyed land adjoining the Kansas River to the predecessor in title of the plaintiffs in error, and, as the tides do not ebb and flow in the river, they allege that the conveyance carried title to the middle of the stream; that they were the owners of the sand dredged from the same; that to enforce the provisions of the Act of 1913 against them would infringe the Fourteenth Amendment, and that they paid the sums exacted under protest and duress, the circumstances of which are detailed. The river was meandered on both sides by the surveys of the United States up to above this land, and with the Missouri and Mississippi constitutes an open and unobstructed water way from the up stream end of the meander lines to the Gulf of Mexico and the high seas. But the plaintiff in error Fowler, while adopting this allegation, alleges that it is not and never has been a navigable stream, and in 1864 the Kansas Legislature made a declaration to that effect. There follow allegations that the sand is migratory, and, in short, of the nature of animals *ferae naturae*, and that ever since the admission of the State the persons within it have taken the sand as of common right. The presence of the sand is alleged to interfere with the use of the stream for its proper purpose of navigation as a valuable commercial highway, the river being alleged to be a public highway the use of which, including the right to take sand, belongs to the people in the State. It

also is suggested that if the court should entertain jurisdiction and determine the questions of fact arising in the proceeding the [157] plaintiffs in error would be deprived of the equal protection of the laws contrary to the Constitution of the United States.

The argument of the plaintiffs in error does not need a lengthy response or a statement of all the answers that might be made to it. It was said that the territorial statute gave to the patent of the United States the effect of a grant *ad filum aquae*. But this attributes to detailed and precise an effect to a general provision of law. We should be slow to believe that a State beginning its organized life with an express adoption of the common law of England stood any differently from one where the common law was assumed to prevail because the citizens were of English descent. Therefore when the Supreme Court of Kansas regards the principle of the common law to be that the fact of navigability, not the specific test of navigability convenient for England, is what excludes riparian ownership of river beds, it is impossible for us to say that the territorial statute even purports to give greater rights. The *Genesee Chief v. Fitzhugh*, 12 How. 443, 13 U. S. (L. ed.) 1058, had been decided before the Territorial Act of 1859 was passed, and as was observed by Mr. Justice Bradley in *Barney v. Keokuk*, 94 U. S. 324, 24 U. S. (L. ed.) 224, after that decision there seemed to be no sound reason for adhering to the old rule as the proprietorship of the beds and shores of waters held navigable by that case. See further *Shively v. Bowlby*, 152 U. S. 1, 58, 14 S. Ct. 548, 38 U. S. (L. ed.) 331, 352; *Kansas v. Colorado*, 206 U. S. 46, 93, 94, 27 S. Ct. 655, 51 U. S. (L. ed.) 956, 973; *Donnelly v. U. S.* 228 U. S. 243, 261, Ann. Cas. 1913E 710, 33 S. Ct. 449, 57 U. S. (L. ed.) 820, 828. We think it too plain for extended argument that the Territorial Act created no constitutional obstacle to the present decision of the Kansas court.

Then it was said, if navigability in fact is the test, the plaintiffs in error were entitled to go to a jury on that fact, as it was in 1860, the date of the original grant, and the Supreme Court of the State was not entitled to take judicial notice that the river was navigable at Topeka. [158] But there is no constitutional right to trial by jury in such a case, and if a state court takes upon itself to know without evidence whether the principal river of the State is navigable at the capital of the State we certainly cannot pronounce it error. In this aspect it is a question of state law. *Donnelly v. U. S.* 228 U. S. 243, 262, Ann. Cas. 1913E 710, 33 S. Ct. 449, 57 U. S. (L. ed.) 820, 828. See *Areher v. Greenville Sand, etc. Co.* 233 U. S. 60, 68, 69, 34 S. Ct. 567, 58 U. S. (L. ed.) 850, 853. The fact is of a kind that should be estab-

lished once for all, not perpetually retried. The court had too, in favor of its decision, the circumstance that the stream was meandered in the original surveys; the decisions of its predecessors; *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *Topeka Water Supply Co. v. Potwin*, 43 Kan. 404, 413, 23 Pac. 578; *Johnston v. Bowersock*, 62 Kan. 148, 61 Pac. 740; *Kaw Val. Drainage Dist. v. Missouri Pac. R. Co.* 99 Kan. 188, 202, 161 Pac. 937; *Kaw Val. Drainage Dist. v. Kansas City Southern R. Co.* 87 Kan. 272, 275, 123 Kan. 991; *Kansas City Southern R. Co. v. Kaw Val. Drainage Dist.* 233 U. S. 75, 34 S. Ct. 564, 58 U. S. (L. ed.) 857; legislation of the State; Private Laws of 1858, c. 30, § 4, c. 34; 1860, c. 20, § 3, etc.; and of the United States; Private Laws of 1858, c. 30, § 4, c. 31, § 4, c. 34; 1860, c. 20, § 3, etc.; and of the United States; Act of May 17, 1886, c. 348, 24 Stat. 57; Act of January 22, 1894, c. 15, 28 Stat. 27; Act of July 1, 1898, c. 546, 30 Stat. 597, 633, etc.; and the assent, so far as it goes, of this court; *Kansas City Southern R. Co. v. Kaw Val. Drainage Dist.* 233 U. S. 75, 77, 34 S. Ct. 564, 58 U. S. (L. ed.) 857, 858, not to speak of the allegations in the answers of the *Wear Sand Company*, adopted, notwithstanding his denial of navigability, by *Fowler*, the other plaintiff in error before this court.

The allegation that the sand is migratory and belongs to whoever may reduce it to possession, and the allegation of the public right, are inconsistent, of course, with the claim of title and hardly consistent with the allegation that it is got by dredging. But the fact that it is liable to be shifted does not change its character while at rest upon the river bed, and if there were the public right alleged, it would not hinder the State from collecting, for the good of the whole public, a charge from those individuals who withdraw it [159] from public access. We see nothing in the case of the plaintiffs in error that requires further answers that might be made, or discussion at greater length.

Judgment affirmed.

NOTE.

The reported case upholds the validity of a state statute imposing a royalty on the taking of sand from the bed of a navigable stream within the state. In so holding the court affirms the decision in *State v. Akers*, which is reported, with a note on the right to take sand, gravel or the like from the bed of a navigable stream, in *Ann. Cas. 1916B* at page 543.

FLYNN

v.

**NEW YORK, WESTCHESTER AND
BOSTON RAILWAY COMPANY ET
AL.**

BRADY

v.

**NEW YORK, WESTCHESTER AND
BOSTON RAILWAY COMPANY ET
AL.**

New York Court of Appeals—May 2, 1916.

218 N. Y. 140; 112 N. E. 913.

Vendor and Purchaser — Building Restrictions — Validity.

Restrictive building covenants are not invalid as against public policy.

[See 21 Am. St. Rep. 485; 95 Am. St. Rep. 219.]

Effect of Restriction — Subsequent Purchaser.

Restrictive building covenants are valid and enforceable in law and in equity, and all the lots covered thereby are subject to an incumbrance, requiring occupation in accordance therewith, binding upon every subsequent purchaser having notice of the plan, even though his legal title is unrestricted.

Effect on Public Service Corporation.

Under Const. art. 1, § 6, declaring that private property shall not be taken for public use without just compensation, rights based on restrictive building covenants are property rights which cannot be taken for a public use without just compensation, and which make direct and compensational damages which otherwise would be consequential and non-compensational.

[See note at end of this case.]

Same.

The owner of a tract of land laid it out on a map in lots fronting on streets, and, as an inducement to purchasers, sold them by deeds, covenanting that no building or structure for any business purpose whatsoever should be erected on the premises. Defendant railroad purchased lots running across the entire southern part of the tract subject to such restrictions opposite the lots of one of the plaintiffs and adjacent to the premises of the other, and built its railway across such lands partly on an embankment and partly in an open cut, and operated on its tracks many fast electric trains daily. It is held, in an action to restrain the maintenance of such structure and the operation of the road, that defendant had violated the covenant, and that plaintiffs were entitled to damages, a "building or structure" being in the widest sense anything constructed that is erected by art and fixed upon or in the soil composed of different pieces connected together and designed for permanent use in the position in which it is so fixed, and to "erect," meaning not only to raise, but also to build or construct.

[See note at end of this case.]

Same.

In such case, the plaintiffs' right is measured by the depreciation in the value of their land, including such depreciation as will be sustained by reason of the use to which the defendant puts its property; the difference in value between their land with and without the railroad.

[See note at end of this case.]

Flynn v. New York, etc. R. Co. 160 N. Y. App. Div. 907; affirmed.

Brady v. New York, etc. R. Co. 160 N. Y. App. Div. 906, affirmed.

Appeals from Appellate Division of Supreme Court, Second Judicial Department.

Actions by Michael W. Flynn, plaintiff, against New York, Westchester and Boston Railway Company et al., defendants, and by Edwin B. Brady, plaintiff, against New York, Westchester and Boston Railway Company et al., defendants. Judgments for plaintiffs. Defendant named appeals. The facts are stated in the opinion. **AFFIRMED.**

Louis Marshall and George S. Graham for appellant.

Edwin L. Kalish and Charles A. Kalish for respondents.

[143] **POUND, J.**—In 1906 one Prince owned a tract of land in the city of New Rochelle, Westchester county, which he laid out on a map in one hundred and fourteen lots fronting on streets. As an inducement to prospective purchasers and in pursuance of a plan to restrict the lots against nuisances and trades and make it exclusively a residence district, all of the lots thus laid out were sold and conveyed by deeds containing the following covenants: "And the said party of the second part does covenant and agree that the grant and conveyance as aforesaid shall be subject to the following covenants, conditions and restrictions, which shall be binding upon them, their heirs, executors, legal representatives and grantees of the respective parties.

[144] "That the said party of the second part shall not build or permit to be built on said premises any house or dwelling of a value less than \$4,500 or being less than two and one-half stories in height, or of the style known as 'flat roof.'

"No part of said premises shall be used for any Hospital, Insane, Inebriate or other Asylum, public or private, or cemetery or place of burial.

"No building or structure for any business purpose whatsoever shall be erected on said premises.

"No part of any structure erected shall be within fifteen feet of any street or street line upon which the lot or lots abut, except the

steps, which may project a reasonable distance beyond the structure.

"No dwelling shall be erected on any plot less than two lots.

"No part of any barn, stable or other structure or structures of any kind or description erected upon said premises shall be within sixty feet of the line of the street or avenue on which the lots front, or within twenty-five feet of any side street; nor shall there be erected on any part of said lot any slaughterhouse, smith shop, forge, furnace, steam engine, brass foundry, nail, iron or other foundry, or any manufactory of gunpowder, glue, varnish, vitriol, ink, turpentine, or for the tanning, dressing or preparing skins, hides or leather, or any manufactory whatever; or any ale house, brewery, distillery, saloon, liquor store, hotel, or inn, or livery stable, or any other obnoxious, dangerous or offensive business or trade or any building of the character or description known as a tenement house. There shall be no toilet outhouse of any kind or description upon the premises. No closed fence shall be erected on said premises, excepting on the rear line thereof, and that no fence shall be erected on said premises more than four feet high, excepting on the rear line thereof.

"No poultry shall be kept upon any part of the premises [145] unless such poultry is retained or inclosed in proper runs or inclosures.

"It being understood and agreed that said covenants and conditions shall run with the land, and shall be enforceable both as covenants and conditions, with the right of re-entry in case of breach thereof."

Appellant purchased from Prince's grantees lots numbered from 1 to 38 inclusive, running across the entire southern part of the tract, subject to the above restrictions. Respondent Flynn purchased lots 107 and 108, on which he has erected a house directly across the street from appellant, and the respondent Brady purchased lots 39-42 inclusive, immediately adjacent to appellant's premises. The railway of appellant was built across the restricted lands owned by it, partly on an embankment 25 feet above the surface, which is next to the Brady lots, and partly in an open cut, 17 feet in depth, which is in front of the Flynn property. The railroad is equipped as high speed electric, operating many trains daily, and its maintenance and operation render respondents' property less valuable than it would be if appellant's property were used exclusively for private dwelling purposes.

These actions were instituted to restrain the appellant from constructing and operating its road across said lots, but at the time of the trial the railroad was in operation. The judgments appealed from restrain the main-

tenance by the appellant of its erections and structures upon the restricted land owned by it and the operation of its road, unless appellant pays Flynn \$3,370 and Brady \$2,000 respectively, as damages by reason of its violation of the restrictive covenants.

Appellant contends (1) that the restrictive covenants upon which respondents rely are, so far as they prohibit the construction and operation of a railroad, against public policy and void, and (2) that they do not by the language used prohibit the construction or operation of a railroad.

[146] The constitutional provision "nor shall private property be taken for public use without just compensation" (Const. N. Y. art. 1, § 6), brings us at once to the inquiry as to whether the rights of respondents based on such restrictive covenants are property rights, for no public policy can exist which is contrary to the fundamental law. Restrictive building covenants have been consistently recognized as valid and enforceable in law and in equity, and it has been held that all the lots covered thereby are subject to an incumbrance requiring occupation in accordance with the plan, which is binding upon each subsequent purchaser having notice of the plan, even though his legal title is unrestricted. *Tallmadge v. East River Bank*, 26 N. Y. 105; *Korn v. Campbell*, 192 N. Y. 490-495, 85 N. E. 687, 127 Am. St. Rep. 925, 37 L.R.A. (N.S.) 1. The public service corporation, exercising the right of eminent domain, has the advantage over the private person or corporation in that it cannot be kept off the premises entirely, but may enter the restricted district and destroy its exclusive character upon making just compensation for property rights thus taken. It is said in *Columbia College v. Lynch*, 70 N. Y. 440, 446, 26 Am. Rep. 615, that building restrictions "have never been regarded as impolitic." It follows that they cannot be taken and destroyed without just compensation. The distinction suggested in *U. S. v. Certain Lands*, 112 Fed. 622; *affd. sub nom. Wharton v. U. S.* 153 Fed. 876, 83 C. C. A. 58, between acts done by private individuals for their own benefit and working injurious consequences, and acts, perhaps equally injurious, done for a public purpose in the execution of a public duty, amounts only to this;—for the private use, rights thus created cannot be lawfully taken; for the public use, they may be taken, but only for just compensation. *Wallace v. Clifton Land Co.* 92 Ohio St. 349, 110 N. E. 940. These restrictive covenants create a property right and make direct and compensational the damages which otherwise would be consequential and noncompensational. *Radcliff [147] v. Brooklyn*, 4 N. Y. 195, 53 Am. Rep. 357;

Uline v. New York Cent. etc. R. Co. 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661. No matter how unpleasant a neighbor the railroad may prove, if it takes no property by physical appropriation it is not chargeable with damages for impaired values due only to proximity. But something in the nature of an easement of privacy over another's land may be acquired by covenant in order that one may live apart from the disagreeable sights and sounds of business if one desires, and if that right has a value and the railroad subtracts a portion thereof by building on the restricted land, it is difficult to conceive why compensation should not follow. *Story v. New York El. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146.

The appellant has violated the restrictive agreement by "erecting a building or other structure for business purposes." A building or a structure is, in the widest sense, anything constructed, *i. e.*, erected by art and fixed upon or in the soil, composed of different pieces connected together and designed for permanent use in the position in which it is so fixed. To erect means not only to raise but also to build or construct. *Century Dictionary*. "A thing constructed" may thus be the equivalent in meaning of "a building erected." We are not now dealing with a penal statute where formal niceties of meaning are invoked in behalf of personal liberty. *People v. Richards*, 108 N. Y. 137, 15 N. E. 371, 2 Am. St. Rep. 373. To say that the construction of the railroad, whether above, on or below the surface of the ground, is not within the inhibition of the restrictive covenants is to say that it is enough to keep the word of promise to the ear and that the surrounding circumstances must not be allowed to aid in ascertaining the fair expressed intent of parties to a contract.

The right of the property owner is measured by the depreciation in value which his land sustains, including such depreciation as will be sustained by reason of the use to which the railroad puts its property, the difference in value between his land with and without the railroad [148] in operation. *South Buffalo R. Co. v. Kirkover*, 176 N. Y. 301, 68 N. E. 366. The railroad and its use in violation of the restrictive covenants may not be separated in considering the effect upon the owner. The rule for assessing damages applied herein seems to have been correct and the amount of the award presents no question of law.

The judgments should be affirmed, with costs.

Willard Bartlett, Ch. J., Hiscock, Chase, Cuddeback, Hogan and Cardozo, JJ., concur.
Judgments affirmed.

NOTE.

Building Restriction or Restrictive Agreement as Binding Public or Public Service Corporation.

Generally.

It seems to be the rule that a building restriction or restrictive agreement is not so far binding on the public or on a public service corporation as to prevent the condemnation of the restricted land or to prevent its use for a purpose for which it might have been condemned. See *Ward v. Cleveland, etc. R. Co.* 92 Ohio St. 471, 112 N. E. 507. And see the cases cited throughout this note. But there is some conflict of authority as to the right of the persons interested in the enforcement of the covenant to compensation or damages for an interference with their right to the continuance of the restriction by the taking of the restricted lands. See the following subdivision of this note.

In *Hayes v. Waverly, etc. R. Co.* 51 N. J. Eq. 345, 27 Atl. 648, it appeared that certain lots were conveyed under a deed making the property subject to the restriction that the 'premises shall not be used for the purpose of a slaughterhouse or manufactory of fertilizers, glue, vitriol, or any other purpose that shall be a nuisance or detrimental to the surrounding property of the party of the first part, this restriction, however, is to be held not to apply to a railroad on the level of the adjoining streets.' Part of the lots by means of conveyances became the property of a railroad company which laid a track over it. Subsequently the track was taken up and the company proceeded to erect an embankment on which the railroad was to be laid. The original grantor of the property filed a bill praying for an injunction to restrain the operation of the railroad on the embankment, and for general relief. Discussing the right of the complainant to relief, the court said: "The question arises whether an elevated railroad is within the inhibition of the stipulation in question. Slaughterhouses and manufactories of fertilizers, glue and vitriol are expressly within it and so also are nuisances. A railroad is not within any of these descriptions. Existing under authority of law it is not a nuisance. The remaining forbidden use is 'a purpose detrimental to the surrounding property.' Is the erection and operation of the elevated railroad such a use? This question must be answered in view of the saving clause at the end of the stipulation, for the intention of the parties to the stipulation, manifested by the whole instrument, is the thing to be ascertained. That clause excludes a railroad on the level of the adjoining streets. The question, then, is reduced to this, whether an elevated railroad, as distin-

guished from a railroad upon the level of the street, is detrimental to surrounding property in that locality. The bill charges that it is because the locality is suitable only for residential purposes. It may be that the reason given, as applied to the particular locality in question, in view of its peculiar conditions and the proposed use of the elevated railroad, will not support the charge. The charge, however, upon this demurrer, which does not specially attack it, is sufficient. The demurrer admits the charge in its full force, and that admission must stand upon this argument, even though we may be able to conceive of circumstances which would destroy the reason upon which it is based. I think that the bill presents a meritorious case within the jurisdiction of this court. It is obvious that the court must act by injunction, and it may be well here to say, in view of the fact that injunction is asked to stay an important public work, that it is the general practice of a court of equity in such case either to withhold its final decree until opportunity may be given the parties to agree upon proper compensation for the complainants' right, or, that failing, until opportunity may be had to take the right by proceedings in condemnation (*Story v. New York El. R. Co.* [90 N. Y. 122] *supra*); or if for any reason that may not be done, to itself ascertain the value of the right to be protected, and decree that unless within a certain time that value be paid to the complainants, the inhibited use shall be restrained."

In *Duncan v. Central Pass. R. Co.* 85 Ky. 525, 4 S. W. 228, it appeared that the owner of land made a plot of it in which it was laid out in lots. He believed that the lots would sell best for residences and his plan was to confine them to that use. He conveyed several lots under a deed restricting their use for building other than dwelling houses. The lots were subsequently conveyed to a street railway company which later began the erection of a station thereon. In the meantime the owner had conveyed all the lots adjoining the first mentioned lots, to other persons, by deeds not containing any restrictions, but he still retained some lots which he had mortgaged. In a suit in equity by the trustee in the mortgage to enforce the covenant, it was held that no relief should be given as the owner had put it out of his power to carry out his plan of using the property for residential purposes only.

Right to Damages.

Several cases support the rule that building restrictions or restrictive agreements are not binding on the public or on a public service corporation possessing the right of eminent domain to the extent of denying that persons otherwise entitled to have them en-

forced may have compensation for the loss of the right. *Wharton v. U. S.* 153 Fed. 876, 83 C. C. A. 58, *affirming* U. S. v. *Certain Lands*, 112 Fed. 622; *Wallace v. Clifton Land Co.* 92 Ohio St. 349, 110 N. E. 940; *Doan v. Cleveland Short Line R. Co.* 92 Ohio St. 461, 112 N. E. 505; *Ward v. Cleveland R. Co.* 92 Ohio St. 471, 112 N. E. 507. See also *Hayes v. Waverly, etc. R. Co.* 51 N. J. Eq. 345, 27 Atl. 648.

In *Doan v. Cleveland Short Line R. Co.* supra, the court said: "The case at bar, . . . is one at law, in which plaintiff seeks to recover compensation by way of damages resulting from the taking of an alleged property right which she claims to have had in the lots of the defendant, a railroad company organized under the laws of the state and possessing the right of eminent domain. It is the owner of a number of lots in the allotment and at the time of the commencement of this action was building a railroad on and over its property. It was devoting these lots to a public use. If plaintiff is entitled to compensation by way of damages by reason of the use of this property by the railroad company, a right must grow out of the covenant in the deeds of the allotter and the general plan adopted which restrict the use of the property to residence purposes. If such restriction is not to be construed as preventing the use of the property for public purposes, then of course there is no violation on the part of the defendant, and it follows that no recovery can be had. If, on the other hand, it is to be construed as prohibiting the use of the property for any purpose other than that of residences, it would prevent a public use of the lots and thereby defeat the right of eminent domain. No covenant in a deed restricting the real estate conveyed to certain uses and preventing other uses can operate to prevent the state, or any body politic or corporate having the authority to exercise the right of eminent domain, from devoting such property to a public use. The right of eminent domain rests upon public necessity, and a contract or covenant or plan of allotment which attempts to prevent the exercise of that right is clearly against public policy and is therefore illegal and void. Plaintiff's right to compensation, if it exists, must be based upon the restrictive covenant in the deeds and the general plan adopted. To give to plaintiff this right we would be compelled to recognize a right existing under what we hold to be an invalid restriction. . . . We are constrained to the conclusion that restrictive covenants in deeds or a general plan for the improvement of an allotment cannot be construed to prevent the use of the lots for public purposes, and as against the state or any of its agencies which are vested with the right to eminent domain are illegal and void, confer no property right and cannot be the basis of a claim for damages."

In *Wharton v. U. S.* 153 Fed. 876, 83 C. C. A. 58, *affirming* U. S. v. *Certain Lands*, 112 Fed. 622, it appeared that a portion of a tract of land was conveyed by a deed containing the following provision: "This deed is on condition that no slaughterhouse, smith shop, steam engine, furnace, forge, bone-boiling establishment, iron or brass foundry, no manufactory of chemicals of any description, of gas, soap, fish guano, fish oil, kerosene or other oil, no brewery, distillery, bar, ale house, drinking saloon, or other place for the manufacture, compounding or selling of any kind of intoxicating liquors in any manner or form, shall ever be erected, located, used, or suffered, in or upon any part of said granted land; and that no other noxious, dangerous or offensive trade or business whatever shall ever be done, carried on or permitted in or upon said land or any part thereof." Subsequently the land was subjected to a condemnation proceeding by the federal government for the purpose of "the location, construction and prosecution of works for fortification and coast defense." In the proceeding a claim was filed by owners of other parts of the same tract which were subject to the same provisions. The claimants asserted that the rights of restriction in the lands taken were appurtenant to their estate as "negative easements" for the destruction of which they were entitled to compensation. Denying relief, it was held that the right of the claimants was not an easement and that the conditions in the deeds were not to be construed as having reference to ordinary public works, or the incidents thereof.

The rule deducible from the reported case appears to be that a building restriction or restrictive agreement is not binding on a public service corporation possessing the right of eminent domain to the extent that it may be kept off the restricted premises entirely; but the corporation may enter the restricted district and destroy its exclusive character on making compensation for the rights taken. It is also held that the building of a railroad is a violation of a restrictive agreement against the erection of "a building or other structure for business purposes" and that compensation therefor would be awarded. Compare *Antes v. Manhattan R. Co.* 116 N. Y. S. 697, wherein a suit was brought for an injunction and to recover damages for breach of covenants. Holding that no ground for relief was shown, the court said: "It is contended by the plaintiff that, although the defendants operate their railway upon their own land, she is entitled to damages by reason of a covenant against offensive establishments. While it is true that plaintiff and defendants derived title to their respective lands from a common predecessor in title, and although the covenant is referred to in several conveyances, yet in a number of deeds prior to and since

the road was constructed no reference is made to the covenant. It appears, however, in the deed from Bartels to the plaintiff, executed in 1905. At that time, not only had the road been in operation for about eighteen years, but the property in the immediate neighborhood had been changed to a factory section and ceased to be used for residential purposes. To attempt to enforce a covenant of this kind under these circumstances would be inequitable. As to the damages either to the fee or rental value of plaintiff's property by reason of the operation of the road, the plaintiff has failed to make out a case. Plaintiff's expert (Swartwout) testified that manufactories were coming in the neighborhood right along from 1875 to the present time, and that the Southern boulevard, both north and south sides, from Alexander avenue west, is a manufacturing center. It is apparent that whatever change took place in the neighborhood cannot be ascribed to the operation of the defendants' railroad."

In Matter of New York, etc. R. Co. 151 App. Div. 50, 135 N. Y. S. 234, it was held that a covenant restricting the use of land to residential purposes did not preclude the construction of a railroad pursuant to statutory authority.

O'REAR

v.

SARTAIN ET AL.

Alabama Supreme Court—June 30, 1915.

193 Ala. 275; 69 So. 554.

Municipal Corporations — Debt Limit — Effect of Exceeding Limit — Validity of Tax for Payment.

Const. 1901, § 224, provides that no county shall become indebted in an amount, including present indebtedness, greater than three and one-half per cent of the assessed value of the property therein. Section 215 provides that no county shall levy a greater rate of taxation in any one year than one-half of one per cent. It is held that section 215 confers no right to levy taxes to pay an indebtedness incurred in excess of the limitation fixed by section 224.

[See 44 Am. St. Rep. 242.]

Computation of Indebtedness — Interest on Obligations.

Under Const. 1901, § 224, providing that no county shall become indebted in an amount, including present indebtedness, greater than three and one-half per cent of the assessed value, the words "become in-
Ann. Cas. 1918B.—38.

debted" contemplate that, in calculating the amount of indebtedness, the face value of the county's obligation and accrued interest thereon must be included, but not interest not yet due.

[See note at end of this case.]

Unissued Bonds.

Under Const. 1901, § 224, limiting the amount to which a county may be indebted to three and one-half per cent of the assessed valuation of the property, road bonds not issued cannot be counted as a present indebtedness.

Time as of Which Indebtedness Is Computed.

In determining whether a county has exceeded its debt limit, the validity of a contemplated issue of bonds depends on the condition of the indebtedness at the time of issuance, and not upon its condition at the time of the election authorizing the same.

Injunctions — Apprehension of Injury.

An injunction should not be issued upon the mere apprehension of the complainant that some illegal act would be done.

Counties — Discretion of Officers — Control by Injunction.

Equity has no power to control the discretion of county commissioners in the conduct of the county's business.

Appeal from Law and Equity Court, Walker county: SOWELL, Judge.

Action by Martin O'Rear, plaintiff, against C. M. Sartain et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

Ernest Lacy for appellant.

Davis & Fite and *Gray & Wiggins* for appellees.

[276] THOMAS, J.—Appellant filed this bill, praying that appellees, as members of the court commissioners of Walker county, be enjoined from letting contracts for the construction of four steel bridges. A temporary injunction was granted on the filing of the bill. Appellees filed their answer under oath, and moved the dissolution of the injunction. On the hearing, submission was had upon the bill as amended, and affidavits supporting the same, together with the answer of the appellees and the affidavit of the judge of probate in support of the answer. From the decree dissolving the injunction the appeal is taken.

The bill as amended alleges that the last assessed value of the taxable property of Walker county, Ala., "for the tax year 1914, does not exceed the sum of \$12,500,000;" "that the total outstanding indebtedness of the county amounts to \$290,250, not including interest warrants;" that said interest warrants were on the court house debt, and amounted, at the time of the filing of the bill,

to \$100,477.50; that interest warrants outstanding on the bridge debt of the county amounted to the sum of \$22,322.96. The interest [277] warrants are payable annually, and, as shown by the exhibits to the affidavit of the county treasurer, have not matured. It is further alleged that there remain unsold \$150,000 of the authorized county road bonds, and that if said bonds are sold this year, as is contemplated by the court of county commissioners, the indebtedness of the county will be increased to the sum of \$413,560.80, not including the interest debt of the county on said bridge warrants and road bonds. It is further alleged that by the act approved August 2, 1907, three-fifths of all special taxes, except special school taxes, collected for Walker county, Ala., belong to the public road fund of said county, and no part of same is authorized to be spent, except in constructing and maintaining the public roads of the county, except that \$2,000 of such taxes may be annually used for repairs to public bridges, and the remaining three-fifths of said special taxes so collected each year have been set aside as a fund with which to meet the payments of the courthouse warrants, and that practically all of this two-fifths of said special taxes is required to pay courthouse warrants as they respectively mature; that after the payment of maturing courthouse warrants, and of demands for building and maintaining the public roads of the county there is, and will be, nothing left of this special tax fund with which to pay debts incurred for the construction of bridges already built or to be built; "that there is no fund out of the money collected by the county out of which payments can be made for bridges, except the general fund of the county; and that it requires all of the money paid into said general fund to meet the expenses of the county, outside of payments of the courthouse debt and money appropriated to the said road fund of the county."

[278] The respondents aver "that the amount of the interest warrants referred to in the bill does not constitute an outstanding indebtedness against the county within the meaning of the constitutional limitation," and "that there remains unsold \$150,000 of the county's road bonds;" but they deny that respondents "are making efforts at this time to sell such bonds, and allege that said amount is not an outstanding debt against Walker county." And respondents deny that the building of the proposed bridges entail an expense of \$125,000 on the county, averring that, on the contrary, such bridges can be constructed at a cost of not exceeding \$75,000. They further aver that the present indebtedness of the county is \$262,805, and that, as under the Constitution and laws of Alabama the county is authorized to incur an indebt-

edness of approximately \$437,500, the indebtedness to be incurred by the construction of the proposed bridges will not increase the total indebtedness of the county to the constitutional maximum, but that the present indebtedness and said proposed indebtedness for bridges will not aggregate in excess of \$350,000—a sum of \$187,500 less than said constitutional maximum. The respondents deny that "there will be nothing left of the special road and bridge and general funds of Walker county out of which to pay for the bridges mentioned in said bill, but allege that Walker county will be amply able to meet its present indebtedness and the additional indebtedness incurred by the building of said bridges."

A county's authority to "become indebted" is limited by section 224 of the Constitution. This provision, peculiar to the Constitution of 1901, is as follows: "No county shall become indebted in an amount including present indebtedness greater than three and [279] one-half per centum of the assessed value of the property therein: Provided, this limitation shall not affect any existing indebtedness in excess of such three and one-half per centum, which has already been created or authorized by existing law to be created: Provided, that any county which has already incurred a debt exceeding three and one-half per centum of the assessed value of the property therein, shall be authorized to incur an indebtedness of one and a half per centum of the assessed value of such property in addition to the debt already existing. Nothing herein contained shall prevent any county from issuing bonds, or other obligations, to fund or refund any indebtedness now existing or authorized by existing laws to be created."

To properly understand section 224, it must be construed in connection with 215, which provides that: "No county in this state shall be authorized to levy a greater rate of taxation in any one year on the value of the taxable property therein than one-half of one per centum: Provided, that to pay debts existing on the 6th day of December, 1875, an additional rate of one-fourth of one per centum may be levied and collected, which shall be appropriated exclusively to the payment of such debts and the interest thereon: Provided, further that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges, or roads, (a) any county may levy and collect one-fourth of one per centum, as may have been or may hereafter be authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected."

[280] (1) On counties having "become indebted in an amount, including indebtedness, greater than three and one-half per centum of the assessed value of the property therein," section 215 can confer no right to levy taxes to pay an indebtedness incurred in excess of the limitation placed by section 224. To determine whether a county would "become indebted" in an amount exceeding the constitutional limitation, add the aggregate amount of the proposed contract to the county's present indebtedness, and if the sum of the contract for the proposed improvement and the total present indebtedness of the county is beyond the constitutional limitation, the annual tax is denied, to the extent of the excess. *Hagan v. Limestone County*, 160 Ala. 544, 562, 49 So. 417, 37 L.R.A.(N.S.) 1027; *Brown v. Gay-Padgett Hardware Co.* 188 Ala. 423, 66 So. 161.

(2) The question to be determined is: The meaning of the words "become indebted," as used in section 224 of the Constitution. Is it principal and *accrued interest*, or is it principal and *all interest*; that is, interest accrued and to accrue between the date of incurring the debt and the date the principal is to mature? Constitutions are the result of popular will, and their words are understood ordinarily as used in the sense that such words convey to the popular mind. 6 Am. & Eng. Enc. of Law (2d ed.) 924, 925. The words "become indebted" were used in section 224 of the Constitution in the ordinary and popular sense, and a natural and common-sense construction must be given them.

The case of *Gunter v. Hackworth*, 182 Ala. 205, 62 So. 101, is cited as authority for the proposition that the word "debt" is to be so defined as to embrace [281] unmaturing interest. The use, in the opinion, of the words, "The prohibition against indebtedness is generally construed to apply to indebtedness in all forms, however incurred, or for whatever purpose," however, did not decide this question. The decision in the *Gunter-Hackworth* Case turned on the question whether certain warrants that were issued for the rebuilding of the court house exceeded the constitutional limitation. The precise question before us was presented in *Hagan v. Limestone County*, *supra*. The bill sets out an itemized statement of the proposed increased indebtedness against which injunction was sought as:

"Total principal, \$59,000.00; interest, \$15,989.00; grand total, \$74,989.00."

Mr. Justice Denson, for the court said: "We are also of the opinion, and so hold, that the amount to be considered, in determining whether the debt exceeds the limitation, is the aggregate amount of the contract. *Culbertson v. Fulton*, 127 Ill. 30, 18 N. E. 781; *Beard v. Hopkinsville*, 95 Ky. 239, 24 S. W. 872, 23 L.R.A. 402, 44 Am. St. Rep. 222;

Salem Water Co. v. Salem, 5 Ore. 30; *Prince v. Quincy*, 128 Ill. 443, 21 N. E. 768; *Earles v. Wells*, 94 Wis. 285, 68 N. W. 964, 59 Am. St. Rep. 886. Adding the \$59,000, which the contract provides shall be paid for the courthouse to the present indebtedness, carries the total indebtedness of the county greatly beyond the constitutional limitations." *Hagan v. Limestone County*, 160 Ala. 544, 563, 49 So. 417, 37 L.R.A.(N.S.) 1027.

On page 558 of 160 Ala. on page 421 of 49 So, in *Hagan's Case*, the distinction is made between the principal debt and the interest. Interest is defined as a premium for the use of money, usually reckoned as [282] a percentage, and necessarily invokes the idea of a continuing liability as its foundation. There can be debt without interest, but no interest without a debt. Interest is regarded as incidental to the debt. Principal is always debt; interest is an accessory to the principal. The principal is the fixed sum; the accessory is a constantly accruing one. The former is the basis or substance from which the latter arises, and on which it rests. *Howe v. Brandley*, 19 Me. 36; *Doe v. Warren*, 7 Greenl. (Me.) 48; *Du Belloix v. Waterpark*, 1 Dowl. & R. 16, 16 E. C. L. 12; *Brewster v. Wakefield*, 1 Minn. 352, 355, 69 Am. Dec. 343.

In *Brown v. Gay-Padgett Hardware Co.* *supra*, it was held that, though a county has reached its constitutional debt limit, it is nevertheless bound to pay its ordinary current obligations, and may, for this purpose, anticipate revenues actually assessed and payable for the year in which the obligations incurred. The court said of the words "indebted" and "indebtedness:" "It is clear that, if they are to be understood in their broadest signification, the effect of section 224 would be, only to inhibit further indebtedness when the prescribed limit is reached, but also to practically forestall all municipal action; for certainly neither a county nor a city government could proceed for a single day . . . without incurring, for some period of time, debts or liabilities. . . . The Constitution could not, in reason and common sense, have intended any such result."

This question in another form was practically passed upon by our court, Chief Justice Stone writing the opinion, in *Gibbons v. Mobile*, etc. R. Co. 36 Ala. 410. It was there contended by the appellant that in making the contract the city authorities [283] had transcended the power conferred upon them, in this: That whereas the statute only authorized them to aid in the construction of the railroad by the issue of city bonds, in the amount not exceeding \$1,000,000, yet they had in fact issued bonds and coupons amounting to over \$2,000,000. Judge Stone replied that: "This argument is more specious than solid. The bonds are for the precise sum of

\$1,000,000; nor more, no less. These bonds mature at various times from 1 to 25 years. The excess over \$1,000,000 consists in obligations, in the shape of coupons, to pay the interest on the said \$1,000,000, until such time or times as the principal of the bonds shall be paid. This, we think, is in strict conformity with the spirit of the statute, which evidently contemplated that the bonds should be interest-bearing, and therefore marketable. Anything less would not have furnished \$1,000,000 of aid to the railroad." 36 Ala. 439.

Similar questions have arisen in other states, under Constitutions and legislative enactments, and the courts in construing such provisions, have announced conclusions similar to that we have reached. In *Durant v. Iowa County*, 1 Woolworth 69, 8 Fed. Cas. No. 4,189, Justice Miller said that the real debt incurred by the county is the principal sum named in the bonds. The coupons attached to the bonds are promises to pay the annual installments of interest. Their form, and the fact that they may be detached from the principal obligation, does not change their character. They do not form part of the debt, any more than would a provision for interest yet to accrue, incorporated in the body of the bond.

"If the defendant's counsel were correct in his position, the bonds when issued were legal, because it is [284] not pretended that the amount secured by them exceeded the 5 per centum of the value of the taxable property in the county; but by lapse of time, as the interest has become due and remained unpaid, they and their incidents, the coupons, have become illegal. The absurdity is manifest." 8 Fed. Cas. No. 4,189.

In *Finlayson v. Vaughan*, 54 Minn. 331, 56 N. W. 49, it was held that in determining the amount of indebtedness that may be incurred within the 5 per cent of the assessment, the par value of the bonds to be issued is alone considered, and not the interest which may subsequently grow thereon by the terms thereof. Mr. Justice Pollock declared in *Kelly v. Cole*, 63 Kan. 385, 65 Pac. 672, that the unearned interest coupons attached to municipal bonds, are not "bonded indebtedness actually existing," within the legislative meaning, and intent as expressed in said act, and may not be included in the amount for which refunding bonds may be issued. In *Ashland v. Culbertson*, 103 Ky. 161, 44 S. W. 441, the court declared that, under the constitutional limitation of the indebtedness that cities and towns were authorized to contract: "The term 'indebtedness,' as used in the Constitution, was not interest . . . to include future interest. The lawmakers were not looking at the incident of the indebtedness, but to the indebtedness proper."

So the Supreme Court of Wisconsin and Illinois have held, in *Herman v. Oconto*, 110 Wis. 680, 86 N. W. 681; *Crogster v. Bayfield Co.* 99 Wis. 1, 74 N. W. 635, 77 N. W. 167; *Rice v. Milwaukee*, 100 Wis. 516, 76 N. W. 341; *Stone v. Chicago*, 207 Ill. 492, 510, 69 N. E. 970, and *Blanchard v. Benton*, 109 Ill. App. 578.

In *Epping v. Columbus*, 117 Ga. 263, 43 S. E. 803, this question was exhaustively reviewed and many authorities [285] collected. and it was there stated: "Taking the word (debt) in the popular sense, it means the amount of the present liability on a given date. The amount of one's indebtedness to-day is the principal sum which may be legally collected from him at a future time, plus any interest on the same which may have accrued up to to-day. Within the meaning of the Constitution, the debt of a city at the time of the adoption of that instrument was an amount represented by the principal and the past-due interest at that time." *Carlson v. Helena*, 39 Mont. 82, 102 Pac. 39, 17 Ann. Cas. 1233.

This is the construction placed on many constitutional and statutory limitations on the power of municipal corporations to contract debts considered in *Mod. L. of Mun. Soc. (by Hainer)* § 61; *Simmonton's Mun. Bonds*, § 37, p. 65; 1 *Dillon on Mun. Corp.* (5th ed.) 397. Mr. Dillon thus concisely states the rule: "Accrued interest must be included in computing the amount of the existing indebtedness, but not the unearned interest, although the obligation may not be payable for a long time."

The Supreme Court of the United States has several times discussed the rule, adopted by the state courts, that, in estimating the amount of indebtedness that may be lawfully incurred under constitutional and statutory limitations upon the power of the municipal corporation to contract debts, there is to be considered only the face value of the obligations and the accrued interest thereon, interest to become due in the future not to be reckoned an indebtedness. *Lake County v. Graham*, 130 U. S. 674, 9 S. Ct. 654, 32 U. S. (L. ed.) 1065; *Chaffee County v. Potter*, 142 U. S. 355, 12 S. Ct. 216, 35 U. S. (L. ed.) 1040; *Sutliff v. Lake County*, 147 U. S. 230, 13 S. [286] Ct. 318, 37 U. S. (L. ed.) 145; *Dixon County v. Field*, 111 U. S. 83, 93, 4 S. Ct. 315, 28 U. S. (L. ed.) 360; *German Ins. Co. v. Manning*, 95 Fed. 597.

If there is an excess of authority, it affects the validity of the bonds or warrants so issued, pro tanto. Bonds are invalid only when issued after the limit is reached; that a portion will not legalize that which is in excess of it. *McPherson v. Foster*, 43 Ia. 48, 22 Am. Rep. 215; *Sutro v. Pettit*, 74 Cal. 332, 16 Pac. 7. 5 Am. St. Rep. 442. Nor is the portion

within the limit invalidated by the fact that another portion of it is in excess of the limit and illegal. *State v. Crete*, 32 Neb. 568, 49 N. W. 272; *Turner v. Woodson County*, 27 Kan. 314; *McPherson v. Foster*, *supra*.

The reasonable construction of section 224, as to "interest" not accrued, is that all obligations of this character, no matter how evidenced, were by the framers of the Constitution intended to be disregarded in estimating indebtedness under limitations of the debt-contracting power. The limitation here dealt with is based on a per centum of the assessed value of the property in the county, and this value is subject to change from year to year. *Butts County v. Jackson Banking Co.* 129 Ga. 801, 60 S. E. 149, 15 L.R.A. (N.S.) 567, 121 Am. St. Rep. 244. It cannot be said that the framers of the Constitution intended the item of interest on long bond issues, or that of unaccrued interest on unmatured warrants issued in payment of authorized county improvements, should be counted a part of the present indebtedness of the county. In many instances this annual interest is distributed through many years, and, in the aggregate, would approach the amount of the cost of the principal improvements. For the same period, the [287] percentage of "the assessed value of the property" in the county is subject to change yielding additional credit or reducing the basis of credit; and the fact that the county has entered into a special contract to pay this interest, or evidenced the same by separate warrants maturing yearly, does not change the fact that these warrants are for interest on a county indebtedness.

If, however, interest on the county's obligations has matured and remains unpaid, this becomes a "present indebtedness," and must be estimated, in ascertaining the county's right to incur additional indebtedness under the limitation of section 224. *Durant v. Iowa County*, 8 Fed. Cas. No. 4,189; *Kelly v. Cole*, 63 Kan. 393, 65 Pac. 672, and authorities there collected; 1 *Dillon Mun. Corp.* (5th ed.) p. 396, § 205; *Stone v. Chicago*, 207 Ill. 492, 510, 69 N. E. 970; *Epping v. Columbus*, 117 Ga. 271, 43 S. E. 803. The unmatured interest warrants are not part of the "present indebtedness" of the county, and the proposed bridge contracts, aggregating \$75,000, would not cause the county of Walker to become indebted in an amount, including present indebtedness, greater than $3\frac{1}{2}$ per centum of the assessed value of the property therein.

(3) The commissioner's court not having issued the road bonds, the authorized issue of \$150,000 of these bonds cannot be counted a present indebtedness of the county, within the meaning of section 224 of the Constitution.

(4) It is evident that the validity of the issue of county bonds must depend upon the condition of the county indebtedness at the

time of the issuance, and not upon its condition at the time of the election authorizing the issue. *Corning v. Meade County*, 102 Fed. 57, 42 C. C. A. 154; *Lake County v. Sutliff*, 97 Fed. 270, [288] 281, 38 C. C. A. 167; *Thomson-Houston Electric Co. v. Newton*, 42 Fed. 723, 728; *Board of Education v. National L. Ins. Co.* 94 Fed. 324, 328, 36 C. C. A. 278; *Rathbone v. Kiowa County*, 83 Fed. 125, 27 C. C. A. 477; *Dudley v. Lake County*, 80 Fed. 672, 26 C. C. A. 82; *Goodson v. Dean*, 173 Ala. 301, 55 So. 1010. In *Redding v. Esplen*, 207 Pa. 248, 56 Atl. 431, bonds having been authorized, but not issued, the borough thereafter entered into contract for the construction of a sewer, and when the issue of the bonds was sought the amount of the bond issue and of the sewer contract exceeded the constitutional limit. It was held that the validity of the bond issue was dependent on the county debt, not of the date of the election, but of the time of the issue.

(5) An injunction should not be issued upon the mere apprehension of the complainant that some illegal act will be done. *Alston v. Dunn*, 176 Ala. 421, 58 So. 300; *Goodson v. Dean*, *supra*; 1 *High on Inj.* (2d ed.) § 591, p. 391; 1 *Joyce on Inj.* § 17, p. 35; *Troy v. Doniphan County*, 32 Kan. 507, 510, 4 Pac. 1009.

(6) A court of equity, at the suit of a taxpayer, may restrain by injunction the misappropriation of county funds by county officials; but no power exists in a court of equity to compel county commissioners in the exercise of their discretion in the conduct of the county's business. When a court of equity undertakes to review the action of the boards of revenue or courts of county commissioners, a question of jurisdiction is presented: and unless the jurisdictional facts are alleged, and the charge thereon is made of fraud, corruption, or unfair dealing, jurisdiction of the subject-matter is not acquired. The bill in this cause falls short of such jurisdictional [289] averment. The Walker county law and equity court could not review the finding of the court of county commissioners, on the necessity for the bridges, or on the sufficiency of the plans and specifications therefor. *Board of Revenue, Covington County v. Merrill*, 193 Ala. 521, 68 So. 971; *Long v. Shepherd*, 159 Ala. 598, 48 So. 675; *Matkin v. Marengo County*, 137 Ala. 155, 34 So. 171; *Hays v. Ahlrichs*, 115 Ala. 239, 22 So. 465; *Talley v. Jackson County*, 175 Ala. 649, 39 So. 167.

The decree of the Walker law and equity court, sitting in equity, dissolving the injunction, is affirmed.

Affirmed.

Anderson, C. J., and Mayfield and Somerville, JJ., concur.

NOTE.**Interest on Municipal Bonds as Factor in Determining Whether Municipality Has Exceeded Constitutional Debt Limit.**

The ruling in *Carlson v. Helena*, 39 Mont. 82, 17 Ann. Cas. 1233, that in determining whether a municipality has exceeded its constitutional debt limit the unaccrued interest on its bonds is not to be computed, is supported by the reported case and two other recent cases. *Goodwine v. Vermilion County*, 271 Ill. 126, 110 N. E. 890; *Brown v. Guthrie* (Ind.) 114 N. E. 443.

In *Goodwine v. Vermilion County*, supra, the court said: "The assessed value of the real and personal property of the county was \$36,402,538, five per cent of which is \$1,820,000. It is stipulated that the aggregate amount of interest on the bonds during the period of twenty years to be paid by the county would amount to \$570,000. While the principal of the bonds is less than the limit of indebtedness which the county may incur, if the interest is to be considered in determining the amount of such indebtedness that amount will exceed the constitutional limit by \$250,000. The appellants insist that the liability of the county for the interest is the same as its liability for the principal of the debt; that the amount of the indebtedness to be incurred by the issue of the bonds will be the full amount of the principal and interest for the time the bonds have to run, and that the whole amount of such indebtedness will be incurred at the time the bonds are issued. The appellees contend that interest is a mere incident of the principal and cannot be regarded as a part of the indebtedness until it has accrued. We have held that accrued interest is a debt within the constitutional limitation (*Stone v. Chicago*, 207 Ill. 492) but the question in regard to accruing interest has never been decided by this court. The doctrine is stated in *McQuillin on Municipal Corporations* (vol. 5, sec. 2224) that 'interest is not a debt, within the meaning of debt-limit provisions, until it is earned and becomes due, and in determining whether an indebtedness will be created in excess of the debt limit, unearned interest cannot be added to the principal. The authority granted by the constitution or statute to contract a debt refers to the amount of the debt at the date at which it is created and has no reference to the amounts of interest which accrue thereafter. On the other hand, interest which has become due and payable is a part of the existing indebtedness in figuring the total amount of municipal indebtedness.' The cases of *Ashland v. Culbertson*, 103 Ky. 161; *Finlayson v. Vaughn*, 54 Minn. 331, and *Herman v. Oconto*, 110 Wis. 660, sustain this statement. In the

last case it is said: 'Interest is not a debt, within the meaning of the constitution, until it is earned and becomes due.' This is in accordance with the ordinary view, which, in estimating the liabilities of individuals or corporations, does not take into consideration interest to accrue on unmatured obligations. Such interest is not to be regarded as a part of the indebtedness of municipal corporations within the constitutional prohibition."

So in *Brown v. Guthrie* (Ind.) 114 N. E. 443, it was said: "It is insisted by appellant that the court erred in its conclusions of law in holding that the interest coupons attached to the bonds in question should not be considered in determining the total indebtedness of the taxing district. It is generally held that interest is not to be taken into consideration in computing indebtedness as used, either in the constitution or the gravel road law."

But in *Bateman v. Clarendon Dist. No. 1*, 102 Ark. 306, 143 S. W. 1062, the court said: "The question presented is, whether interest to accrue on bonds issued to defray the expense of construction is within the meaning of the statute, to be included as a part of the cost of the improvement. This court has already decided the question in the affirmative. *Fitzgerald v. Walker*, 55 Ark. 148."

Interest already due on municipal bonds is to be computed in determining whether the amount of indebtedness incurred by a municipality exceeds its debt limit. *Goodwine v. Vermilion County*, 271 Ill. 126, 110 N. E. 890. And see the reported case.

FARMERS LOAN AND TRUST COMPANY

V.
PLANCK.

Nebraska Supreme Court—April 16, 1915.

98 Neb. 225; 152 N. W. 390.

Bills and Notes — Negotiability — Provision for Discount.

A promissory note is not rendered non-negotiable by the insertion of the following provision: "A discount of six per cent will be allowed, if paid in full within fifteen days from date."

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Madison county: WELCH, Judge.

Action by Farmers Loan and Trust Company, plaintiff, against Walter Planck, defend-

ant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

M. S. McDuffee for appellant.

William V. Allen and *William L. Dowling* for appellee.

[225] *ROSE, J.*—This is an action on a promissory note for \$587, dated August 30, 1909. The principal is payable in six instalments maturing at different times within 13 months. The Equitable Manufacturing Company is named as payee and defendant is maker. By mesne assignments plaintiff, September 1, 1909, became the holder of the note as collateral security for a loan. The instrument, when executed, was attached to a contract for the purchase of jewelry and it was given for the price thereof. Under the terms of sale defendant was entitled to the possession of a piano to be given as a prize to the holder of the largest number of jewelry certificates issued by defendant to purchasers of goods from him. Plaintiff claims to be a holder of the note for value before maturity. In his answer defendant pleaded that the note was obtained by fraudulent representations; that he immediately rescinded the contract of purchase; and that he never received the jewelry or the piano. Upon a trial of the issues the district court directed a verdict in favor of defendant, and plaintiff has appealed.

Defendant contends that, under the rule in *Bothell v. Schweitzer*, 84 Neb. 271, 120 N. W. 1129, 133 Am. St. Rep. 623, 22 L.R.A. (N.S.) 263, the note in controversy is not negotiable, [226] and that even a *bona fide* holder cannot recover in an action thereon. When Planck signed the note it was attached to the order for goods to be shipped, but was separated therefrom by a perforated line, above which were these words: "The instalment note below to be detached by Equitable Mfg. Co." The contract of sale also contained the following: "If goods are shipped, detach and credit my account with attached instalment note which I hereby give in payment of this bill. If goods are not shipped, note is to be returned to me." In the *Bothell* case the note was glued to the contract of sale and was unlawfully detached. In the present case, when the goods were shipped, the note was detached according to agreement. The rule in the *Bothell* case is correct, but is inapplicable here.

The note executed by defendant contained the following provision: "A discount of 6 per cent will be allowed, if paid in full within fifteen days from date." Is the negotiability of the note thus destroyed? Under the statute an instrument, to be negotiable, "must contain an unconditional promise or order

to pay a sum certain in money." Rev. St. 1913, sec. 5319. The act of the legislature defines what a "sum certain" is, but does not mention discount. Rev. St. 1913, sec. 5320. The authorities upon this point are in conflict. In the following cases it is held that such a note is non-negotiable: *Fralick v. Norton*, 2 Mich. 130, 55 Am. Dec. 56; *Story v. Lamb*, 52 Mich. 525, 18 N. W. 248; *Way v. Smith*, 111 Mass. 523; *National Bank of Commerce v. Feeney*, 12 S. D. 156, 80 N. W. 186, 76 Am. St. Rep. 594, 46 L.R.A. 732; *Farmers' Loan, etc. Co. v. McCoy*, 32 Okla. 227, 122 Pac. 125, 40 L.R.A. (N.S.) 177.

Story v. Lamb, 52 Mich. 525, 18 N. W. 248; follows the holding in *Lamb v. Story*, 45 Mich. 488, 8 N. W. 87. In *Kirkwood v. Hastings First Nat. Bank*, 40 Neb. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L.R.A. 444, this court said: "In *Lamb v. Story*, 45 Mich. 488, it was held that the negotiability of a note payable on or before two years from date was destroyed by a memorandum attached, providing that if paid within one year there should be no interest, and that case is cited by Mr. Daniel in support of a similar statement, and is the only authority cited. We are not satisfied with that doctrine. In *Hope v. Barker*, 112 Mo. 338, the provision was 'without [227] interest thereon if paid at maturity; if not paid at maturity, to bear interest from date.' It was held that that provision did not destroy the negotiability of the note, the note on its face showing what should be paid at any particular time, and being therefore certain in its terms."

In *Farmers' Loan, etc. Co. v. McCoy*, 32 Okla. 277, 122 Pac. 125, 40 L.R.A. (N.S.) 177, it is held that a provision in a note similar to the one now in controversy impairs its negotiability. This decision rests upon *Randolph v. Hudson*, 12 Okla. 516, 74 Pac. 946, and *South Dakota* cases therein cited.

In *Randolph v. Hudson*, 12 Okla. 516, 74 Pac. 946, it was held that a provision, "with interest at the rate of 12 per cent from date, if not paid at maturity," destroyed the negotiable character of the note. This is contrary to *Hope v. Barker*, 112 Mo. 338, 20 S. W. 567, 34 Am. St. Rep. 387, cited with approval in *Kirkwood v. Hastings First Nat. Bank*, 40 Neb. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L.R.A. 444.

Oklahoma also holds that a provision for an attorney's fee, if the debt is not paid at maturity, renders the note non-negotiable. This is contrary to the holding in *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37, and is inconsistent with the negotiable instruments law. The Oklahoma cases were decided under local statutes in force when the notes were executed, and in the *McCoy* case the court says that it does not decide what the result would be under the negotiable instruments law subsequently

adopted by that state. The Oklahoma decisions were rendered under the following statutory provisions: "A negotiable instrument must be made payable in money, only, and without any condition not certain of fulfillment," and "must not contain any other contract than such as is specified" in the statute. These provisions were adopted from South Dakota, and the Oklahoma cases follow the South Dakota construction.

In *National Bank of Commerce v. Feeney*, 46 L.R.A. 732, 737, 12 S. D. 156, 80 N. W. 186, 76 Am. St. Rep. 594, it is held that "a stipulation for a discount of 12 per cent, if a note is paid before maturity, renders it non-negotiable because of the uncertainty as to the amount to be paid," and the court quotes an earlier decision containing the following language: "While, in the opinion of the writer, a promissory note, [228] otherwise unobjectionable, meets the requirements, and stands the test of negotiability, when there is no date at which the exact amount then due cannot be ascertained by inspection and computation, this court has placed itself in line with a class of authorities which require such a degree of certainty that the exact amount to become due and payable at any future time is clearly ascertainable at the date of the note, uninfluenced by any conditions not certain of fulfillment; and the rule thus established must control cases subsequently arising, where the facts are substantially the same."

The doctrine thus stated is in conflict with some of the Nebraska decisions and with the negotiable instruments law. *Kirkwood v. Hastings First Nat. Bank*, 40 Neb. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L.R.A. 444; *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37; *Fisher v. O'Hanlon*, 93 Neb. 529, 141 N. W. 157; *Rev. St. 1913*, secs. 5320, 5322.

In *Loring v. Anderson*, 95 Minn. 101, 103 N. W. 722, it is held that a note providing for a discount of 6 per cent, if the debt is paid on or before maturity, does not make the instrument non-negotiable, as the amount of the deduction is readily ascertainable from the face of the paper. To the same effect is *Harrison v. Hunter (Tex.)* 168 S. W. 1036. This is in harmony with the statutory and the general rule that a note is negotiable, though payable on or before a certain date. *Rev. St. 1913*, sec. 5322. The amount of the discount and the amount due on the note in controversy, if paid within 15 days from date, are sums readily ascertainable.

With the question of negotiability determined in favor of plaintiff, the peremptory instruction for defendant is erroneous. Whether plaintiff is a "holder in due course," within the meaning of the statute, and whether there was fraud on the part of the original payee are issues not determined on this appeal. The judgment of the district court is

therefore reversed and the cause remanded for further proceedings.

Reversed.

NOTE.

Negotiability of Note Containing Provision Allowing Discount if Paid within Certain Time.

Introductory, 600.

View that Note is Negotiable, 600.

View that Note is Not Negotiable, 602.

Introductory.

It is of course thoroughly established that certainty with respect to amount is essential to the negotiability of a promissory note. See 3 R. C. L. tit. *Bills and Notes* p. 891. But in the application of that rule considerable diversity of opinion has arisen as to whether a provision for a discount in case of payment within a certain time destroys the certainty of amount which is requisite to negotiability. One line of decisions apparently looks at the matter of certainty of amount from the time of payment, and considers a note to be certain if it is plain from its face what amount must be paid thereon at any particular time. Other jurisdictions take the view that the certainty of amount is to be determined as of the date of the instrument so that a provision for a discount allowable on an uncertain event is deemed to destroy negotiability. The uniform Negotiable Instruments Law is not explicit on the question and conflicting decisions have been rendered under an enactment of that kind. See the reported case wherein it is said that to hold that a provision for a discount renders a note non-negotiable "is inconsistent with the Negotiable Instruments Law," and *Iowa City First Nat. Bank v. Watson (Okla.)* 155 Pac. 1152, wherein the contrary view was taken.

View that Note Is Negotiable.

Some jurisdictions are in accord with the reported case in holding that the negotiability of a note is not destroyed by a provision for a discount in case it is paid within a certain time. *Smith v. Crane*, 33 Minn. 144, 33 N. W. 633, 53 Am. Rep. 20; *Loring v. Anderson*, 95 Minn. 101, 103 N. W. 722; *Hope v. Barker*, 112 Mo. 338, 20 S. W. 567, 34 Am. St. Rep. 387; *Mansfield Sav. Bank v. Miller*, 1 Ohio Cir. Dec. 383, 2 Ohio Cir. Ct. 96; *Harrison v. Hunter (Tex.)* 168 S. W. 1036; *Iowa City First Nat. Bank v. Rooney*, 6 Saak. L. Rep. 72, 11 Dominion L. Rep. 358, 24 West L. Rep. 163. And see the reported case. See also *Kirkwood v. Hastings First Nat. Bank*, 40 Neb.

484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L.R.A. 444. Compare *Syracuse Third Nat. Bank v. Armstrong*, 25 Minn. 530; *Edwards v. Ramsey*, 30 Minn. 91, 14 N. W. 272.

An instrument in the usual form of a negotiable promissory note providing for the payment of interest at ten per cent per annum from date until paid or at seven per cent if paid when due, has been held to be negotiable, the amount being certain and ascertainable. *Smith v. Crane*, 33 Minn. 144, 22 N. W. 633, 53 Am. Rep. 20, wherein the court said: "What the payee really wants is his money at the due date of the contract, and to secure this he holds an increase of the rate of interest over the debtor's head. In other words, the increase is a penalty for the debtor's delinquency. Treating the increase as a penalty, it follows, under the decisions of the court before cited, that the note in suit will in law draw the same rate of interest before as after maturity—that is to say, seven per cent—and that therefore (whatever might be the case if the interest clause were upheld according to its literal terms) the sum absolutely payable upon the instrument at any given time is thus made certain as the principal, and seven per cent interest." The court practically overruled *Syracuse Third Nat. Bank v. Armstrong*, 25 Minn. 530, and *Edwards v. Ramsey*, 30 Minn. 91, 14 N. W. 272, although no reference was made to those cases in the opinion.

In *Loring v. Anderson*, 95 Minn. 101, 103 N. W. 722, the court held to be negotiable a written instrument in these words: "October 1st, 1903, after date I promise to pay to the order of the Maplebay Wind Stacker Company of Crookston, Minnesota, Two Hundred & Fifty and 00/100 Dollars. Value received, with interest before and after maturity at the rate of ten per cent per annum until paid. A discount of six per cent to be allowed if paid on or before October 1, 1903." The court said: "It is an essential condition of a promissory note that there be no uncertainty as to the amount of money it calls for at any particular time. Thus an instrument whereby the maker promises to pay to the payee or order or bearer a definite sum plus or minus a definite amount or discount is a promissory note, and hence it is negotiable; but, if the promise be to pay a stated sum of money plus or minus an indefinite amount or discount, it is not a negotiable instrument. . . . While there is a contingency before the maturity of the note as to whether the maker will pay it at maturity or before, there is no contingency or uncertainty as to the amount to be paid in full discharge of the note at maturity or at any time before, if the maker elects to pay before. The amount is \$250, with interest, less a discount of six per cent—a matter capable of being made cer-

tain by computation. The result of such computation would give the exact amount due on the note at its maturity, and the exact amount which the maker was required to pay in full discharge of the note at any time before October 1, 1903, or at any time on that day, and the exact amount called for by the note at all times until it became dishonored by nonpayment."

It was held in *Harrison v. Hunter* (Tex.) 168 S. W. 1036, that a promissory note payable in instalments was not rendered non-negotiable by a provision for a discount of six per cent if the full amount should be paid at the maturity of the first instalment. The court said: "The only entertainable doubt as to the negotiability of this instrument, results from the following provision: 'A discount of six per cent will be given if the full amount of this instrument is paid at maturity of the first instalment,' which, however, is a definite amount payable at a definite time, reducing the note a certain amount if the option is exercised. A note payable 'on or before' a certain date is negotiable. The maker of such an instrument has the option to pay at any time before the stated maturity of the same, but the payee or holder of said note cannot, of course, demand payment before that day."

In *Mansfield Sav. Bank v. Miller*, 1 Ohio Cir. Dec. 383, 2 Ohio Cir. Ct. 96, it was held that a stipulation in a promissory note that "if this note is paid in full when due, a discount of thirty-nine and 78/100 dollars is to be made from the amount then due" did not render the note non-negotiable. The court said: "In legal effect then, this stipulation in each of these notes is equivalent to the expression: I authorize this note to be negotiated, and when negotiated it shall be payable without deduction or diminution. Taking the whole note together, this is its meaning. Now conceding that this is not strictly a negotiable promissory note, yet to hold that a person who purchases it for value without notice holds it subject to all offsets, defenses and deductions in favor of the maker, would be to hold that he could not by contract bind himself to the contrary. If A held a non-negotiable or past due note on B, and desired to sell it to C, and C should ask B whether it was all right and free from offsets, and B should say it was, on the faith of which C should purchase, I apprehend it would not be claimed after that, that B could set up any transaction between him and A as a defense. This is in substance what Miller says on the face of this paper to whomsoever it may be presented for discount. He invites negotiation by stipulating that the note shall be negotiable and payable in full and without deduction. He could have done so no more specifically if he had written a letter to the bank when the note was presented, stating he

authorized the note to be negotiated, and it should be paid without deduction. While this note may not, therefore, be a 'carrier without luggage,' to use the language of some of the decided cases, a part of the luggage it carries is a written passport and continuing letter of credit recommending its negotiation and waiving all deduction in that event."

In *Iowa City First Nat. Bank v. Rooney*, 6 Sask. L. Rep. 72, 11 Dominion L. Rep. 358, 24 West L. Rep. 163, it was held that a provision in a note that a discount of five per cent would be allowed if the note was paid in full within fifteen days from date, did not render the instrument non-negotiable, the court saying: "Further, the note, as far as I can see, is a good and valid note; it is an absolute and unconditional promise to pay a sum certain in instalments on certain specified days. The provision for a reduction of the sum certain if paid within fifteen days does not render that sum uncertain. The sum less the discount is readily arrived at."

In *Hope v. Barker*, 112 Mo. 338, 20 S. W. 567, 34 Am. St. Rep. 387, it appeared that a note was to bear no interest if paid at maturity; but if not paid at maturity, it was to bear ten per cent interest from date. It was held that this provision did not destroy the negotiability of the note since it showed on its face what should be paid at any particular time and hence it was certain in its terms.

View that Note Is Not Negotiable.

Other jurisdictions, however, adhere to the rule that a note in order to be negotiable must be absolutely and unconditionally certain as to the amount to be paid and that a provision allowing a discount if the note is paid within a certain time renders it uncertain in that respect and hence non-negotiable. *Way v. Smith*, 111 Mass. 523; *Fralick v. Norton*, 2 Mich. 130, 55 Am. Dec. 56; *Lamb v. Story*, 45 Mich. 488, 8 N. W. 87; *Story v. Lamb*, 52 Mich. 525, 18 N. W. 248; *Randolph v. Hudson*, 12 Okla. 516, 74 Pac. 946; *Farmers' Loan, etc. Co. v. McCoy*, 32 Okla. 277, 122 Pac. 125, 40 L.R.A. (N.S.) 177; *Iowa City First Nat. Bank v. Watson* (Okla.) 155 Pac. 1152; *Hegeler v. Comstock*, 1 S. D. 138, 45 N. W. 331, 8 L.R.A. 393; *National Bank of Commerce v. Feeney*, 12 S. D. 156, 80 N. W. 186, 76 Am. St. Rep. 594, 46 L.R.A. 732, *reversing* *National Bank of Commerce v. Feeney*, 9 S. D. 550, 70 N. W. 874, 46 L.R.A. 732; *Farmers Loan, etc. Co. v. Devear*, 2 Tenn. Civ. App. 366.

A note payable in instalments allowing a discount of six per cent if paid in full within fifteen days from date has been held to be non-negotiable for uncertainty as to the amount payable at the time of its execution, the court saying that in order for a note to

be negotiable under the rules of the law merchant there is required such a degree of certainty that the exact amount to be due and payable at any future time can be clearly ascertained at the date thereof, uninfluenced by any conditions not sure of fulfilment. *Farmers' Loan, etc. Co. v. McCoy*, 32 Okla. 277, 122 Pac. 125, 40 L.R.A. (N.S.) 177. The negotiability of a note identical in terms came up for decision in *Iowa City First Nat. Bank v. Watson* (Okla.) 155 Pac. 1152. The court followed the rule and reasoning in *Farmers' Loan, etc. Co. v. McCoy*, *supra*, and held the note to be non-negotiable notwithstanding the following provision of the Negotiable Instruments Act: "The sum payable is a sum certain within the meaning of this chapter; although it is to be paid: First, with interest; or second, by stated instalments; or third, by stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or fourth, with exchange, whether at a fixed rate or at the current rate; or fifth, with costs of collection or an attorney's fee, in case payment shall not be made at maturity." The court said: "The sum payable—that is, the amount for which, by the terms of the instrument, the maker became liable, and which he might tender and pay in full satisfaction of his obligation—was, at the date thereof, to a certain extent, dependent upon his will; he had the right to pay a greater or less sum than the principal; he could, if he saw fit, within the prescribed period, discharge his debt at ninety-four per cent, or thereafter pay one hundred per cent on the dollar. Under such condition, the sum payable was, at the time of the execution of the instrument, clearly indefinite and uncertain. Unless the rule of the law merchant which obtained in this jurisdiction with respect to the certainty required in the sum payable in a negotiable instrument has been changed by the statute, *supra*, such rule still governs, and the note in question is non-negotiable. In our opinion, it is obvious that the statutory provisions above quoted do not purport to prescribe a rule in this regard different from that recognized by the courts of this state before their enactment, in a case where a promissory note provided for the discount of a principal sum otherwise payable, if, at the option of the maker, payment is made before maturity."

In *Fralick v. Norton*, 2 Mich. 130, 55 Am. Dec. 56, it appeared that a note for sixty dollars payable in two years contained a provision that if fifty dollars was paid ten days before maturity the payee would cancel the instrument. It was held that this provision destroyed the negotiability of the note since the makers by the terms of the instrument were bound to pay one sum or the other, but

not to pay either sum at all events. The court gave the reason for its holding as follows: "The sum claimed upon the instrument set forth in the case made, is the sixty dollars and interest mentioned therein; for it is not claimed that the defendants were absolutely and at all events bound to pay the fifty dollars. The question then is, whether they by this note engaged absolutely and without any condition to pay the sixty dollars and interest. The whole of the instrument must be taken and construed together, in order to determine this question. The first clause, taken by itself, clearly imports such an agreement; but, by the last clause, it is made subject to the condition that if a smaller sum should be paid at an earlier day, such payment should cancel the note. Now if the condition had been, that the note should become void provided the makers should convey a certain estate or perform certain labor, or deliver certain goods within a limited time, no one would pretend that the instrument was a promissory note. Such an instrument would simply import an engagement to do one of two things at the option of the maker, and not absolutely and at all events to do either. And could such an instrument be distinguished from the one under consideration?"

In *Lamb v. Story*, 45 Mich. 488, 8 N. W. 87, it appeared that a note was payable on or before two years after date with interest at ten per cent and current rate of exchange. Indorsed on the back of the note was a provision that if the note was paid within one year no interest should be paid. It was held that this provision destroyed the negotiability of the note, the court saying: "We are of opinion that the instrument sued upon cannot be considered a negotiable promissory note. While it is made payable on or before two years with ten per cent interest, and is thus far definite and certain, yet the subsequent clause, that if paid within one year it shall not draw interest, destroys the element of certainty which otherwise would exist. No person until after the expiration of the first year, could with absolute certainty determine or ascertain the amount that would be paid in discharge thereof. The memorandum at the foot of this instrument is inconsistent with the promise made in the body, and in this respect it will be found to differ very materially from other cases decided in this court, and cited by defendant in error." On a second trial, based on the theory that the defendant was liable on the indorsement, judgment was again obtained against the defendant. But on a second appeal, *Story v. Lamb*, 52 Mich. 525, 18 N. W. 248, the court held that the instrument was not a promissory note either negotiable or non-negotiable and was not therefore subject to the rules governing commercial paper since it lacked

the required elements of certainty in time and amount of payment. In so holding it was said: "The so-called note being no more than a simple contract, not a note, and without negotiability, could only be transferred by assignment; and the indorsement 'pay to Thomas Story' on the contract, does no more than transfer the right to recover the money payable on the instrument, and the right to sue therefor, to Story. It is not an unusual way of transferring such claims, but such indorsement imports no legal liability on the part of the indorser to pay the amount of the claim in case of failure by the debtor. This would be giving the indorsement the character, and subjecting the maker of it to the liability, of the indorser of commercial paper."

In *National Bank of Commerce v. Feeney*, 12 S. D. 156, 80 N. W. 186, 76 Am. St. Rep. 594, 46 L.R.A. 732, it was held that a promissory note with a stipulation on the stub that the note was to be discounted at twelve per cent if paid before maturity was not negotiable since the exact amount which would be required to pay it could not be ascertained without considering the discount which depended on a condition uncertain of fulfillment.

In *Farmers Loan, etc. Co. v. Devear*, 2 Tenn. Civ. App. 366, it was held that a note payable in six equal instalments with a condition that a discount of five per cent would be allowed if it was paid within fifteen days from date, was rendered non-negotiable by the condition for the reason that the amount payable was uncertain. The court followed the decision of *National Bank of Commerce v. Feeney*, supra, and quoting from that case, said: "A promissory note is non-negotiable unless the exact amount to become due and payable at any future time is clearly ascertainable at the date of the note, uninfluenced by any conditions not certain of fulfillment." The opinion quoted from was delivered as the result of a second petition to rehear the case, the court having originally held the note negotiable, and the case seems to have been well and thoroughly considered by the court."

In *Henler v. Comstock*, 1 S. D. 138, 45 N. W. 331, 8 L.R.A. 393, the court held to be non-negotiable an instrument in these words: "On or before the 1st day of December, 1884, for value received, I or we, the undersigned, living five miles of Howard P O, county of Miner, Territory of Dakota, promise to pay to Marsh Binder Manufacturing Company or order, one hundred dollars, at the Miner County Bank, in Howard, with interest from date until paid at the rate of ten per cent per annum, eight per cent if paid when due." The court said: "By a careful review of these cases it seems that the basis of the decision is that of uncertainty in the amount to be recovered. In most of them, if not all,

it is not sufficient that the amount necessary to liquidate the note on the day when due is certain, and can be determined, but that certainty must continue till the obligation is discharged."

It has been held that a note promising to pay a certain sum thirty days after date with interest at the rate of twelve per cent from date if not paid at maturity is not a negotiable instrument, not being certain in respect to the time of payment and the amount payable when due. *Randolph v. Hudson*, 12 Okla. 516, 74 Pac. 946.

A note providing that "it is agreed that this note may be paid at any time before maturity and that interest at the rate of eighteen per cent per annum shall be deducted till due" has been held to be non-negotiable. *Way v. Smith*, 111 Mass. 525, wherein the court said: "This stipulation gives the maker the right to pay the note at any time before its maturity at his option, and such payment would discharge his contract. It renders the contract uncertain and contingent, both as to the time of payment and the amount to be paid, and is inconsistent with the essential character of a negotiable promissory note."

GREENE

v.

CALDWELL ET AL.

Kentucky Court of Appeals—June 6, 1916.

170 Ky. 571; 186 S. W. 648.

Workmen's Compensation Acts — Validity.

The Workmen's Compensation Act of 1916 (Laws 1916, c. 33) is not unconstitutional, under Const. § 54, forbidding limitation of amount of recovery for injuries, as being compulsory on employees, since by section 74 it provides for their election to accept the provisions of the act, notwithstanding section 76b, providing that as to nonaccepting employee, the employer may use the defenses of contributory negligence, fellow servant, and assumed risk.

[See note at end of this case.]

Same.

Nor is the act unconstitutional under Const. § 196, forbidding a common carrier to contract for relief from its common-law liability.

[See note at end of this case.]

Same.

Such act is not unconstitutional as a depriving of property without due process of law, contrary to Const. U. S. Amend. 14 (9

Fed. St. Ann. 416) because taking from a nonaccepting employer certain defenses, since the employer has no vested rights in these defenses, and the legislature could take them away without giving any election at all.

[See note at end of this case.]

Same.

Nor is the act invalid as making, by section 11 thereof, radical changes in the law of parent and child, since there is no constitutional restraint on such action by the legislature.

[See note at end of this case.]

Same.

The constitutionality of the act as a whole is not affected by the validity or invalidity of section 22 thereof, as to compensation to alien widows, children, and relatives, since this section is separable from the remainder of the act.

[See note at end of this case.]

Same.

Such act does not violate Const. § 135, forbidding establishment of courts not provided for in the constitution, since the compensation board is not a "court" within the constitution, and the act provides in section 52 for appeal from its decision, so that its members are arbitrators within Const. § 250, providing that arbitrators shall be chosen by the parties, the acceptance of the act by employer and employee constituting a consent that the board act as "arbitrators."

[See note at end of this case.]

Same.

Nor is it unconstitutional because not allowing a jury trial, since the parties accepting it thereby agree to trial without jury.

[See note at end of this case.]

Same.

The title to such act does not violate Const. § 51, requiring the subject of a law to be expressed in the title.

[See note at end of this case.]

Same.

Nor is such act unconstitutional as class legislation in violation of Const. § 59, providing that the general assembly shall not pass local or special acts concerning a number of subjects therein mentioned, since the classification made is reasonable.

[See note at end of this case.]

Same.

Nor is the act special legislation within the meaning of Const. § 59, since "special legislation" applies to particular places or persons as distinguished from classes of places or persons.

[See note at end of this case.]

Appeal from Circuit Court, Franklin county.

Action by Robert L. Greene, plaintiff, against Robert T. Caldwell et al., defendants. From judgment rendered, plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

R. S. Rose and C. I. Dawson, amici curias.
M. M. Logan and Overton S. Hogan for
appellant.

R. T. Caldwell and R. O. P. Thomas for
appellees.

[572] CARROLL, J.—In 1914 the legislature passed a workmen's compensation act which was declared unconstitutional in *State Journal Co. v. Workmen's Compensation Board*, 161 Ky. 562. In 1916 the legislature again enacted a workmen's compensation act, and the validity of this act, which was upheld in the circuit court, is drawn in question on this appeal.

Before considering the objections urged to the present law, it is well to have a clear understanding of the grounds upon which the act of 1914 was condemned. In the *State Journal* case, as appears from the opinion, counsel in opposition to the validity of the act urged many reasons why it should be set aside, but the court, after considering the various objections raised, found that only three of them presented substantial grounds upon which the act could be assailed. These were: (1) That the act violated section 54 of the constitution, providing that, "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property;" (2) that the act was compulsory in that both the employers and employees were compelled to accept its provisions, and being compulsory it deprived appellant of its property without due process of law in violation of section 54 of the constitution; (3) that the act was in contravention of section 241 of the constitution, providing that: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful [573] act, then, in every such case, damages may be recovered for such death, from the corporation and persons so causing the same. . . ."

In the course of the opinion, the court, in pointing out the availability of these objections as grounds for adjudging the act invalid, said that in limiting the compensation to which an injured person should be entitled to the amount specified in the schedule of the act the legislature violated section 54 of the constitution heretofore quoted; and further said: "But we think it is within the power and right of an employee to waive this limit of recovery for injury, by contract, if such contract is freely and voluntarily made."

It was further said that the act was objectionable in compelling the injured employee to accept its provisions and take the compensation allowed by the board in lieu of any cause of action he might have against his employer whether he desired to do this or not, whereas "His election should be free, not

even in the alternative. The law has no right to force him to accept the compensation fixed by this board by depriving him of his causes of action. . . . The legislature has no right to say to one of its citizens that 'unless you accept the provisions of a law impairing your constitutional rights, it will take from you other rights more valuable.' In the light of section 54 of the constitution, we must treat the contract made by the employee under the provisions of this act as compulsory and therefore void."

In reference to the burdens put on the employer who refused to come under the provisions of the act, it was said: "If any employer should determine that he wanted to carry his own risk and make his own contracts instead of having the law to make a contract for him, he can do so. . . . But what is the result? The law says to this employer: 'You may go on with your business industries, but if one of your employees is injured or killed, you shall not avail yourself of the following defenses: The defense of the fellow-servant; the defense of the assumption of risk; or the defense of contributory negligence.' These are practically all the defenses the employer has, and they are taken from him unless he accepts the provisions of this act. He cannot, under these conditions, successfully defend any suit for personal injury. . . . We cannot subscribe to the proposition [574] that this is a voluntary contract, even on the part of the employer."

In upholding the contention that the act violated section 241 of the Constitution before set out, it was said that: "If an injury to an employee should result in his death, his personal representative is authorized to recover damages from the negligent person or corporation causing his death. This is an absolute right given by this section of the constitution to his personal representative to recover damages for such negligence as has resulted in his death. And it is immaterial, under this section of the constitution, whether the money recovered goes to the children or parents, or becomes a part of his personal estate. The disposition of the money after his death cannot affect the right of the personal representative to recover. It may go to his heirs, or it may become a part of his personal estate and go to his creditors. . . ."

"It seems clear to us that such parts of this act as take from the personal representative or estate of a deceased employee, who left no dependents surviving him, any part of the compensation due such representative or his estate, and directs its payment into this fund for the benefit of other people, is a violation of the above section 241 of the constitution. The legislature has no right to limit the damages recovered, for the death of

an employee negligently killed, to his dependents. Nor do we think the legislature has the right to take what is due the estate of one man and give it to another.

"It then necessarily follows that such parts of this act under consideration as give to this Board of Compensation, without the voluntary contract of the employee, the right to recover from the employer for the death of the employee leaving no dependents, and such other parts of the act as coerce the employee to consent or to make a contract that such compensation shall be paid into this compensation fund, are unauthorized and void."

Responding to other objections urged to the act, it was said: "A sufficient answer to all this is, that these are matters addressed entirely to the wisdom of the legislature and can be regulated as necessities may require. . . . The Legislature has the right to create [575] a compensation board and put it into operation free from the objectionable features of the present act. . . . And it is not the purpose of the court of the intention of this opinion to lay down any rule that will preclude the legislature from enacting a compensation act that will conform to the constitution, as we are clearly of the opinion that the legislature may, in conformity to the constitution, adopt an effective compensation law. But this court cannot consent that the legislature has the power to put this compensation act in operation by means of compulsory contracts."

A petition for a rehearing was filed by counsel for the compensation board, and in response to this petition the court, in *Kentucky State Journal Co. v. Workmen's Compensation Board*, 162 Ky. 387, 172 S. W. 674, retracted some objections to the act pointed out in the opinion and stated more explicitly the material grounds upon which it was induced to hold the act invalid, saying:

"First. The provisions of the present compensation act, as far as they affect the employer, are unobjectionable, as they do not conflict with any provisions of the constitution.

"Second. Any employee coming within the provisions of the act may voluntarily agree to accept its provisions fixing and limiting his recovery in case of injury.

"Third. He may likewise voluntarily accept the provisions of the act fixing the amount that shall be recovered in the event of his death, and said sum should be paid to his dependents if he leaves any, and if not, to his personal representatives. The legislature has no power to direct that this sum shall in any event be paid into the compensation fund.

"Fourth. Some provisions should be made in the act whereby the employee signifies his acceptance of the provisions of the act by

some affirmative act on his part. Silence on this subject should not be construed into acceptance.

"Fifth. Provision should be made in the act for appeal to a court of competent jurisdiction for review in all cases where compensation is denied or where a less sum is allowed by the board than that claimed by the injured employee."

In the light of this opinion pointing out the objections to the act of 1914, while indicating that it was competent for the legislature to enact a compensation act [576] that would be free from the objectionable features of the act of 1914, it would appear that all we need do in this opinion is to ascertain whether the legislature conformed the act of 1916 to the opinion of the court by eliminating from it the clauses that rendered the act of 1914 invalid, and if this was done, to further ascertain and determine if any provisions or sections not found in the act of 1914 were inserted in the act of 1916 that would bring it within the condemnation of the constitution. If the act of 1916 is free from the obnoxious features of the act of 1914 and does not contain any new sections prohibited by the constitution, there would seem to be no sound reason why it should not be sustained, however much the policy or wisdom of it may be questioned or its economic benefits to both employer and employee doubted by those not favorable to legislation of this nature, for it has been pointed out by this court in many decisions that the judiciary will not interfere with the enactments of the law-making department of the state unless they are found to be clearly in contravention of some provision of the constitution. This well settled rule in the construction of statutes was thus stated in *Com. v. Goldberg*, 167 Ky. 96, 180 S. W. 68.

"Laws cannot be disregarded merely because they are supposed to be repugnant to some governmental principles that lie outside of constitutional limitations. The constitution of this state, in sections 27 and 28, distributing the powers of government, confined to the legislative branch the authority to enact laws, and this authority the judiciary is not at liberty to interfere with unless the legislation violates directly or by necessary implication some provision of the state or federal constitution. Subject to this limitation, the policy of the legislation or the wisdom or the propriety of it, is not for the judicial branch of the government to decide. When the courts have exercised their jurisdiction in restraining the legislature from transgressing constitutional bounds, they have reached the limit of their control. The people put in the constitution such limitations as they wished to impose on the legislative branch, and within these limitations

its activities are controlled by the constitution; but outside of them it may act with a free hand, subject, of course, to the restraint imposed by the federal constitution. So that when the validity of legislation is challenged in the courts, the inquiry is [577] limited to the questions, what provision of the constitution does it violate? What does it do or propose to do that the constitution forbids?"

Coming now to consider the exhaustive argument of counsel opposing the legislation, we find it insisted that the act of 1916 contains provisions that in their operation and effect, although differing in form of expression from the act of 1914, compel the employee to accept the provisions of the act; and this being so, it is open to the objection that made the act of 1914 obnoxious to the constitution as pointed out in the opinion referred to. But after carefully considering this act, our opinion is that it conforms in the particular mentioned to the requirements of the opinion and hence is not compulsory on the employee, but leaves him the individual right to accept or reject its provisions whichever he chooses to do. Under the act of 1914, as was aptly said in the other opinion, "When the employer accepts the provisions of this act the employee is automatically drawn into this so-called contract and made subject to its provisions." He could exercise no independent volition in the matter at all. It was not necessary that he should be asked to accept the law because when his employer accepted it, this act of the employer, in and of itself without any action on the part of the employee, subjected the employee to all the provisions of the law, and this arbitrary method by which the provisions of the act were imposed on the employee was one of the principal objections urged to the act of 1914 and the chief ground upon which the invalidity of the act was rested."

In the act of 1916, however, the objectionable compulsory features of the act of 1914, in so far as the employee is concerned, were eliminated, and under the act of 1916 the employer cannot, without the consent of the employee, bring him under the influence of the act, nor does it become operative as to the employee until he has voluntarily signified his willingness to accept its provisions by signing the paper described in section 74, which section reads as follows:

"Section 74. Election to operate under the provisions of this act shall be effected by the employee by signing the following notice, to wit:

"I hereby agree with (name of employer) to accept the provisions of chapter 33, acts of 1916, commonly known as the Kentucky Workmen's Compensation Act."

[578] "The election shall be effective from, and including, the date of signing, which shall

be inserted opposite the employee's signature. In case an employee be unable to write, his mark shall be witnessed by a third person, who shall at the time read the notice to the employee. Any number of employees may sign the same notice, provided that there be conspicuously written or printed at the top of each page thereof on which signatures appear a copy of the above form of notice. If the employment be intermittent or be temporarily suspended, the original acceptance of the employee shall continue effective in subsequent employment under the same employer."

It is also provided in section 76 that: "At any time after electing to operate under the provisions of this act, either party may withdraw such election. . . . The employee desiring to withdraw such election shall file with the employer a written notice of withdrawal, stating the date when such withdrawal is to become effective. Following the filing or giving of such notices, the status of the party withdrawing shall become the same as if his former election had not been made; provided, however, that withdrawal shall not be effective as to any injury sustained less than one week after the filing thereof."

It is, however, provided in section 76b that: "Every employee affected by the provisions of this act who does not elect to operate thereunder, and his representative in case of death, shall, in any suit at law to recover damages for personal injury or death by accident arising out of and in the course of his employment against an employer electing to operate under the provisions of this act, proceed at law as if this act had not been enacted, and the employer may avail himself of the defenses of contributory negligence, negligence of a fellow servant, and assumption of risk as such defenses now exist at common law."

Passing for the moment section 76b, it will be seen that whether the employee accepts the act or not depends entirely upon his voluntary act. He can either accept or reject it as he pleases, and no one else has authority to do either of these things for him. It would seem, therefore, that the law itself is a sufficient answer to the argument that it is not an elective, but a compulsory statute [579] by which the employee is drawn under its provisions whether he desires to be subjected to them or not.

But it is said that when section 74 is read, as it should be, in connection with section 76b, it very plainly shows that it was the purpose of the legislature to evade, through the form of voluntary acceptance stipulated in section 74, the compulsory feature of the act of 1914, while coercing the employee by section 76b to accept the provisions of the act, although he might not voluntarily wish

to do so. This coercion is found by counsel to exist in that part of section 76b which denies to the employee the right of recovery for injuries that may have been inflicted by the negligence of the employer, if the injuries were caused by the contributory negligence of the employee, or by the act of a fellow servant, or if the risk of the resulting injuries was assumed by the employee.

It is true that under section 76b the employee who does not elect to accept the act and who brings an action to recover damages for personal injuries sustained by the alleged negligence of the employer who has accepted its provisions, may be met with the defenses that he was guilty of contributory negligence, or that the injuries complained of were caused by the negligence of a fellow servant, or that he assumed the risk of the accident that resulted in his injury. But, clearly, the fact that the employer may rely on these defenses is far from denying to the employee the right to recover for injuries caused by the negligence of the employer. He still has his cause of action as he has always had, and the employer has only the right to rely on defenses that he always had the right to rely on, although it should be said that the common law definition of these defenses has been greatly modified by court opinions and that they do not now excuse the employer to the full extent they formerly did.

To what extent these defenses may be relied on by the accepting employer to defeat recovery by a nonelecting employee, it would be obviously improper in this opinion to undertake to say.

It will be time enough to construe and define section 76b when we have a case arising between a nonelecting employee and an accepting employer in which there is presented the question of the extent to which these defenses may be relied on by the employer to defeat [580] a recovery. For the present it is sufficient to say that whether at all or in what degree this act puts in the way of the nonelecting employee obstacles by which he was not theretofore hindered in suits against his employer, is really not a material inquiry in the case we have, as the right of election or nonelection is left with the employee, and this is all the former opinion required.

We may, however, say that we do not agree that the changes in the existing law proposed in section 76b have the coercive influence attributed to them by counsel or that this section compels the employee to accept the act when he would not have accepted it if this change had not been made. When the section is looked to, this assumption is entirely too speculative to be made the basis of a charge of compulsion. What the employee will do when he comes to decide whether to accept or reject the act depends on the viewpoint

from which he weighs for himself its benefits and disadvantages. One employee might be entirely willing to elect to accept its provisions with a full recognition of the effect of section 76b, while another employee, if this section were eliminated, would not accept it. But, however this may be, and without regard to the influence section 76b may have on the employee, the real and determining question by which the validity of this act upon the point under consideration must be decided is, has the employee the right to act for himself? Has he the right to exercise his voluntary, independent judgment and do as he pleases? The act declares that he has, and as was said in the former opinion, this is all that is necessary to remove the charge of compulsion.

It is also urged that although section 54 of the constitution provides that "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property," the General Assembly, in disregard of this section, has attempted by this act to limit the amount that may be recovered for injuries or death.

It is quite correct to say that this section operates as a restraint on the General Assembly and prohibits it from attempting to limit the amount of recovery in the cases described in the section. But in this legislation the General Assembly did not arbitrarily or at all undertake to limit the amount of recovery. It merely proposed a statute to a certain class of people for their individual [581] acceptance or rejection. It did not assume to deprive these classes or individuals without their consent of any constitutional rights to which they were entitled. The General Assembly merely afforded by this legislation a means by and through which individuals composing classes might legally consent to limit the amount to which the individual would be entitled if injured or killed in the course of his employment.

Section 196 of the constitution provides that: "No common carrier shall be permitted to contract for relief from its common law liability." And it is suggested that as this act includes certain classes of common carriers which are permitted to accept its provisions, the acceptance of the act by these common carriers, if its provisions were not accepted by their employees, would have the effect of enabling the common carrier employer to limit his common law liability in violation of this section.

It was held in *Davis v. Chesapeake*, etc. R. Co. 122 Ky. 528, 12 Ann. Cas. 723, 92 S. W. 339, 121 Am. St. Rep. 481, 5 L.R.A. (N.S.) 458, supported by a reference to section 196 of the constitution, that a contract between a common carrier and its employees by which in consideration of his employment the em-

ployee assumed all risk of death or accident or damage to him or his property sustained by the negligence of the employer, was against the public policy of the state and not binding on the employee. But the principle laid down in this and other cases involving like questions can have no controlling application here, because if we should put to one side this compensation act, it is clear that no employer, whether common carrier or not, could enter into a contract with his employee by which the employee, in consideration of his employment, could bindingly consent to waive any right of action he might have against his employer to recover damages for injuries sustained by the negligence of the employer. Individual contracts like this have always been and are now against the public policy of the state. This act, however, may modify in some measure this rule when the employer has accepted its provisions and the employee has not. But as to all other employers and employees the public policy of the state remains unchanged.

It is, of course, apparent that this act, which is the result of a widespread demand for a radical change in the existing law, has set up as to these classes to which it applies a new public policy for this state which it is [582] confidently believed will prove beneficial to all who come under its protection. And the authority for the legislation is found in the police power of the state; in the power to regulate and control by legislation all matters affecting not only the health and the safety, but the general welfare of the people individually as well as in classes into which they may reasonably be grouped; and this extension of the power has been sustained by the courts practically with unanimity.

Another ground for reversal is found by counsel in the fourteenth amendment to the constitution of the United States in which it is said, in part: "Nor shall any state deprive any person of life, liberty or property without due process of law," (9 Fed. St. Ann. 416) and the contention is made that this act, by taking from the nonelecting employer certain defenses that he had before its adoption, in effect deprives him of his property without due process of law. Many cases are cited by counsel in support of the asserted proposition, but we do not find the reasons advanced available for the purpose urged by counsel. Nor do we think the principle announced in the case of *Louisville v. Cochran*, 82 Ky. 15, relied on, applicable to the questions submitted.

The only ground on which this attack is rested is that the employer who elects not to accept the provisions of the act shall not, in any suit by his employee to recover damages for personal injuries or death arising

out of and in the course of his employment, be permitted to defend the suit upon the grounds that the employee was guilty of contributory negligence, or that the injury was caused by the negligence of a fellow servant, or that the employee had assumed the risk.

Aside from the fact that it was held in the former opinion that the act of 1914 containing like provisions was free from objection so far as the employer was concerned, it may be again said that these burdens are not arbitrarily imposed on the employer, as it is left entirely to his election whether he will assume them by refusing to accept the provisions of the act or be relieved from them by electing to come under its provisions. The choice is put before him and he may act as he chooses. The only compulsion attempted to be exerted is that if he refuses to accept he cannot rely on these defenses which would be available to him if he did accept. But if this is compulsion, as claimed, the legislature had the [583] right at any time to withdraw the benefit of these defenses from employers and to make them liable at the suit of injured employees, although the injured employee may have been guilty of contributory negligence, or the injury may have been inflicted by a fellow servant, or the risk of injury may have been assumed. The employer had no vested right in these defenses. The law gave them to him and the law may take them away, and it could have taken them away without giving any election at all. This being so, it would seem clear that this legislation does not take the property of the employer without due process of law.

Objection is also found to section 11, which provided that "A minor, except where employed in wilful violation of any law of this state regulating the employment of minors, shall be deemed *sui juris* for the purpose of this act, and no other person shall have cause of action or right to compensation for any injury to or death of such minor employee for loss of service on account thereof, by reason of the minority of such employee. In the event of the award of a lump sum of compensation to such minor employee, payment shall be made to the guardian of such minor." And it is insisted that this section is open to serious complaint on account of the radical changes it works in the long existing law in respect to the mutual obligations of parent and child.

It is true that this legislation does make material changes in the law of parent and child; but a sufficient answer to all the objections urged is that the legislature, in undertaking to fix the status of minors under this act, was not restrained by any constitutional provision. It had the unquestioned power to make such changes in what may be

called the business relations of parent and child as seemed to it advisable.

Section 22 of the act reads as follows: "Compensation under this act to alien dependent widows and children, not residents of the United States, shall be one-half of the amount provided in each case for residents; and the employer may, at any time, commute all future installments of compensation to alien dependents or the then value thereof. Alien widowers, parents, brothers and sisters, not residents of the United States, shall not be entitled to any compensation." This section, which was not in the act of 1914, is assailed because it is said to discriminate against aliens and their dependents and [584] is also a discrimination against American labor in favor of foreign labor; and apparently this charge is well founded. We do not, however, find it either necessary or proper, in determining the constitutionality of this act as a whole, to express any opinion as to the validity of this section. It is not so related to or connected with the other sections as that it might not be eliminated and leave a complete act in such form as would accomplish the chief purpose of the legislation. This being so, if this section should be declared to be unconstitutional, the remainder of the act would not be affected by its invalidity. *Com. v. Goldberg*, 167 Ky. 96, 180 S. W. 184, and cases therein cited.

In view of this it is obvious that the fitting thing to do is to postpone adjudging any question concerning this section until its construction and effect come before us in some case in which an alien, his relatives or dependents, are parties, and the objections to the section in its practical application to existing conditions are made an issue.

It is further insisted that the compensation board as created by this act is a court established in violation of section 135 of the constitution, reading: "No courts, save those provided for in this constitution, shall be established." This question was before us when we came to consider the act of 1914, and we did not then find that this compensation board was a court in the meaning of the constitution, and so the objection to the compensation board on this ground was overruled. But it was said in the extended opinion, in 162 Ky. that: "Provision should be made in the act for appeal to a court of competent jurisdiction for review in all cases where compensation is denied or where a less sum is allowed by the board than that claimed by the injured employee." In the 1914 act the right of appeal to the courts by a complaining employee from the decision of the compensation board was so limited as to practically deny any appeal and to make the judgment of the compensation board final. But the act of 1916 contains an elab-

orate scheme by which courts may review the final decisions of the compensation board, and it is provided, in part, in section 52 of the act that:

"Either party, within twenty days after the rendition of such final order or award of the board, may by petition appeal to the circuit court that would have [585] jurisdiction to try an action for damages for said injuries if this act had not passed, for the review of such order or award.

"No new or additional evidence may be introduced in the circuit court, except as to the fraud or misconduct of some person engaged in the administration of this act, and affecting the order, ruling or award, but the court shall otherwise hear the cause upon the record or abstract thereof as certified by the board, and shall dispose of the cause in summary manner, its review being limited to determining whether or not:

"1. The board acted without or in excess of its power.

"2. The order, decision or award was procured by fraud.

"3. The order, decision or award is not in conformity to the provision of this act.

"4. If findings of fact are in issue, whether such findings of fact support the order, decision or award.

"The board and each party shall have the right to appear in such review proceedings; the court shall enter judgment affirming, modifying or setting aside the order, decision or award, or in its discretion remanding the cause to the board for further proceedings in conformity with the direction of the court. The court may, in advance of judgment and upon a sufficient showing of fact, remand the cause to the board."

And it is further provided in section 52 of the act that: "Where an amount sufficient under existing laws to authorize an appeal to the Court of Appeals is involved, the judgment of the circuit court shall be subject to appeal to the Court of Appeals, the scope of whose review shall include all matters herein made the subject of review by the circuit court and also errors of law arising in the circuit court and upon appeal made reviewable by the Civil Code of Procedure where not in conflict with the provisions of this act."

From these excerpts it will be seen that in all cases in which there arises a question affecting the substantial rights of either the employer or the employee, an appeal may be taken to the courts from the decision of the board upon the record made up in the hearing before the compensation board. So that the board in its settlement of disputes arising between employer and employee as to the compensation the employee is entitled to is really [586] nothing more than an agency

created by the legislature for the purpose of assisting the courts in the preliminary findings of fact that may be necessary in executing the administrative features of the act. If the parties are satisfied with the decision of the board, it merely acts as a board of arbitration whose judgment is acquiesced in by the parties who have submitted the matter in dispute to its settlement; if they are not satisfied they may appeal to the courts.

As to the suggestion made that the members of this board are not arbitrators within the meaning of section 250 of the constitution because the employer and employee have no voice in the selection of the board, it may be dismissed with the comment that the employer and employee in accepting the provisions of the act thereby consent that the board of compensation may act as a board of arbitrators for the purpose of determining matters of difference between them. And the criticism that the act is faulty in not allowing a jury trial may be shortly answered by the statement that persons having a case in court may consent to a trial without a jury, and this is what the parties who accept this act agree to do.

The title of the act is also censured as being in violation of section 51 of the constitution, but this criticism is without merit. The title of the act is very elaborate; indeed, more so than the constitution requires, and covers every substantial feature of the law.

It is also pressed on our attention that the act is special and class legislation and for this reason violates section 59 of the constitution, providing that the General Assembly shall not pass local or special acts concerning a number of subjects that are mentioned in the section. It is, however, so well settled as not to need citation of authority that the right of classification when reasonably exercised is not opposed to either the state or federal constitution; and all that this act proposes to do is to create a class out of described employers and employees and deal with this class separately and apart from other classes of employers and employees. In making classifications like this it is obviously impossible to draw the line of separation with such accuracy as to include all who might well be brought within the class or to exclude all who might be left without it. It is, therefore, only required that the classification shall be [587] as reasonable and as practicable as conditions will permit, and this legislation, we think, conforms to this rule.

Neither is the act special legislation within the meaning of the constitution, as special legislation applies to particular places or persons as distinguished from classes of places or persons.

Some objection is also pointed out to the insurance provisions, but these are merely

administrative and for the purpose of making more satisfactory and secure the compensation provisions of the act and do not contravene any section of the constitution.

In conclusion we may say that after a careful consideration of this progressive and beneficial legislation and of all the material arguments advanced by counsel in opposition to its validity, we are convinced that as a whole the act is not open to any constitutional objection. The legislature in its enactment was careful to avoid the objections found to exist in the act of 1914 and to keep it free from other fundamental faults that might affect its validity.

It may be true that there are sections and parts of sections relating to administrative features of the act that need reforming, and, indeed, it would be singular if structural defects could not be found in so comprehensive and complicated a piece of new and remedial legislation dealing with a subject-matter that directly affects so many people and so many business concerns. But when the board charged with the administration of the law comes to apply it to the practical conditions it was designed to regulate, these defects, whatever they may be, will surely be discovered, and when they are, the legislature can, and we have no doubt will, from time to time, correct them in such manner as the needs of the persons and businesses affected may seem to require.

We have not, in the course of the opinion found it useful to support what has been said by authority, although there is abundant that might be found sustaining our conclusions, as may be seen by an examination of *Ives v. South Buffalo R. Co.* 201 N. Y. 271, Ann. Cas. 1912B 156, 94 N. E. 431, 34 L.R.A. (N.S.) 162; *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L.R.A. (N.S.) 466; *Cunningham v. Northwestern Improvement Co.* 44 Mont. 180, 119 Pac. 554; *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209, 37 L.R.A. (N.S.) 489; *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L.R.A. (N.S.) 694; *Milwaukee v. Miller*, [588] 154 Wis. 652, 144 N. W. 188, and the very full note to this case in L.R.A.1916A page 1; *Jeffry Mfg. Co. v. Blagg*, 235 U. S. 571, 35 S. Ct. 167, 59 U. S. (L. ed.) 364.

Wherefore, the judgment is affirmed. The whole court sitting.

NOTE.

Constitutionality of Workmen's Compensation Act.

Generally, 612.
Arizona, 613.
California, 613.
Illinois, 613.

Indiana, 614.
 Iowa, 614.
 Kentucky, 614.
 Maryland, 614.
 Massachusetts, 614.
 Michigan, 614.
 New Jersey, 614.
 New York, 614.
 Ohio, 614.
 Oklahoma, 614.
 Pennsylvania, 615.
 Texas, 615.
 Washington, 615.
 West Virginia, 615.

Generally.

Since the preparation of the note to Kentucky State Journal Co. v. Workmen's Compensation Board, Ann. Cas. 1916B 1273, there have been a number of cases passing on the validity of workmen's compensation acts, and the decisions have been uniformly in favor of legislation of that kind. That such acts are not in violation of any provision of the Federal Constitution is established by three recent decisions of the United States Supreme Court, New York Cent. R. Co. v. White, 243 U. S. 188, Ann. Cas. 1917D 629 (sustaining the compulsory act of New York); Hawkins v. Bleakly, 243 U. S. 210, Ann. Cas. 1917D 637 (sustaining the elective act of Iowa); and Mountain Timber Co. v. Washington, 243 U. S. 219, Ann. Cas. 1917D 642 (sustaining the state insurance fund act of Washington). Since the decision in the reported case, sustaining the act passed as a substitute for that held to be invalid in Kentucky State Journal Co. v. Workmen's Compensation Board, *supra*, there is no American jurisdiction in which the latest compensation act is held to be invalid.

Among the principal objections which have been urged unsuccessfully against workmen's compensation acts in the recent cases are the following:

—that they take property without compensation, *Solvuca v. Ryan, etc. Co. (Md.)* 101 Atl. 710;

—that they deny due process of law, *New York Cent. R. Co. v. White*, 243 U. S. 188, Ann. Cas. 1917D 629, 37 S. Ct. 247, L.R.A. 1917D 1; *Solvuca v. Ryan, etc. Co. (Md.)* 101 Atl. 710; *Madden's Case*, 222 Mass. 487, 111 N. E. 379, L.R.A. 1916D 1000; *Adams v. Iten Biscuit Co. (Okla.)* 162 Pac. 938; *Middleton v. Texas Power, etc. Co. (Tex.)* 185 S. W. 556;

—that they impair the obligation of a contract, *Hunter v. Colfax Consol. Coal Co.* 175 Ia. 245, Ann. Cas. 1917E 803, 154 N. W. 1037, 157 N. W. 145;

—that they impair the liberty of contract, *Anderson v. Carnegie Steel Co.* 255 Pa. St. 33, 99 Atl. 215;

—that they amount to class legislation, *New York Cent. R. Co. v. White*, 243 U. S. 188, Ann. Cas. 1917D 629, 37 S. Ct. 247, L.R.A. 1917D 1; *Chicago Rys. Co. v. Industrial Board*, 276 Ill. 112, 114 N. E. 534; *Casparis Stone Co. v. Industrial Board*, 278 Ill. 77, 115 N. E. 822;

—that they delegate judicial power to administrative officers, *Hawkins v. Bleakly*, 243 U. S. 210, Ann. Cas. 1917D 637, 37 S. Ct. 255; *Hunter v. Colfax Consol. Coal Co.* 175 Ia. 243, Ann. Cas. 1917E 803, 154 N. W. 1037, 157 N. W. 145; *Fassig v. State*, 95 Ohio St. 232, 116 N. E. 104; *Adams v. Iten Biscuit Co. (Okla.)* 162 Pac. 938; *Middleton v. Texas Power, etc. Co. (Tex.)* 185 S. W. 556;

—that they oust the courts of jurisdiction, *Hunter v. Colfax Consol. Coal Co.* 175 Ia. 245, Ann. Cas. 1917E 803, 154 N. W. 1037, 157 N. W. 145; *Solvuca v. Ryan, etc. Co. (Md.)* 101 Atl. 710;

—that they deny to the employee his common-law remedies, *New York Cent. R. Co. v. White*, 243 U. S. 188, Ann. Cas. 1917D 629, 37 S. Ct. 247, L.R.A. 1917D 1; *Keeran v. Peoria, etc. Traction Co.* 277 Ill. 413, 115 N. E. 636; *Anderson v. Carnegie Steel Co.* 255 Pa. St. 33, 99 Atl. 215; *Middleton v. Texas Power, etc. Co. (Tex.)* 185 S. W. 556;

—that they abolish the common-law defenses of the employer, *New York Cent. R. Co. v. White*, 243 U. S. 188, Ann. Cas. 1917D 629, 37 S. Ct. 247, L.R.A. 1917D 1; *Strom v. Postal Tel. Cable Co.* 271 Ill. 544, 111 N. E. 555; *Hunter v. Colfax Consol. Coal Co.* 175 Ia. 245, Ann. Cas. 1917E 803, 154 N. W. 1037, 157 N. W. 145; *Brost v. Whitall-Tatum Co.* 89 N. J. L. 531, 99 Atl. 315; *Adams v. Iten Biscuit Co. (Okla.)* 162 Pac. 938; *Anderson v. Carnegie Steel Co.* 255 Pa. St. 33, 99 Atl. 215; *Middleton v. Texas Power, etc. Co. (Tex.)* 185 S. W. 556; *Watts v. Ohio Valley Electric R. Co.* 78 W. Va. 144, 88 S. E. 659;

—that they violate the constitutional guaranty of a jury trial, *New York Cent. R. Co. v. White*, 243 U. S. 188, Ann. Cas. 1917D 629, 37 S. Ct. 247, L.R.A. 1917D 1; *Hawkins v. Bleakly*, 243 U. S. 210, Ann. Cas. 1917D 637, 37 S. Ct. 255; *Raymond v. Chicago, etc. R. Co.* 233 Fed. 239, 147 C. C. A. 245; *Hunter v. Colfax Consol. Coal Co.* 175 Ia. 245, Ann. Cas. 1917E 803, 154 N. W. 1037, 157 N. W. 145; *Fassig v. State*, 95 Ohio St. 232, 116 N. E. 104; *Adams v. Iten Biscuit Co. (Okla.)* 162 Pac. 938; *Anderson v. Carnegie Steel Co.* 255 Pa. St. 33, 99 Atl. 215; *Middleton v. Texas Power, etc. Co. (Tex.)* 185 S. W. 556.

An elective act does not violate a constitutional prohibition against limiting by stat-

ute the amount recoverable for personal injury or death. *Anderson v. Carnegie Steel Co.* 255 Pa. St. 33, 99 Atl. 215. And see the reported case.

In addition to the rulings on the validity of a workmen's compensation act as a whole, the following specific provisions in such an act have been sustained in recent cases:

—making employer liable for act of stranger on premises, *Sertz v. Industrial Ins. Commission*, reported ante, this volume, at page 354;

—making employer liable for injury occurring in another jurisdiction, *Hagenback v. Lippert* (Ind.) 117 N. E. 531;

—creating liability to dependents for death of workmen, *North Pac. Steamship Co. v. Industrial Acc. Commission* (Cal.) 163 Pac. 910;

—giving to employer alternative to pay compensation personally or to subscribe to insurance fund, *State v. U. S. Fidelity, etc. Co.* (Ohio.) 117 N. E. 232;

—permitting notices to be given to parent or guardian of infant workman, *Young v. Sterling Leather Works* (N. J.) 102 Atl. 395;

—subrogating employer to rights of employee against third person causing injury, *Friebel v. Chicago City R. Co.* (Ill.) 117 N. E. 467;

—including municipality within purview of act, *McLaughlin v. Industrial Board* (Ill.) 117 N. E. 819; *Wood v. Detroit*, 188 Mich. 547, 155 N. W. 592; *Purdy v. Sault Ste. Marie*, 188 Mich. 573, Ann. Cas. 1917D 881, 155 N. W. 597; *State v. Carroll*, 94 Wash. 531, 162 Pac. 593;

—imposing special liability on contractor if he fails to require subcontractors to insure, *Parker-Washington v. Industrial Board*, 274 Ill. 498, 113 N. E. 976;

—allowing funeral expenses in cases of partial dependency but not in cases of total dependency, *Northern Redwood Lumber Co. v. Industrial Acc. Commission* (Cal.) 166 Pac. 828, wherein the court said: "It is obviously not for us to inquire why the legislature discriminated as to funeral expenses between the two classes of cases dealt with, respectively, by the first and second subdivisions of section 15. It is enough to know, as is clearly true, that the distinction or discrimination thus made is one which the legislature has the power and the right to recognize and establish. Presumptively there was, in the legislative mind, a sufficient reason for the discrimination, albeit such reason may not be manifest upon the face of the statute itself. But, as suggested, whether there exists a substantial reason for the distinction, or whether the same was arbitrarily drawn, the power to make it is nevertheless in the legislature. In other words, the fact of the discrimination does not render the provisions invalid, nor does the absence of an obviously

substantial reason therefor compel, as is true in some cases, a construction of the provisions contrary to the plain grammatical signification of the language thereof."

Arizona.

An Arizona act analogous to a workmen's compensation act, imposing an absolute liability for actual damages in case of injury to employee in certain hazardous employments, was sustained in *Inspiration Consol. Copper Co. v. Mendez*, 166 Pac. 278.

California.

The previous decisions sustaining the California workmen's compensation act have been followed in several recent cases. *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 457, Ann. Cas. 1917E 390, 156 Pac. 491; *Western Indemnity Co. v. Industrial Acc. Commission*, 163 Pac. 60; *North Pac. Steamship Co. v. Industrial Acc. Commission*, 163 Pac. 910; *Northern Redwood Lumber Co. v. Industrial Acc. Commission*, 166 Pac. 828.

Illinois.

A number of recent cases follow the previous decisions upholding the workmen's compensation act of Illinois. *Strom v. Postal Tel. Cable Co.* 271 Ill. 544, 111 N. E. 555; *Victor Chemical Works v. Industrial Board*, 274 Ill. 11, 113 N. E. 173; *Parker-Washington v. Industrial Board*, 274 Ill. 498, 113 N. E. 976; *Von Boeckmann v. Corn Products Refining Co.* 274 Ill. 605, 113 N. E. 902; *Vaughan's Seed Store v. Simonini*, 275 Ill. 447, 114 N. E. 163; *Chicago Rys. Co. v. Industrial Board*, 276 Ill. 112, 114 N. E. 534; *Casparis Stone Co. v. Industrial Board*, 278 Ill. 77, 115 N. E. 822.

In *Keeran v. Peoria, etc. Traction Co.* 277 Ill. 413, 115 N. E. 636, it was said: "The workmen's compensation act is an entire departure from the common law in regard to the relation of master and servant. It does not rest on the theory of negligence, but on the theory that the injuries to workmen and deaths caused by accidents in any business should be regarded as a part of the expense of the business and should be borne by the business. We have held the act constitutional in many decisions, beginning with *Deibeikis v. Link-Belt Co.* 261 Ill. 454 [104 N. E. 211, Ann. Cas. 1915A 241]. It is elective, and results in two systems in the law of the state by which the rights of employers and employees are governed. Under the act for the amount which a workman may recover for a particular injury is fixed by law. He may recover this amount regardless of the cause of the injury, the fault of his employer or his own negligence, so long as it arose out of and in the course of his employment. This valuation applies to all injuries which come within the provisions of the act and to all

persons who come within its provisions, and it is not an unreasonable classification which applies the rule uniformly to all persons affected by the act. The act is elective both for employers and employees. It is apparent that the legislature considered the law of negligence as applied to the relation of master and servant as unsatisfactory in its results and sought by this act to secure to injured workmen and their dependents a more certain, prompt, and inexpensive relief than the common-law action afforded, by imposing upon the employer, as incident to his business, the burden of providing for the loss suffered by his employees from injuries received in his business according to a certain definite scale. The burden was not, however, imposed absolutely. The system was submitted to each employer and employee for acceptance or rejection. The employers who accepted the provisions of the act assumed the definite liabilities it imposed upon them in consideration of their exemption from their common-law liability, while the employees who accepted surrendered their common-law rights in consideration of the definite remedy given by the act. The provisions of the act become a binding contract as to all who accept them. So far as employers and employees under the act are concerned, all accidental injuries to workmen arising out of and in the course of their employment are to be paid for by the employer in whose service the injury occurred, or the employer negligently causing the injury, at the rate fixed in the schedule established by the act. This provision constitutes part of the contract entered into by the election to accept the provisions of the act. It is competent to enter into such an agreement, and no constitutional rights are violated by its enforcement."

Indiana.

In *Hagenback v. Lippert*, 117 N. E. 53, the court sustained the validity of the workmen's compensation act of Indiana.

Iowa.

The Iowa workmen's compensation act was held to be valid in an exhaustive discussion in *Hunter v. Galfax Consol. Coal Co.* 175 Ia. 245, Ann. Cas. 1917E 803, 154 N. W. 1037, 157 N. W. 145. The validity of the same act was declared in *Hawkins v. Bleakly*, 243 U. S. 210, Ann. Cas. 1917D 637, 37 S. Ct. 255.

Kentucky.

The elective workmen's compensation act passed in Kentucky as a substitute for that declared to be invalid in *Kentucky State Journal Co. v. Workmen's Compensation*

Board, Ann. Cas. 1916B 1273, is held in the reported case to be valid.

Maryland.

The Maryland workmen's compensation act is valid. *Solvuca v. Ryan, etc.* Co. 101 Atl. 710. In *American Coal Co. v. Allegheny County Com'rs*, 128 Md. 564, 98 Atl. 143, an act providing for industrial insurance of coal miners was sustained.

Massachusetts.

The earlier cases affirming the validity of the workmen's compensation act of Massachusetts have been followed in a recent decision. *Madden's Case*, 222 Mass. 487, 11 N. E. 379, L.R.A.1916D 1000.

Michigan.

The validity of the Michigan workmen's compensation act has been affirmed in several recent cases. *Wood v. Detroit*, 188 Mich. 547, 155 N. W. 592; *Purdy v. Sault Ste Marie*, 188 Mich. 573, 155 N. W. 597; *Grand Rapids Lumber Co. v. Blair*, 190 Mich. 518, 157 N. W. 29.

New Jersey.

In *Brost v. Whitall-Tatum*, 89 N. J. L. 531, 99 Atl. 315, the court followed the earlier cases in the same jurisdiction upholding the validity of the workmen's compensation act.

New York.

The New York workmen's compensation act which had been sustained in several earlier cases in that jurisdiction was upheld by the Federal Supreme Court in *New York Cent. R. Co. v. White*, 243 U. S. 188, Ann. Cas. 1917D 629, 37 S. Ct. 247, L.R.A. 1917D 1.

Ohio

Recent cases have affirmed the previous holdings in favor of the validity of the Ohio workmen's compensation act. *Fasseg v. State*, 95 Ohio St. 232, 116 N. E. 104; *State v. U. S. Fidelity, etc. Co.* 117 N. E. 232.

Oklahoma.

Sustaining the Oklahoma workmen's compensation act, the court said in *Adams v. Iten Biscuit Co.* 162 Pac. 938; "The class of industries embraced by the act are of such a nature as to authorize regulation of their conduct and management by the state, and the obligations of both employer and employee to accept the conditions imposed by the statute grow out of the interest which the public has in the proper adjust-

ment of the relations existing between them and of the right to regulate the industry in which they are both engaged; and, while it may be urged that the relation existing between them is one of contract, the state may impose, as one of the conditions thereof, that the employee shall accept a fixed sum for injuries received in the course of his employment as defined by the act for the same reason it may impose liability upon the employer in cases where he is free from negligence. The unsatisfactory and unscientific method of awarding damages with all of the economic results attendant upon the administration of those laws has been deemed sufficient to justify interference by the state in occupations classed as hazardous, and to warrant the substitution of a new and more scientific plan intended to bring about better results, and to transfer the burden of losses occasioned in the prosecution of such industries in a large number of cases from the injured employee or his dependent ones, to the industry itself, and to effectually bring about such a change it was necessary to withdraw from the employee his right of action as regulated and determined by the rules of the common law for future injuries, and in so doing the legislature simply abolished the common-law rule of liability in such cases. If it may abolish the common-law defenses that were available, it may, with equal authority, declare that purely accidental injuries should no longer be actionable. The power to do both exists where it is deemed wise and for the public good."

Pennsylvania.

The Pennsylvania workmen's compensation act is valid. *Anderson v. Carnegie Steel Co.* 255 Pa. St. 33, 99 Atl. 215.

Texas.

The conflict shown by the earlier note in the decisions of the court of civil appeals as to the validity of the workmen's compensation act of Texas has been resolved by a decision of the Supreme Court sustaining the act. *Middleton v. Texas Power, etc. Co.* 18 S. W. 556.

Washington

In several recent cases the validity of the Washington workmen's compensation act has been reaffirmed. *Mountain Timber Co. v. Washington*, 243 U. S. 219, Ann. Cas. 1917D 642, 37 S. Ct. 260; *Raymond v. Chicago, etc. R. Co.* 233 Fed. 239, 147 C. C. A. 245; *Stertz v. Industrial Ins. Commission*, reported ante, this volume, at page 354.

West Virginia.

Recent cases have reiterated the previous holding in West Virginia in favor of the

validity of the workmen's compensation act of that state. *Watts v. Ohio Valley Electric R. Co.* 78 W. Va. 144, 88 S. E. 659; *Rhodes v. J. B. B. Coal Co.* 90 S. E. 796.

STATE EX REL. ANDERSON

v.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED.

Minnesota Supreme Court—July 7, 1916.

134 Minn. 21; 158 N. W. 715.

Statutes — Retroactive Operation — Statute of Limitation.

A statute of limitation operates prospectively, unless a legislative intent to give it a retrospective operation is clear.

[See 4 Ann. Cas. 166; Ann. Cas. 1912A 1041; 111 Am. St. Rep. 455.]

Same.

The postponement of the time when a limitation statute becomes effective evidences an intent to make it of retrospective operation.

Workmen's Compensation Act as Retroactive.

Where the amending statute materially changes the statute amended, making desirable a postponement of its operation to permit an adjustment to changed provisions, the argument that the limitation was intended to be retrospective is less cogent; and when such limitation, if retrospective, is radical and harsh, and the changes in the substantive provisions of the statute furnish an adequate reason for a postponement, such postponement should not be held to show an intent to make the statute retrospective. And it is held that chapter 209, Laws 1915, approved April 21, 1915, and effective July 1, 1915, amending the Workmen's Compensation Act of 1913 (Laws 1913, c. 467), and providing a limitation of one year after injury in which a workman may commence his action, the effect being, if the act is retrospective, to require accrued causes of action to be brought within seventy days after the passage of the statute, was not retrospective.

[See note at end of this case.]

(Syllabus by court.)

Certiorari to District Court, Winona county: GRANGER, Judge.

Action by A. A. Anderson, plaintiff, against General Accident Fire and Life Assurance Corporation, Limited, defendant. Judgment for defendant. Plaintiff brings certiorari. The facts are stated in the opinion. **REVERSED.**

Lamberton & Looby and *Brown, Abbott & Somsen* for relator.

Watson & Abernethy for respondent.

[22] DIBELL, C.—This was a proceeding in the district court by A. A. Anderson under the Workmen's Compensation Act against the General Accident Fire & Life Assurance Corporation, Limited, the insurer of the Bay State Milling Company, his employer. There was judgment for the insurance company.

The judgment is before us upon a writ of *certiorari* issued on the relation of Anderson.

Anderson was in the employ of the Bay State Milling Company of Winona on April 11, 1914, and on that day was injured under circumstances giving him a right to compensation under the Workmen's Compensation Act of 1913 (Laws 1913, p. 675, c. 467). The proceeding for compensation was brought in November, 1915, a year and eight months after his injury. The act of 1913 contained no limitation upon the time within which a claim for compensation might be made. On April 21, 1915, a year and ten days after the accident, the act of 1913 was amended and the following section was added:

"Sec. 20A. LIMITATION.—The time within which the following acts shall be performed under Part 2 of this act shall be limited to the following periods respectively:

"(1) Actions or proceedings by an injured employee to determine or recover compensation; one (1) year after the occurrence of the injury." Laws 1915, p. 294, c. 209, § 8.

[23] The concluding section of the 1915 act is as follows:

"This act shall take effect on and after the first day of July, A.D. 1915."

The court held that the relator's cause of action was barred by the limitation quoted. The correctness of this holding is the single question for decision.

1. A statute of limitation is construed to operate prospectively, unless a legislative intent to give it a retrospective operation is clear. *Powers v. St. Paul*, 36 Minn. 87, 30 N. W. 433; *Burwell v. Tullis*, 12 Minn. 572; *Walker v. People*, 202 Ill. 34, 66 N. E. 827; *Thoeni v. Dubuque*, 115 Ia. 482, 88 N. W. 967; *Rothford v. Union R. Co.* 25 R. I. 70, 54 Atl. 932; *Thomas v. Higgs*, 68 W. Va. 152, 69 S. E. 654, Ann. Cas. 1912A 1039; 1 Wood, Limitations, §§ 12, 12b, 12c; 19 Am. & Eng. Enc. (2d ed.) 174; 25 Cyc. 991; 33 Cent. Dig. Lim. of Act. §§ 16-31; 12 Dec. Dig. Lim. of Act. § 6. It is not construed to bar a remedy upon a cause of action accrued at its passage, unless the legislative intent to bring such result is expressed or necessarily implied from the language used. "The general rule of construction applicable to all statutes is that they are not to be construed as retroactive unless it clearly appears from their language

that they were so intended. A statute ought never to be so construed as to cut off an existing right if it be reasonably susceptible of any other construction." *Mitchell, J.*, in *Powers v. St. Paul*, 36 Minn. 87, 30 N. W. 433.

2. The postponement of the time when a statute shall become effective evidences an intent to make it of retrospective operation. *Burwell v. Tullis*, 12 Minn. 572; *Stine v. Bennett*, 13 Minn. 153. If such is not the intent, why the postponement? In the case last cited the court said: "No reason is apparent why the lawmakers should depart from the ordinary course of legislative action by postponing the operation of the law, except it be that parties interested might have notice of the passage of the law, and proceed to exercise their existing rights before its operation should prevent them from doing so." In *Duncan v. Cobb*, 32 Minn. 460, 21 N. W. 714, involving a statute limiting the time in which a foreclosure might be made, the operation of the statute being postponed for a year, the court said that "the apparent purpose of the legislature in allowing a year to elapse before the act should become operative, [24] was . . . to afford opportunity to all having existing rights of foreclosure to pursue the remedy before the bar of the statute should intervene." In speaking of a limitation statute affecting actions on judgments, Judge Sanborn, in *Wrightman v. Boone County*, 88 Fed. 435, 31 C. C. A. 570, said: "The second section of the act provides that it shall not take effect until one year after its passage.

. . . A construction that the act has no application to judgments rendered before its enactment would render this provision nugatory." And see *Wrightman v. Boone County*, 82 Fed. 412; *Eaton v. Supervisors of Manitowoc County*, 40 Wis. 668.

3. If the amending statute of April 21, 1915, had done nothing but give a limitation, the postponement of its operation might well enough be conclusive of an intent to give a retrospective operation. It did much more than prescribe a limitation. It was a revision of the act of 1913. The title of the 1913 act and 13 of its 36 sections were amended and three sections were added. Some of the changes were formal; others were substantial. The rates of compensation were changed. The provisions as to dependents and partial dependents were rewritten. The statute was made applicable to minors. There were changes in procedure. Before the amended act could become efficiently and justly operative, it was necessary that those interested adjust themselves to it. This furnished a sufficient legislative reason, a very apparent and a persuasive reason, for the postponement of its operation. Indeed, the act of 1913, our first compensation act, was not effective for six months after its passage, and this for no rea-

son other than that there might be an appropriate adjustment to the changed relation between employer and employee and adequate preparation for it. If the operation of the 1915 act had not been postponed, it would have been immediately effective. It would have operated prospectively but not retrospectively. *Powers v. St. Paul*, 38 Minn. 87, 30 N. W. 433; *Birmingham v. Lehigh, etc. Coal Co. (N.J.)* 95 Atl. 242. And see cases cited in paragraph 1 preceding. It would not have barred or limited a remedy upon a cause of action accrued. The basis of the claim that it was intended to operate retrospectively is that the postponement evidences the legislative intent to that effect, the purpose being to enable those whose causes of action had accrued to present them in the interval. There is no other evidence of such intent. [25] The argument is legitimate, but there were wholly adequate reasons why the operation of the act should be postponed, though it contained no statute of limitation. The reason of the postponement is sufficiently explained without adverting to the limitation. A change from no express limitation upon the time in which to present a claim for an accrued cause of action to a limitation of 70 days, that is, from April 21 to July 1, would be radical. It would be harsh. It might result in an employee losing his remedy without actual fault. The Workmen's Compensation Act is remedial and liberal and was intended to protect the employee. There was no pressing need for so stringent a limitation upon accrued causes of action. It would at once meet an argument on behalf of the workman that it unconstitutionally deprived him of a fair opportunity to present his claim. We should not ascribe to the legislature an intent to make such limitation. We hold that the act of 1915 is not retrospective.

Our attention is directed in support of the conclusion which we have reached to our prior holdings that the right to compensation is determined by the statute in force at the time of the injury. *State v. District Ct.* 131 Minn. 96, 154 N. W. 661; *State v. District Ct.* 132 Minn. 249, 156 N. W. 120. These holdings are not significant upon the question before us. They involve no question of the prospective or retrospective operation of a limitation statute. They involve questions of substantive rights under the compensation acts. We do not forget that a statute of limitation concerns the remedy and not the right.

Judgment reversed.

NOTE.

Workmen's Compensation Act as Retrospective in Operation.

Applying the rule that a statute will be deemed to be prospective in the absence of

language clearly indicating a contrary intent. It is held that a workman's compensation act has no application to an injury occurring before the act took effect. *Arizona, etc. R. Co. v. Clark*, 207 Fed. 817, 125 C. C. A. 305; *Moriarty v. Miller*, 99 Neb. 14, 157 N. W. 329; *Sexton v. Newark Dist. Tel. Co.* 84 N. J. L. 85, 86 Atl. 451.

In *Salem Hospital v. Olcott*, 67 Ore. 448, 136 Pac. 341, it was said: "The act took effect, as already stated, not prior to November 4, 1913, the date of the election at which it was approved by the people. 'June 30th next following the taking effect of this act' cannot mean anything else than June 30, 1914. It is only the workman who sustains personal injury after this last-mentioned date and is otherwise qualified that is entitled to the benefits of the act, and it is only for such workmen that the commission is authorized to provide hospital accommodations under section 23 of the act. Until after June 30, 1914, there cannot be anyone who may enjoy the bounty of the statute."

In *State v. District Ct.* 128 Minn. 221, 150 N. W. 623, the court said: "We are clear that the statute was intended to apply to relations of employer and employee existing at the time of its passage and continuing thereafter, and we so hold. But this does not render it obnoxious to the constitution, as impairing the obligations of the contract, arising from such relation. As remarked in the *Mathison* case and held by the courts generally, no person has any vested right to a rule of law or form of procedure, except perhaps when some form of redress permitted by existing law is expressly stipulated for in the contract." But in *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L.R.A. (N.S.) 694, it was said: "As to the suggestion that this statute impairs the obligations of contracts it is sufficient to say that it can of course not affect contracts in existence and unexpired at the time it is put into operation by the employer."

An amendment of a workmen's compensation act in a matter of substantive right does not apply to an injury occurring before the amendment became effective. Thus an amendment providing for the maturing of the instalments of compensation and the payment of a lump sum does not apply to a claim pending at the time it was enacted. *Texas Employers' Ins. Assoc. v. Bryan (Tex.)* 198 S. W. 342; *Martin v. Cape*, 49 Quebec Super. Ct. 347; *Jennings v. Brissette*, 25 Quebec K. B. 21. So a provision for notice of injury is substantive, and an amendment relating thereto does not affect a claim under a prior accident. *Schmidt v. O. K. Baking Co.* 90 Conn. 217, 96 Atl. 963, wherein the court said: "The Act of 1913 was in force when this claimant's injuries were received, when the thirty days provided by it for notice thereof to be given

to his employer had run, when notice was in fact given to his employer, and when the attempt to enforce his claim was begun. Whatever right of compensation he might have had thus became fixed, and the extent of it determined, or, rather, the elements to be considered in its determination became fixed. Whatever inchoate right, arising from his injuries, he may have lost by noncompliance with the conditions precedent to a definite and enforceable claim, was then lost. Whatever that loss was, it could not be restored to him by subsequent legislation. Any attempt to do so would be to deprive his employer of a right vested in it under its contract."

Since the claim of a dependent accrues at the death of the workman, an amendment enacted after the injury but before the death applies to such a claim. *State v. District Ct.* 131 Minn. 96, 154 N. W. 661; *State v. District Ct.* 132 Minn. 249, 156 N. W. 120. As to the time as of which the fact of dependency is to be determined, see the notes to *Lee v. Ship Bessie*, Ann. Cas. 1913E 477, and *Blanton v. Wheeler*, etc. Co. reported post, this volume, at page 747.

An amendment imposing a time limit on proceedings to secure compensation does not apply to a proceeding based on a prior accident. *State v. District Ct.* (Minn.) 164 N. W. 812; *Birmingham v. Lehigh*, etc. Coal Co. (N. J.) 95 Atl. 242; *Baur v. Essex County*, 88 N. J. L. 128, 95 Atl. 627. And see the reported case. In the case first cited it was said: "Relator asks us to adopt the rule that the holders of claims accruing prior to the 1915 statute are granted the period fixed by that statute after the statute went into effect in which to present their claims. In other words, that the time which elapsed before the statute became operative is disregarded and the cause of action is to be deemed to have accrued at the time the limitation statute became effective. This rule has been adopted by creditable authority. The fact is, a new statute of limitation enacted in general terms, applied literally, would often bar existing rights of action without a fair chance to present them. Such a result would often be harsh and would sometimes render the statute unconstitutional. To avoid such a result and to give the statute a construction that will enable it to stand, courts have adopted rules of construction which in fact modify the literal meaning of the statute. The rules of construction adopted by different courts are not harmonious. One rule is to construe the statute as applying only to causes of action arising after its passage, unless a contrary intent is made to appear. A second rule is to construe the statute as applying only to such existing actions as have already run a portion of the statutory time but which still have a reasonable time left

for prosecution before the statutory time expires. A third rule is to construe the statute as affecting existing causes of action but as commencing to run at the time when the statute takes effect, so that pre-existing causes of action not already barred are treated as if accruing at the time of the enactment of the new statute. The last rule is that adopted by the Supreme Court of the United States. *Lewis v. Lewis*, 7 How. 776, 12 U. S. (L. ed.) 909; *Sohn v. Waterson*, 17 Wall. 596, 21 U. S. (L. ed.) 737. See also 1 Wood, Limitations (4th ed.) p. 76; 25 Cyc. 994. . . . The first rule is, however, the rule adopted in this state. *State v. General Acc. F. etc. Assur. Corp.* 134 Minn. 21, 158 N. W. 715, and cases there cited."

In *Texas Employers' Ins. Assoc. v. Bryan* (Tex.) 198 S. W. 342, it was held that an amendment creating a new tribunal did not divest jurisdiction of a pending proceeding.

An amendment as to a matter of procedure such as the mode of review applies to a pending proceeding. *People v. McGoorty*, 270 Ill. 610, 110 N. E. 791.

GRINNELL

v.

WILKINSON.

Rhode Island Supreme Court—July 6, 1916.

39 R. I. 447; 98 Atl. 103.

Workmen's Compensation Acts — Procedure — Review of Facts.

On appeal from a judgment dismissing the petition for compensation under the Workmen's Compensation Act (Pub. Laws 1911-12, c. 831), where the trial justice made no findings of fact upon the evidence adduced, the supreme court has jurisdiction only to determine the proposition of law on which dismissal was had, and cannot determine the facts.

[See Ann. Cas. 1916B 475; Ann. Cas. 1918B 647.

Scope of Act — Injury Received in Another Jurisdiction.

A carpenter hired in the state of Rhode Island, and while engaged in the master's work in the state of Connecticut, was injured. He sought recovery under Workmen's Compensation Act (Pub. Laws 1911-12, c. 831). Article 2, § 21, declares that an employee shall, after injury, at reasonable times during the continuance of his disability, if requested by his employer, submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the state, and declares that, if the

employee refuses to submit to such examination, his right of compensation shall be suspended, and compensation during the period of suspension shall be forfeited. Article 2, § 1, in broad terms gives employees compensation for personal injuries by accident arising out of and in the due course of employment, while article 3, § 16, declares that proceedings shall be brought either in the county where the employer or employee lives or has his usual place of business, and that changes of venue may be granted. Pub. Laws 1915, c. 1268, provides for a report of injuries. It is held that, as the act was obviously intended to furnish a comprehensive scheme for the compensation of injured employees, it governed injuries received by the employee, hired in the state, while at work for the master without the state.

[See note at end of this case.]

Appeal from Superior Court, Providence and Bristol counties: TANNER, Judge.

Petition for compensation under workmen's compensation act. William T. Grinnell, petitioner, and Edward Wilkinson, respondent. Judgment for respondent. Petitioner appeals. The facts are stated in the opinion. REVERSED.

George A. Breaden and Edward W. Bradford for appellant.

Ernest P. B. Atwood for appellee.

[447] PARKHURST, J.—This is a petition for compensation under Public Laws, Chap. 831 (1912), commonly known as the "Workmen's Compensation Act." The petitioner alleges and the answer admits that the parties were subject to the provisions of the Workmen's Compensation Act. The petitioner was employed by respondent as a carpenter and his employment commenced at Providence, in the course [448] whereof he was directed by his employer to go without the State, to New Haven, in the State of Connecticut, to complete work already commenced by him at Providence. While so engaged at New Haven he claimed to have received a splinter in his finger, on the 20th day of May, 1915, and that as a result of receiving said splinter in the middle finger of his right hand, blood poisoning set in from which he has never recovered. The petitioner claims that he personally brought the attention of his employer to his injury at the hospital, within a period of thirty days from the occurrence of the accident. The petition was heard before the Presiding Justice of the Superior Court at Providence and denied for the reason substantially that the statute does not apply because the injury was received outside the state. The matter is before this court on an appeal duly taken by the petitioner from the decision of the Presiding Justice.

The question to be decided is whether our statute gives to an employee whose contract of service is within its scope the right to recover compensation for injuries resulting from an accident in the State of Connecticut.

The petitioner in his reasons of appeal says that the decree appealed from "is against the evidence and the weight thereof." But the Presiding Justice, ruling as above against the petitioner and dismissing the petition solely on the point of law stated, made no findings of fact upon the evidence adduced before him; this court therefore has before it upon this appeal only the question of law involved in the decision above referred to; it has no jurisdiction under the act to try and determine the facts of the case. Petitioner's counsel offered no argument upon this point; the argument on this point on behalf of the respondent by his counsel is disregarded for the reasons stated.

Since acts relating to workmen's compensation are of comparatively recent date in this country, the precise question raised in this case has been presented to the courts [449] of this country in comparatively few instances, and quite recently.

The Presiding Justice in his rescript dismissing this petition cites only four cases, viz.: *In re Gould*, 215 Mass. 480, Ann. Cas. 1914D 372, 102 N. E. 693; *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620; *Hotez v. Marine Co.* 144 N. Y. S. 355, and *Tomalin v. Pearson*, 100 L. T. N. S. 685, also found in 2 B. W. C. C. 1. Of these cases *Johnson v. Nelson* is a Minnesota case decided January 8, 1915, and simply holds, substantially, that the plaintiff was an employee whose contract of service related only to work in Wisconsin and was carried out in that state where he was injured, and that both he and his employer were subject to the terms of the Workmen's Compensation Act of Wisconsin, and that his right of recovery was governed thereby; that the sole remedy of the plaintiff was under the Wisconsin Act, and that he could not recover in Minnesota. This case has no bearing upon the question here under consideration.

The case of *Hotez v. International Mercantile Marine Co.* 83 Misc. 25, 144 N. Y. S. 355 (1913), was for a marine tort where the complainant charged negligence attempted to be imputed to the owner of a vessel through a subordinate officer. The case was in tort for negligence, and it was held that the Workmen's Compensation Act of New York did not cover the case of torts committed without the State, and that the action could not be maintained as a common law action under the evidence. This case has no application to the case at bar.

The case of *Tomalin v. Pearson*, 100 L. T. N. S. 685, 2 B. W. C. C. 1, in the court of

appeal for England relates to the English Workmen's Compensation Act, and holds that an employee injured in work done at Malta under contract with a British employer has no right of recovery, under the English Act, which by its terms as interpreted by the English Court covers only injuries received within the territorial limits of the United Kingdom. This construction is based principally upon the fact that there is no express language in the act to cover injuries suffered outside the United Kingdom, except in case of a limited class of seamen; [450] and it appears to be held that this express extension to a limited class of seamen is evidence of an intention on the part of Parliament to limit the effect of the act otherwise as above stated. See also *Hicks v. Maxton*, 1 B. W. C. C. 150; *Schwartz v. India Rubber, etc. Co.* [1912] 2 K. B. 299, where the English Act is held not to apply to foreign injuries.

The leading case in this country up to 1913 was *In re Gould*, 215 Mass. 480, Ann. Cas. 1914D 372, 102 N. E. 693, decided September 12, 1913, and it was doubtless upon this authority that the Presiding Justice relied in his decision, and he is, at first sight, apparently supported thereby. Since that time, however, certain other cases have been decided which in the opinion of this court more closely apply to our act and which we shall later discuss.

Gould's case, *supra*, was a petition under the Massachusetts Act; the petitioner was a citizen resident of Massachusetts and made a contract of service with a Massachusetts corporation and accepted the benefits of the act. "In the course of his employment he received the injury out of which the claim arises in the State of New York. He was principally employed in Massachusetts, but at times incidentally worked in New York and other States." After discussing certain incidental questions of practice which are not here material, the court proceeds to discuss the construction of the act, and while conceding that the Legislature has power if it sees fit to give the act such scope as to cover injuries received outside the State, finds no express words giving it such scope, which is deemed to be significant; and then proceeds to examine its provisions in detail to see whether there is any intent to be gathered therefrom to make the act apply to such injuries. At page 484, the court says:

"A consideration of the act in detail fails to disclose any plain intent to that end. On the contrary, several provisions indicate solely intrastate operation. Part II, § 19, provides that the employee who has received an injury shall submit himself on request to an examination 'by a physician or surgeon authorized to practice medicine under the laws of the Commonwealth.' It hardly can be inferred from this [451] language that the Legislature

intended that physicians or surgeons from Massachusetts should journey to the place of injury, or that those authorized to practice under the laws of other states should make the examination. Part III of the act, which relates to procedure, and which as has been pointed out creates a wholly new method of procedure, deals only with boards and courts within this Commonwealth. No provision is made for enforcing rights as to injuries occurring outside the State. Part III, § 7, as amended by St. 1912, c. 571, § 12, requires that the hearings of the committee on arbitration 'be held in the city or town where the injury occurred.' Obviously, this cannot relate to injuries received outside this Commonwealth. Section II, as amended by St. 1912, c. 571, § 14, provides that in the event of resort to the court copies of the papers shall be presented 'to the Superior Court for the county in which the injury occurred or for the county of Suffolk.' The words 'for the county of Suffolk' may be presumed to be inserted for convenience, as the offices of the Industrial Accident Board are in Suffolk and courts are continually in session in that county, and not in order to make provision for injuries occurring outside the State. Part III, § 18, requires the employer, within forty-eight hours, not counting Sundays and legal holidays, after the accident resulting in personal injury, to make a report 'in writing to the Industrial Accident Board.' Part IV, § 18, authorizes the directors of the Massachusetts Employees' Insurance Association, created by the act, to make and enforce reasonable rules and regulations for the prevention of injuries on the premises of the subscribers, and for this purpose the inspectors of the association shall have free access to all such premises during regular working hours.' This section is in furtherance of that part of the purpose of the act as set forth in its title for the prevention of industrial injuries. But it cannot be operative outside of Massachusetts. . . ."

From these various provisions of the Massachusetts Act the court finds an intent to confine the operation of the act to [452] accidental injuries happening in the State, and that it is not applicable to injuries arising out of the State. On page 488, the court says: "If employees and employers from different States carry their domiciliary personal injury law with them into other jurisdictions, confusion would ensue in the administration of the law, and at least the appearance of inequality among those working under similar conditions. If such a result had been intended by the General Court it cannot be doubted that it would have been disclosed in unambiguous words."

These remarks do not seem to be applicable to the case before the court, but seem to be used *arguendo*, in the general discussion

of the scope and intent of such Acts generally. In this State we have found no difficulty such as that last referred to in the administration of the law; for in the case of *Pendar v. H. & B. American Mach. Co.* 35 R. I. 321 (1913) 87 Atl. 1, L.R.A.1916A 428, a case of an injury which occurred in Massachusetts to a citizen of Rhode Island who was employed in Massachusetts by a corporation which had taken the benefit of the act in that State we held that: "Where an accident occurred in a foreign jurisdiction, under whose laws plaintiff waived his right to bring a common law action to recover by failing to give notice in writing to his employer at the time of the hiring that he claimed his right to bring such action, plaintiff cannot bring in this State an action at common law to recover for the injury." See also *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620 (1915); *Albanese v. Stewart*, 78 Misc. 581, 138 N. Y. S. 942; *Schweitzer v. Hamburg-Amerikanische*, etc. 149 App. Div. 900, 134 N. Y. S. 812; *Schweitzer v. Hamburg-Amerikanische*, etc. 78 Misc. 448, 138 N. Y. S. 944.

Returning now to the specific provisions of the Massachusetts Act above referred to in the quotation from Gould's case, *supra*, upon which the court principally relies to support its finding that the Massachusetts Act was intended to apply solely to injuries received within that State, we find only two of these provisions which are the same in substance as are certain provisions of the act of this State. The first of these is the provision that the employee "shall, [453] after an injury, at reasonable times during the continuance of his disability, if so requested by his employer, submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the State," etc. (Pub. Laws 1912, Chap. 831, Art. II, § 21, p. 436.)

We do not find that this provision is important in determining the intent of our law, bearing in mind at all times that our law nowhere in terms excludes the consideration of injuries occurring out of the State, but in broad and general terms gives to the employee compensation for "personal injury by accident arising out of and in the course of his employment." (Art. II, § 1.) The provision for examination by a physician or surgeon is for the benefit and protection of the employer, and the act further provides: "If such employee refuses to submit himself for any examination provided for in this act, or in any way obstructs any such examination, his rights to compensation shall be suspended and his compensation during such period of suspension may be forfeited." The provisions here referred to are general and apply to any time after the injury, during the pendency of proceedings, and during the operation of the decree, "during the continuance of his

disability." It is not impossible for such examination to be made, at the request of the employer, even in another State; it will probably happen in most cases that a resident of this State injured elsewhere will come home for treatment and for the prosecution of his remedy under the law, and will be subject to examination here. At all events when the case arises it will be disposed of according to the act; and we do not propose further to discuss this provision until it shall be necessary, except to repeat that in our opinion it is not of importance in determining the general intent of the act. (See *Rounsaville v. Central R. Co.* 87 N. J. L. 371, 94 Atl. 392, where there is a similar provision in the law; but no inference of intent to confine the act to injuries arising in the State is drawn.)

The next provisions of the Massachusetts Act, referred to in Gould's case, *supra*, relate to procedure, requiring that [454] hearing "be held in the city or town where the injury occurred;" that papers shall be presented "to the Superior Court for the county in which the injury occurred," etc. These provisions in our opinion furnish the best ground in support of the decision in Gould's case; there are no such provisions in the Rhode Island Act, which provides (Art. III, § 16, p. 444). "Sec. 16. Proceedings shall be brought either in the county where the accident occurred or in the county where the employer or employee lives or has a usual place of business. The court where any proceedings is brought shall have power to grant a change of venue." By the general provisions of the act original jurisdiction of these proceedings is vested in the Superior Court. From the provisions last quoted it will be seen that there is no difficulty about the jurisdiction, and it would almost seem that the General Assembly in making this provision had taken pains to provide for jurisdiction in cases where the injury occurred out of the State. In our opinion no restriction of the scope of the act is to be found in this regard.

The provision regarding reports of injuries is found in Public Laws, January, 1915, Chapter 1268, p. 261, et seq., and in some respects is similar to the provision of the Massachusetts Act referred to in Gould's case, *supra*. We do not regard it as of the slightest importance in determining the construction and scope of the act as a whole. The other provisions referred to in Gould's case are not found in our act. We do not regard the decision in Gould's case as a precedent which we should follow, partly because of the differences between the act there discussed and our act, as above shown; partly because we do not agree with certain reasoning therein set forth. We prefer the broader view set forth in certain cases hereafter cited from Connecticut, New Jersey and New York.

The Workmen's Compensation Act of Connecticut (Laws of 1913, c. 138 of Public Acts; see also 2 Bradbury's Workman's Compensation, p. 1144) in its general purpose, [455] scope and provisions, with minor differences in details, is very similar to the Rhode Island Act. The same question here involved arose under the act and was decided in June, 1915, in the case of Kennerson v. Thames Towboat Co. 89 Conn. 367, 94 Atl. 372, L.R.A. 1916A 436. The case was a proceeding for compensation from the defendant, a Connecticut corporation, for the death of an employee, a citizen of Connecticut, who was in the employ of the defendant on a towboat and whose death occurred by drowning in Raritan Bay, New Jersey, when the tug on which he was employed foundered. After disposing of certain contentions advanced by defendant that the petitioner's claim was cognizable only in the admiralty courts, or under the Federal Employer's Liability Act, and some points of practice, the court in its opinion says (p. 374): "We come then to the next question, whether our compensation act provides for compensation for injuries received outside our State and arising out of and in the course of the employment. The respondent insists that our act has no extraterritorial effect. That is not the precise question to be determined, but, rather, whether our act provides for compensation arising out of a contract of employment authorized by our act, for injuries suffered without our jurisdiction. If our act authorizes such a contract, recovery may be had; otherwise, not.

"Unless the intention to have a statute operate beyond the limits of a State is clearly expressed or reasonably to be inferred from the language of the act, or from its purpose, subject-matter, or history, the presumption is that the statute is intended to have no extraterritorial effect. A like presumption should control the operation of a contract based upon a statutory authority.

"We find no clearly expressed intention in our act that the contract authorized should operate without the State. If found in the act, it must be found as an inference reasonably to be inferred from the language of the act, read in the light of its purpose, subject-matter, and history. In our search for such an intention it is all important that we do [456] not forget the remedial character of the act, and that we construe its provisions broadly and liberally 'in order to effectuate its purpose.' Hotel Bond Co.'s Appeal, 89 Conn. 143, 93 Atl. 245.

"The remedy provided by our compensation act is substitutionary in character, furnishing what was purposed to be a more humanitarian and economical system as a substitute for one deemed wasteful to industrial enterprises and commerce, and unfair to employees. Its

intent was to afford its protection to all Connecticut employers and employees who might voluntarily choose to make its provision for compensation for injury a part of their contracts of employment. It assumed that accident is incident to employment, and purposes to charge its cost in the case of every injury not caused by the wilful and serious misconduct or intoxication of the injured employee to the industry in which it occurred. It intended that the employee should know what compensation he or his dependents would receive in the event of injury, and that payment should be made speedily by a procedure at once simple and inexpensive. It intended that the employer should know his liability in this regard, and so might include it among the items charged to operation. If our act intends its contracts of employment to include compensation for injuries occurring only within our jurisdiction it manifestly defeats its own ends. In that case the employer may not charge to the industry the compensation for injuries occurring without the State, and the employee or his dependents may not collect the same. Neither employer nor employee can know what portion of this period of employment will be subject to the provisions of the act, and no provision for insurance of this liability will be practically possible, since it may not ordinarily be known what part of the service will be in and what part out of the State, or in what jurisdiction the service will be performed, in industries and commercial enterprises engaged in intrastate and interstate employment. The State boundary is not the limit of very many businesses. To subject [457] them to the laws of the many jurisdictions in which they may be engaged will be especially burdensome to them, and involve them probably in greater expense and liability and far greater difficulties than under the old system. Equally hard will it prove to the employee since he must pursue his remedy in the State of the accident, or the federal court applying that State's law, and thus he may be brought under any one of many different compensation acts, with whose provisions he cannot hope to be familiar, some acts contractual in character, some compulsory, some optional, and some *ex delicto*, and he may find he has forfeited the benefit of the foreign act through failure to comply with its provisions. A reading of the several acts now in force convinces us that these difficulties are not imaginative, but imminent actualities.

"Is it reasonable to infer that our legislature, inaugurating a new system, based upon humanitarian and economical considerations, should intentionally frustrate the object of the new system, and cast a multitude of employers and employees into a maelstrom of trouble, uncertainty, and liability? On the

other hand, is it not reasonable to infer that the Legislature, having bottomed the right to compensation upon contract, deemed unimportant the place of injury, since it must be presumed to have known that it, and not the place of injury, would govern the recovery. Such a construction of the act would lift insuperable burdens from industry and commerce and workmen, and give to each his course and the ascertained fruits of the contract of his will. Whether the contract shall include injuries in a jurisdiction other than where the contract was made is determined by the expressions or implications of each act.

"Section 1, pt. A, of our act recites that, 'in an action to recover damages for personal injury,' certain defenses shall not be available. Here is no limitation to injuries received within the State. We through comity, enforce action for injuries received outside the State when not against our law or public policy. The natural construction of this language makes it include every action wherever it originates.

[458] Section 1, pt. B, recites that when employer and employee have accepted part B, the employer shall not be liable to any action for damages for personal injury sustained by his employee in the course of his employment, but the employer shall pay compensation on account of such injury as provided by the act. Do not the words 'any action' mean what they say? And have we any more right to insert after them 'within the State' than 'within or without the State?' In this section the acceptance of the act is by its express terms a renunciation and waiver of all rights and claims arising out of injuries sustained in the course of the employment, except as specified. It seems to us plain that the rights and claims waived are not merely those arising in Connecticut, but anywhere.

"In Section 8, pt. B, compensation is required to be paid for 'any injury' which incapacitates for more than two weeks. There is no warrant for construing any injury to consist of one arising within the State.

"By Section 20 every employer who has accepted part B 'shall keep a record of such injuries sustained by his employees in the course of their employment . . . and send each week to the commissioner such report of said injuries as the commissioner may require.' It cannot be that the record intended was solely of the injuries happening within the State. Obviously it was intended to embrace all injuries occurring to such employees everywhere; any other construction would do violence to the ordinary meaning of the word used and to the manifest purpose in keeping the record.

"Similarly the notice of injury of Section 21, and the voluntary agreement of Section

22, relate to every injury, and not merely those occurring within the State.

"Under Section 29 any employer may enter into a substitute system of compensation with his employees in lieu of the compensation of the act. The Legislature had the undoubted power to make the substitute system apply to injuries without as well as those within the State. Is it likely that the Legislature intended a substitute system [459] applicable to its employees when employed within the State, and inapplicable when employed elsewhere? How could the employer engaged in intrastate and interstate employment take advantage of the substitute system? If the agreement of this character had to be confined to the injuries received in the State, neither employer nor employee would undertake it. Practically the provision for a substitute system would be nugatory.

"Certain sections of the act are referred to as indicating that the act has relation exclusively to intrastate injuries. Thus Section 7, which requires the employer to furnish medical and surgical aid, and Section 23, which requires the injured employee to submit himself to examination by a reputable physician, are said necessarily to refer to Connecticut practitioners. We see no practical reason why these sections may not refer to the practitioner without the State as well as within it. Unless this limitation be read in the section, the language used does not express the limitation."

The opinion then proceeds to discuss certain questions as to hearings before commissioners and courts, not contained in the Rhode Island Act, which are not material here; and proceeds, page 379:

"In legislative acts inaugurating a new system not infrequently are found contradictory provisions, and it becomes the duty of the court to reconcile them so far as it can. It does this whenever it is possible in such way as to sustain the act and carry out its purposes. This we believe to be our present duty. In a sense the injury may be said to have been sustained in the place of the contract, and if appeal is taken, in cases of injury, occurring without the State, to the county of the contract, the terms of the act will be reasonably satisfied. The precise question we are considering has been the subject of discussion in two cases. One under the New Jersey Act, a contractual optional act very similar to our own, where the trial court, in *Deeny v. Wright, etc. Lighterage Co.* 36 N. J. L. J. 121, construed the contract [460] under the New Jersey Act as we construe these contracts. The other under the Massachusetts Act, where the Supreme Court construed their act as confined to accidents within the State. In *re Gould*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D 372. We must accept the

construction accorded the Massachusetts Act by its Supreme Court. It may be well, however, to point out that the court does not state that its act is contractual in character. That, as we have indicated, is of final importance in the conclusion we reach concerning our own act. Then, too, under the Massachusetts Act, the employee is merely the beneficiary under a contract between the employer and the insured; with us the employer and employee enter into a contract relation. In its reference to and comment upon certain sections of their act the court says that there must be found within the act from 'unequivocal language,' or 'plain and unmistakable words,' that the act was intended to relate to injuries without the Commonwealth. We have adopted a broader rule. We read our act in the light of the purpose, subject-matter, and history of the act to determine whether it expressly or by reasonable inference intended to include in its contract injuries without our jurisdiction. This is our ordinary rule in the interpretation of statutes. The Massachusetts court states that: 'The subject of personal injuries received by a workman in the course of his employment is within the control of the sovereign power where the injury occurs.'

"And it argues that, if the act had intended employers and employees from different states to carry their domiciliary personal injury law with them into other jurisdictions, it would have expressed its intent in unambiguous words. This argument concerns a proceeding to enforce an *ex delicto* claim, not one for compensation by way of contract. It is also argued that, if an act is given extraterritorial force, similar effect must be given to like laws of other States. If contracts of employment cover compensation for injuries outside the State, recovery for these will be governed by the usual rules for the construction and enforcement of all [461] contracts. We should give similar effect to contracts of like character to those before us, though made under a compensation act of another jurisdiction, provided they did not conflict with our law or public policy, and the machinery provided for the ascertainment and collection of the compensation could be used in our jurisdiction.

"Where, as with us, the determination of the award is committed to a board or commission under a specified procedure, there will be serious obstacles to the enforcement of the contract in a foreign jurisdiction. Bradbury's Workman's Compensation Law (Ed. 1914) p. 52. If it should be necessary to so rule, no hardship would result. The parties in interest would be relegated to the place where they had elected to make their contract and no questions of conflict of laws could arise. At the base of this question is the character of the compensation. Mr. Bradbury, repudi-

ating his earlier view, stoutly maintains that, if the act be contractual, the contracts arising will, unless a contrary intent appears, be found to cover injuries without as well as within the State. We think his later conclusion sound and one which will prove beneficial alike to employer and employee."

Also in June, 1915, the Supreme Court of New Jersey passed upon the question whether the act of that state applies where the accident occurs in another state, in the case of *Rounsaville v. Central R. Co.* 87 N. J. L. 371, 94 Atl. 392. In this case the petitioner was employed in New Jersey by the defendant, a New Jersey corporation, as a brakeman on a train which went into Pennsylvania, and was injured in Pennsylvania; his wages were paid in New Jersey; it was held that his contract of service was a New Jersey contract; both parties were subject to the New Jersey Act. It was held that the act covered the case, and the petitioner could maintain his proceeding. The New Jersey Act is, in its general features and scope very similar to the Connecticut and Rhode Island Acts; the provision requiring the employee to submit to medical examination in the state by a physician authorized [462] to practice medicine in the state is almost the same in essential terms as in the Rhode Island, and differs lightly from the Connecticut Act. (See Laws of New Jersey, 1911, Chap. 95, § 17, p. 141.) After disposing of certain preliminary questions and deciding that the liability of the employer under the act was contractual, and discussing a certain previous decision not directly in point, the court said, page 393: "We are now dealing with the simpler question, whether a New Jersey court will enforce a New Jersey contract, according to the terms of a New Jersey statute. The question hardly calls for an answer. The place where the accident occurs is of no more relevance than is the place of accident to the assured, in an action on a contract of accident insurance, or the place of the death of the assured in an action in a contract of life insurance."

It is notable that these two cases should each have been independently decided by the courts of Connecticut and New Jersey in June, 1915, and have reached the same conclusion upon the same point in the consideration of statutes essentially similar.

The latest case which has come to our attention is *Post v. Burger*, 216 N. Y. 544, Ann. Cas. 1916B 158, 111 N. E. 351 (January, 1916), a New York case, where the same question arose under the Workmen's Compensation Act of New York. The case follows substantially the same line of argument and arrives at the same conclusion as the cases of *Kennerson v. Thames Towboat Co.* supra. and *Rounsaville v. Central R. Co.* supra, both of which it cites with approval. See also *Deeny*

v. Wright, etc. Lighterage Co. 36 N. J. L. J. 121; 1 Bradbury Workman's Compensation, p. 50, 52 et seq., cited with approval in the Kennerson case, supra, p. 378, and in the Post case, supra, p. 354.

We are of the opinion that the reasoning of the cases above cited from New York, New Jersey and Connecticut is quite applicable to the case at bar; that under the Workmen's Compensation Act of Rhode Island the relation of employer and employee is contractual and the terms of the act are to [463] be read as a part of every contract of service between those subject to its terms; that on principle and in reason and in view of the purpose, scope and character of the act it should be construed and held to include injuries arising out of the State as well as those arising within it; and that the weight of authority upon acts similar to our own gives full support to our conclusion. Gould's case, supra, stands alone so far as any cases have come to our attention and is only deemed to be authoritative on the particular statute therein considered, which we regard as different from ours in many important respects.

The Superior Court was in error in dismissing the petition in this cause for the reasons above set forth; the appeal is sustained, the decree of the Superior Court is reversed, and the cause is remanded to the Superior Court for a trial upon its merits.

NOTE.

Workmen's Compensation Act as Applicable to Injury Received in Another Jurisdiction.

Scope of Note, 625.

In General, 625.

Effect on Common-law Rights, 627.

Scope of Note.

The earlier cases discussing the applicability of a workmen's compensation act to an injury received in another jurisdiction are collated in the notes to *In re Gould*, Ann. Cas. 1914D 372, and *Post v. Burgher*, Ann. Cas. 1916B 158. This note reviews the recent cases.

In General.

It is generally held that a compulsory workmen's compensation act has no extra-territorial force, so that under such an act, in case of an injury received outside the jurisdiction where the contract of employment was made, no compensation can be recovered in that jurisdiction. *Hicks v. Maxton*, 1 B. W. C. C. (Eng.) 150; *Tomalin v. Pearson* Ann. Cas. 1913B.—40.

[1909] 2 K. B. (Eng.) 61; *Schwartz v. Indiana Rubber, etc. Co.* [1912] 2 K. B. (Eng.) 299; *Vincent v. La Cie De Chenun, etc.* 45 Quebec Super. Ct. 353; *North Alaska Salmon Co. v. Pillsbury* (Cal.) 162 Pac. 93; *Kruse v. Pillsbury* (Cal.) 162 Pac. 891, L.R.A.1917E 645. The contrary ruling is however made as to an optional act whose binding force rests in the assent of the parties. *Jenkins v. Hogan*, 177 App. Div. 36, 163 N. Y. S. 707; *Gooding v. Ott*, 77 W. Va. 487, 87 S. E. 862, L.R.A.1916D 637; *Foughty v. Ott* (W. Va.) 92 S. E. 143. And see the reported case.

In *Jenkins v. Hogan*, supra, it was said: "The claimant's employer, at the time the claimant received the injury, was a stevedore having its office in the city of New York, and engaged in loading and unloading vessels in New York harbor on both the New York and New Jersey shores, and was insured under the compensation statutes of both those states by the insurance carrier herein. The claimant was a longshoreman, and at the time of receiving the disabling injuries, May 15, 1916, was at work unloading a vessel at a pier at West New York, state of New Jersey. His family resided at Hackensack, N. J., where he had voted during the last ten years. The claimant, in order to be conveniently situated as to his work, and because he could not live so far away as Hackensack and follow his occupation, and not intending to return to Hackensack, hired a furnished room in New York city in December, 1915. From this room he went to his work each morning, returning at night, visiting his family every week or two, usually on Sundays, unless then employed. On April 28, 1916, the foreman of his employer came to claimant's said room and engaged him to go to work temporarily at said pier at West New York. Claimant commenced work there the next morning, and continued at work there until he was injured. Following the receiving of the injury he presented a claim for compensation under the New York statute. The insurance carrier appeared at the hearing before the New York state industrial commission and contested the jurisdiction of the commission. The objection of the insurance carrier was overruled and awards made, June 29th, of four weeks' compensation, and July 31st of five weeks' compensation, each at \$15 per week. July 18, 1916, an appeal was taken by the employer and insurance carrier from the award first made. . . . The decision in this case as to the liability of the employer under the Workmen's Compensation Law is apparently controlled by that of *Post v. Burger*, 216 N. Y. 544 [111 N. E. 351, Ann. Cas. 1916B 158], in which case the employer and employee were residents of this state, and the contract of employment was made here, and the employee was injured while working without the state,

the court holding that the New York Workmen's Compensation Law applied, and that: "The act, in view of its humane purpose, should be construed to intend that in every case of employment there is a constructive contract between the employer and employee, general in its terms and unlimited as to territory, that the employer shall pay as provided by the act for a disability or the death of the employee as therein stated. The duty under the statute defines the terms of the contract."

In *Gooding v. Ott*, 77 W. Va. 487, 87 S. E. 862, L.R.A.1916D 637, the court said: "A distinction has been noted in some of the authorities between cases arising under compulsory statutes and those controlled by statutes, as in New Jersey, and we think in this state, which are optional. Where the statute compels submission by the employer and employee, there is no contract, as a general rule, enforceable outside of the state. But where, as in New Jersey and in this state, the statute makes acceptance optional, and the parties freely enter into the contract of employment with reference to the statute, the statute should be read into the contract as an integral part thereof, binding the parties, and enforceable in any jurisdiction the same as any other contract. Such is the holding, and we think the correct holding with reference to workmen's compensation statutes generally, of the New Jersey cases of *Deeny v. Wright*, etc. *Lighterage Co.* [36 N. J. L. J. 121]."

In *Gardner v. Horseheads Constr. Co.* 171 App. Div. 66, 156 N. Y. S. 899, the rule was confined to cases where the employment outside the jurisdiction is a mere incident to an employment therein. It appeared that the injured employee had been for several years in the service of a New York corporation, engaged continuously in jurisdictions other than New York. Being injured in Pennsylvania, compensation was sought in New York. The court said: "In this case the decedent had not been employed by the appellant in the state since 1912. His employment had not been continuous, but had been from time to time for certain jobs which were being performed entirely without the state. The contract of employment did not contemplate any work by him within the state; no such work was done. The statute in question is intended to regulate the relations between the employer and employee in hazardous employments within the state, and to protect the employee within the state from the ordinary risks of the employment, and to charge those risks upon the ultimate consumer. The mere fact that an employee is engaged by a resident of the state to go out of the state for service, and no service in the state is contemplated or done, cannot bring the employment within the act. Ordinarily a statute has no extraterri-

torial effect. But where the regular service of the employee is being performed in the state, and, as an incident to it, he goes over the state line temporarily, we have held that such temporary absence from the state does not relieve the employer from liability under this statute. The relations between the decedent and the company with reference to the work at Ford City depended upon the laws of the state of Pennsylvania, and the protection there given to the employer and the employee. The mere fact that the contract was made in the state, if it was made in the state, is not material here, when we understand that the contract related solely to work to be performed outside of the state. It follows, therefore, that the employment of the decedent was outside of the state of New York, and that he was not an employee, or engaged in an employment within the state at the time of his death."

In *Hagenback v. Leppert* (Ind.) 117 N. E. 531, a workman employed in Indiana sought to recover in that state for an injury received in Illinois, under a statute containing the following provision: "Every employer and employee under this act, except as provided in section 19, shall be bound by the provisions of the act whether injury by accident or death resulting from such injury occurs within the state or in some other state or in a foreign country." The court said: "The language of the foregoing sections is clear and definite. The acceptance of the act is not compulsory, but voluntary. There is nothing in the record to indicate or even suggest that either party gave notice of exemption as provided in section 3; and it is therefore conclusively presumed that they accepted the provisions of the act. Having elected to accept the act, every provision thereof became a part of the contract of service. By the terms of the statute the element of tort is eliminated; all remedies at common law or otherwise are excluded, and the employee's right to compensation arises out of the contract. This right, being contractual, accompanies the employee wherever he goes and abides with him until the contract of service is terminated."

It has been held that compensation may be recovered under the workmen's compensation act of the jurisdiction where the injury is received though the contract of employment was made elsewhere. *Douthwright v. Champlin*, 91 Conn. 524, 100 Atl. 97; *Davidheiser v. Hay Foundry, etc. Works*, 87 N. J. L. 688, 94 Atl. 309. So in *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620, wherein it appeared that a workman employed in Minnesota was injured in Wisconsin, it was held that recovery should be sought under the Wisconsin act. But in *Barnhart v. American Concrete Co.* 167 N. Y. S. 475, the court refused to allow compensation to the depend-

ents of a resident of New Jersey, who while in the employ of a New Jersey corporation was killed in New York.

A release given in the jurisdiction where the contract was made bars a proceeding for compensation in the jurisdiction where the injury occurs. *Leach v. Mason Val. Mines Co.* (Nev.) 161 Pac. 513.

Compensation cannot be allowed under the workmen's compensation act of a jurisdiction if the contract of employment was made and the injuries occurred elsewhere. *Lehmann v. Ramo Films*, 92 Misc. 418, 155 N. Y. S. 1032; *McCarthy v. McAllister Steamboat Co.* 94 Misc. 692, 158 N. Y. S. 563. In the case first cited it was said: "The defendant has demurred to this complaint and raises the question of jurisdiction. Section 18 of chapter 95, Laws of 1911, of the state of New Jersey, provides that in case of a dispute or failure to agree upon a claim for compensation between employer and employee either party may submit the claim to the judge of the court of common pleas of such county as would have jurisdiction in a civil case. It will thus be seen that the forum is provided under such law. This action, being a statutory one, must be strictly construed. The mere fact that the complaint alleges that personal service could not be obtained on the defendant is no ground for bringing the action in this court."

Effect on Common-law Rights.

In case a workman injured in one jurisdiction is by his election or by the terms of the workmen's compensation act, precluded from seeking a recovery in that jurisdiction other than as allowed by the act, he may not sue at common law in another jurisdiction to recover for the injury. *Piatt v. Swift*, 188 Mo. App. 584, 176 S. W. 434; *Albanese v. Stewart*, 78 Misc. 581, 138 N. Y. S. 942; *Wasilewski v. Warner*, 87 Misc. 156, 149 N. Y. S. 1035; *Verdicchio v. McNab*, etc. Mfg. Co. 178 App. Div. 48, 164 N. Y. S. 290; *Pendar v. H. & B. American Mach. Co.* 35 R. I. 321, 87 Atl. 1, L.R.A.1916A 428. But where a workman is not bound by the compensation act of the jurisdiction where he is injured, or there is no such act in that jurisdiction, he may sue in another jurisdiction though its workmen's compensation act is exclusive. *Hamm v. Rockwood Sprinkler Co.* 88 N. J. L. 564, 97 Atl. 730; *Reynolds v. Day*, 79 Wash. 499, 140 Pac. 681, L.R.A.1916A 432. In the case last cited it was said: "The hostility of our law is not directed against the remedial purpose of the common law. It extends that purpose to cases not reached by the common-law action. The rule of the common law is contemned not because it furnishes a remedy, but because the remedy is deemed inadequate. This is far from a declaration of policy which

would refuse that remedy where that remedy is the only alternative. There is nothing in the employers' liability act so hostile to the common-law remedy as to deny any remedy where the circumstances will permit the application of no remedy save that of the common law. The assertion that our law declares a policy 'utterly antagonistic and opposed in its every notion and theory to the common law' is more rhetorical than exact. It is true only in a qualified sense. Our law is not opposed to the common-law theory of recompense for injury. It is only opposed to the common-law assumption that a suit at law furnishes adequate recompense. Such a policy is certainly not contrary to the giving of any remedy merely because the only remedy possible is deemed inadequate. Our statute was never intended to declare that, because workmen injured in this state receive compensation without suit, it is against the public policy of this state that workmen injured outside of the state, and where the common law prevails, should receive any compensation."

VICTOR CHEMICAL WORKS

v.

INDUSTRIAL BOARD OF ILLINOIS ET AL.

Illinois Supreme Court—June 22, 1916.

274 Ill. 11; 113 N. E. 173.

Constitutional Law — Construction in Favor of Validity.

When the constitutionality of a statute is questioned, it is the duty of the courts, and also a rule of construction, to adopt such construction as will make the statute constitutional if its language will permit.

Presumption of Validity.

There is a strong presumption in favor of the validity and constitutionality of an act of the legislature.

Same.

Courts should not declare acts of the legislature unconstitutional unless satisfied of their unconstitutionality beyond a reasonable doubt.

Workmen's Compensation Acts — Election to Accept Act — Time for Election.

Workmen's Compensation Act approved June 28, 1913, and going into effect July 1, 1913 (Laws 1913, p. 337), providing that every employer enumerated in section 3, par. 6, shall be conclusively presumed to have filed notice of election to come under the act

unless and until notice to the contrary is filed with the industrial board, and that every employer who has elected to come under the act shall be bound by it until January of the next succeeding year, but may elect to withdraw from the operation of the act after the end of such year by filing notice with the board at least sixty days prior to the end of the year, is held to have given employers not affirmatively filing notice to come under the act at least until November, 1913, to withdraw from the same by giving notice. [See Ann. Cas. 1915C 308; Ann. Cas. 1918B 715.]

Validity of Workmen's Compensation Act.

Such act so construed is not unconstitutional as being, in effect, compulsory by giving an unreasonably short time—from June 28th to July 1st—for election by employers whether or not to come under the act.

[See Ann. Cas. 1916B 1286; Ann. Cas. 1918B 611.]

Statutes — Construction — All Parts Considered.

In arriving at the meaning and intent of a legislative enactment, every part thereof, as well as the title, must be taken into consideration.

Workmen's Compensation Acts — Beneficiaries — Nonresident Alien.

The Workmen's Compensation Act of 1913, entitled "An act to promote the general welfare of the people of this state by providing compensation" for workmen, and by section 5 defining the term "employee," as used in the act, to include aliens, applies to nonresident alien dependents claiming as beneficiaries thereunder; for the general welfare of the people of the state might well be promoted by providing compensation for accidental injuries or death suffered by aliens, as well as citizens, in the course of employment within the state, since many alien dependents reside in the state, and the people of the state would be interested in not having aliens, as well as citizens, become charges upon the community by reason of injuries suffered in employment.

[See note at end of this case.]

Review of Facts on Appeal.

Under the Workmen's Compensation Act of 1913, § 19, par. "f," providing that the decision of the industrial board, acting within its powers, in the absence of fraud, is conclusive, but that the supreme court shall have power to review questions of law involved therein, the decision of the board upon questions of fact is conclusive, if founded upon competent or legal evidence.

[See Ann. Cas. 1916B 475; Ann. Cas. 1918B 647.]

Same.

Under this section the circuit court by certiorari may review the decision of the industrial board for errors of law.

Same.

Whether legal evidence is offered to support the decision of the industrial board as shown by the record of proceedings, where

such evidence is agreed upon or reported by stenographer, is a question of law reviewable by certiorari.

Dependency — Sufficiency of Evidence.

In proceedings under the 1913 Workmen's Compensation Act evidence is held to support a finding of the board that deceased left parents, to whose support he had within five years contributed.

[See Ann. Cas. 1913E 480; Ann. Cas. 1918B 749.]

Nature and Purpose of Compensation Act.

The general purpose of the Workmen's Compensation Act of 1913 is to provide a method by which injuries received by employees in certain classes of occupations may be quickly adjusted so that something shall be received according to fixed rules for determining compensation in said cases.

Applicability of Rules by Legal Procedure.

A proceeding for compensation under the Workmen's Compensation Act of 1913 is not a proceeding at law, and is not altogether governed by the rules of legal proceedings.

[See Ann. Cas. 1915A 741.]

Who Is Workman — Casual Employee — Burden of Proof.

Under such act it is not part of claimant's prima facie case to show he was not within the class of casual employees excepted by section 5, par. 2, thereof; such exception being matter of defense.

[See Ann. Cas. 1913C 28; Ann. Cas. 1916B 793; Ann. Cas. 1918B 793.]

Objection First Made on Appeal.

Such defense cannot be considered for the first time on appeal.

Notice of Claim — Time for Giving.

In proceedings for compensation under the 1913 Workmen's Compensation Act, evidence of formal notice of claim and correspondence in regard to settlement is held to show claim made within six months after accident as required by section 24; the statute being silent as to how such claim shall be made.

[See Ann. Cas. 1917D 867.]

Evidence Admissible. — Verdict of Coroner's Jury.

In such proceedings the verdict of the coroner's jury impaneled to inquire into the death is proper evidence, since such proceedings take the place of the ordinary action on the case for negligence, in which such evidence was proper.

[See generally, 4 Ann. Cas. 1020; Ann. Cas. 1917B 892.]

Error to Circuit Court, Cook county: TORRISON, Judge.

Claim for compensation under workmen's compensation act. Casimo Landolina claimant, and Victor Chemical Works, defendant. Claim allowed by Industrial Board. Decision affirmed by Circuit Court. Defendant brings error. The facts are stated in the opinion.

AFFIRMED.

Lewis A. Stebbins and Burton P. Sears for plaintiff in error.

Craig A. Hood, Simon T. Sutton and Harry A. Goldsmith for defendants in error.

[13] CRAIG, C. J.—August 4, 1914, one of the defendants in error, Casimo Landolina, as administrator of the estate of Filippo Landolina, deceased, filed with the Industrial Board of Illinois his application for adjustment of claim against the plaintiff in error, the Victor Chemical Works, under the Workmen's Compensation act, asserting that his brother, Filippo Landolina, was killed September 6, 1913, in an accident arising out of his employment by the plaintiff in error, and that claim for compensation was made in the plaintiff in error within six months thereafter under the Workmen's Compensation act. An arbitration committee was appointed as provided in the act, a hearing was had, evidence was taken, and said committee on August 26, 1914, entered its award against plaintiff in error and in favor of the defendant in error for \$6 per week for four hundred and sixteen weeks from September 6, 1913. Plaintiff in error filed a petition with the Industrial Board to review the award of the arbitrators, and said board on September 12, 1914, confirmed the award. No additional evidence was taken before the Industrial Board. The plaintiff in error thereafter filed its petition for a writ of *certiorari* with the circuit court of Cook county, and on April 3, 1915, said writ was ordered to issue to said Industrial Board to send up the record of said proceedings, and on April 20, 1915, a certified copy of all proceedings had before said board was returned to the circuit court pursuant to said writ. Thereafter, on November 24, 1915, the attorneys for the administrator moved to quash the writ of *certiorari*, and upon a hearing on said motion and in inspection by the court of the record of the Industrial Board the court entered an order quashing the writ of *certiorari* and awarding a *procedendo*, [14] with costs. On motion of the plaintiff in error the court granted a certificate that the cause was one proper to be reviewed by this court and signed and sealed a bill of exceptions. A writ of error was sued out from this court.

It is assigned as error that the circuit court of Cook county erred in quashing the writ of *certiorari* and awarding the writ of *procedendo* for the reasons (1) that the Workmen's Compensation act of 1913 is unconstitutional; (2) that said act of 1913 does not apply to non-resident alien dependents; (3) that the evidence produced before the arbitrators, which was passed upon by the Industrial Board and is contained in the record, did not show that the deceased had contributed to the support of his parents;

(4) that it was not affirmatively shown that the deceased was not a casual employee; and (5) that it was not shown that a proper claim for compensation had been made. These contentions will be considered in their order.

First—As to the constitutionality of the act, this court has held the Workmen's Compensation act of 1911, which is similar to and of the same general effect as the act of 1913, to be constitutional. *Deibeikis v. Link-Belt Co.* 261 Ill. 454, Ann. Cas. 1915A 241, 104 N. E. 211; *Crooks v. Tazewell Coal Co.* 263 Ill. 343, Ann. Cas. 1915C 304, 105 N. E. 132; *Dietz v. Big Muddy Coal, etc. Co.* 263 Ill. 480, 105 N. E. 289. Plaintiff in error claims, however, that the act of 1911 was held constitutional by this court because it was elective and not compulsory; that the act of 1913, while in terms elective, the same as the act of 1911, is in effect compulsory, for the reason that the time given for election by employers as to whether or not they would accept or reject the provisions of said act is unreasonably short. The act was passed by the legislature and was approved by the Governor on June 28, 1913, and went into effect the first day of July following, by reason of the provisions of the constitution. Without discussing the reasoning of this court in the cases above referred to in which the act of 1911 was held constitutional, and assuming, for the sake of argument, that the act of [15] 1911 was held constitutional because it was elective and that the act of 1913 should be held constitutional for the same reason, we think it is true, as contended by plaintiff in error, that where the act is made elective a reasonable time must be given by the act in which to exercise the election. Is the act, however, subject to the objection made?

Section 1 of the act (Laws of 1913, p. 337) provides: "That any employer in this State may elect to provide and pay compensation for accidental injuries sustained by any employee arising out of and in the course of the employment according to the provisions of this act." Paragraph (a) of the same section provides: "Election by an employer to provide and pay compensation according to the provisions of this act shall be made by the employer filing notice of such election with the Industrial Board." Paragraph (b) provides: "Every employer within the provisions of this act who has elected to provide and pay compensation according to the provisions of this act shall be bound thereby as to all his employees covered by this act until January 1 of the next succeeding year and for terms of each year thereafter: *Provided*, any such employer may elect not to provide and pay the compensation herein provided for accidents resulting in either injury or death and occurring after the expiration of any such calendar year by filing notice of such election

with the Industrial Board at least sixty days prior to the expiration of any such calendar year, and by posting such notice at a conspicuous place in the plant, shop, office, room, or place where such employee is employed, or by personal service, in written or printed form, upon such employee, at least sixty days prior to the expiration of any such calendar year." Section 2 provides: "Every employer enumerated in section 3, paragraph (b), shall be conclusively presumed to have filed notice of his election as provided in section 1, paragraph (a), and to have elected to provide and pay compensation according to the provisions of this act, unless and until notice in writing [16] of his election to the contrary is filed with the Industrial Board and unless and until the employer shall either furnish to his employee personally or post at a conspicuous place in the plant, shop, office, room or place where such employee is to be employed, a copy of said notice of election not to provide and pay compensation according to the provisions of this act; which notice of non-election if filed and posted as herein provided, shall be effective until withdrawn; and such notice of non-election may be withdrawn as provided in this act."

It is the contention of counsel that plaintiff in error not having taken affirmatively action by filing a rejection of the act with the Industrial Board before July 1, 1913, was by the express terms of section 2 of the act conclusively presumed to have elected to have accepted the same and was bound thereby and could not escape from its terms until January 1, 1914, and then only by filing a notice of rejection by November 1, 1913. Before said date the accident from which this case arose occurred, September 6, 1913, at a time, therefore, before plaintiff in error could possibly have rejected the act and at a time when it had been arbitrarily forced into the position of having elected to accept the same. We do not so understand the meaning and intent of this act. When the constitutionality of a statute is questioned it is the duty of the courts, and also a rule of construction, to adopt such construction as will make the statute constitutional if its language will permit. There is a strong presumption in favor of the validity and constitutionality of an act, and courts should not declare acts of the legislature unconstitutional unless satisfied of their unconstitutionality beyond a reasonable doubt.

The main fault found with the act is section 2 above set out. The act was passed and went into effect on July 1, 1913. Either employers or employees could elect not to come within the provisions of the act. In the first sentence of the first section it is provided that any employer [17] may elect to provide and pay compensation, etc., according to the pro-

visions of the act, and paragraph (a) following, provides that such election "shall be made by the employer filing notice of such election with the Industrial Board." So far there is required an affirmative action on his part. Paragraph (b) of section 1, immediately following paragraph (a) above set out, provides that "every employer within the provisions of this act who has elected to provide and pay compensation according to the provisions of this act shall be bound," etc., until January 1 of the next succeeding year. Undoubtedly this provision would apply to all employers who had actually filed notice with the Industrial Board of their election to be bound by the act. Section 2 provides that every employer "shall be conclusively presumed to have filed notice of his election as provided in section 1, paragraph (a), and to have elected to provide and pay compensation according to the provisions of this act, unless and until notice in writing of his election to the contrary is filed with the Industrial Board," etc. No time is set in this section for filing such notice of election not to be bound by the act, and as far as the provisions of the section are concerned the notice could be given by the employer any time after the act went into effect. The act went into effect July 1, 1913, and no one would be under the act until after that date, hence those employers who would come under the act by virtue of the provisions of section 2 would be under the act from July 1, 1913, to some date subsequent to July 1, 1913, when they could give notice of their election not to be bound thereby. Such employers had some period within which to file notice not to be bound by the terms of the act. There is a distinction between those employers mentioned in paragraph (b) of section 1 who affirmatively file notice with the Industrial Board of their election to come within the act, and those employers mentioned in section 2 who are presumed to have filed notice of their election to come within the act and hence are [18] within the act unless and until notice in writing of an election to the contrary is filed with the Industrial Board. The former are only allowed to withdraw from the provisions of the act by filing notice sixty days before the expiration of a calendar year. The latter could file notice to the contrary at least prior to November 1, 1913.

Paragraph (b) of section 1 provides that every employer who has elected to come within the act shall be bound until January 1 of the next succeeding year and for terms of every year thereafter. We think that it was not the intention of the legislature to permit an employer who has either affirmatively filed his notice to come within the act or as to whom the act has become self-executing by reason of the provisions of section 2, to file the notice of withdrawal with the Industrial

Board at any time in any year thereafter. We think, however, that any employer who had actually filed notice of his election to come within the provisions of the act could only withdraw from the same by filing a notice sixty days before the first of January in some succeeding year, and that any employer to whom the act was self-executing, as mentioned in section 2, would only be under the act, after it went into effect in July 1, 1913, until such employer filed a notice of his election to the contrary, and such employer would have up to sixty days prior to January 1, 1914, to give such notice and withdraw from the act. After that, the provision of the act providing for yearly terms would operate uniformly on all employers and require all of them to give sixty days' notice of withdrawal from the act prior to the first of January of some succeeding year. It is a familiar maxim that ignorance of the law excuses no one, and in this case plaintiff in error had over a month in which to learn the law and to file notice of its election prior to the accident, and it has made no claim that this was not sufficient time. As we do not think the act was mandatory or compulsory any more than the act of 1911, its constitutionality must be considered [19] as settled by the cases heretofore cited in which the act of 1911 was construed.

Second.—Plaintiff in error contends, conceding the parents of the deceased were dependent upon him for support, that the said parents were aliens and nonresidents of the United States and were citizens of and residing in Italy, and the act has no application to nonresident alien dependents claiming as beneficiaries under the act. It is conceded that it is within the power of the legislature to give or not to give nonresident alien dependents the right to take as beneficiaries under the act, but it is claimed that the act does not give such right. It is first insisted that the title of the act confine its operation to citizens of this State. The act is entitled "An act to promote the general welfare of the people of this State by providing compensation for accidental injuries or death suffered in the course of employment within this State," etc. The case of *Dred Scott v. Sanford*, 19 How. 393, 15 U. S. (L. ed.) 691, and *Boyd v. Nebraska*, 143 U. S. 135, 12 S. Ct. 375, 36 U. S. (L. ed.) 103, are cited, which held that the words "people of the United States" mean the same thing as "citizens of the United States;" also the case of *Matter of Silkman*, 84 N. Y. S. 1025, 88 App. Div. 102, in which the court held that the phrase "people of the State of New York" does not include aliens, and intimated that the phrase "people in the State of New York" would so have included them.

In arriving at the meaning and intent of a legislative enactment every part thereof, as

well as the title, must be taken into consideration. The words in the title "to promote the general welfare of the people in this State" do not necessarily mean that it is the intent and purpose of the act to limit compensation that may be paid for accidental injuries or death suffered in the course of employment to citizens of the State. The general welfare of the people of the State, or citizens of the State, might well be promoted by providing compensation for accidental injuries or death suffered by aliens, as well as citizens, in the course [20] of employment within the State. There are many alien employees within the State to whom the act should apply, and we can perceive no reason why it should not apply to them as well as to citizens. In many cases those depending upon them reside within the State, and the people or citizens of the State would be interested in not having aliens, as well as citizens, become charges upon the community by reason of injuries received in the course of employment. Moreover, the title, alone, is not the sole criterion but the terms of the act itself must be considered. Section 5 provides that the term "employee," as used in the act, shall be construed to mean "every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and minors who are legally permitted to work under the laws of the State, who, for the purpose of this act, shall be considered the same and have the same power to contract, receive payments and give quittances therefor, as adult employees, but not including any person whose employment is but casual or who is not engaged in the usual course of the trade, business, profession or occupation of his employer: *Provided*, that employees shall not be included within the provisions of this act when excluded by the laws of the United States relating to liability of employers to their employees for personal injuries where such laws are held to be exclusive." By the terms of the act we think that alien dependents are included.

In *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 386, 79 Am. St. Rep. 309, 54 L.R.A. 934, where this same question was raised, it was held that a mother who had never been a resident of the State of Massachusetts and who was a citizen and resident of Ireland was entitled to recover in the courts of Massachusetts in an action for negligence causing the death of her son. In that case it was said: "One or two cases may be found where a general grant of a right of action for wrongfully causing death has been held to confer no rights upon nonresident aliens. (*Deni v. Pennsylvania R. Co.* 181 Pa. St. 525, 59 [21] Am. St. Rep. 676, 37 Atl. 558; *Brannigan v. Union Gold-Min. Co.* 93 Fed. 164; but compare *Knight v. West Jersey R. Co.* 108 Pa. St. 250, 56 Am. Rep. 200.) On the other

hand, in several States the right of the non-resident to sue is treated as too clear to need extended argument. (Philpott v. Missouri Pac. R. Co. 85 Mo. 164; Chesapeake, etc. R. Co. v. Higgins, 85 Tenn. 620, 4 S. W. 47; Augusta R. Co. v. Glover, 92 Ga. 132, 18 S. E. 406; Luke v. Calhoun County, 52 Ala. 115.) . . . In all cases the statute has the interest of the employees in mind. It is on their account that an action is given to the widow or next of kin. . . . We cannot think that workmen were intended to be less protected if their mothers happened to live abroad or less protected against sudden than against lingering death. In view of the very large amount of foreign labor employed in this State we cannot believe that so large an exception was silently left to be read in."

In the case of *Guianos v. De Camp Coal Min. Co.* 242 Ill. 278, 89 N. E. 1003, this court held as to the right of alien beneficiaries to recover, as follows: "It is further insisted that the deceased was an alien,—a citizen of Greece,—and that this suit is for the benefit of his parents, brothers and sisters, who are not citizens of this country but reside in Greece, and that there should be no recovery under our statute in favor of these nonresident aliens. Counsel admits that in *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 63 N. E. 94, 88 Am. St. Rep. 191, this court, after reviewing the authorities, held the contrary, but insist that we should reverse that ruling because of the recent ruling of the United States Supreme Court in *Maiorano v. Baltimore, etc. R. Co.* 213 U. S. 268, 29 S. Ct. 424, 53 U. S. (L. ed.) 792. In that case the deceased was killed in Pennsylvania, and the Supreme Court of that State has consistently held that under its statute non-resident alien relatives could not recover. The United States Supreme Court, in deciding that case, followed the general rule of that court that the [22] construction of a State statute by the highest court of such State must be accepted by the United States courts. Manifestly, under that decision, if this case were taken to the United States Supreme Court that court would follow the ruling of this court on this question." We think it is the plain meaning and intent of the act not to except alien beneficiaries from its provisions.

Third—It is insisted that there is no evidence that the deceased had ever contributed to the support of his parents within four years or that they were beneficiaries under the act. Under paragraph (f) of section 19 of the act the decision of the Industrial Board, acting within its powers, in the absence of fraud, is conclusive. The circuit court may review the decisions of the Industrial Board by *certiorari* for errors of law, only. Whether legal evidence is offered to support the de-

cision of the Industrial Board as shown by the record of proceedings, where such evidence is agreed upon or preserved by a stenographic report, is a question of law, but if there is competent or legal evidence to support the decision of the Industrial Board it is not within the province of the courts to pass on its sufficiency. We have examined the evidence in the record on this point. The administrator, Casimo Landolina, a brother of the deceased, testified that the father of the deceased was living at Caccamo, Italy, and was sixty-three years of age; that the mother was fifty-four years of age and was living with his father; that there are some younger children, all under twenty years of age, the oldest about seventeen; that the deceased contributed to the support of this family in the old country prior to his death; that the family lived upon a farm of about four acres; that he had seen a receipt for a post-office money order for \$40 which the deceased showed to him. Charles Costello testified that he knew the deceased in Italy; that he and the deceased both came from the same province; that he knew him at the time he arrived in this country; that at the request of the deceased [23] he went with him to act as an interpreter, because the deceased could not speak English, and assisted him to get a money order for \$40, which he put in a letter addressed to his father, Giovanni Landolina, Caccamo, Italy; that the witness saw him address the envelope, seal it and mail it, and the money order was in it. James Barto testified that he saw the deceased put money in a letter which he sent to his father in Italy; that the witness, at the request of the deceased, wrote a return address on the envelope. There was other evidence, consisting of declarations of the deceased at the time he sent the money to his father and his purpose in sending it, and that his parents depended upon him for support, which was objected to and which objection should have been sustained. The arbitration committee received this evidence, and the chairman stated that the committee was not bound by the rules of evidence. The arbitration committee is allowed by the law to inspect premises, books and records and make such inquiries and investigations as it shall deem necessary. The committee reports to the Industrial Board, and either party desiring a review of the report and decision of the arbitrators may file either an agreed statement of facts or a correct stenographic report of the proceedings. In this case the arbitrators heard witnesses, which was within their power, but it requires no argument to show that when the arbitrators hear evidence there must be evidence that is competent and legal, as tested by the usual rules for producing evidence in any legal proceeding, to sustain their find-

ing, otherwise they could make an award on other incompetent evidence or on no evidence at all, and this was not contemplated by the law. Such evidence must also be preserved and incorporated into the record of the proceedings, as provided in the act and as above pointed out. If books and records are examined, the contents relied upon must be competent and properly authenticated and must be set out in the record of the proceedings. While a view or inspection of premises might be [24] helpful to the arbitrators in making a decision, there should be evidence of the fact, unless all parties agreed that the arbitrators might decide a claim before them from such view or inspection, alone. In short, there must be some competent evidence to sustain the decision of the arbitrators and of the Industrial Board, and if founded on hearsay or other improper or insufficient evidence it is the duty of the circuit court, on *certiorari*, to remand the proceeding to the Industrial Board for proper proceedings. We think, however, there was sufficient competent evidence to sustain the finding of the Industrial Board that the deceased left parents and that he had within five years contributed to their support.

Fourth—It is claimed that it was not shown by the plaintiff in error that the deceased was not a casual employee. The second paragraph of section 5 of the act defines as employees, in addition to those in the preceding paragraph, every person in the service of another, etc., "but not including any person whose employment is but casual or who is not engaged in the usual course of the trade, business, profession or occupation of his employer." In considering this question recourse must be had to the provisions of the act and its general intent and purpose. Section 15 of the act provides that the Industrial Board, which is created by section 13, shall have jurisdiction over the operation and administration of the act. Section 16 provides that the board may make rules and orders for carrying out the duties imposed upon it by law, and that the process and procedure before the board shall be as simple and summary as reasonably may be, and that the board, or any member thereof, shall have the power to administer oaths, subpoena and summon witnesses, and to examine and inspect such books, papers, records, places or premises as may relate to questions in dispute. Section 18 provides that "all questions arising under this act, if not settled by agreement of the parties interested therein, shall, except [25] as otherwise provided, be determined by the Industrial Board," and section 19 provides that any disputed questions of law or fact upon which the employer or employee or personal representative cannot agree, shall be determined by the board. Paragraph (a) of the

same section provides for the appointment of a committee of arbitration, which was done in this case. Paragraph (b) provides for the hearing by the committee of arbitration and that such committee shall file its decision with the Industrial Board, which shall send to each party a copy thereof, and that either one of the parties, within fifteen days after receiving a copy of such decision, may petition the Industrial Board for a review, and shall within twenty days of filing such decision file with the board either an agreed statement of facts on the hearing before the committee of arbitration or a correct stenographic report of the proceedings of such hearing. Paragraph (c) provides that if a petition for review and agreed statement of facts or stenographic report is filed as provided in the preceding paragraph, the Industrial Board shall promptly review the decision of the committee of arbitration and the facts as they appear from said statement of facts or stenographic report, and shall also, if desired, hear the parties together, with such additional evidence as they may wish to submit, etc.

It will be seen that the general purpose of the act is to provide a method by which injuries received by employees in certain classes of occupations may be quickly adjusted, so that something shall be received according to fixed rules for determining compensation in said cases. It would seem to be the duty of both parties, under the act, either to agree upon a statement of facts or at least to submit all questions of law and fact for determination, and if the employer desires to raise the question as to whether or not the employee is a casual employee and not within the terms of the act he should submit evidence on that question. We have held that a plaintiff relying on a statute for recovery [26] need only negative the exceptions in the enacting clause, and it is for the defendant to show, by way of defense, that the case falls within an exception in some other clause of the statute. (Toledo, etc. R. Co. v. Lavery, 71 Ill. 522, citing 1 Chitty's Pl. 223; Chicago, etc. R. Co. v. Carter, 20 Ill. 391.) Under this rule, in a suit at law governed by the strict rules of procedure it would be the duty of the defendant to show, by way of defense, that the case fell within an exception. But this is not a proceeding at law and is not altogether governed by the rules of legal proceedings. In suits at law by employees against employers to recover damages for injuries sustained in the course of employment, the employee, as plaintiff, is compelled, under the law and the rules of procedure, to make out a case, and must affirmatively show sufficient to entitle him to recover by reason of some fault or negligence of the employer. Since the enactment of the law in question compensation is to be paid by the employer if

the employee is killed in the course of his employment irrespective of the negligence of the employer, and the main thing is to determine the amount of compensation which must be paid. The statute provides that if the parties cannot agree as to the facts of the case it is their duty to bring in all matters of dispute, and under the terms of the act it would seem to be the duty of the employer to allege and prove, as a matter of defense, that the employment of the employee was but casual. We do not think the plaintiff in error can raise this question for the first time on appeal. It was its duty to raise this point before the board of arbitrators or the Industrial Board, and if plaintiff in error relied on such fact as a defense it was its duty to show it. On the hearing before the arbitrators the chairman of the board asked the attorney for plaintiff in error, at the beginning, if there was any dispute as to both the deceased and the employer being under the act, and he replied, "No, there is no dispute as to that."

[27] *Fifth*—It is claimed that the record fails to show that the claim for compensation was made within six months after the accident, as is provided in section 24 of the act. The proof shows that the accident occurred September 6, 1913. The attorney for the administrator testified that he prepared a written claim for compensation under the act and gave it to a constable to serve on the plaintiff in error on March 5, 1914. He also produced a carbon copy of such written claim, and further testified that the superintendent of the plaintiff in error admitted that the constable had served the notice. This was not denied. The statute provides that no proceedings for compensation under the act shall be maintained unless claim for compensation has been made within six months after the accident. It also appears that the parties had corresponded through their attorneys in endeavoring to make a settlement of the matter. The statute is silent as to how such claim shall be made, and we think the proof sufficiently shows that a claim for compensation was made upon plaintiff in error within six months.

It is also claimed that the verdict of the coroner's jury empaneled to inquire into the death of the deceased was improperly admitted in evidence. Proceedings under the Workmen's Compensation act take the place of the ordinary action on the case against an employer for damages for causing the death of or injury to an employee. In actions for causing death by negligence we have held such evidence proper. *Foster v. Shepherd*, 258 Ill. 164, Ann. Cas. 1914B 572, 101 N. E.

411, 45 L.R.A. (N.S.) 167; *Devine v. Brunswick-Balke-Collender Co.* 270 Ill. 504, Ann. Cas. 1917A 887, 110 N. E. 780, and cases cited.

Perceiving no error sufficient to justify a reversal, the judgment of the lower court will be affirmed.

Judgment affirmed.

NOTE.

Residence of Beneficiary as Affecting Right to Compensation under Workmen's Compensation Act.

For a discussion of the earlier cases on the effect of the residence of a beneficiary on his right to compensation under the workmen's compensation act, see the note to *Krzus v. Crow's Nest Pass Coal Co.* Ann. Cas. 1912D 862.

The reported case holds that under the workmen's compensation act of Illinois the beneficiary of one who is killed during the course of his employment may recover for the latter's death although the beneficiary is a nonresident of Illinois. A contrary result has been reached in recent cases under the New Jersey and New York acts. *De Biasi v. Normandy Water Co.* 228 Fed. 234 (New Jersey act); *Gregutis v. Waelark Wire Works*, 86 N. J. L. 610, 92 Atl. 354; *State Industrial Commission v. McCormick*, 167 N. Y. S. 564.

In *Gregutis v. Waelark Wire Works*, supra, it appeared that one Gregutis, an Italian subject, was killed in New Jersey, while employed by the defendant. He left a father, mother, three sisters and a brother, all residents of Italy. It was held that under the New Jersey workmen's compensation act none of the relatives named could recover for his death. The court said: "The scheme of the act is to give compensation in lieu of damages to certain dependents, and not to next of kin as such. The legislature saw fit, as a matter of public policy, to exclude nonresident aliens from such benefits, and we think that the power of the legislature to give or withhold a right of action in such case, and to declare to whom and in what amount compensation shall be made, cannot be doubted."

In *State Industrial Commission v. McCormick*, 167 N. Y. S. 564, it was held that under the New York workmen's compensation act the right to compensation of a beneficiary residing in a foreign land was limited to those who, for the period of one year prior to the accident, had been supported in whole or in part by the employee.

STATE EX REL. CITY OF DULUTH

v.

DISTRICT COURT OF ST. LOUIS
COUNTY ET AL.

Minnesota Supreme Court—July 7, 1916.

134 Minn. 28; 158 N. W. 791.

Workmen's Compensation Acts — Persons within Act — Municipal Employee.

A fireman of the city of Duluth was killed while in the performance of his duty. His dependents are entitled to recover under the workmen's compensation act.

[See Ann. Cas. 1917D 4.]

Effect of Receipt of Other Benefits.

The fact that deceased was a member of the Duluth Firemen's Relief Association and that his dependents draw benefits therefrom, does not bar recovery of compensation nor reduce the amount thereof.

[See note at end of this case.]

(Syllabus by court.)

Certiorari to District Court, St. Louis county: DANCER, Judge.

Action by Dorothea S. P. Granzow, plaintiff, against City of Duluth, defendant. Judgment for plaintiff. Defendant brings certiorari. The facts are stated in the opinion. **AFFIRMED.**

John E. Samuelson and Leonard McHugh for relator.

Abbott, McPherran, Lewis & Gilbert for respondents.

[29] HALLAM, J.—1. Frederick E. Granzow, an assistant chief of the fire department of the city of Duluth, was killed while in the discharge of his duty. His widow and ten-year-old daughter commenced proceedings to recover under the compensation act (G. S. 1913, §§ 8195-8231). This case involves the question whether a member of the Duluth fire department is an employee within the meaning of the Workmen's Compensation Act. We hold that he is, for the same reason which induced us to hold in *State v. District Court of St. Louis County*, supra, page 26, 158 N. W. 790, that police officers of the city are within the act.

2. One other question is raised here as follows: Deceased was a member of the Duluth Firemen's Relief Association, a voluntary relief association organized to provide for the relief of sick or injured members, and the widows and orphans of deceased members. The association receives its money from three sources: (1) From a tax of one-tenth of

one mill; (2) from a portion of the insurance premiums collected in Duluth, which are required by law to be paid to the association, and (3) from the voluntary contributions of its members. Membership in the association is optional with firemen. Only those who are members and who contribute are entitled to benefits for themselves or their families. The widow and daughter now draw benefits from the association.

The receipt of funds from the association does not bar them from receiving benefits under the compensation act, nor does it reduce the amount thereof. The act does not so provide, either expressly or by implication.

The source of revenue of the Relief Association, so far as it depends on the bounty of the state, may be withdrawn at any time *Gibbs v. Minneapolis F. Dept. Relief Assoc.* 125 Minn. 174, Ann. Cas. 1915C 749, 145 N. W. 1075. So far as it depends on contributions made by the members, it is something the member has purchased for himself with his own funds, and is akin to life and benefit insurance. It is well settled, in death by wrongful [30] act cases, that the fact that the deceased had life insurance does not diminish the amount of damages which his widow and next of kin may recover. 4 Sutherland, Damages (3d ed.) § 1265; *Evans v. Chicago*, etc. R. Co. 133 Minn. 293, 158 N. W. 335; *Nashville*, etc. R. Co. v. *Miller*, 120 Ga. 453-455, 47 S. E. 959, 67 L.R.A. 87; 1 Ann. Cas. 210. This is on the principle that where one through his own providence has purchased and maintained insurance on his life, the proceeds thereof should inure to his beneficiaries and not to the one who has caused his death. A similar principle is applicable here. True, under the compensation act there may be recovery, though the death of the employee was not caused by any wrongful act of the employer. At the same time, we are of the opinion that the fireman who joins and contributes to the funds of this association should be held to have purchased the protection which the association affords, for the benefit of himself and his family, and not for the benefit of his employer. See *In re Nichols*, 217 Mass. 3, 104 N. E. 566, Ann. Cas. 1915C 862.

NOTE.**Receipt of Insurance or Other Benefit as Affecting Right to Compensation under Workmen's Compensation Act.**

The holding of the reported case, that the receipt of funds from a relief association does not affect the right to recover compensation under the Minnesota workmen's compensation act, rests on the principle that by contributing to the funds of the association

a member thereof purchases the right to benefits. The decision in *Ross v. Erickson Constr. Co.* 89 Wash. 634, 155 Pac. 153, L.R.A.1916F 319, indirectly supports this view. It was held in that case that a recovery under the workmen's compensation act was not a bar to a recovery on an accident insurance policy, the latter right resting on an independent contract.

The English Workmen's Compensation Act of 1906 provides that in fixing the amount of the weekly compensation regard shall be had to payments, allowances or benefits which the employee may receive independent of compensation under the act. Thus, where one employed by the civil service commissioners as an attendant at a lunatic asylum, received an injury out of and in the course of his employment which incapacitated him from further work, it was held in *Considine v. McInerney*, 114 L. T. N. S. 1138, 9 B. W. C. C. 390, that the payment of a gratuity and a pension by the asylum authorities was to be regarded, in a subsequent action under the workmen's compensation act, in fixing the amount of weekly payments. *Earl Loreburn* said: "The Workmen's Compensation Act 1906 directs the arbitrator that 'in fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity.' In the present case the workman receives a pension from his employers, for the asylum board and the treasury have been regarded by both sides as one and the same. He had no legal right to claim it, but he had an expectation practically amounting to a certainty of obtaining it at the age of sixty, and even before sixty if he should get a medical certificate that he was incapable from infirmity of mind or body. He got the certificate and received a pension at the age of forty-eight on a lower scale than he would have received at the age of sixty. It was granted by the treasury under statutory powers. There is no doubt that the incapacity was due to an injury by accident which brought him within the workmen's compensation act. In fixing the amount of the weekly payment which the workman was to receive under that act the arbitrator had regard to this pension. The court of appeal decided that he was not entitled to have regard to it. And that raises the point which we have to settle. With all respect to the court of appeal, I think the arbitrator was right. This payment came from the employer. The employer was not obliged by statute to pay it, and in my opinion it would have made no difference had he been so obliged. It is an error to say that the workman contributed toward the pension. It came wholly out of the employer's pocket. Under this act the

employer is the person required to pay compensation (sect. 1), and it is in ease of this burden on the employer that the arbitrator is directed that regard shall be had to any payment, allowance or benefit which the workman may receive from him (sched. 1, 3)."

Where an injured fireman received, under the Provisional Order Confirmation Act, 1891, a weekly pension from the fund toward which he had contributed, it was held that that sum was to be regarded in fixing the amount of the weekly payment under the workmen's compensation act. *Watts v. Manchester Corp.* (1917) 1 K. B. (Eng.) 791, (1917) W. N. 84, 33 Times L. Rep. 238, 86 L. J. K. B. 669, 116 L. T. N. S. 578, wherein it was said by Warrington, L. J.: "In the year 1902, the applicant became a fireman in the fire brigade of the Manchester corporation. On the 30th Oct. 1915 he met with an 'accident arising out of and in the course of' his employment which caused him to break his thigh, and which has incapacitated him from further service in the fire brigade. At the date of the accident his wages were £2. 14s. a week. He is now earning £1. 5s. a week from another employer. He claims one-half the difference of 14s. 11d. per week. The corporation contend that the pension he receives in consequence of his incapacity should be taken into consideration and offer 8s. a week. The learned county court judge has held that the pension should not be taken into consideration, and has awarded the applicant 14s. 11d. a week. He has further made an alternative award in case he should be held to be wrong in law in excluding the pension from consideration, and in that event he has found that 10s. a week would be the proper amount of his award. The pension scheme is constituted by the corporation under the Police Act, 1890, and the Fire Brigade Superannuation Manchester Order Confirmation Act, 1891. By the fireman's contract of service a deduction of three per cent per annum is made from his wages. A document from the chief accountant of the city treasurer's department that was put in appears to show that the pensions are contributed from three sources: One, dividends on invested capital; two, the three per cent deductions from pay; and, three, a payment by the corporation from the city rate. This corporation contribution forms from seventy to eighty per cent of the whole, and makes good whatever balance may be needed beyond that which is available from items one and two. The learned county court judge attached considerable importance to the fact that a portion of the income was derived from investments. I do not myself attribute importance to this. It seems to me to have arisen when in 1891 the fire brigade was separated from the police for the purpose of superannuation, and the

share of the fire brigade in the then investments was adjusted at the sum of £2960: (see the Provisional Order Confirmation Act, art. 1 (2.)). There is nothing to show to what extent these investments were the result of corporation moneys. The pension is clearly a term of his service, and upon superannuation or incapacity the fireman becomes entitled to a pension in accordance with the scale. The applicant contends that it should be disregarded as irrelevant to the compensation under the workmen's compensation act. The corporation contends that some regard should be had to it. Not necessarily for deduction as a concrete figure, but as a relevant fact and within the words of clause 3 of sched. 1. It was argued for the applicant that the case was within the principle of *McDermott v. Steamship Tintoretto*, 103 L. T. N. S. 769, [1911] A. C. 35, but I do not think it is so. The payments made there under the merchant shipping act were not in respect of the incapacity during the period covered by the compensation act. In this case the payment of the pension falls upon the city rate of the corporation in consequence of the incapacity and during the period in respect of which the compensation is payable from the same source. It is just because otherwise the corporation would be contributing twice at the same time towards the same incapacity that I think regard ought to be had to the pension. The Workmen's Compensation Act 1906 is a general act applicable to the whole community. I regard the Fire Brigade Superannuation Confirmation Act 1891 as one to some extent in *pari materia*. It is desirable that employers should be encouraged to institute schemes of this kind. If a proper and just regard is not given to the payments made under such a scheme it will discourage their institution. The words of clause 3 of sched. 1 are clearly wide enough to include this pension; it is a 'payment, allowance, or benefit' which the workman receives from the employer during the period of his incapacity, and I see nothing in the dicta or in the case of *Considine v. McInerney*, 114 L. T. N. S. 1138, (1916) 2 A. C. 162, which oblige me to say that this pension should be wholly disregarded." See also *Bullen v. London United Tramways*, 121 L. T. J. (Eng.) 415, 8 W. C. C. 103.

Section 30 of the New York Workmen's Compensation Act (Consol. Laws, ch. 67) provides as follows: "No benefits, savings or insurance of the injured employee, independent of the provisions of this chapter, shall be considered in determining the compensation or benefits to be paid under this chapter, except that, in case of the death of an employee of the state, a municipal corporation or any other political subdivision of the state, any benefit payable under a pension

system which is not sustained in whole or in part by the contributions of the employee, may be applied toward the payment of the death benefit provided by this chapter."

COX

v.

GEORGE TROLLOPE & SONS

England—Court of Appeal—July 19, 1916.

[1916] 2 K. B. 682.

Workmen's Compensation Acts — Average Weekly Earnings — Computation.

That a workman had been in the service of an employer but seven weeks when he was injured and that the service in question was in the winter when shorter hours were worked make it proper to compute his "average weekly earnings" on the average earnings of others in the same employment and not on his actual earnings in that employment.

[See note at end of this case.]

[682] Appeal from an award of the judge of the City of London Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was employed by the respondents, a firm of builders [683] and contractors, as a scaffolder at a wage of 8½d. an hour. He entered their employ on December 10, 1915, and met with an accident on January 27, 1916, by which he was totally incapacitated. It was admitted that the accident arose out of and in the course of the employment, and the sole question was what was the amount of the compensation to which he was entitled. Owing to absence due to illness and to occasional holidays the period during which he was actually employed by the respondents was seven weeks, and his average weekly earnings during that period amounted to 11. 7s. 8½d. It appeared from the evidence that scaffolders were usually employed for short periods by different employers, but that they could generally obtain employment throughout the whole year. The hours of work were fifty hours per week in the summer as against forty-four hours per week in the winter. The applicant put his wages as a scaffolder for fifty-two weeks at an average of 11. 18s. per week, but in cross-examination he admitted that he would probably lose three weeks during changes or other incidents of employment, and that in that case his average weekly earnings would be 11. 15s. 10d.

The question depended on the construction of Sched. I. pars. 1 (b) and 2 (a), of the Workmen's Compensation Act, 1906.¹

[684] The judge of the City of London Court held that it was impracticable within the proviso to par. 2 (a) of the schedule to compute fairly the rate of remuneration of the applicant with reference to his earnings during the seven weeks, having regard to the fact that the average during the twelve months previous to the accident was the dominant principle to be applied, and that the average weekly earnings varied in summer and winter. He therefore awarded compensation at the rate of 17s. 11d. a week by reference to the average weekly earnings of a person in the same grade employed in the same class of employment and in the same district.

The employers appealed.

Ellis Hill for appellants.

Rigby Swift, K.O. and *E. F. Lever* for respondent.

Mackrell, Maton, Godlee & Quincey, solicitors for appellants.

Leonard Bingham, solicitor for respondent.

[686] LORD COZENS-HARDY, M.R.—The applicant here admittedly met with an accident arising out of and in the course of his employment and was totally incapacitated. The question is, what is the amount to which he is entitled by way of compensation? The workman was a scaffolder, which I suppose is a recognized term for a man who is specially skilled in erecting scaffolds, as distinguished from carpenters or builders. The time during which he is engaged on any particular job will vary with the size of the building, but generally speaking the job does not last long. In the present instance the workman had been employed by the appellants for seven weeks. Those seven weeks were during the winter, when the days were short. The payments to scaffolders are 8½d.

¹ Workmen's Compensation Act, 1906, Sched. I.

"(1.) The amount of compensation under this Act shall be . . .

"(b) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding fifty per cent of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound.

"(2.) For the purposes of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman, the following rules shall be observed:—

"(a) average weekly earnings shall be

per hour. The man's earnings would therefore depend entirely upon the number of hours he was at work.

Two views were put before the learned county court judge. One view was that as this man had been engaged by the same employer for seven weeks at the date of the accident, all that had to be done was to add up his total earnings from that employer for the seven weeks and divide by 7 and so get his average weekly earnings under the Act. And it was also said that only where it was impracticable to do that simple addition and division sum any method outside par. 1 (b) of the schedule could be resorted to. It is said, therefore, that the learned county court judge was wrong in saying that it was impracticable to compute the compensation as directed in par. 1 (b), and that he was therefore not at liberty, as he thought he was, to decide the case with reference to par. 2 (a). In my opinion these two paragraphs, difficult as they both are to construe, have been construed by this Court for a number of years now, certainly for more than eight years, in a manner which it is not open for us now to depart from.

The material words of par. 1 (b) are these: [His Lordship read them and continued:] If the schedule had stopped there it would have been a short answer in this case to have said "the workman [687] has been engaged for seven weeks by the same employer, and that is sufficient." But then you have to go to par. 2, which gives certain rules for computing "earnings" and "average weekly earnings." As has been said more than once in this Court, the dominant principle, the dominant rule, in these cases is to be found in the opening words of par. 2 (a): "average weekly earnings" (these are the crucial words) "shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." That cannot, it seems to me, mean that they are to be computed simply by an arithmetical

computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district."

calculation. What you have to do is something much more difficult than the mathematical computation. The mathematical computation is the only thing that has to be made, I agree, if the man has been twelve months with the same employer. There you are told to do the sum without having regard to anything more or less than the earnings during the twelve months; and the average weekly earnings thus arrived at are to be taken as final and conclusive. When, however, the employment is for less than a year the average weekly earnings are to be ascertained or computed "in such manner as is best calculated to give the rate per week at which the workman was being remunerated." There are several provisos to that, but the only one that is material is in clause (a): "Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had"—not "must be had:" it is an enabling clause—"to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district."

These two paragraphs were elaborately and carefully considered by this Court in *Perry v. Wright* [1908] 1 K. B. 441. I do not propose to read again my judgment in that case, or the judgment of Fletcher Moulton, L.J.; but it is quite clear that I did not think that a mere [688] mathematical calculation was all that could be required. I instanced the case of an agricultural labourer who happens during the portion of the year when the accident takes place to be earning comparatively high wages, as for instance in the middle of harvest, and I said that it was not the test simply to look at what he was earning at the date of the accident, but that if he had not been in the employment for twelve months or for a period sufficiently long to give the normal rate of remuneration you must work on the second part of clause (a). Fletcher Moulton, L.J., seems to me to take precisely the same view.

The view which I expressed there was repeated in *Cue v. Port of London Authority* [1914] 3 K. B. 892, Ann. Cas. 1916C 877, and I do not desire in any way to resile from that. Very shortly after the decision in *Perry v. Wright* [1908] 1 K. B. 441, the matter came before the Scottish Courts in *Carter v. Lang* [1908] Sc. Ct. Sess. 1198, 1 B. W. C. C. 379. The Lord President in that case examined our decision in *Perry*

v. Wright [1908] 1 K. B. 441, and adopted the language and the principles which we there endeavoured to lay down, and said [1908] Sc. Ct. Sess. 1203, 1 B. W. C. C. 385: "The first observation I have to make is that I entirely agree with the Master of the Rolls and Moulton, L.J. [1908] 1 K. B. 451, 456 in the remark which they both make that the leading proposition in these somewhat complicated sub-sections is the one at the beginning—that the average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. In other words you are as far as possible to cut yourself loose from what I may call the circumstances of the moment"—that is the date of the accident—"and to take a broad view of the matter in order to get truly at what the workman was in the habit of earning week by week." That is merely putting in other words what I endeavoured to say in *Perry v. Wright* [1908] 1 K. B. 441.

There have been other cases in which the same point has been raised. I am not aware of any decision which cuts down or qualifies the view which I have taken. Certainly the case of *Godden v. Cowlin* [1913] 1 K. B. 590, which was called to our attention, is in no way [689] inconsistent with that. That was the case where a carpenter who had been in Canada for some years came back and took a short job with his old master. I say "a short job" because it was common knowledge that he was going back to Canada and that he had taken a passage by a particular steamer which was sailing a few months later. In those circumstances the learned county court judge held that the period of nine weeks during which he had been employed was a sufficient period for the purpose of computing compensation. This was based entirely upon the fact that to the knowledge of both parties the engagement was not one in which the possibility of a twelve months' employment existed, but was one which was only to last until the workman started back for Canada. I do not think that there is a single word in that case which has any bearing upon the present case; certainly it has not any bearing adverse to the view which I have taken.

Whose duty is it to say whether it is impracticable to compute the compensation by reference to the workman's actual earnings in the employment? I think it is the business of the county court judge; and if he has not misdirected himself upon that point it is not for us to interfere. If Mr. Ellis Hill's contention on behalf of the employers was right, there was an error of law on his part; but I do not think that this was so, and in my opinion we ought not to interfere.

I do not think that it is necessary to base my judgment upon one ground which rather impressed the learned county court judge. He seems to have thought that twelve months is the *prima facie* period to which regard has to be had in every case. That may be so: I am not prepared to say that it is not; but I do not think that it is necessary to consider whether that is so or not. I prefer to base my decision upon the words at the beginning of par. 2 (a) as being the dominant guiding words. That, I think, is quite sufficient to justify what the learned judge did here. He gave the man the benefit of the good season as well as the winter season and avoided saying that because this accident happened in the winter compensation could only be computed on the footing that the average earnings of the winter were the earnings of the twelve months. I think if the contrary view were taken the result would be sometimes very unfair to the man and sometimes very unfair to the master, [690] and, more important still, that it would not be in accordance with the language of the Act itself.

In my opinion the appeal fails and must be dismissed.

PICKFORD, L.J.—I agree. I think that the case is governed by authority. I do not mean by that there is a direct decision upon the point, but that the reasoning in the cases to which reference has been made applies here. Under those circumstances I think that it is quite unnecessary to consider what conclusion I might have come to if I had not been assisted by the authorities.

WARRINGTON, L.J.—I agree. I also think that the case is completely concluded by the observations made by the Master of the Rolls and Fletcher Moulton, L.J., in the case of *Perry v. Wright* [1908] 1 K. B. 441, to which we have been referred, and also by the very carefully considered judgments of the Lord President and Lord McLaren in *Carter v. Lang* [1908] Sc. Ct. Sess. 1198, 1 B. W. C. C. 379, delivered very shortly after the decision in *Perry v. Wright* [1908] 1 K. B. 441, and after a thorough investigation of the judgments in that case. I agree that the appeal should be dismissed.

Appeal dismissed.

NOTE.

Meaning of Phrase "Average Weekly Earnings" in Workmen's Compensation or Similar Act.

Introductory, 640.

In General, 640.

What Included in Term "Earnings," 642.

Periodical Employment, 643.

Grade of Employment, 644.

Introductory.

The purpose of the present note is to review the recent cases construing the phrase "average weekly earnings" in a workmen's compensation or similar act. The earlier cases on the subject are collected in the notes to *White v. Wiseman*, Ann. Cas. 1913D 1021, and *Shipp v. Frodingham Iron, etc. Co.* Ann. Cas. 1914C 183.

In General.

Under the English Workmen's Compensation Act of 1906 (6 Edw. VII, c. 58) the "average weekly earnings" of the injured applicant for compensation is the basis of computation, and the phrase is defined by the act as follows: "Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district." Sched. 1, par. 2a. See *Snell v. Bristol* [1914] 2 K. B. (Eng.) 291, Ann. Cas. 1916B 519, 7 B. W. C. C. 236, 83 L. J. K. B. 353, [1914] W. C. & Ins. Rep. 101, [1914] W. N. 47, 110 L. T. N. S. 563; *Cue v. Port London Authority* [1914] 3 K. B. (Eng.) 892, Ann. Cas. 1916C 887, 7 B. W. C. C. 447, 83 L. J. K. B. 1445, [1914] W. C. & Ins. Rep. 487. And see the reported case.

Where a workman has been in the employment of the same master for a period of three years next preceding the injury and in the same grade of employment, the quantum of compensation and the basis for computation is the reproduction of the actual earnings of that period regardless of the employee's absence due to "illness or other unavoidable cause" and not affected by his average earnings. *Greenwood v. Nall* [1915] 3 K. B. (Eng.) 97, 8 B. W. C. C. 503, 113 L. T. N. S. 612, [1915] W. C. & Ins. Rep. 346, [1915] W. N. 244, 31 Times L. Rep. 476, 59 Sol. J. 577, following the ruling laid down by the same court in *Perry v. Wright* [1908] 1 K. B. (Eng.) 441, 77 L. J. K. B. 236. But where an employee has not been in the same employ for three years next preceding the injury, the basis of compensation under section 1 of the act in case of

death from his injury, is 156 times his average weekly earnings during the period of his actual employment. *Gill v. Grainger* [1916] 2 I. R. 354, wherein it was held that where an employee had worked for twenty-six weeks before the accident occurred from which he died, the "average weekly earnings" were to be computed by dividing the total amount actually earned by the deceased by twenty-six, and the trial court could not in the computation leave out of account certain weeks in which small sums were earned. So it was held in *Gill v. Fortescue*, 6 B. W. C. C. (Eng.) 577, [1913] W. C. & Ins. Rep. 471, that in computing the average weekly earnings of a workman under Schedule 1 regard should be had only to his earnings in the period of continuous employment next preceding the injury, and it appearing that the claimant had worked but 119 weeks in the three preceding years, and when not employed by the defendant had worked for other persons, it was held that the employment could not be said to be continuous during the preceding three years and that the average weekly earnings must be arrived at by dividing the sum earned during the three years by the number of weeks of actual employment.

Under section 3 of the English Act of 1906, the average weekly earnings of a workman who is partially incapacitated by an injury received in the course of his employment is arrived at, by ascertaining the difference between the amount of his average weekly earnings before the accident and the average weekly amount which he earns or is able to earn in some suitable employment or business after the accident. *Heathcote v. Haunchwood Collieries* [1917] W. C. & Ins. Rep. 140, wherein it was held that if the applicant was able to get employment in his own occupation after the accident, at the same rate of compensation that he received before the accident, he was not entitled to any benefits under the act; notwithstanding the fact that he was actually employed at the time in another occupation at a lower wage. See also *Bevan v. Energy Colliery Co.* [1912] 1 K. B. (Eng.) 63, [1912] W. C. Rep. 126, 81 L. J. K. B. 172.

The phrase "average weekly earnings" as used in the Canadian compensation acts is given a construction similar to that given to the English act. *Re Barrie*, etc. *Coal Co.* 7 Alberta L. Rep. 138, 28 West. L. Rep. 701, 6 West. W. Rep. 651, 17 Dominion L. R. 385; *Kopyi v. Jacobs Asbestos Min. Co.* 46 Quebec Super. Ct. 466. But it has been held that an offer by the employer to re-employ an injured workman at better wages than he was earning at the date of the accident did not prove that his wages had not been reduced in consequence of the accident.

Ann. Cas. 1918B.—41.

Grand Trunk R. Co. v. McDonnell, 21 Quebec K. B. 532, 5 Dominion L. Rep. 65.

The ability of the workman to do the exact work for which he had been employed at the time of the injury is not the sole measure of disability, as regard must be had to the nature of the injury or disfigurement as well as the age of the applicant. *Frankfort General Co. v. Pillsbury*, 173 Cal. 56, 159 Pac. 150. See also *Giachas v. Cable Co.* 190 Ill. App. 285.

In Massachusetts the "average weekly wages" of an injured workman are by an express provision of the workmen's compensation act determined by dividing the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury by 52; but if the employee lost more than two weeks time during that period then the earnings for the remainder of the twelve calendar months must be divided by the number of weeks remaining after the time so lost has been deducted. *Bartoni's Case*, 225 Mass. 249, 114 N. E. 663, L.R.A.1917E 765. But where an employee was not engaged under such circumstances as to make it practicable to compute his average weekly earnings in that manner then, as under the English act, regard may be had to the average weekly amount earned by a person in the same grade employed in the same class of employment and in the same district. *Gove's Case*, 223 Mass. 187, 111 N. E. 702.

In California the average annual earnings of an injured workman "consist of three hundred times the average daily earnings" of the employee in the same employment, whether for the same employer or not during substantially the whole of the year immediately preceding his injury.

In *Frankfort General Co. v. Pillsbury*, 173 Cal. 56, 159 Pac. 150, it was said: "The petitioner contends that the average daily earnings should have been computed by dividing his earnings for the year by 312, the number of working days in the year. Section 17a (1) bases the annual earnings upon the average daily earnings 'which he earned as such employee during the days when so employed.' The petitioner argues that 'the days when so employed' means the number of working days during which he might have worked or might have been expected to work. The respondents, on the other hand, claim that the phrase refers to the number of days during which the employee was actually engaged in work. We think the latter is the fair and reasonable interpretation of the language used. The basis of computation is the individual days upon which the workman is employed in the year during which he may have been in the employment. For this purpose each day stands by itself, and his

average daily wage is the average for the year, figuring the number of days on which he earned wages. To the argument that this would produce an unjust result where the employee worked only two or three days a week, it may be said that the provision of the statute deals only with cases where the employee has worked 'during substantially the whole of the year.' It may well be questioned whether an employment which falls far short of the normal number of working days is an employment during substantially the whole of a given period."

In *Kansas* the average annual earnings are deemed to be fifty-two times the average weekly wage. *McCracken v. Missouri Valley Bridge, etc. Co.* 96 Kan. 353, 150 Pac. 832.

Under the *New Jersey* Act of 1911 compensation is based on the wages which the decedent received at the time of the accident, and it has been said that while this provision may result in injustice to the employer when the employee's earnings are unusually high at the time of the injury, or a corresponding injustice to the workman when his earnings are unusually low, it is a defect which is in the power of the legislature only to correct. *Huyett v. Pennsylvania R. Co.* 88 N. J. L. 688, 92 Atl. 58. And see *Davidheiser v. Hay Foundry, etc. Works*, 87 N. J. L. 688, 94 Atl. 309.

It has been held that where payment was made by the hour, and at the time of the injury the decedent was employed at twenty-five cents an hour, a finding by the trial judge that his weekly wage within the would be fifteen dollars a week was proper, it appearing that the regular working in that community and in that employment was six days of ten hours each. *Scha v. De Grottola*, 85 N. J. L. 444, 89 Atl. See also *Smolenski v. Eastern Coal Co.* 87 N. J. L. 28, 93 Atl. 85; *Conner v. Public Service Electric Co.* 89 N. J. L. 97 Atl. 792.

What Included in Term "Earnings"

An employee's earnings include, for the purpose of computing his average weekly earnings under the English Act of 1906, not only weekly wages received from his employer also all sums received as an incident of employment from persons other than the employer with whom he has business relations. *Helps v. Great Western R. Co.* 88 L. J. B. 1006, [1917] W. C. & Ins. Rep. 196 Times L. Rep. 366, 61 Sol. J. 490, *aff'd* [1918] A. C. 141, wherein it was held where an accident occurred to a rail porter within the course of his employment the tips received in addition to his wages formed part of his "average weekly earnings," the rule of the employer in effect at the time of the injury being to the effect

that no servant of the company was allowed to "solicit" gratuities from passengers. The court holding that, while there was a prohibition against actively soliciting tips, no complaint was made by the company of tips received by their servants without solicitation, which practice was notorious and well known to everybody; and therefore the money so received must be brought into account in computing his "average weekly earnings." To the same effect see *Penn v. Splers* [1908] 1 K. B. (Eng.) 766, 14 Ann. Cas. 335, 98 L. T. N. S. 541, 77 L. J. K. B. 542, 24 Times L. Rep. 354.

So under the *New York* compensation act the average weekly wages are computed by including the tips of such employees as porters of sleeping cars, waiters in restaurants, attendants at hat stands, bell boys and others serving patrons at hotels, as it is clear that the compensation paid by the employer is based on the assumption that the expected tips form a part of the wages of the employee. *Sloat v. Rochester Taxicab Co.* 177 App. Div. 57, 163 N. Y. S. 904.

Under the English Act (Sched. 1, clause 2b), where a workman enters into concurrent contracts of service with two or more employers under which he is to work at one time for one employer and at another time for another, his average weekly earnings are computed as if his earnings under all the contracts were earned in the employment of the employer for whom he was working at the time of the accident. *Lloyd v. Midland R.*

ployed as a night watchman concurrently by six different employers and was found murdered on the premises of the defendant, the average earnings of the deceased were not to be based on what he had earned in the service of the employer on whose premises he was killed, but were to be computed from his combined earnings from all his employers. See also *In re Gillens*, 215 Mass. 96, 102 N. E. 346, L.R.A.1916A 371. Compare *Hathaway v. Argus Printing Co.* [1901] 1 K. B. (Eng.) 96, 3 W. C. C. 177.

In a claim for compensation under the English act it appeared that the applicant managed a herd of cattle, in which work he was assisted by his two sisters who lived with him in a house provided by his employer, and to whom he paid a certain amount weekly, though not under any specific agreement with them. It was held that in computing the "average weekly earnings" the sum paid weekly by the plaintiff to his sisters could not be deducted; since there was no agreement express or implied that he should employ his sisters, and still less that he should pay them. *Roper v. Hussey-Freke* [1915] 3 K. B. (Eng.) 222, 8 B. W. C. C. 604, [1915] W. C. & Ins. Rep. 377. It has been held that where a claimant received a stated sum per week as wages besides his board, the value of the board was to be added to the weekly wage in computing his earnings. *Baur v. Essex County Ct.* 88 N. J. L. 128, 95 Atl. 627. See also *State v. Sibley County Dist. Ct.* 128 Minn. 486, 151 N. W. 182.

In *Squizzato v. Brennan* [1916] 51 Quebec Super. Ct. 301, it was held that in computing the average weekly earnings of an employee who prior to the accident received a wage of two dollars a day, the sum of sixty cents which was retained daily by the employer for a workmen's pension should not be deducted.

Section 14 of the New York Workmen's Compensation Law provides that the average weekly wages of an employee at the time of the accident should be determined as follows: If the injured employee shall have worked in the employment in which he was working at the time of the accident during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times his average daily wage. If he shall not have so worked, the basis for computation shall be the average daily wage which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place, shall have earned when so employed. If either of the foregoing methods of arriving at the annual average earnings cannot reasonably and fairly be applied,

such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee, and of other employees of the same or most similar class, shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the accident. In *Fredenburg v. Empire United Ry. Co.* 168 App. Div. 618, 154 N. Y. S. 351, it appeared that the claimant had worked for the defendant as a motorman for several years at the rate of thirty cents an hour, but about a month prior to the injury was put in charge of an express car at the rate of \$3.50 a day, which last employment though uncertain as to its duration was assured for at least six months from the time he entered on it. It was also stated by the company's secretary that it was the custom of the defendant to pay an employee who had been in the service of the company as long as the claimant thirty-five cents an hour for the service he performed before he was put on the express car. It was held that this tended to fix the average daily wage of such an employee as well as of other employees in the same position and therefore the finding of the commission that the average weekly wages of the claimant was at the rate of \$3.50 per day was fully warranted. In *Kilberg v. Vitch*, 171 App. Div. 89, 156 N. Y. S. 971, it was held under the same section that the average weekly wages of a minor, when injured in the course of his employment, may include a probable increase of his earning capacity under normal conditions.

Periodical Employment.

Under Schedule 1 of the English Act of 1906 in the calculation of average weekly earnings the question has often arisen whether absence from work and consequent loss of earnings are to be included or excluded. The rule seems to be that absence from work by the employee by reason of his illness or other "unavoidable cause" is not to be taken into account. But absence from work due to causes incidental to the employment such as a recognized lack of continuity in the particular employment, or absence due to trade depression is not to be excluded as absence due to an "unavoidable cause." *Griffiths v. Gilbertson*, 8 B. W. C. C. (Eng.) 548, 113 L. T. N. S. 628, 84 L. J. K. B. 1312, [1915] W. C. & Ins. Rep. 359, [1915] W. N. 253. In a concurring opinion by Warrington, L. J., in that case it was said that the rule was not affected by the fact that the slackness or trade fluctuation may have been due to the war; that an event affecting the whole of the industries of the country could not be said to be such an abnormal incident of the employment as to prevent the period from

being excluded, since war is no more an abnormal circumstance than is some extraordinary depression of trade. And see the opinion of Cozens-Hardy, M. R., in *Perry v. Wright* [1908] 1 K. B. (Eng.) 441, 77 L. J. K. B. 236.

Where the nature or grade of the work is such, that the period of employment is usually for six weeks during a year, the average weekly earnings are to be computed on that basis, i. e., the total earnings of the six weeks divided by fifty-two, and then half of the quotient as the weekly payment during the incapacity. *Gill v. Fortescue*, 6 B. W. C. C. 577, [1913] W. C. & Ins. Rep. 471. See also *Williams v. Hollings*, C. A. [1915] W. C. & Ins. Rep. 540, 9 B. W. C. C. 47.

In *Andreyewski v. Wolvern Coal Co.* 182 Mich. 298, Ann. Cas. 1916D 724, 148 N. W. 684, it appeared that the injured workman had been for ten years employed in a mine which was operated only about 211 days in each year. It was held that his average weekly earnings were to be ascertained by dividing by fifty-two his average annual earnings during the period of the employment. And see *Robbins v. Original Gas Engine Co.* 191 Mich. 122, 157 N. W. 437; *Linestead v. Louis Sands Salt, etc. Co.* 190 Mich. 451, 157 N. W. 64; *De Mann v. Hydraulic Engineering Co.* 192 Mich. 594, 159 N. W. 380.

In *High v. York Mfg. Co. (Me.)* 100 Atl. 9, L.R.A.1917E 277, the question arose where the working week consisted of fifty-eight hours which was divided into five and one-half days, work being done only half a day on Saturday, whether compensation was to be determined by dividing the weekly wage by five and one-half or by six in order to ascertain the average daily wage. It was held that the division must be made by six.

Grade of Employment.

Where the actual earnings of the injured employee cannot be used as the basis of computation and the calculation is made from the earnings of others similarly employed, average earnings cannot be computed by merely taking the average earnings of men in the same class and disregarding the fact that the particular workman in question may be above or below the average of men in his grade of employment. If the injured man is a superior workman, evidence may be given of that fact with the view of increasing the compensation to be awarded; but

the limit of remuneration on which compensation is based is the maximum earned by a man employed in the same work by the same employer. *Cue v. Port of London Authority* [1914] 3 K. B. (Eng.) Ann. Cas. 1916C 887, 7 B. W. C. C. 447, 83 L. J. K. B. 1445, [1914] W. C. & Ins. Rep. 481. So it is an essential element in the computation of the average weekly earnings to take into consideration the personal qualifications of the employee. *Snell v. Bristol* [1914] 2 K. B. (Eng.) 291, Ann. Cas. 1916B 516, 7 B. W. C. C. 236, 83 L. J. K. B. 353, [1914] W. C. & Ins. Rep. 101, [1914] W. N. 47, 110 L. T. N. S. 563, wherein it was held that where the claimant was employed as a casual laborer and was engaged by some employers as a preferred employee at a higher compensation than was given to the average employee doing the same grade of work, but was not so employed by the defendant, it was error for the trial court to consider solely the average earnings of workmen doing the same grade of work without regard to the particular qualification of the plaintiff to earn more than the average workman.

The *Wisconsin* act (§ 2394) provides that where the specified methods for ascertaining the average earning cannot reasonably and fairly be applied, then the average annual earning for basis of compensation shall be fixed in the light of the employee's previous earning at the sum received by other employees of the same or most similar class engaged in the same or similar employment in the same neighboring locality. *West Salem v. State Industrial Commission*, 162 Wis. 57, 155 N. W. 929. In that case it appeared that a workman being summoned as a member of a posse to make an arrest was shot and killed by the man sought to be arrested. It was held that the village was liable to his dependent, not on the basis of his average earnings as a plumber which was his regular occupation, but on the basis of the average earnings in "the same or a similar" or the "most similar employment" to that which the deceased was engaged at the time of the injury, namely, that of a policeman of the village.

Under the *Illinois* act it was held in *Erickson v. American Well Works*, 196 Ill. App. 346, that compensation should be based on the wages he was earning at the time of his death though he had been earning that wage but a short time, it appearing that the wage in question (\$3 per day) was not above that earned in similar employment by men of like capacity.

CHICAGO DRY KILN COMPANY

v.

INDUSTRIAL BOARD OF ILLINOIS
ET AL.

Illinois Supreme Court—December 21, 1916.

276 ILL. 556; 114 N. E. 1009.

Workmen's Compensation Acts — Injury Arising Out of Employment — Watchman.

A watchman employed in a planing mill, whose employees would, independent of election, fall within Workmen's Compensation Act (Laws 1913, p. 339, § 3b), and be entitled to compensation, if injured while protecting the property at the plant from suspected persons, receives an injury arising out of an employment within such section, and is entitled to compensation.

[See Ann. Cas. 1913C 4; Ann. Cas. 1914B 498; Ann. Cas. 1916B 1293; Ann. Cas. 1918B 768.]

Review of Findings of Industrial Board.

The decision of the industrial board that an employee was injured by accident arising out of the employment, if there is competent or legal evidence to support it, cannot be reviewed, as it is not the court's province to pass upon weight or sufficiency of evidence.

[See note at end of this case.]

Error to Circuit Court, Cook county:
TORRISON, Judge.

Claim for compensation under workmen's compensation act. W. W. Jackson, claimant, and Chicago Dry Kiln Company, defendant. Claim allowed by Industrial Board. Award affirmed by Industrial Board. Defendant brings error. The facts are stated in the opinion. **AFFIRMED.**

Adams, Crews, Bobb & Wescott for plaintiff in error.

George E. Gorman for defendants in error.

[557] **CRAIG, C. J.**—Defendant in error W. W. Jackson (hereinafter called the applicant) was an employee of plaintiff in error (hereinafter called the company) as a night watchman. The company was engaged in drying lumber and operating planing mills, its plant covering several blocks in the city of Chicago. There were also on the premises of the company several buildings occupied by tenants, one of the building being occupied by Anderson & Shumaker as a blacksmith shop. Applicant's duties required him to watch the property of the company, and in so doing to make the rounds of the premises of the company and the premises of the respective tenants, includ-

ing Anderson & Shumaker, every hour. In so doing he was required to walk about four blocks and was required to "pull" eleven "boxes" located in various parts of the premises of the company, one being in the shop of Anderson & Shumaker. The applicant had been employed as watchman for the company about five years, and on May 29, 1914, went to work as usual about six o'clock P.M. In making his rounds, when he arrived at the blacksmith shop he found three men there,—Hard, King and Miller, employees of Anderson & Shumaker. King asked permission to leave his motorcycle in the blacksmith shop. Applicant apparently was not acquainted with King but was assured by the other two that he was an employee, and gave his consent. King tossed him a dime, which fell to the ground, and the applicant picked it up. Applicant went on about his duties, and in making the next round of the premises returned to the blacksmith shop about seven o'clock. King was inside. Applicant again returned to the blacksmith shop about eight o'clock. At this time the door of [558] the blacksmith shop was locked and King was outside in the street or alley with his motorcycle. Applicant unlocked the blacksmith shop and went inside and hid the lock, with the intention, as he stated, of changing the lock or putting another one on the door. He returned to the blacksmith shop again about nine o'clock. King, who in the meantime had become intoxicated, demanded the lock from applicant, and upon applicant's refusal to give it to him struck at the applicant, who punched or struck at King with a cane which he carried and broke it. During the scuffle applicant, in trying to get away through the door and prevent King from getting the lock, as he claimed, caught his foot on the sill and fell and received the injuries complained of, which consisted of a fracture of the neck of the thigh bone.

Commencing June 6, 1914, a week after the accident, the company paid the applicant compensation at the rate of \$7.50 a week for a period of forty-one weeks and then refused to continue making further payments. He then filed his application for an adjustment of claim with the Industrial Board. A committee of arbitration was appointed, as provided by the act, which heard the evidence of both parties and rendered its decision finding that the applicant was entitled to recover from the company \$7.50 a week for a period of 416 weeks and was entitled to a pension of \$10 a month thereafter during life. The company filed with the Industrial Board its petition for review of the decision of the committee on arbitration, alleging that the applicant was not totally disabled or incapacitated, that the alleged injuries did not arise out of the course of his employment,

and that his present alleged incapacity did not result from the alleged accident. The Industrial Board rendered its decision finding that both the parties to the proceeding were at the time of the accident operating under and subject to all the terms and provisions of the Workmen's Compensation act; that the accident for which compensation was claimed arose out of and occurred in the [559] course of the applicant's employment; that his wages for the purpose of the proceeding were \$15 per week, and that he was then totally and permanently disabled. The board confirmed the decision of the committee of arbitration, except that it ordered that after the expiration of the 416 weeks, for which the applicant was to be paid at the rate of \$7.50 a week, he should receive from the company an annual pension of \$249.60, payable in installments of \$20.80 per month, for the remainder of his life, being eight per cent of the total amount which would have been due him had death resulted from the accident. The company then filed a *praecipe* with the clerk of the circuit court of Cook county for a writ of *certiorari* to the Industrial Board, which was issued and served upon the secretary of the board. On July 8, 1916, the court entered a judgment approving and confirming the finding of the Industrial Board and certified that the cause was one proper to be reviewed by the Supreme Court, and the company sued out this writ of error.

Two points are raised in the briefs: (1) The injury the applicant received did not arise out of and in the course of his employment in a business or enterprise under the Workmen's Compensation act; (2) the injury of the applicant did not arise out of the course of his employment.

It appears that the company had never elected to come under the provisions of the Workmen's Compensation act and would not be subject to its provisions unless the company was engaged in one of the occupations or businesses enumerated in paragraph (b) of section 3 of the act. (Laws of 1913, p. 339.) It is conceded by counsel for the company that the business of the company in operating drying kilns and a planing mill is one of the occupations which would involuntarily come under the act, and as we understand the argument of counsel there is no question that one of the employees engaged in the planing mill, for example, would be entitled to recover compensation under the act in [560] case of injury. The claim is that the duties of employment of the applicant in this case are not of such a nature as to entitle him to compensation under the act in case of an injury. Under the holding of this court in the recent case of *Vaughan's Seed Store v. Simonini*, 275 Ill. 477, 114 N. E. 163, the mere fact that an employer is engaged in some occupation or business which might be under

the act does not entitle a person working for the employer to recover compensation for injuries where he is injured in the course of his employment in another business conducted by the employer or in some employment remote from and having no connection with the hazardous occupation. As to whether the employee claiming compensation for injuries under the act is engaged in a line of employment that entitles him to such compensation depends to some extent on the particular facts of each individual case. In *Suburban Ice Co. v. Industrial Board*, 274 Ill. 630, 113 N. E. 979, where a teamster was in the employ of a concern engaged in making ice and in delivering ice and fuel and whose duty it was to handle ice and coal and care for the horses used by the company on premises adjacent to the ice plant, it was held that his duties were of such a nature and so related to and connected with the occupation of the company as to bring both employer and employee within the provisions of the workmen's compensation act.

It is stated by counsel for the company in the argument that "if a watchman, being engaged in protecting the property of his employer from thieves, is injured no one would contend the injury did not arise out of the employment." It seems to be conceded by counsel for the company that the duties of the applicant required him, among other things at least, to guard the property of the company against fires and trespassers. Such an employment is not without its hazards and dangers. It must be assumed that the duties of the applicant were necessary to the protection of the company's property or he would not have been employed [561] for that purpose, and in such employment he would run the risk of being subject to assault and injury in protecting the property of the company,—and that was, in fact, what happened in this case according to the finding of the Industrial Board. In the case of *Anderson v. Balfour* [1910] 2 Ir. R. 497, a game-keeper was attacked by poachers and wounded. It was held that he was entitled to recover under the Workmen's Compensation act of Great Britain, from which the Illinois act was taken. In the case of *Nisbet v. Bayne* [1910] 2 K. B. (Eng.) 689, Nisbet was employed as a cashier, and in the performance of his duties, while carrying a large sum of money and going by train to his employer's colliery, was shot and killed. The court held that the risk of being attacked by reason of carrying large sums of money was incidental to his employment and that the murder was an accident which arose out of his employment. To the same effect is *Challis v. London, etc. R. Co.* [1905] 2 K. B. (Eng.) 154.

A number of cases are cited by counsel for the company. Without commenting upon them, it is sufficient to say that it was held

by the court in each of those cases that the employee was not entitled to recover compensation for the reason that the injuries complained of did not arise out of and in the course of his employment but by reason of something that happened outside such employment. In this case the Industrial Board found to the contrary, and, as above pointed out, the facts and circumstances under which the action arose seem to entirely justify the conclusion arrived at by the board that the applicant, as a watchman and in the course of his employment as such watchman, was injured while performing the duties as such for the company.

The second point urged for reversal, that the injury to the applicant did not arise out of and in the scope of his employment, is based upon the assumption that the applicant received his injury by reason of doing something outside of the scope of his employment,—that is, undertaking [562] to watch the motorcycle of King and that King gave him a dime for so doing. Whether the applicant was injured by reason of guarding his employer's property as he was hired to do and which injury would be one arising out of or in the scope of his employment, or was injured by reason of having undertaken to guard the motorcycle of King, which was something outside of his employment, was a question of fact to be determined from the evidence by the Industrial Board. If there is competent or legal evidence to support the decision of the board it is not within the province of the court to pass upon its weight or sufficiency. (*Parker-Washington Co. v. Industrial Board*, 274 Ill. 498, 113 N. E. 976; *Armour v. Industrial Board*, 273 Ill. 590, 113 N. E. 138.) If the applicant had undertaken to watch the motorcycle for the owner thereof and had received his injuries in attempting to prevent someone from stealing it, or otherwise because of his undertaking to watch the motorcycle, a different question would arise. But such is not the case. There was evidence to sustain the finding of the Industrial Board, which was, in effect, that even though the applicant had agreed to watch King's motorcycle and such agreement was outside the scope of applicant's employment, such agreement had terminated at the time the accident occurred, as the testimony showed conclusively that King had taken the motorcycle from the blacksmith shop and had it out in the street at the time of the accident, and that the alleged understanding between applicant and King with reference to watching the motorcycle had no bearing upon the case, and that the altercation between King and the applicant in which applicant was injured came about by reason of applicant becoming suspicious of the movements of King and taking measures to keep him out of the blacksmith shop.

For the reasons given, the judgment of the circuit court will be affirmed.

Judgment affirmed.

Cooke, J., dissenting.

Rehearing denied February 9, 1917.

NOTE.

Review of Facts on Appeal under Workmen's Compensation Act.

Introductory, 647.

General Rule, 647.

Application of Rule:

Injury Arising Out of or in Course of Employment, 650.

Proximate Cause, 651.

Wilful Misconduct, 652.

Incapacity, 654.

Dependency, 654.

Introductory.

It is the purpose of this note to review the recent cases passing on the right of an appellate court to review findings of fact in a case arising under a workmen's compensation act. For a discussion of the earlier cases on this subject, see the note to *In re Buckley*, Ann. Cas. 1916B 474.

General Rule.

It is generally held that findings of fact by a board or commission on a claim under a workmen's compensation act are conclusive; and the appellate court will not review such findings of fact except to determine whether there is any evidence to support the award. It may reverse an award if there is an absence of any evidence to support it, but it is not a trier of facts.

England.—*Lakey v. Blair* [1917] W. C. & Ins. Rep. 78.

California.—*Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, Ann. Cas. 1917E 390, 156 Pac. 491; *Southwestern Surety Ins. Co. v. Pillsbury*, 172 Cal. 768, 158 Pac. 762; *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 159 Pac. 721; *Frankfort General Ins. Co. v. Pillsbury*, 173 Cal. 50, 159 Pac. 150; *Western Grain, etc. Products Co. v. Pillsbury*, 173 Cal. 135, 159 Pac. 423; *Donlon v. Industrial Acc. Commission*, 173 Cal. 250, 159 Pac. 715; *Kirkpatrick v. Industrial Acc. Commission*, 31 Cal. App. 668, 161 Pac. 274; *North Pac. Steamship Co. v. Industrial Acc. Commission*, 163 Pac. 910; *Richmond Dredging Co. v. Industrial Acc. Commission*, 164 Pac. 407; *Santa v. Industrial Acc. Commission*, 165 Pac. 689; *McDonagh v. Industrial Acc. Commission*, 166 Pac. 1024; *Easton v. Industrial Acc. Commission*, 167 Pac. 288; *Gray v. Industrial Acc. Commission*, 163 Pac.

702; Massachusetts Bonding, etc. Co. v. Industrial Acc. Commission, 168 Pac. 1050. See also Northwestern Pac. R. Co. v. Industrial Acc. Commission, 173 Cal. 652, 161 Pac. 123.

Connecticut.—Swanson v. Latham, 92 Conn. 87, 101 Atl. 492; Osterhout v. Latham, 92 Conn. 91, 101 Atl. 494.

Illinois.—Armour v. Industrial Board, 273 Ill. 590, 113 N. E. 138; Victor Chemical Works v. Industrial Board, 274 Ill. 11, 113 N. E. 173; Munn v. Industrial Board, 274 Ill. 70, 113 N. E. 110; Chicago, etc. R. Co. v. Industrial Board, 274 Ill. 336, 113 N. E. 629; Parker-Washington Co. v. Industrial Board, 274 Ill. 498, 113 N. E. 976; Suburban Ice Co. v. Industrial Board, 274 Ill. 630, 113 N. E. 979; Bloomington, etc. R. Co. v. Industrial Board, 276 Ill. 454, 114 N. E. 939; Decatur Ry. etc. Co. v. Industrial Board, 276 Ill. 472, 114 N. E. 915; Kerens-Donnewald Coal Co. v. Industrial Board, 277 Ill. 35, 115 N. E. 225; Commonwealth Edison Co. v. Industrial Board, 277 Ill. 74, 115 N. E. 158; Illinois Midland Coal Co. v. Industrial Board, 277 Ill. 333, 115 N. E. 527; Forschner v. Industrial Board, 278 Ill. 99, 115 N. E. 912; Eugene Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684; Squire-Dingee Co. v. Industrial Board, 281 Ill. 359, 117 N. E. 1031. And see the reported case. See also Hochspeier v. Industrial Board, 278 Ill. 523, 116 N. E. 121; Stubbs v. Industrial Board, 280 Ill. 128, 117 N. E. 419.

Indiana.—Columbia School Supply Co. v. Lewis, 115 N. E. 103; Interstate Iron, etc. Co. v. Szot, 115 N. E. 599; Columbia School Supply Co. v. Lewis, 116 N. E. 1; In re Myers, 116 N. E. 314; Bloomington-Bedford Stone Co. v. Phillips, 116 N. E. 850; Meehan v. Edward Valve, etc. Co. 117 N. E. 265; In re McCaskey, 117 N. E. 268; Waterman v. Riehl, 117 N. E. 272; United Paperboard Co. v. Lewis, 117 N. E. 276; Indianapolis Abattoir Co. v. Coleman, 117 N. E. 502; Bimel Spoke, etc. Co. v. Loper, 117 N. E. 527; Haskell, etc. Car Co. v. Brown, 117 N. E. 555; Kenwood Bridge Co. v. Stanley, 117 N. E. 657; Zeitlow v. Smock, 117 N. E. 665; Sugar Val. Coal Co. v. Drake, 117 N. E. 937; Walker v. Chicago, etc. R. Co. 117 N. E. 969.

Iowa.—Des Moines Union R. Co. v. Funk, 164 N. W. 648.

Massachusetts.—Kenney's Case, 222 Mass. 401, 111 N. E. 47; Newman's Case, 222 Mass. 563, 111 N. E. 359, L.R.A.1916C 1145; Von Ette's Case, 223 Mass. 56, 111 N. E. 696, L.R.A.1916D 641; Lemieux's Case, 223 Mass. 346, 111 N. E. 782; Crowley's Case, 223 Mass. 288, 111 N. E. 786; Fierro's Case, 223 Mass. 378, 111 N. E. 957; Sanderson's Case, 224 Mass. 558, 113 N. E. 355; Moore's Case, 225 Mass. 258, 114 N. E. 204; Cox's Case, 225 Mass. 220, 114 N. E. 281; Gorski's Case, 227 Mass. 466, 116 N. E. 811; In re Uzzio, 117

N. E. 349. See also McManaman's Case, 224 Mass. 554, 113 N. E. 287.

Michigan.—Papinaw v. Grand Trunk R. Co. 189 Mich. 441, 155 N. W. 545; Deem v. Kalamazoo Paper Co. 189 Mich. 655, 155 N. W. 584; Bischoff v. American Car, etc. Co. 190 Mich. 229, 157 N. W. 34; Lindsteadt v. Louis Sands Salt, etc. Co. 190 Mich. 451, 157 N. W. 64; La Veck v. Parke, 190 Mich. 604, 157 N. W. 72, L.R.A.1916D 1277; Kennelly v. Stearns Salt, etc. Co. 190 Mich. 628, 157 N. W. 378; Bell v. Hayes-Ionia Co. 192 Mich. 90, 158 N. W. 179; Ramlow v. Moon Lake Ice Co. 192 Mich. 505, 158 N. W. 1027, L.R.A.1916F 955; Shafer v. Parke, 192 Mich. 577, 159 N. W. 304; Daich v. Studebaker Corp. 161 N. W. 927; Van Gorder v. Packard Motorcar Co. 162 N. W. 107, L.R.A.1917E 522; Vogeley v. Detroit Lumber Co. 162 N. W. 975; Miller v. Acme White Lead, etc. Works, 164 N. W. 432; Meyers v. Michigan Cent. R. Co. 165 N. W. 703; Riley v. Mason-Motor Co. 165 N. W. 745. See also Foley v. Detroit United Ry. 190 Mich. 507, 157 N. W. 45.

New Jersey.—Foley v. Home Rubber Co. 89 N. J. L. 474, 99 Atl. 624; Sessler v. Peter, 89 N. J. L. 722, 98 Atl. 834; Nevich v. Delaware, etc. R. Co. 100 Atl. 234, L.R.A.1917E 847.

New York.—Dale v. Saunders, 218 N. Y. 59, 112 N. E. 571, *affirming* 171 App. Div. 523, 157 N. Y. S. 1062; Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L.R.A.1917A 344; Glatzel v. Stumpp, 220 N. Y. 71, 114 N. E. 1053, *reversing* 174 App. Div. 901, 159 N. Y. S. 115; Kingsley v. Donovan, 169 App. Div. 828, 155 N. Y. S. 801; Rhyner v. Hueber Bldg. Co. 171 App. Div. 56, 156 N. Y. S. 903; Collins v. Brooklyn Union Gas Co. 171 App. Div. 381, 156 N. Y. S. 957; Tirre v. Bush Terminal Co. 172 App. Div. 386, 158 N. Y. S. 883; Marinaccio v. Flinn-O'Rourke Co. 172 App. Div. 378, 158 N. Y. S. 715; Uhl v. Guarantee Constr. Co. 174 App. Div. 571, 161 N. Y. S. 659; Marhoffer v. Marhoffer, 175 App. Div. 52, 161 N. Y. S. 527; Fowler v. Risedorph Bottling Co. 175 App. Div. 224, 161 N. Y. S. 535; Boscarino v. Carfagno, 175 App. Div. 286, 161 N. Y. S. 562, *order reversed* 220 N. Y. 323, 115 N. E. 710; Prokopiak v. Buffalo Gas Co. 176 App. Div. 128, 162 N. Y. S. 288; Fleming v. Robert Gair Co. 176 App. Div. 23, 162 N. Y. S. 298; Sullivan v. Preston, 177 App. Div. 110, 163 N. Y. S. 692; Lindquest v. Holler, 178 App. Div. 317, 164 N. Y. S. 906; La Fleur v. Wood, 178 App. Div. 397, 164 N. Y. S. 910; Van Keuren v. Divine, 179 App. Div. 509, 165 N. Y. S. 1049; Bylow v. St. Regis Paper Co. 166 N. Y. S. 874; Walsh v. F. W. Woolworth Co. 167 N. Y. S. 394; Benjamin v. Rosenberg, 167 N. Y. S. 650. See also Cunningham v. Buffalo Copper, etc. Rolling Mills, 155 N. Y. S. 797.

Pennsylvania.—Poluskiewicz v. Philadelphia, etc. Coal, etc. Co. 257 Pa. St. 305, 101 Atl. 638.

Vermont.—*Packett v. Moretown Creamery Co.* 99 Atl. 638.

West Virginia.—See *Poccardi v. State Compensation Com'r*, 91 S. E. 663.

Wisconsin.—*Johnstad v. Lake Superior Terminal, etc. R. Co.* 165 Wis. 499, 162 N. W. 659; *William Rahr Sons Co. v. Industrial Commission*, 163 N. W. 169; *Wasau Lumber Co. v. Industrial Commission*, 164 N. W. 836. See also *Lesh v. Illinois Steel Co.* 163 Wis. 124, 157 N. W. 539, L.R.A.1916E 105.

Thus it was said in *Massachusetts Bonding, etc. Co. v. Industrial Acc. Commission (Cal.)* 168 Pac. 1050, that an award may be reviewed and annulled if the commission exceeded its powers in making it or if it was procured by fraud, or if it is unreasonable, or if the findings of facts on which it was made do not support it, but on no other grounds. It should not be set aside for errors of procedure only or for insufficiency of the evidence, where there is substantial evidence to support the findings.

So it was said in *Swanson v. Latham*, 92 Conn. 87, 101 Atl. 492: "The trial court does not retry the facts. It decides the appeal upon the findings as made by the commissioner, unless the appeal assigns as error the finding or omission to find any facts, and the court finds that facts have been found or omitted, which, if found, in accordance with the evidence, would affect the result. The right of the trial court to correct the finding of the commissioner is similar to that exercised by us upon a proper appeal over the finding of a trial court. And our authority upon appeal from the decision of the trial court, or upon a reservation in a compensation case, does not differ from that exercised by us in the ordinary appeal for errors in the finding of the trial court."

Similarly it was said in *Sanderson's Case*, 224 Mass. 558, 113 N. E. 355: "The industrial accident board have found that the injury arose out of the employment and it is expressly provided by section 11, part III, of the act as amended by St. 1912, § 14, that the decree entered in the superior court 'shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly determined by said court' except that there shall be no appeal upon findings of fact. The findings of fact made by the industrial accident board are equally conclusive with the findings of a judge, or the verdict of a jury, and are not to be set aside if there is any evidence to support them. *Pigeon's Case*, 216 Mass. 51, Ann. Cas. 1915A 737, 102 N. E. 932. The industrial accident board in the determination of questions of fact is permitted to draw such inferences from the evidence and all the circumstances as a reasonable man could draw, but its findings cannot properly be based merely

upon conjecture or speculation." See to the same effect *Haskell, etc. Car Co. v. Brown (Ind.)* 117 N. E. 555.

In *Rhyner v. Hueber Bldg. Co.* 171 App. Div. 56, 156 N. Y. S. 903, the court said: "The appellant contends that the method of computing the deceased's wages was incorrect. We think the conclusion reached by the commission was correctly worked out. Of course, we are unable to say what mental processes the commission employed in arriving at the figures given in their decision; but it seems to us that, under the evidence, the figures given might, very properly, have been the result of the method of computation pointed out in subdivision 3 of section 14. But here again a finding of fact, based upon evidence, is presented to us, and we are powerless to criticize, modify, or revoke. It is not well for this court to fall into the habit of discussing the facts, even for the purpose of showing that the findings of fact are reasonable and meet with our approbation. We cannot, except by usurpation, invade the realm of facts, for it was the clear intent of the legislature that 'the decision of the commission shall be final as to all questions of fact.' Of course, if there are no facts, and the decision is arbitrary, unfair, and unreasonable, a question of law arises, and we may right the wrong. *Gardner v. Horseheads Constr. Co.* 171 App. Div. 66, 156 N. Y. S. 899, handed down herewith. But it is wholly improbable that the commission will make any such decision. The commission is the sole judge and the 'final' judge of the facts, and this court is not only forbidden to trespass upon the jurisdiction of the commission in this field, but, by section 20 of the act, it is circumscribed, even, in its review of questions of law. It was the purpose of the legislature to create a tribunal to do rough justice—speedy, summary, informal, untechnical. With this scheme of the legislature we must not interfere; for, if we trench in the slightest degree upon the prerogatives of the commission, one encroachment will breed another, until finally simplicity will give way to complexity, and informality to technicality."

In *Parker-Washington Co. v. Industrial Board*, 274 Ill. 498, 113 N. E. 976, it was said: "The industrial board held, in effect, in its finding, that plaintiff in error was paving certain streets, for which the crushed stone was being hauled for a foundation. The contract which plaintiff in error entered into with the Bessmer Teaming Company for this hauling stated, in terms, that the Parker-Washington Company had a contract for paving those streets. Paragraph (f) of section 19 of the workmen's compensation act makes the decision of the industrial board, if it acts within its powers, in the absence of fraud, conclusive upon the courts. The circuit court

and the supreme court, in reviewing a proceeding of this kind, can only review questions of law. Whether legal evidence is offered to support the decision of the board, where such evidence is properly preserved for review here, is a question of law, but if there is competent or legal evidence to support the decision of the board, it is not within the province of the courts to pass upon its weight or sufficiency. *Munn v. Industrial Board*, 274 Ill. 70, 113 N. E. 110; *Victor Chemical Works v. Industrial Board*, 274 Ill. 11, 113 N. E. 173. As there was evidence in this record justifying the finding of the industrial board that the plaintiff in error was engaged in construction work, even though this evidence was controverted, we cannot inquire into this question of fact."

If the facts proven are capable as a matter of law of sustaining the inferences of fact drawn from them by the board, its findings are conclusive, in the absence of fraud, and an appellate court is not at liberty to interfere with them. This is but an application to workmen's compensation cases of the comprehensive and fundamental principle universal in courts of law, that whether there is any competent evidence is for the court to determine, but whether the evidence is sufficient is a question for the jury; the function of the board being in that respect those of a jury in actions at law. *Papinaw v. Grand Trunk R. Co.* 189 Mich. 441, 155 N. W. 545.

The commission cannot act arbitrarily on the information it receives, or in direct violation of the conceded facts. Its duty is to base its determination on the facts of the case and the reasonable inference to be drawn from the general situation. When its findings are without evidence, and in direct conflict with the undisputed facts, and all reasonable inferences which may be drawn from them, its determination may be reversed as an error of law. *Gardner v. Horseheads Constr. Co.* 171 App. Div. 66, 156 N. Y. S. 899. And see *Carrol v. Knickerbocker Ice Co.* 218 N. Y. 435, 113 N. E. 507, reversing 169 App. Div. 450, 155 N. Y. S. 1; *Matter of Saxon*, 221 N. Y. 179, 116 N. E. 983. While a finding of facts by the board will stand if there is any evidence on which it can rest, it must be founded on evidence and cannot rest on surmise, conjecture or speculation. *Gorski's Case*, 227 Mass. 456, 116 N. E. 811.

While the findings of fact are conclusive and cannot be reviewed on appeal, the legal conclusions of the board based on their findings are subject to the supervision of the appellate court. *Eugene Dietzen Co. v. Industrial Board*, 279 Ill. 11, 116 N. E. 684.

The question when an injury occurred, like any other question of influence in determining whether a claim should be allowed by the industrial board, is, ordinarily, a question of

fact to be determined by the board from all the evidence before it, and its determination thereof, where it has any evidence for its support, will be conclusive on the appellate court. In *re McCaskey (Ind.)* 117 N. E. 268.

The fact that other persons testified differently from the claimant does not authorize interference with the decision of the board. *Bloomington, etc. R. Co. v. Industrial Board*, 276 Ill. 454, 114 N. E. 939. The credibility of a witness is a question of fact and rests with the commission and is beyond the appellate court to review. *Benjamin v. Rosenberg*, 187 N. Y. S. 650.

The office of the writ of certiorari is to bring before the circuit court for review the decision of the industrial board on questions of law only. *Forschner v. Industrial Board*, 278 Ill. 99, 115 N. E. 912.

Application of Rule.

INJURY ARISING OUT OF OR IN COURSE OF EMPLOYMENT.

If there is competent evidence in the record which standing alone fairly tends to prove that the accident arose out of and in the course of employment, a reviewing court may not question its sufficiency, but whether there is any evidence in the record which fairly tends to establish that fact is a question of law for the determination of the court. *Northern Illinois Light, etc. Co. v. Industrial Board (Ill.)* 117 N. E. 95.

The question whether an accident arose out of the claimant's employment is practically eliminated by the rule of law which prevents the appellate court from weighing the evidence and compels it to affirm the award of the industrial board, unless it can say that the board had no evidence, either direct or circumstantial, furnishing any ground on which a reasonable mind might predicate the inference drawn by the board. *Haskell, etc. Car Co. v. Brown (Ind.)* 117 N. E. 555. The finding of the industrial accident board that the death of an employee resulted from an injury arising out of and in the course of his employment is, as in the analogous case of the verdict of a jury or the finding by a court in an action at law, conclusive; and the conclusion may be reached not only by direct evidence of facts but by reasonable inferences from them. In *re Uzzio (Mass.)* 117 N. E. 349. And see *Sanderson's Case*, 224 Mass. 558, 113 N. E. 355.

The powers of the appellate court to review are limited to a determination from the facts recited in the decision of the industrial board, whether that body acted within its powers in making the award. If the injury which caused the employee's death arose out of and in the course of his employment, then the board acted within its powers, and if no fraud

is alleged, its decision is conclusive upon the circuit court and this court. *Munn v. Industrial Board*, 274 Ill. 70, 113 N. E. 110. In that case the facts on which the board based its conclusion were stated by the court as follows: "It was the duty of the deceased to operate the elevator, fire the boilers that were in operation in the building, and keep the hall and stairways swept and clean. His work was to begin at 7 o'clock in the morning and ended in the afternoon at 6 o'clock. One of the tenants in the building in which the deceased was employed was the Standard Film Exchange, who in the conduct of its business accumulated large amounts of what is known as 'film scraps.' These film scraps were put in bags by the film company and set outside of the door and the deceased was in the habit of taking them away. . . . On or about 7 o'clock in the evening, the 10th of November, 1914, Casparson was seen in the basement of the building attempting to extinguish a fire in the coal in and about the boiler and engine room. In this attempt he became suffocated by the fumes or smoke from a fire in the boiler room, collapsed, and fell on the floor. He was carried out, and in a short time was restored and went back into the boiler room and adjusted and moved some boxes in which there were possibly some film scraps. Bags of film scraps were found at various places in and about the basement of the building the next day after the fire, some of which, from appearances in the room, may have been taken from the boiler room after the fire. The deceased said to some witnesses who testified in the case, in substance, that someone had set fire to the film scraps and that he must get what remained out of the rooms or he would possibly lose his job. The deceased returned to his home and died early the next morning from the inhaling of poisonous gases or from suffocation, the result of the fire in the boiler room." In deciding that the findings of the board were not inconsistent with the facts, it was said: "The recital of facts states that about 7 o'clock in the evening Casparson was seen in the basement 'attempting to extinguish a fire in the coal' in the engine and boiler room, and all he did after he entered the boiler room the second time was to adjust and move some boxes, 'in which there were possibly some film scraps,' but nowhere is there any finding that the fire originated in or was caused by film scraps, much less in the film scraps brought into the room by Casparson in his own private interest. Nor does it appear from the recital of facts that Casparson's presence an hour after his day had ended under the terms of his employment was caused by his employment by the film company to remove its scraps. The mere fact that at the time of the accident Casparson's day's service, according to the terms of his

employment, had ended, is not sufficient to authorize a reversal of the finding that the accident arose out of and was received in the course of his employment. The industrial board found that upon his return to the boiler room the second time he put in some coal. An employee should not be penalized for working overtime if he wishes to do so or for endeavoring to save his master's property. *Dragovich v. Iroquois Iron Co.* 269 Ill. 478, 109 N. E. 999; *Ruegg on Employers' Liability and Workmen's Compensation* (8th ed.) 346. The circuit court and this court are bound by the decision of the industrial board if there is any legal evidence to support it. . . . It is not claimed this court can weigh and determine the preponderance of the evidence, but the claim, in substance, is, that the facts recited show, without contradiction, that the accident did not arise out of and in the course of the employment. Without further adverting to the facts recited by the board upon which it based its decision, we do not think the conclusion contended for by plaintiffs in error is warranted."

It has been held that a finding by the industrial accident board that injuries sustained by the manager of a store, while answering a telephone call from his daughter, arose out of and in the course of his employment would not be set aside if there was any evidence on which it could rest; that if it was his duty to answer telephones, then the circumstances that the call happened to be one which interested him personally would not prevent his conduct in attending to the call from being service arising out of and in the course of his employment. *Cox's Case*, 225 Mass. 220, 114 N. E. 281.

PROXIMATE CAUSE.

Where substantial testimony is given before the commission to justify its inference and finding that the injury sustained by a workman was the proximate cause of his death, the finding is conclusive on appeal. *Santa v. Industrial Acc. Commission (Cal.)* 165 Pac. 639.

Where there is conflicting medical testimony as to whether a workman's injuries resulted in his death, it is a question of fact for determination by the board, and an appellate court has no jurisdiction to review its action. *Waterman v. Riehl (Ind.)* 117 N. E. 272.

A finding by the industrial board on an application for increased compensation that the claimant developed a disease of the spine as the result of the accident, although the original award was made on a claim of having sustained a hernia, has been held to be conclusive on appeal. *Squire-Dingee Co. v. Industrial Board*, 281 Ill. 359, 117 N. E. 1031,

wherein the court said: "The further argument is made that there was no sufficient evidence in the record as to this disease being caused by the injury in question to justify the industrial board in finding that it was so caused. The evidence shows clearly that Dombkowski was a man in excellent health before this injury and that the disease in question was very apt to be caused by a weakened condition of certain portions of the system attacked by it. The evidence also shows that from the first Dombkowski complained of pain in his back and hips; that originally he did not complain so much of this pain because of the acute suffering caused by the double hernia; that that trouble, in a measure, apparently overshadowed the pain from the injury to his back. This court has repeatedly held that the burden of proof rests upon the complainant before a recovery can be had. *Armour v. Industrial Board*, 273 Ill. 590, 113 N. E. 138; *Chicago, etc. R. Co. v. Industrial Board*, 274 Ill. 336, 113 N. E. 629; *Savoy Hotel Co. v. Industrial Board*, 279 Ill. 329, 116 N. E. 712. We have also held that the industrial board must not surmise, conjecture, or guess, but that it may draw an inference from the proved facts so long as it is a legitimate inference; that, if it is guided by the facts, then it is not guessing, but inferring, and, if there is material for it to do that, the industrial board is the judge as to the conclusion which should be reached, and not the courts. *Peoria R. Terminal Co. v. Industrial Board*, 279 Ill. 352, 116 N. E. 651. On the record before us we think the industrial board was justified in finding that the disease of the spine was the result of the accident; that such a conclusion is a legitimate inference from the facts proved by competent evidence in the record. That being so, that finding is conclusive on the courts."

In *Bimel Spoke, etc. Co. v. Loper* (Ind.) 117 N. E. 527, it was said: "Under the first and second assignments of error appellant seeks to present the question that there is a total failure of evidence to show that the accident to the deceased described in the findings of the board was a proximate, contributing cause of his death, and contends that the undisputed evidence shows that he died from peritonitis. Ultimate facts need not be proven by any particular kind or class of evidence. If there are facts and circumstances proven in the case from which the essential ultimate facts may reasonably be inferred, and the court or board whose duty it is to pass upon such facts has drawn therefrom the essential ultimate facts, this court will not disturb such finding, though other and different facts might be inferred therefrom by other minds equally as fair and reasonable. We deem it unnecessary to set out the evidence in detail. The deceased had complained of some abdom-

inal trouble, and had taken treatment therefor shortly before the fatal accident, but had continued to work regularly. He was working when injured in the manner set forth by the industrial board, and there is no claim that he was at that time participating in the use for sport with the air hose. His injury occurred on the evening of the 28th, and he died on the 30th of September, at 9:30 P.M. The testimony shows that immediately after the accident he suffered pain, became sick, was taken home, called a physician immediately, a consultation of physicians was held, and an abdominal operation performed on September 29th, the day after the accident. There was inflammation of the bowels and abdominal walls, pus and serum were found in the abdominal cavity, and a diseased condition in the region of the gall bladder of a character which indicated the parts had been affected before the accident; that the conditions found would not likely have resulted from a sudden jerking or wrenching of the body if there had been no diseased condition prior to the day of the accident. One of the physicians testified that in his opinion the conditions found at the autopsy might have resulted from an accident which later caused his death; that the diseased condition of the intestines began before the accident occurred. The facts are sufficient to bring the case within the rules of law already declared by this court. In *re Bowers*, 116 N. E. 842. There is evidence tending to support the finding of facts."

WILFUL MISCONDUCT.

A finding of the commission or board on the question of wilful misconduct of an employee seeking recovery under the act will not be disturbed if it is supported by evidence. Thus in *North Pac. Steamship Co. v. Industrial Acc. Commission* (Cal.) 163 Pac. 910, the petitioner contended that the commission was without jurisdiction to make the award, since the uncontradicted evidence showed that the decedent's death was caused by his own wilful misconduct. The court stated the facts and its conclusions as follows: "The words 'wilful misconduct,' or phrases of similar import, are found in many workmen's compensation statutes. We need not undertake the difficult, perhaps impossible, task of giving an accurate and comprehensive definition of the term. As is true, generally, of inquiries turning upon standards of human conduct, each case must turn upon its own peculiar facts and circumstances. *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35. Certain it is, however, that 'wilful misconduct' means something more than negligence—more, even, than gross negligence. In the *Great Western Power Company* case we held that a workman was guilty of wilful misconduct where he had deliberately and intentionally

violated a reasonable rule established for the very purpose of protecting men in his occupation from the danger of serious injury. In the present case it is claimed that Bolger deliberately violated a proper command of his superior officer, the captain, and that his death was the direct result of this disobedience. The testimony shows that, when the engines stopped and the vessel had struck or was about to strike, the captain ordered the crew to take to the boats. Two boats were available, and were launched, one, a 'working boat,' near the bow, and the other, a lifeboat, near the stern. Bolger's station was at the lifeboat. Most of the evidence indicates that the captain and some of the men took their places in the working boat, while Bolger and others went into the lifeboat. There is, however, some testimony that Bolger was with the captain in the working boat. At any rate, Bolger, for some reason which is not disclosed by the evidence, left the boat in which he was, and went back to the steamer. While he was still absent from his comrades, the lifeboat was cast off, and when Bolger was next seen he was on the Eureka, appealing to the men in the boats to save him. A high sea was running, and it was not possible to approach near enough to get Bolger off. The wilful misconduct asserted is the failure of Bolger to obey the captain's order to take to the boats. Of course, he did, in the first instance, heed the command by going into the boat. But the order of the captain may fairly be interpreted as an order to abandon the vessel once for all. This does not, however, answer the whole question. Did the evidence compel an inference that Bolger's act in returning to the ship was a deliberate and intentional defiance of his superior's command, in reckless disregard of his own safety? The situation was obviously one of great peril, and any competent mariner must have realized the necessity for a prompt leaving of the vessel. But when Bolger returned to the Eureka the lifeboat was still attached to the main vessel. We do not know the purpose of his return. It may conceivably have been a legitimate purpose, and one that might have been accomplished in a few moments. The entire episode, from the order to lower the boats to the final abandonment of the ship, occupied but a brief time. Bolger may well have thought that he could do what he set out to do on the vessel, and get back before the occupants of the boat should cast off. Some allowance may be made for errors of judgment in times of sudden emergency and stress. There can be no presumption that a man recklessly imperils his own life. In view of all the facts, we think the commission took no unreasonable view of the evidence when it found that Bolger was not guilty of wilful misconduct. His actions were not

those of one intending to refuse compliance with the captain's order to get into the boat. On the contrary, he showed his purpose of doing as he was bid. He was remiss, perhaps, in not following out the directed course as speedily as he might have done, but it cannot be said as a matter of law that his brief delay amounted to wilful misconduct. This view of the commission's conclusion derives some additional support from the testimony of one witness, who stated that, when Bolger left the boat to return to the ship, the captain was in the same boat and made no objection to Bolger's return. This is some evidence to indicate, either that the captain did not regard Bolger's return as a violation of his orders, or that Bolger was justified in thinking that the captain assented to his conduct. . . . Under section 12, (a), (3), of the workmen's compensation act (St. 1913, p. 283), liability exists only where the injury is not 'caused by the intoxication or the wilful misconduct of the injured employee.' The commission found that Bolger's injury was not so caused. But its finding is subject to review here if totally unsupported by the evidence. *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35. The commission is, however, the body charged with the determination of issues of fact, and its findings of fact are not reviewable where they find support under any rational view of the evidence."

In affirming an award in *Ramlow v. Moon Lake Ice Co.* 192 Mich. 505, 158 N. W. 1027, L.R.A.1916F 955, it was said: "A further contention is made that the conduct of Ramlow was unreasonable, amounting to wilful and intentional misconduct within the meaning of section 2, part 2, of the compensation act (Pub. Acts Extra Sess. 1912, No. 10). This is based upon the claim that deceased, when asked by his attending physician if he was an alcoholic, replied that he was not; that, had he answered truthfully that he was, the treatment would have been different, and the attack might have been averted. Touching the habit of deceased in this respect, his foreman testified that he had known the deceased for twenty-three years, and that he had worked with him off and on for about sixteen years, and that the deceased 'used to take a drink once in a while, and sometimes quite often,' but that 'he never saw him in a state when he thought he had been drinking while on duty, and that his drinking did not interfere with his work, and that during the sixteen years he had known him he had not known him as a drinking man.' There is nothing in the record to show that the deceased understood to what extent a person must be addicted to the use of intoxicating liquors to become an alcoholic, neither is there anything to show that he knew that the question propounded had any bearing upon the

treatment of his injury. We cannot say as a matter of law that the record discloses any wilful or intentional misconduct concerning his answer to the doctor's question. The extent to which he was addicted to the use of intoxicating liquors was a question of fact, and, the same having been determined by the board, it is not within our power to review it."

But where the evidence fails wholly to support a finding of the industrial accident commission that the workman was not guilty of misconduct, the award may be set aside. *Pacific Coast Casualty Co. v. Pillsbury*, 31 Cal. App. 701, 162 Pac. 1040, wherein it was held that an employee who was killed while attempting to operate an elevator contrary to the express warning and instructions of the employer, was guilty of wilful misconduct as a matter of law.

INCAPACITY.

The extent of disability occasioned by an injury is not capable of exact measurement, and the percentage of such disability is a matter to be determined by the commission in the exercise of its sound discretion, based upon a fair view of all the circumstances. Its conclusion on this matter is the determination of a question of fact, and is not subject to review by the courts unless palpably contrary to the undisputed evidence. *Frankfort Gen. Ins. Co. v. Pillsbury*, 173 Cal. 56, 159 Pac. 160.

In *Lahey v. Blair* [1917] W. C. & Ins. Rep. (Eng.) 78, it appeared that an employee injured his foot in the course of his employment, and after being incapacitated for a period of about two years his doctor amputated a toe of the foot, contrary to the advice of an expert. In an application for full compensation for total incapacity it was held that the incapacity was due to the amputation and not to the accident, expert testimony having been given that the amputation was unnecessary. On appeal from the decision of the arbitrator, it was held in affirming the award that the arbitrator having found as a fact that the condition of the applicant was not due to the accident but to the operation that was performed, the only question for the appellate court, was whether there was sufficient evidence on which the arbitrator could come to that conclusion. And see *Rouse v. Hutchinson* [1917] W. C. & Ins. Rep. (Eng.) 299.

DEPENDENCY.

Whether one person is dependent on another within the meaning of that term as used in the workmen's compensation acts is usually held to be a question of fact, so that a finding thereon will not be reviewed if there is any

evidence to sustain it. *Rhyner v. Hueber Bldg. Co.* 171 App. Div. 56, 156 N. Y. S. 903; *Matter of Bylow*, 179 App. Div. 555, 166 N. Y. S. 874. And see *Poccardi v. State Compensation Com'r* (W. Va.) 91 S. E. 663. The fact that the oral testimony of an applicant is, on the question of dependency, inconsistent with his application card does not require a finding against the truth of the testimony. *Northern Redwood Lumber Co. v. Industrial Acc. Commission* (Cal.) 156 Pac. 828.

So in *Com. Edison Co. v. Industrial Board*, 277 Ill. 74, 115 N. E. 158, wherein it appeared that the father and sister of a deceased workman testified before the coroner's jury that the decedent did not contribute to their support, but testified before the board that he did so contribute, and gave as an excuse for their former testimony that they were excited at the time, it was said in affirming the award of the board: "No question is made as to the competency of this testimony, but it is claimed it was untrue and should not be believed because it was at variance with the testimony of the same witnesses before the coroner's jury. . . . This court has power to review only questions of law. There was legal evidence tending to prove deceased had contributed to the support of his father within four years previous to the time of his injury, and we have said where this is so it is not within our province to pass upon its sufficiency."

In *Victor Chemical Works v. Industrial Board*, reported ante, this volume, at page 627, it was insisted by the petitioner that there was no evidence on which the board could base its findings that the deceased had ever contributed to the support of his parents, or that they were beneficiaries under the act. The court said: "Under paragraph (f) of section 19 of the act the decision of the industrial board, acting within its powers, in the absence of fraud, is conclusive. The circuit court may review the decisions of the industrial board by certiorari for errors of law only. Whether legal evidence is offered to support the decision of the industrial board as shown by the record of proceedings, where such evidence is agreed upon or preserved by a stenographic report, is a question of law, but, if there is competent or legal evidence to support the decision of the industrial board, it is not within the province of the courts to pass on its sufficiency. We have examined the evidence in the record on this point. The administrator, Casimo Landolina, a brother of the deceased, testified that the father of the deceased was living in Caccamo, Italy, and was sixty-three years of age; that the mother was fifty-four years of age, and was living with his father; that there are some younger children, all under twenty years of age, the oldest about seventeen; that the deceased contribut-

ed to the support of this family in the old country prior to his death; that the family lived upon a farm of about four acres; that he had seen a receipt for a post-office money order for \$40 which the deceased showed to him. Charles Costello testified that he knew the deceased in Italy; that he and the deceased both came from the same province; that he knew him at the time he arrived in this country; that at the request of the deceased he went with him to act as an interpreter, because the deceased could not speak English, and assisted him to get a money order for \$40, which he put in a letter addressed to his father, Giovanni Landolina, Caccamo, Italy; that the witness saw him address the envelope, seal it, and mail it, and the money order was in it. James Barto testified that he saw the deceased put money in a letter which he sent to his father in Italy; that the witness, at the request of the deceased, wrote a return address on the envelope. . . . We think, however, there was sufficient competent evidence to sustain the finding of the industrial board that the deceased left parents, and that he had within five years contributed to their support."

In *Muncie Foundry, etc. Co. v. Coffee* (Ind.) 117 N. E. 524, the court said: "It was the duty of the board to determine from the evidence, as a matter of fact, whether the wife was living with the husband at the time of his death. W. C. A. § 38. This court will not disturb the finding on the ground that the evidence is conflicting. A finding of the board will be reversed only where there is no evidence on which the finding can stand. There is no evidence that appellee had disposed of the household goods, and therefore the presumption prevails that at the time of his death their home at Mound City was still intact; and the board was justified in finding that they were living together within the meaning of the statute. Having found as a matter of fact that she was living with her husband at the time of his death, it follows as a matter of law that she was totally dependent on him for support."

In the case of *In re Carroll* (Ind.) 116 N. E. 844, it was said: "It is perhaps more accurate to say that questions of dependency are mixed questions of fact and law, since the ultimate question of what constitutes a dependency is a law question. It is the exclusive province of the board to determine the facts and to draw legitimate inferences therefrom. It is the province of the board also in the first instance to determine from such facts and inferences whether dependency exists: but, as such latter process involves a law question, the action of the board in such respect is reviewable by this court, when an appeal is taken under section 61 of the workmen's compensation act. In each case, the

burden is on the claimant to establish by evidence, direct, circumstantial, or both, the facts showing dependency. . . . Here the facts have been submitted to us. We have said that ordinarily it is the exclusive province of the industrial board to deduce inferences from proven facts. An analysis of these facts might lead to certain conclusions under which dependency here becomes a question of law. Thus, if such facts establish conclusively the existence or the nonexistence of dependency, or if they are insufficient to establish such a state, then dependency becomes a law question; or if such facts, of themselves and unaided by inference, are not sufficient to establish anything on the subject of dependency, and if they are reasonably susceptible of only harmonious inferences—that is, inferences all tending to indicate a state of dependency or the opposite—then also dependency becomes a law question, as under such circumstances this court may draw the inferences that arise inevitably from the facts, and having done so, it ultimately becomes the province of this court to determine dependency as a law question. It is our judgment that the facts here, when aided by all proper deductions, are not sufficient to establish that either the wife or the children were wholly dependent on the deceased employee for support. Such is our opinion as matter of law." And see *Bloomington-Bedford Stone Co. v. Phillips* (Ind.) 116 N. E. 850.

SHAUGHNESSY

v.

NORTHLAND STEAMSHIP COMPANY.

Washington Supreme Court—January 24, 1917.

94 Wash. 325; 162 Pac. 546.

Master and Servant — Negligence — Safe Appliances — Maritime Employee.

Where a stevedore returning to work in the hold of a ship was required to pass down the ladder from a hatchway so located that he had to take hold either of the hatch coaming, or of a rope just above it, which rope was apparently firmly fixed to stanchions, and on his taking hold of such rope one of the stanchions pulled loose, it cannot be said as a matter of law that the master was free from negligence in having the rope less secure than it appeared to be.

Contributory Negligence.

In such case, it could not be said as a matter of law that the servant was guilty of contributory negligence in using the rope for support.

Workmen's Compensation Acts — Right of Election.

Neither the master nor the servant has any right of election whether he will come under the Workmen's Compensation Act (Laws 1911, p. 345 [Rem. Code 1915, §§ 6604—1 to 6604—32]), if engaged in the kind of work which falls thereunder, and neither can exempt himself from the burdens imposed, nor waive the benefits.

[See Ann. Cas. 1915C 308; Ann. Cas. 1918B 715.]

Scope of Act.

The workmen's compensation act is applicable only to those relations of employer and employee which are in the legislative control of the state, untrammelled by the laws of the United States.

Maritime Employees as within Act.

Where a servant was injured while working in the hold of a ship lying in the navigable waters of Puget Sound, the question of his compensation is subject to controversy in admiralty in the federal courts, regardless of state law, although he was assisting only in unloading the ship, and not in its navigation.

[See note at end of this case.]

Same.

Since an employer whose employees are engaged in maritime service is not required to contribute to the accident fund of the state, his employees so engaged cannot lawfully claim compensation from that fund.

[See note at end of this case.]

Same.

Rem. Code 1915, § 6604—1, withdraws from private controversy all phases of workmen's compensation to the exclusion of every other remedy, proceeding, or compensation, and all civil actions and civil causes of action for personal injuries, and all jurisdiction of the courts of the state thereover is abolished. Section 6604—2 provides that the act shall apply to all inherently hazardous work within the jurisdiction of the state, and that the term "extrahazardous" embraces work about steamboats, tugs, and ferries. Section 6604—27 provides that if any employer shall be adjudicated to be outside the lawful scope of the act, the act shall not apply to him, or to his workmen. It is held that a stevedore injured while working in the hold of a ship in the navigable waters of Puget Sound was not within the act, and that his other rights and remedies remained unimpaired.

[See note at end of this case.]

Courts — Effect of Decision — Federal Decision as Binding State Court.

The question whether the workmen's compensation act abolishes all other actions by an employee injured while unloading a ship in the navigable waters of Puget Sound is a wholly state question as to the right to maintain a common-law action, and therefore the decision of the federal district court in

another case as to the interpretation of the act is not controlling upon the state court.

Workmen's Compensation Acts — Maritime Employees as within Act.

Although Rem. Code 1915, § 6604—2, includes in the workmen's compensation act as extrahazardous steamboats, tugs, and ferries, such provision does not require that the law be construed to include injuries on ships lying in navigable waters, since there are inland lakes over which the state has sole jurisdiction to which such provision may apply.

[See note at end of this case.]

Judgments — Correction — Premature Entry by Clerk.

Where the court took the case under advisement and intimated that it would decide for defendant, and the clerk then without proper authority made a judgment entry for defendant on the minutes, the court is not thereby precluded from changing its mind and ordering a judgment entry for plaintiff, and the judgment so entered is valid where the court then on motion and hearing ordered the incorrect entry expunged.

Appeal from Superior Court, King county:
FRATER, Judge.

Action by George Shaughnessy, plaintiff, against Northland Steamship Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Bronson, Robinson & Jones for appellant.
Brady & Rummens and Thos. B. McMartin for respondent.

[326] PARKER, J.—The plaintiff, Shaughnessy, commenced this action in the superior court for King county, seeking recovery [327] of damages for personal injuries claimed by him to have resulted from the negligence of the defendant steamship company while he was working for that company in the hold of its steamship Alki assisting in its unloading, while it was lying in the navigable waters of Puget Sound alongside a wharf in the city of Anacortes. The trial resulted in verdict and judgment in favor of the plaintiff, awarding him \$3,500 damages, from which the defendant has appealed to this court.

It is first contended in appellant's behalf that the trial court erred in refusing to sustain its counsel's challenge to the sufficiency of the evidence, timely made, and decide, as a matter of law, that appellant was not guilty of negligence and that respondent's injuries were the result of his own negligence. It was while returning to his work after having his supper on the day in question that respondent received the injuries for which he here sues to recover. He was required to go to his work in the hold of the ship

through the hatch down a ladder. The hatch was about twelve feet square, its coaming rising some ten inches above the deck. The ladder down which the employees were required to go into the hold to their work was stationary, perpendicular, and set back under the edge of the hatch some four or five inches so as to avoid coming in contact with the cargo sling as it was lowered into or raised from the hold in loading or unloading the ship. While the hatch was open and the unloading proceeding, there was placed around it in the usual manner a rope run through eyelets at the top of iron stanchions which were set in the deck at each corner of the hatch just outside the coaming, so that the rope ran parallel with the sides of the hatch some two feet or more above the deck over the edge of the hatch. The stanchions and rope constituted a railing which was apparently strong enough to at least bear the weight of a man, whether such weight might come in contact with the rope laterally or directly downward. When respondent returned to his work after supper and started [328] to go down into the hold, he took hold of the rope with his hands, or at least with one hand, reached one foot down to the upper rung of the ladder, evidently intending to descend backward, as was usual; and, proceeding upon the assumption that the rope was strong enough and the stanchion sufficiently secure to bear his weight, allowed his weight to come upon the rope. One of the stanchions gave way where it was set into the deck, and this sudden giving away and slackening of the rope caused him to lose his hold and fall into the hold, some twenty feet below, resulting in his injuries.

It seems quite plain to us that, in view of the position of the rope with reference to the ladder, its apparent strength, and the apparent strength and security of the iron stanchions which held it in place, and the fact that to start to descend the ladder necessarily required respondent to take hold of either the top of the hatch coaming or the rope, it cannot be said, as a matter of law, that appellant was free from negligence in having the rope in this position less secure than it apparently was, or that respondent was guilty of contributory negligence in taking hold of the rope and depending upon it to temporarily support him rather than entirely depending upon a hold upon the hatch coaming. The jury might have well concluded that the situation was such as invited respondent and others descending the ladder to take hold of the rope as well as the hatch coaming in starting to descend. We are quite clear that it cannot be held otherwise as a matter of law.

Some contention is made in appellant's behalf upon the theory that the complaint

seems to be framed upon the assumption that respondent was necessarily required to take hold of the rope in starting to descend and that the proof fails to show that there was any real necessity for his so doing, the argument being apparently that there was no other issue in the case than that of the necessity of taking hold of the rope, so far as respondent's contributory negligence is concerned. We are convinced, however, that the [329] proof did not, in any event, constitute such a variance as worked to the prejudice of appellant upon the trial, and that it was enough to warrant the jury finding in respondent's favor that the situation was such as to in effect invite him to take hold of the rope preliminary to his descending into the hold. It seems quite clear to us that the court did not err in leaving the question of negligence, both on the part of appellant and respondent, to the jury, and that respondent was not prejudiced by the fact that the issues were not confined by the court strictly to the question of the necessity of taking hold of the rope by respondent.

What we regard as the most important question here presented is, Has our workmen's compensation act (Rem. Code, § 6604-1 et seq.) withdrawn from controversy in the courts causes of action of this nature arising out of employment such as respondent was engaged in at the time he was injured, and substituted therefor the remedy and compensation provided for by that act? This question was presented to the superior court by respondent's demurrer to appellant's first affirmative defense, and by appropriate motions, made during the course of the trial, invoking the provisions of the workmen's compensation act as a complete defense in this action. The trial court, by its rulings on the demurrer and the motions, declined to entertain this defense, being of the opinion that claims of this nature arising out of maritime employment are not withdrawn from controversy in the state courts and the right to compensation from the accident fund provided for by the act substituted therefor.

Our workmen's compensation act, let us be reminded, is one under which neither the employer nor the employee has any right of election as to whether he will come under and be governed by its provisions, so far as extrahazardous employment is concerned. Neither can exempt himself from the burdens which it imposes, nor by contract waive the benefits thereof in the sense that he can bar himself from the right to claim its benefits. The employee, by the terms of the act, [330] has taken away from him the right to sue in the courts upon his cause of action, and in lieu thereof is furnished indemnity in certain specified amounts, payable from the accident fund provided for in the act, ac-

cording to the nature of his injury, regardless of the fault of his employer. The employer is compelled to contribute to the accident fund certain specified amounts, according to the hazardous nature of the work of his employees, and in return therefor is furnished indemnity against all claims of his employees for injuries received in the course of their employment. Thus the act in effect provides for compulsory insurance, both for the employer and the employee, and manifestly contemplates that *all employers and all employees*, who are compelled to come under the act and have their rights each as against the other controlled and determined by its provisions, shall enjoy such privileges and immunities equally, in harmony with the guaranty of § 12 of art. 1 of our state constitution. This evident spirit of the act, we think, points to a legislative intent to make the act applicable only to those relations of employer and employee which are in the legislative control of the state untrammelled by the laws of the United States and the jurisdiction of the courts of the United States, which might have the effect of rendering the privileges and immunities for which the act provides unequal as between employers or unequal as between employees. If these observations be sound, it seems to follow almost as a matter of course that, in so far as the maritime service of appellant's employees is concerned, it is not required to contribute to the accident fund provided for in the act out of which workmen are to be compensated for their injuries in lieu of the right to sue therefor in the courts and such employees, injured while so engaged in maritime service, are not required to accept the limited compensation provided therefor out of the accident fund.

That the employment in which respondent was engaged for appellant was maritime in its nature, and that the question of his compensation for the injuries received by him here involved [331] are subject to controversy in admiralty in the Federal courts regardless of all state laws, seems quite clear in view of the fact that he was working upon the ship for appellant while it was lying in the navigable waters of Puget Sound. Nor does the fact that he was assisting only in unloading the ship of assisting in its navigation lessen his right to seek his remedy in admiralty. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 34 S. Ct. 733, 58 U. S. (L. ed.) 1208, 51 L.R.A.(N.S.) 1157; *Imbrovek v. Hamburg-American Steam Packet Co.* 190 Fed. 229; *The Fred E. Sander*, 208 Fed. 724.

In our recent decision in *State ex rel. Jarvis v. Daggett*, 87 Wash. 253, 151 Pac. 648, L.R.A.1916A 446, we reached the conclusion that a navigation company operating vessels

upon Puget Sound is not required to contribute to the accident fund provided for by our workmen's compensation act to compensate its employees injured while engaged in maritime service. In that case, the question arose upon the petition of a maritime employee of the company injured while working upon one of its ships as an oiler. He presented his claim to the commission, seeking compensation from the accident fund provided for by the act. His claim was rejected by the commission upon the ground that the act did not give it any jurisdiction over such navigation companies and their employees engaged in maritime service. The injured employee then applied to this court for a writ of mandate to compel the commission to make demand upon and take proceedings to collect contributions to the accident fund from navigation companies to the end that his claim might be paid from such fund. While recognizing that certain language of the act presently to be noticed, which, read literally and apart, would seem to have the effect of subjecting such companies and their employees to the provisions of the act, Judge Main, speaking for the court, at page 257, said:

"The maritime law being a part of the law of the United States, the legislature of a state has no power to modify or abrogate it. *Workman v. New York City*, 179 U. S. 552, 21 S. Ct. 212, 45 U. S. (L. ed.) 314. [332] It follows, therefore, that the legislature in passing the compensation act could not take from a workman any right which he had under the maritime law of the United States. The petitioner here still has the right to pursue his remedy in admiralty. Gathering the purposes of the act from all its provisions, we think it could not have been the legislative intent to attempt to encroach upon the admiralty jurisdiction of the Federal courts. . . . It seems to be the purpose of the act to give the relief therein granted where the legislature had the power to abolish every other remedy. If companies operating boats upon Puget Sound are within the act, then they may be compelled to pay the percentage of their pay rolls specified, and yet be subject to a right of action in admiralty; while other persons or corporations engaged in a hazardous business not covered by admiralty law would be completely protected against the pursuit of any other remedy or proceeding. The owner of a steamboat, if he should pay the percentage of his pay roll specified, and his injured seamen should pursue their remedy in admiralty, would receive no protection from the act, and yet would be subject to its burdens. If the act were given this construction, it might well be doubted whether it would not offend against that provision of the fourteenth

amendment to the constitution of the United States which provides that no state shall make or enforce any law which shall 'deny to any person within its jurisdiction the equal protection of the laws.'"

We note that the ship there in question was engaged in interstate as well as intrastate commerce; but the decision was rested upon the fact that the admiralty remedy remained unimpaired, which is not affected by the nature of the ship's commerce so long as it is not on inland waters having no connection with the high seas or another state. Now it seems almost unthinkable that the legislature ever intended to give to an employee the right to compensation out of the accident fund provided for in the act and at the same time not require his employer to contribute to that fund. So it seems to us that when it has once been determined, as it has been in the Jarvis case, that an employer whose employees are engaged in maritime service is not required to contribute to the accident [333] fund, it necessarily follows that such employees cannot lawfully claim compensation from that fund. This, we think, became in effect as thoroughly settled by the Jarvis decision as that navigation companies are not required to contribute to the accident fund so far as the maritime service of their employees is concerned.

Does it follow that the act by its terms, assuming that it could do so, has taken away respondent's right to sue in the courts, other than in admiralty, for damages resulting in his injuries, as he is here doing? It seems to be so argued by counsel for appellant. Looking to the provisions of the act, ch. 74, page 345, Laws of 1911, Rem. Code, §§ 6604-1, 6604-2, 6604-27, so far as necessary to here notice them, we read:

"Section 1. . . . The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

"Sec. 2. . . . This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the state, in the following enumeration, and they are intended to be embraced within the terms 'extrahaz-

ardous' wherever used in this act, to wit: . . . steamboats, tugs, ferries . . ."

"Sec. 27. If any employer shall be adjudicated to be outside the lawful scope of this act, the act shall not apply to him or his workman, . . ."

If our decision in the Jarvis case is to remain as a correct exposition of the law in so far as therein discussed, the last quoted paragraph from section 27 of the act seems to render [334] it quite plain that both appellant and respondent are "outside the lawful scope of this act," that none of the rights of either of them are in the least changed or lessened by its provisions, and that their rights and remedies remain unimpaired as if the act had never become the law of this state. The views expressed in the following decisions are in harmony with our conclusion here reached, though the questions therein considered are not exactly the same as here presented. Reynolds v. Day, 79 Wash. 499, 140 Pac. 681, L.R.A.1916A 432; Cunningham v. Northwestern Imp. Co. 44 Mont. 180, 119 Pac. 554; Schuede v. Zenith Steamship Co. 216 Fed. 566.

There has come to our notice the decisions in Mathison v. Minneapolis St. R. Co. 126 Minn. 286, 148 N. W. 71, L.R.A.1916D 412; Lindstrom v. Mutual Steamship Co. 132 Minn. 328, 156 N. W. 669, L.R.A.1916D 935, and Kennerson v. Thames Towboat Co. 89 Conn. 367, 94 Atl. 372, L.R.A.1916A 436, which are thought to be out of harmony with our own views herein expressed. Those cases, however, deal with workmen's compensation acts which leave it optional with the employer and employee as to whether they will come under and be governed by the provisions of the acts in question. In such cases we see no reason why such an election on the part of the employer and employee might not be held to divest the claimant of the right to resort to admiralty for relief upon the ground of estoppel; as where there is an election to sue in the state court instead of in admiralty, in the absence of a workmen's compensation act. Such, in substance, is the theory upon which Judge Neterer of our Federal district court rendered his decision in the case of The Fred E. Sander, 212 Fed. 545, holding that the libelant having applied for and received compensation from the accident fund under our workmen's compensation act, he thereby became precluded from seeking redress in admiralty. The question of the libelant's right to receive compensation from the accident fund, and the question of the duty of the commission in making such award from that fund, [335] was a matter with which the Federal court was not called upon to concern itself. It was enough for the learned judge of that court to know that the libelant, seeking his

remedy in admiralty, had been awarded and accepted compensation from the accident fund under the act.

In *Walker v. Clyde Steamship Co.* 215 N. Y. 529, 109 N. E. 604, Ann. Cas. 1916B 87, we have a decision in which there are some remarks of the court which may seem opposed to our views herein expressed. In that case, the injured employee was engaged in maritime service such as would have secured to him his remedy in admiralty had he elected to so assert it. He applied to the state commission and was awarded compensation from the accident fund provided for in the workmen's compensation act. His employer, the steamship company, as it apparently had the right to do under the act, caused the question of the claimant's right to compensation from that fund to be removed to the courts for review, with a view of defeating the award made by the commission. The fact of the steamship company having contributed to the accident fund seems to be assumed in the decision. Whether it did so by compulsion or at its own election does not appear in the opinion of the court. The decision may be harmonized with the conclusion we here reach, if we assume that the workmen's compensation act of that state does not compel the employer to contribute to the fund from which the claimant was compensated, but is only elective in that regard. If the employer having such right of election voluntarily contributed to the fund and the employee took compensation therefrom, both would be in substantially the same position as the employee found himself in *The Fred E. Sander* case, 212 Fed. 545. If the decision cannot be harmonized with our views upon this theory, with all due respect for that great court, we would feel constrained to not follow it, in the light of our decision in the *Jarvis* case, which we are not now inclined to recede from.

[336] We have not overlooked the decision of Judge Cushman of our Federal district court in *Stoll v. Pacific Coast Steamship Co.* 205 Fed. 169, wherein it was held that an action upon the law side of the Federal district court, which could have been maintained in admiralty, for injuries received as the result of the steamship company's negligence could not be maintained; the decision being reated upon the language of section 1 of the act (Id. § 6604-1) above quoted, and apparently regarded by the court as absolutely abolishing the employee's right to maintain such an action in the courts and substituting therefor his right to compensation from the accident fund. The fact that the plaintiff had a right to seek his remedy in admiralty seems not to have been noticed in the case. We think, therefore, that the decision would not be a controlling authority

here even if the question were a Federal one, as it manifestly is not, since it has to do, in its last analysis, only with the right to maintain a common-law action in the state courts.

Included in the enumeration of extrahazardous works in section 2 (Id. § 6604-2) of the act are "steamboats, tugs, ferries." If our conclusion rendered these words in the act meaningless, it might be argued with some show of reason that we are not correctly construing its provisions. There are, however, a number of inland navigable lakes wholly within the boundaries of this state having no navigable connection whatever with rivers or tide waters constituting navigable waterways to the high seas. It seems to be well settled that the jurisdiction of the state over such inland waters so unconnected with the high seas is exclusive, and that there is no Federal admiralty jurisdiction over such waters. *Com v. King*, 150 Mass. 221, 22 N. E. 905, 5 L.R.A. 536; *Stapp v. Steam-Boat Clyde*, 43 Minn. 192, 45 N. W. 430; *U. S. v. Burlington, etc. County Ferry Co.* 21 Fed. 331. It therefore seems plain that the words "steamboats, tugs, ferries" are not rendered meaningless by our construction of the act. We note in this connection that section [337] 2 (Id. § 6604-2) of the act, above quoted from, provides that "it is the purpose to embrace all of them [extrahazardous works] which are within the legislative jurisdiction of the state."

It is contended that the trial court had no jurisdiction to render the judgment in favor of the respondent which is here appealed from because it had previously rendered a final judgment of dismissal in appellant's favor upon its motion for judgment notwithstanding the verdict. Upon the return of the verdict, the clerk, by direction of the court, withheld entry of judgment thereon pending appellant's motion for judgment notwithstanding the verdict. Thereafter that motion was argued and decision thereon taken under advisement by the court. Thereafter the trial judge announced in open court, in substance, that he had concluded to grant appellant's motion for judgment notwithstanding the verdict, when it evidently was understood by the court and counsel for both parties that judgment be prepared accordingly; and since the ground upon which the court was inclined to so hold was that respondent had no right of action in the courts because of the passage of our workmen's compensation act, it apparently was then contemplated that judgment of dismissal would be prepared in such form that the question of respondent's right to maintain the action in the light of our workmen's compensation act might be presented to this court upon a short record. The matter was to be post-

poned until counsel could prepare some such form of judgment. However, at that time the clerk of the court did make a brief minute entry which could be construed as a final judgment of dismissal of the case in harmony with the views then expressed by the court. This entry was made without the knowledge of the court or of counsel for either party as to its contents. Thereafter, counsel for both parties were again before the court for the purpose of having formal judgment entered, when the judge announced that he had reached a different conclusion upon further reflection and had become [338] of the opinion that the workmen's compensation act did not preclude respondent from maintaining this action, in view of the fact that his injuries resulted while he was in maritime service. Formal judgment was then prepared and entered accordingly, from which this appeal was taken. It was not until after this that the contents of the minute entry made by the clerk were discovered by either counsel or the court. Thereafter, on a proper showing and notice in the form of an order to show cause, the minute entry was set aside and expunged from the record upon the ground that the same had been entered by the clerk "inadvertently and through mischance." It seems plain to us that the showing was sufficient and warranting the court and so concluding and ordering in reference to that entry. It follows that the judgment here appealed from is the only judgment that was actually rendered in the case.

Some other claimed errors are relied upon by counsel for appellant. We think, however, that whatever technical error there may have been in the rulings so questioned, they were wholly without prejudice to the rights of appellant and that they do not call for further notice here. We conclude that the judgment must be affirmed. It is so ordered.

Ellis, C. J., Main, Mount, Holcomb, and Fullerton, JJ., concur.

NOTE.

Maritime Employees as within Purview of Workmen's Compensation Act.

It is intended in this note to discuss the recent decisions passing on the question whether a maritime employee is within the purview of a workmen's compensation act. The earlier cases are collected in the note to Walker v. Clyde Steamship Co. Ann. Cas. 1916B 87.

In the recent case of Southern Pac. Co. v. Jensen, 244 U. S. 205, Ann. Cas. 1917E 900, 37 S. Ct. 524, reversing 215 N. Y. 514, Ann.

Cas. 1916B 276, 109 N. E. 600, L.R.A.1916A 403, the Supreme Court of the United States has definitely established that a maritime employee may not be brought within the purview of a state workmen's compensation act. The decision in Clyde Steamship Co. v. Walker, 244 U. S. 255, 37 S. Ct. 545, reversing 215 N. Y. 529, Ann. Cas. 1916B 87, 109 N. E. 604, is to the same effect. Those decisions have been followed in other recent cases. See Hartman v. Toyo Kisen Kaisha Steamship Co. 244 Fed. 567; Tallac Co. v. Pillsbury (Cal.) 168 Pac. 17; Neff v. Industrial Commission (Wis.) 164 N. W. 845. And see the reported case.

It was said in Hartman v. Toyo Kisen Kaisha Steamship Co. supra: "The contention that plaintiff's claim is within the workmen's compensation act of the state (St. 1913, p. 279), and that jurisdiction accordingly rests exclusively with the industrial accident commission, has been settled adversely to defendant, since this case was submitted, in the very recent case of Southern Pac. Co. v. Jensen, 244 U. S. 205, 37 S. Ct. 524, 61 U. S. (L. ed.) 1086. In that case it was sought to uphold an award under the workmen's compensation act of New York (Consol. Laws, c. 67) for an injury received in a maritime transaction, as against the objection that that act had no application, that the jurisdiction in such cases was exclusively in the federal courts. . . . The present case is concededly of maritime origin, but it is suggested that the fact that plaintiff's duties were other than those of the ordinary seafaring man has the effect to take it without the principles of the Jensen case. But that case is not bounded by any such narrow lines."

In the following cases, decided prior to the Federal Supreme Court decision, maritime employees were held to be within the purview of the act and entitled to compensation. North Pac. Steamship Co. v. Industrial Acc. Commission (Cal.) 163 Pac. 199; Steamship Bowdoin Co. v. Pillsbury, (Cal.) 163 Pac. 204; Alaska Pac. Steamship Co. v. Pillsbury (Cal.) 163 Pac. 204; Lindstrom v. Mutual Steamship Co. 132 Minn. 328, 156 N. W. 669, L.R.A.1916D 935. And see Bjolstadt v. Pacific Coast Steamship Co. 244 Fed. 634.

It was held in Riegel v. Higgins, 241 Fed. 718, that an injured maritime employee did not by receiving compensation voluntarily paid under a compensation act lose his right to recover damages in admiralty for the negligence of his employer, the court saying: "Respondents, and very properly, urge upon the consideration of the court the uncertainties and injustices to which shipowners may be subjected if they are compelled to answer in the admiralty court after having paid to

an injured employee the compensation provided for by the workmen's compensation act. I am of the opinion, however, that this act cannot and does not deprive the seaman of his right of action in the admiralty court for damages for injuries caused by the negligence of the shipowner in providing defective appliances. But if the injured seaman shall, as he may, subject himself to the state tribunals, and claim and receive the amount awarded under the act, or if by agreement, fairly entered into, the amount to be paid under the act is fixed, and he accepts it with full knowledge of the extent of his injuries, he should not later be permitted to maintain an action for the same injuries. But where, as here, the amount has been fixed by the employer, and not by any tribunal or agreement, and is not adequate, the seaman may pursue his remedy in the admiralty, and, if successful, the amount already received by him will be credited upon the amount of the judgment entered."

ERIE RAILROAD COMPANY

v.

WINFIELD.

United States Supreme Court—May 21, 1917.

244 U. S. 170; 37 S. Ct. 556.

Employers' Liability Acts — Federal Act as Exclusive.

Congress intended the Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, c. 149, Fed. St. Ann. 1909 Supp. p. 584), regulating the liability of an interstate railway carrier in case of the injury or death of an employee when employed in interstate commerce, to be as comprehensive of those instances in which it excludes liability, i. e., where there is no causal negligence for which the carrier is responsible, as of those in which liability is imposed, and in both classes such act is paramount to, and exclusive of, state regulation.

[See Ann. Cas. 1915B 493.]

Employees within Act — Engineer of Switch Engine.

An employee of an interstate railway carrier in charge of a switch engine who is killed while leaving the yards after his day's work, which includes employment in both interstate and intrastate commerce, is employed in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, c. 149, Fed. St. Ann. 1909 Supp. p. 584), governing the liability of such carriers for the death or in-

jury of their employees when employed in interstate commerce.

[See Ann. Cas. 1914C 164; Ann. Cas. 1916E 472; Ann. Cas. 1918B 55.]

Workmen's Compensation Acts — Employees within Act — Employee of Interstate Railroad.

The operation of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, c. 149, Fed. St. Ann. 1909 Supp. p. 584), governing the liability of interstate railway carriers for the death or injury of their employees while employed in interstate commerce, cannot be interfered with by a state either by putting the carriers and their employees to an election between the provisions of that statute and a state workmen's compensation act, as is attempted by N. J. Laws 1911, chap. 95, or by imputing such an election to them by a statutory presumption.

[See note at end of this case.]

Error to Court of Errors and Appeals of New Jersey.

Action by Amy L. Winfield, plaintiff, against Erie Railroad Company, defendant. Judgment for plaintiff in Court of Common Pleas, Hudson county. Judgment reversed by Supreme Court of New Jersey, and latter judgment reversed by Court of Errors and Appeals. Defendant brings error. The facts are stated in the opinion. REVERSED.

George S. Hobart and Gilbert Collins for plaintiff in error.

Harry Lane for defendant in error.

[171] VAN DEVANTER, J.—This was a proceeding under a New Jersey statute, c. 95, Laws 1911, against a common carrier by railroad, engaged in both interstate and intrastate commerce, to obtain compensation for the death of one of its employees. The employee was in charge of a switch engine in the carrier's extensive yard at Croxton, New Jersey, and was switching freight cars about in the yard, especially to and from a transfer station. The cars usually contained package freight and many were moved in the course of a day's work. In some the freight was interstate, in others intrastate and in still others it was of both classes. This was true of the cars moved on the day in question. In concluding his work for that day the employee took his engine to the place where it was to remain for the night and started to leave the yard. His route lay across some of the tracks and while passing over one he was struck by an engine and received injuries from which he soon died. No causal negligence was alleged or proved and both parties assumed there was none. In these circumstances the trial judge, while not doubting that the fatal injury occurred in the course of the deceased's employment, held

that he was not then employed in interstate commerce and that compensation should be made under the state statute to the widow. A judgment in her favor was entered, but was reversed by the Supreme Court of the State, which concluded that the deceased's employment at the time of the injury was in interstate commerce and that the case was controlled by the Employers' Liability Act [172] of Congress (Fed. St. Ann. 1909 Supp. p. 584) which makes negligence the test of the carrier's liability or obligation. That judgment was in turn reversed by the Court of Errors and Appeals, which, although assuming "that the conclusion of the Supreme Court as to the character" of the deceased's employment at the time of the injury "was justified by the facts proved," regarding the federal act as without bearing, because affording no remedy and imposing no liability in the absence of causal negligence. 88 N. J. L. 619, 96 Atl. 394.

The questions presented for decision are these: First, whether the federal act is regulative of the carrier's liability or obligation in every instance of the injury or death of one of its employees in interstate commerce, or only in those instances where there is causal negligence for which the carrier is responsible. Second, whether the facts proved sustain the conclusion that the deceased was employed in interstate commerce at the time of the injury. Third, whether by reason of the state statute the carrier became bound contractually to make compensation in this instance, even though it came within the federal act.

The first question is fully considered in *New York Cent. R. Co. v. Winfield*, the opinion in which has been just announced, 244 U. S. 147, Ann. Cas. 1917D 1139, 37 S. Ct. 546, and it suffices here to say that, for the reasons there given, we are of opinion that the federal act proceeds upon the principle which regards negligence as the basis of the duty to make compensation and excludes the existence of such a duty in the absence of negligence, and that Congress intended the act to be as comprehensive of those instances in which it excludes liability as of those in which liability is imposed. It establishes a rule or regulation which is intended to operate uniformly in all the States, as respects interstate commerce, and in that field it is both paramount and exclusive.

The second question must be given an affirmative answer. [173] In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. See *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 260, Ann. Cas. 1914C 159, 34 S. Ct. 305, 58 U. S. (L. ed.) 591. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the char-

acter of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for present purposes of no importance.

The third question requires some notice of the New Jersey statute. It consists of two parts. One conforms to the principle which regards negligence as the basis of liability and excludes liability in the absence of negligence. In its details, however, that part differs materially from the federal act. The other conforms to a different principle which rejects negligence as a basis of liability and requires compensation to be made by the employer wherever the injury or death of the employee is an incident of the service in which he is employed. This part is described as "elective" and is not to be applied unless the employer and the employee shall have agreed, expressly or impliedly, to be bound thereby and to surrender "their rights to any other method, form or amount of compensation or determination thereof." Respecting the mode of manifesting such an agreement or the contrary, it is provided that every contract of hiring "shall be presumed to have been made" with reference to this part of the statute and, unless the contract or a notice from one party to the other contain "an express statement in writing" to the contrary, it "shall be presumed" that the parties "have agreed to be bound" by this part of the statute. There was no express agreement in this instance and there is no [174] basis for regarding the carrier as in any way bound by this part of the statute, save as it provides that an agreement to be bound by it shall be presumed in the absence of a declaration to the contrary. But such a presumption cannot be indulged here, and this for the reason that by the federal act the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of state laws. It is beyond the power of any State to interfere with the operation of that act, either by putting the carriers and their employees to an election between its provisions and those of a state statute or by imputing such an election to them by means of a statutory presumption. The third question therefore must be answered in the negative.

It follows that the Court of Errors and Appeals erred in failing to give controlling effect to the federal act.

Judgment reversed.

Brandeis and Clarke, JJ. dissent.

NOTE.**Railroad Employees as within Purview of Workmen's Compensation Act.**

Introductory, 664.

Employee Engaged in Interstate Commerce, 664.

Employee Engaged in Intrastate Commerce, 664.

Street Railway Employee, 665.

Introductory.

When the note to Minneapolis, etc. R. Co. v. Industrial Commission, Ann. Cas. 1914D 655, was written, there was no other case which dealt with the question whether railroad employees were within the purview of a workmen's compensation act. The rule therein laid down was fortified by several decisions cited in the annotation to Winfield v. New York Cent. etc. R. Co. Ann. Cas. 1916A 817. Since the last cited note, the authorities dealing with this phase of the subject have been quite numerous.

Employee Engaged in Interstate Commerce.

While a few early cases took the view that a railroad employee engaged in interstate commerce was entitled to claim compensation under a state workmen's compensation act, it has now been definitely settled by the United States Supreme Court that railroad employees or their representatives cannot recover under a state workmen's compensation act for injuries or death arising out of acts connected with their employment in interstate commerce. New York Cent. etc. R. Co. v. Winfield, 244 U. S. 147, Ann. Cas. 1917D 1139, 37 S. Ct. 546, reversing 216 N. Y. 284, Ann. Cas. 1916A 817, 110 N. E. 614. That decision has been followed in a number of recent cases. Grand Trunk R. Co. v. Knapp, 233 Fed. 950, 147 C. C. A. 624; Waters v. Guile, 234 Fed. 532, 148 C. C. A. 298; Smith v. Industrial Acc. Commission, 26 Cal. App. 560, 147 Pac. 600; Grybowski v. Erie R. Co. 89 N. J. L. 361, 98 Atl. 1085, affirming 88 N. J. L. 1, 95 Atl. 764; Rounsaville v. Central R. Co. (N. J.) 101 Atl. 182, reversing 87 N. J. L. 371, 94 Atl. 392, and following the ruling laid down in the reported case. Flynn v. New York, etc. R. Co. (N. J.) 101 Atl. 1034; Saxon v. Erie R. Co. 221 N. Y. 179, 116 N. E. 983; State v. Bates, etc. Constr. Co. 91 Wash. 181, 157 Pac. 482. And see the reported case. Compare West Jersey Trust Co. v. Philadelphia, etc. R. Co. 88 N. J. L. 102, 95 Atl. 753.

By the Federal Employers' Liability Act (Fed. St. Ann. 1909 Supp. p. 584) Congress

has undertaken to cover the subject of the liability of railroad companies to their employees while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states. It therefore follows that in respect to state legislation prescribing the liability of such carriers for injuries to their employees while engaged in interstate commerce the federal act is paramount and exclusive. Grand Trunk R. Co. v. Knapp, 233 Fed. 950, 147 C. C. A. 624. So it has been held that an employee engaged as a railroad watchman who was injured in attempting to eject trespassers from an interstate train, could not claim any relief under a workmen's compensation act. Smith v. Industrial Acc. Commission, 26 Cal. App. 560, 147 Pac. 600.

The decisive question in determining the applicability of a workmen's compensation act to an employee of an interstate railroad being whether he was at the time of the injury engaged in interstate commerce, the cases passing on the applicability of the federal employers' liability act are in point, every employment included in that act being excluded from the workmen's compensation acts. For these cases see the notes to Illinois Cent. R. Co. v. Behrens, Ann. Cas. 1914C 163; Shanks v. Delaware, etc. R. Co. Ann. Cas. 1916E 467; and Minneapolis, etc. R. Co. v. Winters, reported ante, this volume, at page 54.

Employee Engaged in Intrastate Commerce.

A railroad employee is within the purview of a workmen's compensation act, if at the time of the injury he is not engaged in interstate commerce within the meaning of the federal employers' liability act. New York Cent. R. Co. v. White, 243 U. S. 188, Ann. Cas. 1917D 629, 37 S. Ct. 247, L.R.A. 1917D 1; Chicago, etc. R. Co. v. Industrial Board, 273 Ill. 528, L.R.A. 1916F 540, 113 N. E. 80; Nevich v. Delaware, etc. R. Co. (N. J.) 100 Atl. 234, L.R.A. 1917E 847; Flynn v. New York, etc. R. Co. (N. J.) 101 Atl. 1034; Parsons v. Delaware, etc. Co. 167 App. Div. 536, 153 N. Y. S. 179, appeal dismissed in 216 N. Y. 710, 111 N. E. 1093; Watts v. Ohio Val. Electric Co. 78 W. Va. 144, 88 S. E. 659. See also Truman v. Kansas City, etc. Co. 98 Kan. 761, 161 Pac. 587.

Thus it was held in New York Cent. R. Co. v. White, supra, that a night watchman charged with the duty of guarding tools and materials intended to be used in the construction of a new station and new tracks on a line of intrastate railroad, in which occupation he was injured, was not engaged in interstate commerce, and was accordingly within a state workmen's compensation act.

[1916] 1 K. B. 970.

Similarly it was held in *Chicago Junction R. Co. v. Industrial Board*, 277 Ill. 512, 115 N. E. 647, that the fact that the claimant who was injured while engaged in repairing an empty freight car partly dismantled and which was used indiscriminately for intrastate as well as interstate commerce as occasion required, was entitled to the benefit of the Workmen's Compensation Law, since the shops and tracks leading into them were not used at any time as an agency in interstate commerce as such.

Not every employee of an interstate carrier is engaged in interstate commerce, and unless his work constitutes a substantial part of the interstate commerce in which the carrier is engaged, he will when injured be entitled to compensation under a workmen's compensation act. *Dickinson v. Industrial Board* (Ill.) 117 N. E. 438.

An employee is not engaged in interstate commerce within the meaning of the federal act to the exclusion of the Workmen's Compensation Law, where his work consists of preparing materials which are subsequently designed to be used for transportation in interstate commerce. *Sullivan v. Chicago*, etc. Co. 163 Wis. 583, 158 N. W. 321.

Street Railway Employee.

Street railway employers are liable to injured employees for compensation under the state workmen's compensation acts. *Chicago Rys. Co. v. Industrial Board*, 276 Ill. 112, 114 N. E. 534; *McCabe v. Brooklyn Heights R. Co.* 177 App. Div. 107, 162 N. Y. S. 741; *Watts v. Ohio Val. Electric Co.* 78 W. Va. 144, 88 S. E. 659; *Canadian Northern R. Co. v. Green*, 9 Sask. 371, 30 Dominion L. Rep. 546. See also *Bloomington*, etc. R. Co. v. *Industrial Board*, 276 Ill. 239, 114 N. E. 517.

Thus in *Chicago Rys. Co. v. Industrial Board*, supra, it was held that the defendant street railway company was engaged in an occupation which brought it under the provisions of the Illinois Workmen's Compensation Act of 1913 which provides that employers engaged in extrahazardous occupations are conclusively presumed to be under the act unless they file a written election to the contrary. It appeared in that case that the workman in his application for employment as a motorman agreed to assume all risks of accidents resulting from his own negligence while in such employment and to acquit the defendant company of all liability for any personal injury suffered by him while in such employ. The workman was killed by an accident arising out of and in the course of his employment, and the commission made an award in favor of his estate under the workmen's compensation act. The court

held that the appellant's contention that it was not subject to the provisions of the act by virtue of the contract between it and the deceased was without merit, since the workmen's compensation act was the declared public policy of the state on the subject embraced in the statute, and provided the sole method by which employers might exempt themselves from providing and paying compensation under the act of employees for accidental injuries sustained and arising out of and in the course of the employment, viz., by electing not to come under the act; that it was contrary to the policy of the act to allow an employer, while choosing to come under its provisions, to relieve itself from liability thereunder by a private agreement or contract with an employee.

However, in order that compensation may be had under the New York act for an injury to a street railway employee, the injury must be sustained in connection with or as an incident of the hazardous employment. *McCabe v. Brooklyn Heights R. Co.* 177 App. Div. 107, 162 N. Y. S. 741. In *Brown v. Richmond Light, etc. Co.* 173 App. Div. 432, 159 N. Y. S. 1047, it was held that the workmen's compensation act did not apply to a case where the decedent was employed as a process server, claim adjuster and investigator for the company and was returning to the office of the defendant, riding on one of its cars, when a fellow passenger stepped on and injured his foot.

EARWICKER

v.

LONDON GRAVING DOCK COMPANY, LIMITED.

England—Court of Appeal—March 23, 1916.

[1916] 1 K. B. 970.

Workmen's Compensation Acts — Medical Examination of Workman.

An application by the employer for a medical examination of an injured workman claiming the benefit of the workmen's compensation act is not a nullity because it was not made until the hearing, and while it may be that the trial judge may in his discretion deny an application made at that time, he must rule on it. Accordingly where no note of the proceeding was taken, and no ruling on the application appears, a new trial must be granted.

[See note at end of this case.]

Medical Referee — Duties.

A medical referee sitting as an assessor with the judge hearing a claim under the workmen's compensation act should not be permitted to cross-examine witnesses or otherwise take part in the conduct of the hearing.

[70] Appeal from an award of the judge of the City of London Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant in this case was a boiler-maker in the employ of the respondents, a firm of ship repairers. On November 30, 1914, while engaged in his work, he was injured by a small piece of steel which entered his right eye and ultimately destroyed the sight of it. The [71] respondents paid him 1*l.* a week down to September 17, 1915, when they discontinued their weekly payments on the ground that he had recovered from the accident and was able to work again. The applicant then commenced proceedings for an arbitration. The case was in the list for hearing at the City of London Court on January 10, 1916, but was not reached. On January 26, 1916, the respondents' solicitors wrote to the applicant asking him to submit himself for medical examination by their doctor. To this request the applicant made no reply. On February 1 the respondents gave notice that they intended to apply on February 4 for an order under Sched. I. par 4, of the Act suspending the right of the applicant to continue the proceedings on the ground that he had refused to submit himself for medical examination. On February 4 the case came on for hearing, when counsel for the respondents applied for the suspension of the applicant's right to compensation on the ground that he had declined to undergo a medical examination. It appeared that he had already been medically examined several times, the last occasion being on January 5. After hearing counsel for the applicant, who asked him to go into the question whether there had been an unreasonable refusal to submit to an examination, the judge determined to proceed with the hearing.

There was evidence that the applicant as a one-eyed man was incapable of following his employment, which involved going about in dangerous and ill-lighted places in the interior of ships.

The judge found that the applicant was unfit to resume his former work and awarded him 1*l.* a week compensation during total or partial incapacity. This weekly payment represented half the difference between 1*l.* 10*s.* per week which the applicant was found to be able to earn as an injured man and the sum of 3*l.* 10*s.* per week which he earned before the accident.

The employers appealed on the grounds (1.) that the judge was wrong in law (a) in refusing to decide the question of the reasonableness of the applicant's refusal or neglect to submit himself for medical examination in accordance with the provision of Sched I. par. 4, of the Act, and (b) in rejecting the evidence tendered by the respondents in that behalf. (2.) That the judge was wrong in law in permitting the medical assessor at the hearing to examine and cross-examine the witnesses. (3.) That there was no evidence to [72] support an award of more than a declaration of liability to which the respondents had already submitted or agreed to submit.

At the hearing of the appeal it appeared that the county court judge had taken no note at all of the proceedings before him, but, in accordance with the practice in the City of London Court, a note of the evidence was taken by the shorthand writer attached to the Court. The transcript, however, did not contain any note of the submissions of counsel, and counsel did not agree in their recollections of what actually took place, it being contended on the part of the applicant that the respondents' objection had been abandoned, this being disputed by counsel for the respondents.

It further appeared that in the county court the medical assessor, who sat with the judge, was allowed by him to put a number of questions to the witnesses as to the capacity for work of a one-eyed man, and as to the value of such a man in the labour market.

Rigby Swift, K. C. and *H. Duckworth* for appellants.

Shakespeare for respondent.

W. Carpenter & Son, solicitors for appellants.

Lewis Barnes, Drake & Nicholson, solicitors for respondent.

[73] LORD COZENS-HARDY, M.R.—This is an anxious case. The applicant some time ago met with a serious injury to one eye; compensation was paid for a considerable time, and it was then stopped because his employers thought that he was able to work again. There had been several medical examinations of the man. There were two or three examinations before the case came into the paper on January 10. The desire of the employers, however, for a further examination was made quite manifest by the letter of January 26. That was a formal letter asking for another examination, and with a view of bringing the case within par. 4 of the First Schedule the solicitors asked that the trial might be adjourned in order

that there might be an examination. That application was renewed by counsel when the case came on on February 4. I think it is a fallacy to say that the Court had seisin of the case on January 10; the case was not reached, it was not part heard, and certainly I do not think that the Court was seised of the case on January 10 in any sense which is material for the purpose of to-day. It was not even called on, it was simply not reached; it went over, if I may use a colloquial expression, until the next Court day, which was February 4. When that day was reached an application was made by counsel for the respondents in the terms of the letter. Counsel for the applicant said it was too late to ask for an adjournment, because the Court had seisin of the matter, and the application ought not to be granted, but the learned judge, after apparently hearing counsel for the respondents again (though it is not clear whether he did so or not), said: "I will go on with the case and let this stand over until the end of the case and then I will see what is to be done." The case went on, the learned judge sitting with a medical assessor; it was obviously impossible to try the case without one.

[974] What was the duty of the learned judge? As to this duty under r. 36 I decline to say one word more than I have said in previous cases; and I do not think that I can make more emphatic what I consider to be the duty of the learned judge in these cases. It has been suggested that although the learned judge took no note whatever of this case (that is that his registrar tells us), still the fact that there is an official shorthand writer in the City of London Court exempted the learned judge from that duty. I do not assent to that view. The parties may if they are so minded take the not unreasonable course of agreeing that the official shorthand writer's notes of the evidence shall be taken as accurate, giving the learned judge an opportunity of seeing the transcript and adopting it as his note. If that course is taken no objection can be raised, but it is a very serious hardship in these cases that there should be no available note or record for this Court of the evidence which was taken except upon the terms of the parties paying a very considerable sum for the shorthand writer's transcript of what took place. In the present case we are told that the cost of the transcript of the evidence alone was 4*l.* 12*s.* That is a very serious matter indeed, whereas if the learned judge had taken a reasonable note of the evidence it would have been much shorter; and the cost of taking a copy of his notes is something very trivial and unimportant, and in no sense a burden on the workman as compared with the cost of taking a transcript

of the shorthand writer's notes. It is not a question of the evidence only in this case, for it is said that a question of law was raised of which there was no note, about which I certainly do not propose to express any final view. It is argued that under Sched. I. par. 4, you cannot have a compulsory examination after the Court has seisin of the case, and that the Court had seisin of the case on January 10. The learned judge did not express any opinion about that. No note was taken by the official shorthand writer to show what took place at the end of the trial. It is quite plain that in the correspondence before the case came on the employers asked for an examination under par. 4, and that counsel asked for it at the beginning of the hearing. We are invited to presume that at the end of the trial he did not persist in it, being a wise man and knowing what the medical evidence had been, and being afraid, in fact, to persist in it. There is a difference of opinion between counsel as to [975] what took place. What is this Court to do? With all respect to the learned judge, I think this is a case in which he has neglected the duty imposed upon him by r. 36, and has thus put upon this Court an impossible task. It is quite impossible for us to say what did take place. It is certain, I think, that the learned judge did not from first to last indicate any view whatever as to whether the application for an adjournment ought or ought not to be acceded to. He did not express any view whatever as to whether there had been unreasonable conduct by the applicant in obstructing the examination. We are therefore not in the least in a position to say whether the application was one which ought or ought not to have been acceded to. If the learned judge had heard the application and had given reasons one way or the other, it is extremely probable that we should not have interfered with his discretion, but as he has exercised no discretion in the matter, I do not see what we can do except to send the matter back for a new trial.

There is another point to which I desire to refer. The learned judge was sitting quite properly with a medical assessor. The medical assessor in this case seems to me to have taken a part which was quite outside and beyond his duties. In one of the authorities referred to, *Lewis v. Port of London Authority*, 7 B. W. C. C. (Eng.) 577, 588, a passage was quoted from the judgment of Pickford, L.J., who defined, in language which I think cannot be misunderstood, the functions and the duties of a medical assessor. He is an assessor to assist the learned judge upon points as to which his expert knowledge may render assistance; he is not there to conduct an examination or a cross-

examination—I care not which you call it—of a more or less hostile character to one side or other in the case; his duty is simply and solely that of assisting the learned judge by his expert knowledge to arrive at a proper conclusion, there being points raised which the learned judge cannot be assumed to know without being aided by a medical assessor. He is not a witness, of course; he cannot be cross-examined, and he certainly ought not to take up the position of cross-examining witnesses at length; and he ought not to take up the case as if he were leading counsel for one side or the other. Upon that ground also I think that this trial was very unsatisfactory, and it seems to me that all we can do is to say with [976] regret that there must be a new trial of this case because it was not properly tried.

PHILLIMORE, L. J.—I agree with what the Master of the Rolls has said upon both points.

As regards the first matter there was a question of law raised under the First Schedule of the Act, par. 4, which says that a workman shall if so required submit himself to an examination by a duly qualified medical practitioner, and if he refuses or obstructs the same his right to take or prosecute any proceeding shall be suspended until such examination has taken place. The Courts have put a construction on the word "obstruct" which is quite reasonable, and there are cases in which an employer may require a workman to be examined or further examined, and the workman may refuse, and the Court may or may not hold that he has improperly refused or that he has obstructed, but it then becomes a question for the decision of the learned judge or arbitrator who hears the matter, whose discretion, if he properly exercises it, is not likely to be successfully impugned. Here there is no doubt that towards the end of January the employers applied by letter and in February by a notice that the workman should submit himself to a further examination. There is no doubt he had been examined, and when the hearing took place on February 4 counsel for the employers took this preliminary point and asked that the man should be further examined by one of their doctors, and that either the case should be adjourned or that the final decision should be left open until that examination had taken place; to which answer was made by counsel for the workman in substance that this was a very unreasonable application, that the man had been examined at no very distant date, and it was wrong to take advantage of the fact that the case had not been reached on the day it was put down for hearing, to wit, January 10, but had been necessarily postponed and agreed to be postponed to Febru-

ary 10 in order to try to put in force this paragraph in the schedule. Speaking for myself, I think that it was a reasonable point to urge before the learned judge as a reason why he should decide the question left to him under par. 4 in favour of the workman, but if put as a kind of estoppel that the learned judge could not require it because the parties had waited until after the date when the case was first in the list for hearing, I [977] do not think the point was a good one. I do not think the learned judge could say "This is so late that I have no jurisdiction to entertain the point." He might have said "This application is made so late that for that and other reasons I do not think it is one to which I should accede." However, what we do know is that the learned judge, after hearing counsel for the employers and counsel for the workman in answer and counsel for the employers in reply, said, "I will go on with the case: anyhow I can go on with the whole case and leave this point open until the end." What happened at the end, and how far what happened at the end can be elucidated by the final speech of counsel for the employers, is unfortunately a matter upon which we have no accurate knowledge. Counsel before us were present at the trial in the county court; as I understand, the recollection of one is that he still insisted on his point that there ought to be this examination; the recollection of the other is, not that he formally withdrew it, but that by not insisting on it he was legitimately taken to have dropped it. That being the case, and we being in difficulty as to what did happen, we are deprived of that source of information which would have been conclusive and which the Legislature has intended that we should have. Under r. 36 it is the duty of the arbitrator or of the learned judge to take a note of any question of law raised and of the facts in evidence in relation thereto and of his decision thereon. That rule differs, as has been pointed out, from the general rule regulating county court procedure under which the duty of the learned judge to take a note does not arise until the party before him has requested him to take a note of the material evidence and of the point of law and of his decision thereupon. Under r. 36 he has to do it without request, and this Court has so held—indeed it was necessary for the Court so to hold—under the direct words of the rule. Now the learned judge has taken no note. Application has been made to him, and through the registrar he says he has taken none. That is *prima facie* a contravention of the rule, but it is said that by custom in the City of London Court, and at the expense of the City up to a point, there is a paid shorthand writer who

takes notes and whose notes are available to the parties upon their paying the cost of a transcript. That is not a burden which except by consent can be put upon the parties. I do not understand that the City pays for the cost of a transcript; [978] indeed it would be unreasonable to expect that it should. There was no note taken here by the county court judge. It is suggested that so settled is the practice in the City of London Court that everybody is to be taken to have understood it, but I think it would be unwise to trust to that. But assuming that a shorthand writer's note signed and certified by the learned judge may, by consent of the parties, be substituted for and be deemed a sufficient compliance with r. 36, we find that the note in this case is deficient on the very points which have to be determined by us. There is no note of the speeches of either counsel at the end. It is apparent from the shorthand writer's note that Mr. Duckworth did address the Court; it is not quite so apparent that Mr. Shakespeare did. Mr. Duckworth states he did, and I understand Mr. Shakespeare does not wish to be understood to contradict him. There is no record of what was said, and we are left with this: At the end of the cross-examination of the last witness for the defence an observation by the learned judge is reported; then these words appear: "Mr. Duckworth addressed the Court;" and then this follows, which it is agreed was said by the Court, although I do not know that the shorthand writer's note shows that it was: "He is not fit to go back as a charge hand. I think he is entitled to 1l. a week as compensation;" and then there was a discussion about costs. With regard to the question whether this point of law was maintained—or I will put it in another way, whether the point of law which had been taken was waived—the record is entirely silent. What we do know, because both counsel take the same view, is that the learned judge passed no opinion upon it at all. We do know from the note presented to us that he reserved it to the end, and it is common ground that he said nothing about it at the end. That being the case, we really must have this matter properly tried and properly recorded. The learned judge not having passed his opinion upon this matter, we have no sufficient reason to suppose that he was relieved from doing so, and it being something which he ought to have passed his opinion upon, upon that ground alone the case ought to go back for a new trial.

Then it was said by Mr. Shakespeare—and I do not want to disregard the argument—"If you will allow me to read the official shorthand writer's notes of the medical evidence you will see that the respondents could not have the face to ask for this adjournment

[979] after what came out." I do not see the force of that. I have glanced at the evidence, I have not properly read it through, but I have taken in Mr. Shakespeare's favour that which he has argued, that the hospital doctor for the employers had examined the man on January 5 and had taken a view unfavourable to the employers, and when called as a witness expressed a view unfavourable to the employers. I assume all that. From one point of view that is all the more reason why the employers should wish, if they had to go into Court to fight with that doctor's evidence before them, as long before as January 5, to have a further examination which they think may displace even the opinion of the hospital doctor whom they have employed, and whom, having nobody else to call, they called. Therefore, giving due weight to that argument, I see no sufficient reason why there should not be a new trial.

With regard to the other matter, I do not want to be understood to put within too narrow bounds the way in which the medical assessor should be allowed to elicit information which ought to be before the Court and upon which ultimately he may have to advise his principal, the learned judge. It is enough to say that he was allowed by the learned judge in this case to take an undue share in the trial and to usurp duties which were not his.

SARGANT, J.—I am also of opinion that this case should go back for a new trial, and I will add but a few words.

As regards the duty of the learned judge to take a note, it seems to me that these arbitrations constitute some of the most important business that comes before the county courts, and r. 36 of the Rules, which have statutory effect, was deliberately made an imperative rule and in no way dependent upon the request of one of the parties. Secondly, with regard to the important question of fact, whether there was a withdrawal by Mr. Duckworth of his application for the suspension of the right to compensation, I think I ought to say this. Counsel have very properly, in the absence of any shorthand note of the whole of what took place, declined to contradict each other, or to commit themselves to statements which might be not in accordance with the recollection of the opposing counsel. But there are two circumstances which seem to me extremely important: in the first place had the application once been properly made, it seems to me [980] that the onus lies on him who alleges that it was withdrawn or waived; and in the second place I attach great importance to the fact that Mr. Duckworth, while the matter was still fresh in his mind, only a few days after the trial had taken place—I think seven days

after the date of the trial—in his notice of appeal raised this very point. It seems to me that that confirms his recollection on the point rather than that of Mr. Shakespeare.

NOTE.

Provisions in Workmen's Compensation Acts Respecting Medical Examination of Workmen.

Introductory, 670.
 English Statute, 670.
 American Statutes:
 United States, 671.
 Colorado, 672.
 Indiana, 672.
 Kentucky, 673.
 Louisiana, 673.
 Maine, 673.
 Massachusetts, 673.
 Montana, 674.
 New Jersey, 674.
 Oklahoma, 674.
 Pennsylvania, 674.
 Vermont, 675.
 West Virginia, 675.
 Wyoming, 675.

Introductory.

The earlier cases construing the provisions in the various workmen's compensation acts respecting the medical examination of workmen together with the earlier statutes providing for such an examination are collected in the note to *Major v. South Kirby*, etc. *Collieries*, Ann. Cas. 1914C 86. It is the purpose of the present note to discuss the recent cases passing on this question and to set forth the provisions in the recent acts.

English Statute.

It was held in *Smith v. Davis* [1915] 31 Times L. Rep. 356, W. C. & Ins. Rep. 299, that the English compensation act (Paragraph 4 of Schedule 1) does not limit the employer's right to a single examination, where a further examination appears to be reasonable and necessary. The court said: "The contention put forward on the appellant's behalf that these and other evils would follow if a workman were bound to submit himself to more than one examination has, therefore, no substance in it, and will not bear a moment's examination. One of the objects of the act and of the rules in the schedule attached to it clearly is that settlements of claims for compensation should, if possible, be arranged by agreement between the employer and the workman. Nothing, I think, would be more calculated to defeat that object, and nothing could be more opposed to common sense and reason, than to

require that an employer should make up his mind definitely in all cases on the result of one examination whether he would or would not resist the workman's claim. In the present case, for instance, three months elapsed between the date of the first examination and the demand for the second. A still further time might, and in many cases does, elapse. The employer, and indeed the workman, are both interested in having a medical examination made as soon after the accident as possible, in order that both of them may be able to fix the time when the incapacity to work, if it supervened, had commenced. Again, such symptoms of bodily hurt in their early stages might be of such an obscure nature that it would be quite impossible to ascertain on one examination whether they would soon abate or pass away, or whether some incapacity more or less permanent might not supervene. Of course if the language of rule 4 be so plain that it admits of no other construction than that contended for by the appellant, one must adopt that construction, however irrational, absurd, or mischievous the result; but, unless one is coerced to adopt a construction from which such consequences may follow, it ought not to be adopted. It is in my view clear that the words of rule 4 need not be read as if the words 'once but only once' were written into it between the words 'submit' and 'himself.' The 'submitting himself for examination' provided for is a 'process,' not a single act. It may necessitate one or more acts to effect its object—namely, to ascertain the bodily condition of the sufferer. I think that rule 15 strongly supports this conclusion, inasmuch as the concluding words of the first paragraph of that rule, 'or at more frequent intervals than may be prescribed by those regulations,' cannot be confined in their application to rule 14. I think these words apply equally to rule 4, and, if so, they indicate conclusively that more than one act of submission to examination was contemplated in the framing of this fourth rule. I am clearly of opinion, therefore, that the county court judge had jurisdiction to make the order which he did make, and that the judgment appealed from was right and should be affirmed, and this appeal be dismissed with costs." See also the reported case.

A workman entitled to compensation under the act, for injuries sustained while in the course of his employment, cannot be said to have refused to submit to a medical examination, when it appears that he had enlisted in the army and had been sent to India. *Harrison v. Dowling* [1915] 3 K. B. (Eng.) 218, 8 B. W. C. C. 544, wherein the court said: "An accident occurred to the workman, and his employers paid him compensation at varying rates, which are not now

[1916] 1 K. B. 970.

material. Last September the man enlisted in the Territorials, in the East Surrey Regiment, and by order of the military authorities his regiment has been sent to India, and the man is at present at Cawnpore with the regiment. An award had been made on February 4, 1913, of 15s. a week, and the employers having stopped payment of this, the workman applied to issue execution, and, according to the usual procedure in these cases, the employers met this by an application to terminate the award. They then desired to have him medically examined, but were told that he was in India, and they now say that under Sched. I, clause 14, of the act the payment of compensation ought to be suspended. This clause provides as follows: 'Any workman receiving weekly payments under this act shall, if so required by the employer, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place.' I cannot find that there has been any refusal by the workman to submit to any examination. I am quite aware of the correspondence between the solicitors, but there is certainly nothing in this amounting to a refusal to submit to examination. Nor do I see that there is any evidence that he is obstructing the same. His being in India with his regiment, under military control, does not seem to me to amount to obstruction within the meaning of that clause. I am not at all satisfied that he might not be required by the employers to submit to examination in India by a duly qualified practitioner, it may be the regimental surgeon at Cawnpore. It seems to me that might be the case."

In *Chuter v. Ford* [1915] 2 K. B. (Eng.) 113, 8 B. W. C. C. 160, it was held that where a workman, who, on the certificate of the examining physician that he was suffering from a cerebral hemorrhage due to the nature of his employment, applied to the certifying surgeon for a disabling certificate, an appeal might be taken to the medical referee from the refusal of the surgeon to grant the application, and that the decision of the referee that the applicant was entitled to the certificate, was conclusive. The court said: "I have come to the conclusion that the certificate of the medical referee in a case like this is conclusive as to the nature of the industrial disease and the date of the accident, that is to say the date of disablement, and also as to the fact that the man was suffering from that disease, not at the date of the medical referee's certificate, but at the date of the certifying surgeon's certificate."

In the reported case it is held that a request for an examination is not a nullity so as to dispense with a ruling thereon because it is first made at the hearing.

American Statutes.

UNITED STATES.

A federal compensation act more recent than that set out in the previous note (Act of Sept. 7, 1916, c. 458, Fed. St. Ann. Pamph. Supp. No. 8, p. 145) contains the following provision respecting the medical examination of employees of the United States, injured in the performance of their duties: "Sec. 21 [*Submission of injured employee to examination by physician, etc.*] That after the injury the employee shall, as frequently and at such times and places as may be reasonably required, submit himself to examination by a medical officer of the United States or by a duly qualified physician, designated or approved by the commission. The employee may have a duly qualified physician designated and paid by him present to participate in such examination. For all examinations after the first the employee shall, in the discretion of the commission, be paid his reasonable traveling and other expenses and loss of wages incurred in order to submit to such examination. If the employee refuses to submit himself for or in any way obstructs any examination, his right to claim compensation under this act shall be suspended until such refusal or obstruction ceases. No compensation shall be payable while such refusal or obstruction continues, and the period of such refusal or obstruction shall be deducted from the period for which compensation is payable to him."

Under the original Federal Act of 1908 (Fed. St. Ann. 1909 Supp. p. 330) civilian employees, injured in the government service, were required to submit themselves for medical examination once in six months. The section providing for such examination was construed in the case of *In re Haynes*, Op. Sol. Dept. of Labor 761, wherein it was maintained that as the law required an examination every six months, one who had suffered the loss of his hand, could not recover compensation for a greater period of time. The solicitor said: "The law provides for a medical examination at least once in six months, and the secretary cannot approve payment of compensation for a longer period than six months at a time, the presumption being that such medical examination may reveal that the claimant by that time has recovered sufficiently to resume his work. The precise question as to whether an injury is permanent or not cannot arise under this act, which provides only

for compensation for incapacity for work. The continuance of the injury is only important for the purpose of ascertaining when the injured party is able to resume work. The six months' period has been fixed for further examination to ascertain that fact. There is no doubt that the disability in this case will continue for six months. Such conclusion may be assumed as a matter of fact. Claimant's position as a brakeman on a dirt train made of him a laborer depending entirely for his livelihood upon the work of his hands, and it would take him a long time to adjust himself to his changed condition sufficiently to make a living in other pursuits. At any rate, the loss of his right hand disabled him for doing the manual labor of his usual avocation. It is my opinion, therefore, that he should be compensated for loss of time for six months subject to the right of continuance of such compensation for another period of six months thereafter if at the end of the first period he is still found to be incapacitated for work."

Although a workman was bound under the earlier act to submit himself for examination, the failure of the secretary of labor to provide for an examination did not bar the claimant's right to compensation under the act. In *re Villafranca*, Op. Sol. Dept. of Labor 762, wherein it was said: "I do not mean to say, however, that the secretary would be justified in ignoring the provision. It should be complied with as an expression of the legislative intent, but if, for any reason, the secretary does not require the examination, the right of the employee to compensation is not defeated. The examination may be made after the expiration of six months, and, so far as the statute is concerned, the employee does not lose his right to the compensation between the expiration of the six months' period and the date of the examination. It should be borne in mind, however, that where the secretary has authorized the payment of compensation limited to a 'period of six months beginning with the date of the accident,' no compensation beyond such period can be paid until further authority is given by the secretary." See also In *re Mayott*, Op. Sol. Dept. of Labor 765.

Examination by a naval surgeon has been held to be an examination within the act where it was requested by the secretary of labor. In *re Villanueva*, Op. Sol. Dept. of Labor 765.

COLORADO.

The Colorado Workmen's Compensation Act (Sess. Laws 1915, S. B. No. 99, c. 179, p. 515) contains the following provision with reference to the medical examination of

workmen: "Whenever, in case of injury, the right to compensation under this act would exist in favor of an employee, he shall, upon the written request of his employer, or the insurer carrying such risk, submit himself from time to time to examination by a physician or surgeon duly authorized to practice medicine under the laws of this state, who shall be provided and paid for by the employer or insurer and shall likewise submit to examination from time to time by any regular physician selected and paid for by said commission, or a member, or examiner thereof. The employee shall be entitled to have a physician provided and paid for by himself present at any such examination. So long as the employee, after such written request of the employer or insurer, shall refuse to submit himself to such examination, or shall, in any way, obstruct the same, his right to collect or to begin or to maintain any proceeding for the collection of compensation shall be suspended; and if he shall refuse to submit to such examination, after direction by the commission, or any member or examiner thereof, or shall in any way obstruct the same, his right to weekly indemnity which shall accrue and become payable during the period of such refusal or obstruction, shall be barred. If any employee shall persist in unsanitary or injurious practice which tends to imperil or retard his recovery, or shall refuse to submit to such medical or surgical treatment as is reasonably essential to promote his recovery, the commission may, in its discretion, reduce or suspend the compensation of any such injured employee. Any physician who shall make, or be present at, any such examination, may be required to testify as to the results thereof. Any physician having attended an employee in a professional capacity, may be required to testify before the commission when it shall so direct. Physicians will not be required, however, to disclose confidential communications communicated to them for the purpose of treatment and which are unnecessary to a proper understanding of the case."

INDIANA.

The Indiana Workmen's Compensation Act (Laws 1915, c. 106) contains the following provision with reference to the medical examination of workmen: "Sec. 27. After an injury and during the period of resulting disability, the employee, if so requested by his employer or ordered by the industrial board, shall submit himself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the industrial board. The employee shall have the right to have present at any such examination any duly qualified

physician or surgeon provided and paid by him. No fact communicated to, or otherwise learned by, any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in the hearings provided for in this act, or any action at law brought to recover damages against any employer who may have accepted the compensation provisions of this act. If the employee refuses to submit himself to or in any way obstructs such examination, his right to compensation and his right to take or prosecute any proceeding under this act shall be suspended until such refusal or obstruction ceases, and no compensation shall at any time be payable for the period of suspension unless in the opinion of the industrial board the circumstances justify the refusal or obstruction. The employer, or the industrial board, shall have the right in any case of death to require an autopsy at the expense of the party requiring the same."

KENTUCKY.

The provision of the Kentucky Workmen's Compensation Act (Acts 1916, S. B. No. 40, c 33, p. 354) with reference to the medical examination of workmen is as follows: "Sec. 37. After an injury and so long as compensation is claimed, the workman, if so requested by his employer or the board, shall submit himself to examination, at reasonable time and places, to a duly qualified physician or surgeon designated and paid by the employer. The employee shall have the right to have a duly qualified physician or surgeon designated and paid by himself present at such examination, which right, however, shall not be construed to deny to the employer's physician or surgeon the right to visit the injured employee at all reasonable times and under all reasonable conditions. If an employee refuses to submit himself to or in any way obstruct such examination his right to take or prosecute any proceedings under this act shall be suspended until such refusal or obstruction ceases and no compensation shall be payable for the period during which said refusal or obstruction continues."

LOUISIANA.

The Louisiana Workmen's Compensation Act (Act No. 20, op. 1914; H. B. No. 150; Acts Reg. Sess. 1914, p. 44, as amended) contains the following provision with reference to the medical examination of workmen: "§ 9. Be it further enacted, etc., That an injured workman shall submit himself to examination by a duly qualified medical practitioner provided and paid for by the employer, as soon after the accident as demanded, and from time to time thereafter, as often

as may be reasonably necessary and at reasonable hours and places, during the pendency of his claim for compensation or during the receipt by him of payments under this act."

MAINE.

The provision of the Maine Workmen's Compensation Act (Laws 1915, c. 295) with reference to the medical examination of workmen is as follows: "§ 21. The employee shall after the injury, at all reasonable times during the continuance of his disability, if so requested by his employer, submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of this state, to be selected and paid for by the employer. The employee shall have the right to have a physician or surgeon selected and paid for by himself, present at such examination of which right the employer shall give him notice when requesting such examination. The chairman of the commission may at any time after the injury appoint a competent and impartial physician or surgeon to act as a medical examiner, and the reasonable fees of such medical examiner shall be fixed and paid by the commission. Such medical examiner being first duly sworn to the faithful performance of his duties before any justice of the peace, or any clerk of the supreme judicial court, shall thereupon and as often as the chairman of the commission may direct, examine such injured employee in order to determine the nature, extent and probable duration of the injury. Such medical examiner shall file a report of every examination made of such employee in the office of the commission, and a copy thereof certified by the clerk of said commission may be produced in evidence in any hearing or proceedings to determine the amount of compensation due said employee under the provisions of this act. If such employee refuses to submit himself to examination provided for in this act, or in any way obstructs any such examination, his rights to compensation shall be suspended and his compensation during such period of suspension may be forfeited."

MASSACHUSETTS.

Construing the provision for medical examination in the Massachusetts workmen's compensation act, set out in the earlier note, in McLean's Case, 223 Mass. 342, 111 N. E. 783, wherein it appeared that an injured employee had given notice of his injury to a foreman and had replied to a letter written by the insurer requesting him to have an examination made, indicating his willingness to comply with the statute, a finding by the board that the employee did not refuse to

be examined or in any way obstruct the examination, was sustained.

MONTANA.

The Montana statute (Laws 1915, c. 96) contains the following provision with reference to the medical examination of workmen: "§ 13. (a) Whenever in case of injury the right to compensation under this act would exist in favor of any employee, he shall, upon the written request of his employer or the insurer, submit from time to time to examination by a physician, who shall be provided and paid for by such employer or insurer, and shall likewise submit to examination, from time to time, by any physician selected by the board, or any member or examiner, or referee thereof. . . . § 13. (b) The request or order for such examination shall fix a time and place therefor, due regard being had to the convenience of the employee and his physical condition and ability to attend at the time and place fixed. The employee shall be entitled to have a physician, provided and paid for by himself, present at any such examination. So long as the employee, after such written request shall fail or refuse to submit to such examination, or shall, in any way obstruct the same, his right to compensation shall be suspended. Any physician, employed by the employer, the insurer, or the board, who shall make or be present at any such examination may be required to testify as to the results thereof."

NEW JERSEY.

Under the provision of the New Jersey workmen's compensation act relative to the medical examination of workmen, set out in the earlier note, it has been held that an announcement that an employee would refuse to submit to a medical examination, made before the arrival of the physician, did not constitute a refusal to submit to a medical examination. *Birmingham v. Lehigh, etc. Coal Co.* (N. J.) 95 Atl. 242, wherein it was said: "The claim that petitioner refused to submit to medical examination at the trial is not substantiated. Before prosecutor's physician arrived, petitioner's counsel announced that they would not consent to an examination. But no demand appears to have been made after the physician arrived, and the anticipatory refusal, if it may be so called, did not lead prosecutor to countermand him, for he appeared and was sworn as a witness."

OKLAHOMA.

With reference to the medical examination of workmen the Oklahoma Workmen's Compensation Act (Laws 1915, c. 246) provides

as follows: "§ 9. An employee injured claiming or entitled to compensation under this act, shall, if requested by the commission, submit himself for medical examination at a time, and from time to time, at place reasonably convenient for the employee, and as may be provided by the rules of the commission. If the employee or the insurance carrier request he shall be entitled to have a physician or physicians of his own selection to be paid by him present to participate in such examination. If an employee refuses to submit himself to examination, his right to prosecute any proceeding under this act shall be suspended, and no compensation shall be payable for the period of such refusal."

PENNSYLVANIA.

The provision of the Workmen's Compensation Act of Pennsylvania (Laws 1915, No. 338, p. 736) with reference to the medical examination of workmen is as follows: "§ 314. At any time after an injury the employee, if so requested by his employer, must submit himself for examination, at some reasonable time and place, to a physician or physicians legally authorized to practice under the laws of such place, who shall be selected and paid by the employer. If the employee shall refuse, upon the request of the employer, to submit to the examination by the physician or physicians selected by the employer, the board may, upon petition of the employer, order the employee to submit to an examination at a time and place set by it, and by the physician or physicians selected and paid by the employer, or by a physician or physicians designated by it and paid by the employer; and if the employee shall, without reasonable cause or excuse, disobey or disregard such order, he shall be deprived of his right to compensation under this article. The board may at any time after such first examination, upon petition of the employer, order the employee to submit himself to such further examinations as it shall deem reasonable and necessary, at such times and places and by such physicians as it may designate; and, in such case, the employer shall pay the fees and expenses of the examining physician or physicians, and the reasonable traveling expenses and loss of wages incurred by the employee in order to submit himself to such examination. The refusal or neglect, without reasonable cause or excuse, of the employee to submit to such examination ordered by the board, either before or after an agreement or award, shall deprive him of the right to compensation, under this article, during the continuance of such refusal or neglect, and the period of such neglect or refusal shall be deducted from the period during which the compensation would otherwise be payable."

The employee shall be entitled to have a physician or physicians of his own selection, to be paid by him, participate in any examination requested by his employer or ordered by the board."

VERMONT.

The Vermont Workmen's Compensation Act (Acts 1915, No. 164, p. 275) contains the following provision with reference to the medical examination of workmen: "When application is made to said board under the provisions of the preceding section, said board may appoint a duly qualified and impartial physician to examine the injured employee and to report to said board. The fee for such physician's services shall be five dollars, and traveling and hotel expenses, but the board may allow additional reasonable amounts in extraordinary cases. Said fees and expenses shall be paid by the state, on presentation of accounts approved by the board."

WEST VIRGINIA.

The West Virginia workmen's compensation act does not appear to contain a provision requiring injured workmen to submit to a medical examination.

WYOMING.

The Wyoming Workmen's Compensation Act (Laws 1915, c. 124, House Bill No. 147) contains the following provision with reference to the medical examination of workmen: "Sec. 30. Any workman awarded compensation for temporary total disability under this act, as defined by clause (c) of Section 19 hereof shall, if thereafter requested by his employer, submit himself for medical examination by a physician licensed to practice medicine in this state, at a place designated by the employer and which shall be reasonably convenient for the workman, and said workman may have a licensed physician present of his own selection. The purpose of such examination shall be to determine whether the workman has recovered so that his earning power at any kind of work is restored. If it be agreed that the workman has recovered so that his earning power at any kind of work is restored, the fact shall be reported by the employer and said physician to the judge of the district court who made the award in the first instance, or if there be a dispute, as to the recovery of the workman and his restoration to earning power, it shall be likewise reported to said judge by filing a statement in either case in the office of the clerk of the district court of the county where the award was made and the matter shall be disposed of in such manner as said judge may deem proper under the facts. If said judge

find that said workman has recovered and has been restored to his earning power and that compensation should be discontinued, his decision and judgment in the premises shall be certified to the state auditor and state treasurer and shall be authority and direction to said officers to discontinue compensation payments. If the workman in such case refuse to submit to such examination or obstructs the same, his right to monthly payments shall be suspended until such examination has taken place, and no compensation shall be payable during or for account of such period or refusal."

STETZ

v.

F. MAYER BOOT AND SHOE COMPANY.

Wisconsin Supreme Court—March 14, 1916.

163 Wis. 151; 156 N. W. 971.

Workmen's Compensation Acts — Workmen within Act — Minor Illegally Employed.

Under Workmen's Compensation Law (St. 1915, §§ 2394—1 to 2394—31), § 2394—7, subd. 2, declaring that the term "employee" as used in the law shall include every person in the service of another under any contract of hire, including minors who are legally permitted to work under the laws of the state, who for the purposes of section 2394—8, relating to election by employees, shall be considered the same and have the same power of contracting as adult employees, plaintiff, who was under sixteen years of age at the time of his employment and injury, and who had not obtained a written permit authorizing his employment under St. 1915, § 1728a, subd. 1, forbidding the employment of children between fourteen and sixteen in any factory, etc., unless there is first obtained from the commissioner of labor, etc., a written permit authorizing the employment of such child, is not an "employee" whose claim for injury is governed by the workmen's compensation law.

[See note at end of this case.]

Infants — Action for Injuries — Defenses — Misrepresentation as to Age.

Under St. 1915, § 1728a, subd. 1, prohibiting the employment of any child between the ages of fourteen and sixteen at work in any factory, etc., without first obtaining the written permit therein specified, and section 1728h, declaring that any employer including a corporation violating section 1728a, subd. 1, shall be guilty of a misdemeanor and liable to fine or imprisonment, an employer of a

child having no permit cannot defend on the ground that its foreman was reasonably justified under all the facts in relying on his representation that he was more than sixteen years of age; since the employer's violation of the statute constitutes a criminal offense, classed with gross negligence, and makes him liable in a civil action for injury resulting from such violation of law.

Same.

Under St. 1915, § 1728a, subd. 1, forbidding the employment of children between fourteen and sixteen in any factory, etc., without first obtaining the permit therein specified, the violation of which is made by section 1728h a misdemeanor punishable by fine and imprisonment, plaintiff, under sixteen, who misrepresented his age to defendant's foreman when he was employed, is not thereby estopped from recovering damages for the injury in such employment, as the statute is declaratory of a public policy, and is aimed at the master and not at the servant.

Release by Guardian — Effect.

A release given by plaintiff's guardian to the employer in whose service he had been injured, on the ground that plaintiff's claim against the employer was regulated by the Workmen's Compensation Law, does not settle the claim for damages for injury resulting from his wrongful employment in violation of St. 1915, § 1728a, subd. 1, forbidding employment of children between fourteen and sixteen, without permit, etc., and if so intended is not binding because it was not approved by the county court as expressly required by section 3982.

[See 17 Ann. Cas. 608.]

Appeal from Circuit Court, Milwaukee county: ESCHWEILER, Judge.

Action by Peter Stetz, by his guardian ad litem, plaintiff, against F. Mayer Boot and Shoe Company, defendant. Judgment for defendant. Plaintiff appeals. REVERSED.

[152] This is an action to recover damages resulting from personal injuries sustained by the plaintiff while in the employ of the defendant company.

The defendant is a corporation engaged in the manufacture of boots and shoes in the city of Milwaukee. The plaintiff was employed by the defendant, and while operating a heelpress machine he was injured. At the time the plaintiff was injured he was less than sixteen years of age and had no permit authorizing his employment. The plaintiff went with his father and uncle to the home of the foreman of the defendant company to apply for work. They represented to defendant's foreman that plaintiff was then sixteen years of age. Sometime after plaintiff was injured he went to the liability insurance company which carried insurance for the defendant, and a settlement of \$287.84 was agreed upon as the maximum allowed under the

Workmen's Compensation Law. Plaintiff's guardian signed a release for this amount. This settlement was approved by the industrial commission, but was not approved by the county court of Milwaukee county. The court submitted a special verdict to the jury, who found (1) that the plaintiff was less than sixteen years of age at the time he was employed by the defendant; (2) that the plaintiff represented to the defendant's foreman at the time he was employed that he was more than sixteen years of age; (3) that the plaintiff's father, at or prior to plaintiff's employment, represented to the defendant's foreman that plaintiff was more than sixteen years of age; (4) that the foreman was justified in the exercise of proper vigilance, in the light of plaintiff's appearance, in relying upon the representations that the plaintiff was more than sixteen years of age; (5) that there were no false and fraudulent representations knowingly made by any one, on behalf of the defendant or the insurance company, to the plaintiff or his father as an inducement to the [153] signing of the release of plaintiff's claim; (8) that there was not gross negligence on plaintiff's part which contributed to his injury; (9) that if plaintiff is entitled to recover his damages are \$985.

The court awarded judgment on this verdict dismissing plaintiff's complaint with costs. From such judgment this appeal is taken.

Rubin, Faucoett & Dutcher, and P. R. Newcomb for appellant.

Doe, Ballhorn, Wilkie & Doe for respondent.

SIEBECKER, J.—Are the rights of the parties to this action governed by the provisions of the Workmen's Compensation Law, secs. 2394—1 to 2394—31, Stats. 1915, inclusive? By sub. (2) of sec. 2394—7 of this act the term "employee" as used in the Workmen's Compensation Law shall include "Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work under the laws of the state (who, for the purposes of section 2394—8, shall be considered the same and shall have the power of contracting as adult employees)." The plaintiff was less than sixteen years of age at the time of his employment and injury. He had not obtained "a written permit authorizing the employment" of him, under sub. 1, sec. 1728a, which forbids the employment of children "between the ages of fourteen and sixteen years . . . in any factory or workshop, . . . or at any gainful occupation, or employment, directly or indirectly, unless there is first obtained from the commission of labor . . ." or other specified officers "a written permit authorizing the employment of such child

within such time or times as the said commissioner of [154] labor . . . " or other officers "may fix; . . . " If the plaintiff's legal remedy for the injury he suffered is governed by the Workmen's Compensation Law, then the defendant has discharged its obligations toward him by the settlement made with him under this law, which received the formal approval of the industrial commission.

The plaintiff, being under sixteen years of age at the time of employment and not having obtained a written permit authorizing his employment as provided by sub. 1, sec. 1728a, could not be legally employed by defendant for the service at which he was engaged and in which he suffered his injuries. The terms of sub. (2), sec. 2394—7, which confers on minors the power to contract for employment the same as adults, clearly limit the power so conferred to minors "who are legally permitted to work under the laws of the state." It seems plain that the statute includes only such minors who at the time of contracting are legally authorized to enter the employer's service. The legislative intent evidently is to enable any minor who has the legal right to work to make a contract for his employment as same as adults, and if he has the legal authority to exercise this right then he "shall be considered the same . . . as adult employees" for the purposes of sec. 2394—8 of the Workmen's Compensation Law. The provisions of this statute can only apply to minors who are at the time of contracting to enter the service of another authorized and permitted under the law to engage in such service and employment the same as adults.

It is urged that the Workmen's Compensation Law applies to and includes all minors in the service of others, who, under the law, may upon specified conditions and circumstances obtain a permit authorizing their employment, without first obtaining the permit provided by law. This contention runs counter to the terms of the Compensation Law and the provisions of other statutes prohibiting the employment of children under certain ages. The interpretation of sub. (2), sec. [155] 2394—7, as applied in *Foth v. Macomber, etc. Rope Co.* 161 Wis. 549, 154 N. W. 369, does not include the instant case. In that case the minor who was injured was at the time of entering the service legally authorized to engage in the occupation for which he contracted to work, but at the time of injury he was working at a machine at which he was forbidden to work, and it was held that, since the minor was legally authorized to make that contract of employment, for the purposes of sec. 2394—8 he must be considered the same as an adult employee, and that under the facts and circumstances shown he was injured while "per-

forming service growing out of and incidental to his employment." The language of the court in the decision of the *Foth Case* must be understood and interpreted in the light of the facts of that case. When so read and properly restricted in its application, the phraseology employed in construing the statutes therein referred to does not conflict with the interpretation of the law in its application to this case. From the foregoing it necessarily results that the provisions of the Workmen's Compensation Law do not govern the rights of the parties to this case.

The question then arises whether or not the defendant is liable in damages to the plaintiff under the law applicable to persons having the relation which is shown to have existed between plaintiff and defendant when the accident happened. The provisions of sub. 1, sec. 1728a, prohibit the employment of any child between the ages of fourteen and sixteen years to work in any factory or workshop, etc., without first obtaining a written permit as therein specified. Sec. 1728a declares that any employer, including a corporation, violating the provisions of sec. 1728a shall be deemed guilty of a misdemeanor and liable to fine or imprisonment. It is without dispute that defendant's employment of plaintiff, under the facts found by the jury, was a violation of these statutes and makes the defendant liable in damages to plaintiff, unless the finding of the jury to the effect that defendant's foreman was reasonably [156] justified, under all the facts and circumstances, in relying on plaintiff's representation that he was more than sixteen years of age, bars the plaintiff's right to a recovery of his damages. In *Pinoza v. Northern Chair Co.* 152 Wis. 473, 140 N. W. 84, it was held that in an action for injuries to a boy under sixteen years of age which resulted from his employment by the defendant in that case in violation of sec. 1728a, Stats. 1911 (ch. 338, Laws 1909), in an "employment dangerous to life and limb," the defense of contributory negligence is not available, and that such a violation of the statute, constituting a criminal offense, is classed with gross negligence as defined in our law and makes the person liable in a civil action for the injuries resulting from such violation of the law. The basis of that decision rests essentially, as there declared, on these propositions:

"If a person purposely does an act in violation of a duty created by law as regards the personal safety of others, and the policy of the written law is that the prevention of such violations is so important that a person guilty thereof should in addition to civil liability to the injured person be held criminally liable as for a serious offense against the public, the act should be regarded as done regardless of human life or bodily in-

jury . . . ; thus classing the act of the wrongdoer with ordinary acts of gross negligence. . . . The principle thus stated is in harmony with general public policy. Every one is presumed to know the law, even though as a matter of fact he may be ignorant of it."

Lenahan v. Pittston Coal Min. Co. 218 Pa. St. 311, 67 Atl. 642, 120 Am. St. Rep. 885, 12 L.R.A.(N.S.) 461; *Stehle v. Jaeger Automatic Mach. Co.* 220 Pa. St. 617, 14 Ann. Cas. 122, 69 Atl. 1116; *Strafford v. Republic Iron, etc. Co.* 238 Ill. 371, 87 N. E. 358, 128 Am. St. Rep. 129, 20 L.R.A.(N.S.) 876.

Upon the facts of this case the defendant, under the doctrine as applied in the *Pinoza* Case, is liable to plaintiff for the injuries he sustained as a result of such unlawful employment of him by the defendant unless plaintiff's misrepresentation of his age to defendant's foreman, as found by [157] the jury, operates as a bar to plaintiff's right to recover damages for his injuries. As has been indicated in the decisions of this court, the liability in this class of cases is predicated on the tort arising from the act which the law denounces as a crime as distinguished from liability arising from acts of ordinary negligence. In those cases it is said of the act of the employer in employing a minor in violation of the law, which results in injury to the minor, "The fault was advertent in character. There was an actual or constructive intent to violate the law, equivalent, as indicated, to a constructive intent to cause the consequences which the law was designed to prevent." Under the law as here established the record now before us presents no case within the law of negligence, and all precedents in other jurisdictions, of which *Koester v. Rochester Candy Works*, 194 N. Y. 92, 16 Ann. Cas. 589, 87 N. E. 77, 19 L.R.A.(N.S.) 783, is representative, have no application to this case because it and others similar in their character go on the grounds of negligence.

The inquiry then arises, Is plaintiff estopped from recovering his damages in this case by misrepresenting his age to defendant's foreman at the time he was employed? The object of the provisions of sec. 1728a, Stats., is to conserve the health and morals of children in the interest of the general welfare. It is declaratory of a public policy and makes all employments of children contrary to its provisions criminal acts, and we do not deem it permissible for the court to so construe the statute and restrict its operative effect that it would not harmonize with this clear legislative intent. To permit an employer to protect himself against the consequences resulting from his violation of this law by the plea that he acted with reasonable diligence to avoid a breach of it, would seriously restrict and modify the beneficial ob-

jects for the protection of children which the legislature obviously intended to accomplish. The *Pinoza* Case points out the fact that the statute is undoubtedly taken from a similar one [158] in the state of Illinois and was there construed, before this state enacted it, in *American Car, etc. Co. v. Armentraut*, 214 Ill. 509, 73 N. E. 766. In that case the injured child had misrepresented his age, and it was urged that such misrepresentation was a bar to his recovery in an action for injuries resulting from the illegal employment. The court held: "This doctrine is not applicable for the reason that the statute under consideration is aimed at the master and not at the servant. The act of the child in accepting or entering into the employment is not unlawful." In the case of *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N. E. 229, 139 Am. St. Rep. 389, where a minor brought action for injuries he suffered from a violation of a statute of this class, the court, after a thorough review of the grounds upon which the policy of such statutes rests, holds that a minor is not barred or estopped from recovering damages for such injuries by his misrepresenting his age. This rule was also enforced in the following cases wherein this question was presented for decision: *DeSoto Coal Min. etc. Co. v. Hill*, 179 Ala. 186, 60 So. 583; *Synszewski v. Schmidt*, 153 Mich. 438, 116 N. W. 1107; *Kirkham v. Wheeler-Osgood Co.* 39 Wash. 415, 4 Ann. Cas. 532, 81 Pac. 869; *Matlock v. Williamsville, etc. R. Co.* 198 Mo. 495, 95 S. W. 849, 115 Am. St. Rep. 481. In *Eliot v. Eliot*, 81 Wis. 295, 51 N. W. 81, 15 L.R.A. 259, the question whether an infant who is incapable of entering into a marriage contract for want of age is estopped by a fraudulent declaration of his age, which induced a marriage with him, was negatived upon the ground that an infant who is legally incapacitated to make a valid contract of marriage is incapable also to estop himself by such fraudulent representation. The case of *Grauman, etc. Co. v. Krienitz*, 142 Wis. 556, 126 N. W. 50, holds that a minor may by his own fraud estop himself from assailing a contract on the ground of infancy, but it is declared that the rule rests upon certain conditions, and that: "It is confined to cases where the infant, though under legal discretion, is in fact developed to the condition of actual discretion. It is further confined to cases of actual fraud and [159] where the contract or transaction is beneficial to the minor." The doctrine as applied to minors is there held to be closely fenced about: "(1st) By necessity for actual discretion; (2d) necessity for actual fraud; (3) necessity for beneficial nature of the transaction to the minor." An attempt to class the instant case as within the foregoing rules would necessarily fail because the em-

ployment of the plaintiff in violation of the law is obviously not a transaction which can in any light be considered beneficial to the minor. It necessarily follows from what has been said on the foregoing questions that defendant's contention respecting its rights to enforce a counterclaim for damages resulting from the minor's fraudulent misrepresentation of his age must fail. As indicated, these misrepresentations of the plaintiff afford no legal ground on which defendant can predicate a claim against the minor.

The release given by plaintiff's guardian was based on the ground that the plaintiff's claim against defendant was regulated and controlled by the provisions of the Workmen's Compensation Law. Manifestly there was no intent to settle the plaintiff's claim against defendant under the law for damages for his injuries resulting from his wrongful employment in violation of the law. Furthermore, if it is claimed that the release included this claim for damages, it is not binding on plaintiff because it was not approved by the county court as is required by sec. 3982, Stats. The guardian's power is limited by the law, and his acts which the law does not sanction are not binding on his ward.

BY THE COURT.—The judgment appealed from is reversed, and the cause remanded to the circuit court with direction to award judgment in plaintiff's favor for the recovery of the damages found by the jury.

Vinje, J., dissents.

A motion for a rehearing and for a modification of the mandate was denied, with \$25 costs, on May 2, 1916.

NOTE.

Person Employed in Violation of Law as Entitled to Compensation under Workmen's Compensation Act.

General Rule.

The cases involving the question whether a person employed in violation of law is entitled to compensation under a workmen's compensation act, are in the main confined to those which deal with the unlawful employment of minors; and the general rule to be deduced from the authorities is that a workman's compensation act does not cover illegal contracts of employment, but is based on the existence of a lawful contract of employment and from the foundation of such a contract regulates the compensation to be paid for injuries growing therefrom. See the reported case.

Thus it was said in *Hetzel v. Wasson Piston Ring Co.* 89 N. J. L. 201, 98 Atl. 306, L.R.A.1917D 75: "It can hardly be doubted that the legislature, in providing for the in-

grafting of these statutory provisions on contracts of hiring, had in mind contracts which were valid in law, or, at least, contracts the making of which was not prohibited by express legislative enactment; for it would be entirely unreasonable to attribute to the legislature the intention of adding terms to a contract of hiring which it had already prohibited the parties thereto from making." In reversing the dismissal of a common-law action for injuries brought by an infant the court said further: "Was, then, the contract in the present case a valid one? A mere reference to chapter 64 of the laws of 1904 (Pamph. L. p. 152) furnishes a complete answer to this query. This act regulates the age, employment, safety and work hours of persons employed in factories, workshops, mills and all places where the manufacture of goods of any kind is carried on, and its first section is that 'No child under the age of fourteen years shall be employed, allowed or permitted to work in any factory, workshop, mill or place where the manufacture of goods of any kind is carried on; any corporation, firm, individual, parent or guardian of any child who shall violate any of the provisions of this section shall be liable to a penalty of \$50 for each offense.' The basis of the judgment below is that there was a contract of hiring by which the plaintiff became the employee of the defendant. That there was such a contract, either express or implied, clearly appears from the facts set out in the plaintiff's complaint. That the contract was in violation of this statute, and that the making thereof was absolutely prohibited thereby, cannot be questioned; for it will hardly do to say, as is suggested by counsel, that the employer and the parent of the minor can by joint agreement deprive the child of the protection of this statute by a payment of \$50 as a penalty for a violation of its provisions. The purpose of the statute cannot be thwarted in any such way. Its primary object is the protection of children who are too young to appreciate the dangers arising out of work in places such as those described in the act. And in order to make the protection complete the legislature left no loophole for the escape from its provisions of either the employer or the parent. It says to the employer, 'You shall not employ any child under the age of fourteen years in your factory; you shall not allow or permit him to work there.' It says to the parent of such a child, 'You shall not allow or permit your boy or girl to work in such a place until he or she has reached the age of fourteen years.' Having declared this absolute prohibition, how can it logically be said that the legislature, by a subsequent enactment, recognized the right of the factory owner and the parent to disregard the mandate of this statute, and

make a contract for the employment of the boy which might or might not have read into it the provisions of the workmen's compensation act, as the master and the parent between them should elect? It is said that there is nothing in the complaint which shows that the contract of hiring was made by the parent on behalf of the plaintiff, and not by the plaintiff himself. It is not necessary that this should appear. Ordinarily the parent is entitled to the services of the child, and the wages earned by the child, until he reaches his majority, and so contracts for the employment of the child are presumed to be made by the parent. But in this particular case it is immaterial whether the contract was that of the parent for the child, or of the child by his own act; for the prohibition of the Act of 1914 is not only against the making of contracts for the employment of minors under the age of fourteen in factories where the manufacture of goods is carried on, but against allowing or permitting him to work in any such factory; and so a contract of hiring which by its terms proposes to violate that act, is equally invalid whether made by the parent or by the child. We conclude, therefore, that the common-law right of action of the plaintiff arising out of the facts set out in his complaint has not at all been affected by the provisions of the workmen's compensation act." See also *Hoey v. Superior Laundry Co.* 85 N. J. L. 119, 88 Atl. 823.

It is immaterial that there is no causal connection between the youth of the workman and the injury received by him. *Hillestad v. Industrial Insurance Com.* 80 Wash. 426, Ann. Cas. 1916B 789, 141 Pac. 913.

In *Westerlund v. Kettle River Co.* (Minn.) 162 N. W. 680, a common-law action brought by a minor through his guardian to recover for injuries sustained in the course of his employment, the defendant interposed a demurrer to the complaint contending in support thereof that the plaintiff's remedy was under the workmen's compensation act. In overruling the demurrer and deciding that the fact that the employment of the plaintiff was prohibited by statute rendered the compensation act inapplicable, it was said: "The question whether plaintiff's remedy is exclusively under the compensation statute depends: (1) Upon the construction to be given section 8230, G. S. 1913, wherein the legislature expressly declared what persons should be treated as within the compensation statute as employees; and (2) the scope and effect of sections 3848 and 3870, G. S. 1913, by which the employment of minors between the ages of fourteen and sixteen years is prohibited in the classes of work there stated. 1. The section of the compensation statute referred to provides that the term 'employee'

shall include, among others, 'minors who are legally permitted to work under the laws of the state.' We are satisfied that this language will permit of no construction other than as stated in *Pettee v. Noyes*, 133 Minn. 109, 157 N. W. 995, namely, that the legislature intended thereby to exclude from the act minors whose employment is prohibited by law. This is made too clear for controversy when viewed in the light of the legal rights of minors in this state, and of our statutes affecting such rights, known as 'child labor laws.' In the absence of legislation to the contrary, all minors may lawfully engage in such employments or work as their age and capacity fit them, and in this respect are 'legally permitted' to work, though their contracts, except as to necessities, are voidable at their election. In fact, we have no statute expressly permitting the employment of minors, and the use of the words 'legally permitted to work' was not intended as a reference to permissive legislation. But we have statutes, and have had for many years, known as the child labor laws, by which the employment of minors of certain age is expressly prohibited in specified classes of employment deemed detrimental to their moral welfare and dangerous to their life or limb. And in making use of the language quoted it is apparent that the legislature intended to preserve the status of minors in respect to their employment in dangerous occupations, and to remove them from the compensation act when employed in violation of law. No other construction of the statute can be adopted that would not be in discord with our whole legislative policy upon the subject. This view is sustained by other courts. *Stetz v. F. Mayer Boot, etc. Co.* 163 Wis. 151, 156 N. W. 971; *Stephens v. Dudbridge Iron Works Co.* [1904] 2 K. B. (Eng.) 225; *Hetzel v. Wasson Piston Ring Co.* [89 N. J. L. 201] 98 Atl. 306. It follows that the compensation act can have no application to the case of an injured minor who was employed in violation of any of the child labor laws of the state. 2. We turn then to the second question, namely, whether plaintiff's employment was in violation of any such laws. We answer the question in the affirmative. Plaintiff was just over fourteen years of age at the time of his injury. The facts with reference to the character of his work and the place where it was performed are stated in the complaint substantially as follows: Defendant's plant covers several acres of land upon which are located necessary buildings, stone crushers, coal sheds, hoisting derricks, stationary engines. The operating yard is traversed by railroad tracks, upon which defendant operates engines and cars in the movement of material in and about the works. At and near one of the tracks three large hoisting derricks are located, all equipped with neces-

sary machinery and appliances, and operated by stationary engines. These derricks are used in loading heavy material upon cars to be carted out of the plant either for shipment, or to be dumped outside thereof as waste material. The waste material is referred to in the complaint as 'spalls.' The work of loading the spalls is described at some length in the complaint, not necessary here to repeat, but it is shown by the averments to be attended with danger to the workmen, particularly and especially to young boys of the age of plaintiff. Plaintiff was employed in that work, and also in connection with the movement of cars about the loading platform. He was injured by being run over by a car being shunted down the track leading to the loading department, the brakes upon which were either defective or out of repair, and which plaintiff was attempting to stop by placing a block in front of the moving wheels. This the complaint alleges was in accordance with the practice and custom adopted by defendant in handling such cars. That was of itself dangerous employment for a boy the age of plaintiff. Plaintiff was not engaged to operate nor to assist in operating machinery of any kind, though he was in close proximity thereto when in the discharge of his duties.

3. Was this such employment as the statutes of the state prohibit to minors of the age of plaintiff? This question must be answered by the construction to be given to sections 3848 and 3870, G. S. 1913. Those statutes in their present form are found in section 3, c. 316, Laws 1913, and section 2, c. 516, Laws 1913. So far as here material, the statutes are substantially the same, though section 3870 contains certain provisions, not here material, not found in section 3848. Both statutes prohibit or make unlawful the employment of minors under sixteen years of age in the particular kinds of work there enumerated, being of a kind naturally to expose the minor to danger of injury either physical or moral. The various provisions are too numerous to set out at length. The concluding clause, following the enumerated prohibited employments, reads: 'Nor shall they be employed in any capacity whatever in the manufacture of goods for immoral purposes, or any other employment dangerous to their lives or limbs or their health or morals.' The work for which plaintiff was employed by defendant does not come within any of the specifically enumerated employments, and his employment was rendered unlawful or forbidden, if at all, by this general clause, distinctly prohibiting the employment in any work which may endanger the life, limb, health, or morals of the minor. The employments specifically referred to in the statute embrace the operation or assisting in the operation of machinery, the preparation of any composition in

which dangerous or poisonous acids are used, or in the manufacture of paints, colors, or white lead, or in the operation of any passenger or freight elevator, or the manufacture of goods for immoral purposes, following which is the general prohibition quoted. It is the contention of defendant that the general prohibiting clause following the specific enumerations must, under the rule of ejusdem generis, be held to refer to and include only such employments as are substantially similar to one of the classes so enumerated. We do not concur in that view of the statute. The rule invoked is one of construction, employed as an aid in determining the intent of the legislature, and the effect thereof should not be permitted to confine the operation of the statute within narrower limits than intended by the law makers. That, as well as all other rules of construction, has but one object in view, namely, the ascertainment of the intent of the statute. The general purpose of a statute, as disclosed by the provisions thereof, taken as a whole, often requires that the final general clause, inserted with a view of bringing within its scope matters not specifically mentioned, should not be restricted in meaning by the preceding specifications. . . . And when it appears that the legislature intended to go beyond the specifications, effect must be given that intent and the statute construed accordingly. The whole purpose of the legislature in the enactment of this statute; as clearly disclosed by its numerous provisions, was the protection of boys and girls from moral or physical harm who by reason of immature years presumptively are incapable of appreciating risks of injury which are incident to the particular employments. And it is manifest that the concluding clause was inserted for the express purpose of including any employment not embraced in those specifically mentioned which for the same reason might expose them to like dangers. It obviously was not intended as a limitation upon the scope of the statute, but rather as an enlargement thereof and to fully effectuate the protection intended thereby to be placed about the young and inexperienced minor child. This view is sustained by reputable authority. . . . It requires no extended argument or discussion to demonstrate that it is just as dangerous to a child to be set to work in a factory, machine shop or other like industry, where he will be hourly exposed to injury from machinery in operation, as to set him to work in operating or in assisting in operating of the same. Danger of injury of that character is what the legislature intended to guard against, and not especially the dangers incident to a particular employment. We therefore hold that the employment of plaintiff, as disclosed by the complaint, was prohibited by the statute

referred to, and excludes the case from the Compensation Law."

In *New York* it seems that the fact that a minor is employed in violation of the Labor Law is no defense to a claim for compensation. *Ide v. Faul*, 179 App. Div. 567, 166 N. Y. S. 858.

Qualification of Rule.

In *Pettee v. Noyes*, 133 Minn. 109, 157 N. W. 995, it appeared that the plaintiff's son entered the defendants' service as an apprentice, intending to become an operator of an electric passenger elevator. After two weeks' tutelage, he operated the elevator alone in the tutor's absence, without a license as required by the statute, in which service he was injured. Thereafter the parties adjusted the compensation for which the defendants were liable under the workmen's compensation act and the adjustment was presented to and approved by the district court. In an effort thereafter to maintain a common-law action it was contended that the relation of master and servant did not exist between the parties since the son was not licensed and was therefore prohibited by law from operating the elevator so that the compensation statute had no application and any proceeding thereunder was wholly void. In denying that contention it was held that the original legal relation of master and servant continued until changed by some agreement of the parties express or implied, since it did not appear that the son was authorized to operate an elevator alone and the employment was therefore not unlawful.

In *West Virginia* it is not unlawful to employ an infant over fourteen years of age, and if injured he is confined to his remedy under the compensation act. *Rhodes v. J. B. B. Coal Co.* (W. Va.) 90 S. E. 796. See also *Adkins v. Hope Engineering, etc. Co.* (W. Va.) 94 S. E. 506.

Minors who have procured the necessary permit or certificate to permit them to work are "employees" in the same sense as adults and are embraced within a workmen's compensation act, though at the time of the injury they are engaged on a certain class of work not permitted by law. *Foth v. Macomber, etc. Rope Co.* 161 Wis. 549, 154 N. W. 369.

If a person who is a subcontractor, employs another in respect to the work which is the subject of the contract, the rights of the employee under the workmen's compensation act are not affected by an invalidity of the subcontract. *Wausau Lumber Co. v. Industrial Commission* (Wis.) 164 N. W. 836, wherein it was held that where a workman was employed by a subcontractor under a contract entered into on Sunday between the subcontractor and the principal contractor of the general employer, the workman's rights were not affected thereby.

WILLIAMS

v.

LLANDUDNO COACHING AND CARRIAGE COMPANY LIMITED.

England—Court of Appeal—January 29, 1915.

[1915] 2 K. B. 101.

Workmen's Compensation Acts — Effect of Intoxication of Workman.

Where a workman sustains an accidental injury causing his death, while actually engaged in the performance of his duties and from a risk incident to his employment, his dependents are entitled to compensation under the workmen's compensation act though the proximate cause of the accident was the intoxication of the workman.

[See note at end of this case.]

Accident in Course of Employment — Disobedience of Orders.

A workman injured while engaged in performing a duty of his employment is none the less within the workmen's compensation act because in entering on that work he disobeyed an order to perform first another duty.

[See Ann. Cas. 1913C 4; Ann. Cas. 1914B 498; Ann. Cas. 1916B 1293; Ann. Cas. 1918B 768.]

[101] Appeal from an award of the judge of the Carnarvonshire County Court sitting at Conway as arbitrator under the Workmen's Compensation Act, 1906.

[102] The applicant Ann Evans Williams, the widow of John Williams, a stableman, claimed compensation on behalf of herself and the two infant children of the marriage in respect of the death of her husband by an accident arising out of and in the course of his employment with the respondents.

The facts as found by the county court judge were as follows:—

"(1.) On the 31st of January, 1914, the deceased was engaged with the respondents as a stableman, his duty being to chop and mix feed for the horses and convey it to the various stables by carts.

"(2.) The loft in which the deceased had to chop hay for the horses was in Oxford Road, Llandudno, and was approached by a vertical ladder fastened and running parallel to but a little distance from the wall; and it was part of the deceased man's duty to ascend and descend the ladder.

"(3.) On the day in question the deceased was seen by the respondents' manager about 9 A. M. He was then sober and in a condition fit and proper for the discharge of his duties.

"(4.) At 12.30 the deceased, in the course of his employment was going up the ladder

to the loft for feed for the top stable, and had got up about nine steps, when he slipped and fell sideways, striking his head against a window-sill, causing injuries from which he died on the 15th of February, 1914.

"(5.) At the time of the accident the deceased was under the influence of drink."

There was uncontradicted evidence that the deceased workman was told by the managing director of the respondents on the morning in question to wash certain motor cars, which he did not do, and that a fellow workman told him not to go up to the loft as he was not in a fit condition to do so.

The county court judge, after stating the findings of fact above set out, said that in his opinion slipping off the ladder was a risk incidental to the employment of the deceased; that his accident might or might not have been due to his intoxicated condition; and that if he had to decide the point he should say it was due to his intoxicated condition. But, on the above findings, if the [103] decision in *Frazer v. Riddell* (1914) W. C. & Ins. Rep. 125; 7 B. W. C. C. 841, was right, although that might rightly be called an accident due to the serious and wilful misconduct of the deceased, it was none the less an accident arising out of and in the course of the employment, and his award must therefore be for the applicant for the agreed sum of 186*l.* 15*s.* with the usual costs.

The respondents appealed.

W. Shakespeare for appellants.

R. I. Simey for respondent.

Solicitors: *Pritchard, Englefield & Co.*, for *Brighouse, Jones & Co.*, Ormskirk; *Sharpe, Pritchard & Co.*, for *Porter, Amphlett & Co.*, Conway.

[105] LORD COZENS-HARDY, M. R. read the following judgment:—This appeal raises a question which has given rise to differences of judicial opinion, namely, how far drunkenness, or rather in what circumstances drunkenness, is an answer to a claim by dependants. In *Frith v. Steamship Louisianian* [1912] 2 K. B. 155, 159, a sailor at a foreign port was so hopelessly drunk that he could not walk and was brought along the quay by a negro just as his vessel was starting, and was pushed on board like a bag of sand. He rose from the deck, staggered, and fell overboard at a place where the rail had not been replaced, and he was drowned. It was held by this Court that the accident did not arise out of the employment, although the sailor was on the ship, but it was due to his drunken condition. In *Nash v. Steamship Rangatira* [1914] 3 K. B. 978, the [106] principle of *Frith's Case* [1912] 2 K. B. 155, 159 was, it may be, slight-

ly extended, though I doubt it. There a sailor who had gone on shore with leave returned in a drunken condition along the quay. There was a gangway, a part of the ship, well constructed and properly lighted, and used both by the crew and passengers, including ladies. To a man not under the influence of drink it was perfectly safe. Before he reached the top of the gangway he let go of one of the guide ropes, swung round, and fell and broke his head. It was held by this Court, Pickford, L. J., dissenting, that the accident did not arise out of his employment, although it happened within the ambit of his employment on the ship and in a place more attended with risk than the quay itself.

These decisions are binding upon this Court, even if it should be held that the Scotch Courts have taken a different view of the law.

The authority principally relied upon in support of the alleged difference is *Frazer v. Riddell* [1914] W. C. & Ins. Rep. 125, 7 B. W. C. C. 841. There an engine driver, while driving a traction engine, fell off the footplate and was fatally injured. At the time he was under the influence of drink and unfit for his work, and the arbiter refused compensation and held that the accident did not arise "out of" his employment. But the Court of Session held that the man was actually performing the duty which he was employed to perform—namely, to drive the engine—although he was guilty of serious and wilful misconduct. I do not think there is any inconsistency between this case and *Frith's Case* [1912] 2 K. B. 155, 159 and *Nash's Case* [1914] 3 K. B. 978. It is rather like a case which I put by way of illustration in *Frith's Case* [1912] 2 K. B. 155, 159, that if a sailor, told to go aloft, does so, when in a state of intoxication, and meets with a fatal accident, that might be an accident arising out of the employment, notwithstanding his drunkenness.

The facts in the present case as found by the county court judge are as follows: [His Lordship read findings (1.) to (5.) above set out and also finding (6.), which was in the following terms: "In my opinion slipping off the ladder was a risk incidental to the employment of the deceased, and his accident may or may not [107] have been due to his intoxicated condition." He continued:] There is no finding that the ladder was not properly constructed or properly fastened. The only material finding is that the slipping off was "due to his intoxicated condition." I should add that there was uncontradicted evidence that he was told by the managing director on the morning in question to wash motor cars, which he did not do, and that a fellow workman told him not to go to the

loft as he was not fit to do so. But it was his duty, and it seems to me his primary duty, to cut chaff, and for that purpose to go to the loft by ascending the ladder. I attach no importance to the circumstance that he did not on the morning in question first finish washing the motor cars.

The learned county court judge has held the dependants entitled to compensation. I think he was quite right in so holding. I do not propose to consider in detail the numerous authorities which have been called to our attention.

The true principle is this. A workman who, while doing an act which it was part of his duty to do, meets with an accident to which he is more exposed than persons not so engaged is—or in case of death his dependants are—entitled to compensation from the employer, although the act is done negligently or contrary to rules. I assume a case to which the defense of serious and wilful misconduct is not available. I think the appeal fails and must be dismissed with costs.

SWINFEN EADY, L.J., read the following judgment:—The county court judge stated the facts of the case as he found them. I will not read those findings again, as they have already been read by the Master of the Rolls. He held that the fatal accident arose out of and in the course of the deceased's employment, although also an accident due to his serious and wilful misconduct. This misconduct is not a defence, as the accident terminated fatally.

It was urged by the appellants (the employers) that the real cause of the accident was the drunkenness of the deceased, and therefore that his widow could not recover, although if he had been sober and the accident had happened, it might be said to have arisen out of and in the course of his employment. It was also urged that he had been told to wash a motor car, and that [108] he departed from the terms of his employment by proceeding to the loft before he had done that duty. It was also said that there was a conflict of authority on the point involved in the case.

The cases establish the proposition that if an accident occurs while the workman is acting within the scope of his authority, and is doing an act which it was part of his duty to do, and the accident arises from his being engaged in doing that act and being thereby exposed to a special risk beyond that of other persons not so engaged, the employer is liable to pay compensation, although the workman is doing the act negligently or contrary to rules laid down for his guidance. Illustrations of this, are furnished by *Mawdsley v. West Leigh Colliery Co.* [1911] 5 B. W. C. C. 80, where a workman was engaged

to oil machinery, but told not to do so when it was in motion; and *Chilton v. Blair & Co.* [1914] 7 B. W. C. C. 607, where a workman was employed to turn a wheel in a rolling machine, but told not to do so sitting down.

If a state of facts is proved which brings the workman within the proposition I have stated, the fact that he was drunk when the accident happened, or indeed the fact that the proximate cause of the accident was his drunkenness, will not disentitle him or in the case of death his dependants from recovering compensation from his employer where death or serious and permanent disablement results.

There can be no doubt that it is serious and wilful misconduct for a man to be drunk at his work, but where death ensues this element may be disregarded in considering whether the workman is entitled to compensation.

In *Frazer v. Riddell* [1914] W. C. & Ins. Rep. 125, 7 B. W. C. C. 841, the accident arose out of and in the course of the employment, and the widow of the engine driver, who fell off the traction engine he was driving, was not precluded from recovering because the fall was due to the deceased's intoxicated condition. Intoxication is not of itself a defence in the case of fatal accidents.

In the other cases referred to in the argument the accident did not arise out of and in the course of the employment; the fact of the intoxication explained how the accident arose, but did not [109] prevent a workman from recovering who would otherwise have been entitled to do so.

In *Murphy v. Cooney* [1914] W. C. & Ins. Rep. 44; 7 B. W. C. C. 962, the first mate, who took the wheel of the ship, when he came on board heavily under the influence of drink, had been ordered away from the wheel and to go below, as he was not in a fit condition to do his work, and he had thus been removed from his work before the accident happened.

In *Renfrew v. M'Crae* [1914] W. C. & Ins. Rep. 195; 7 B. W. C. C. 898, the accident did not arise out of the employment. A commercial traveller at a railway station does not run any more risk of falling off the platform on to the line than any other intending passenger by train. The accident arose not from any special risk to which a commercial traveller is exposed by his employment, but only from the circumstance that he was intoxicated.

In *Frith v. Steamship Louisianian* [1912] 2 K. B. 155, the accident did not arise out of the employment. The sailor was brought back to the ship, hopelessly drunk, and pushed "like a sack of sand" on to the deck. Fletcher Moulton L. J. said that the accident

had nothing to do with the employment, except that it occurred more or less in the place of employment, that is on board the ship. It arose entirely out of his state of drunkenness.

Nash v. Steamship Rangatira [1914] 3 K. B. 978, is to the same effect, and followed *Frith v. Steamship Louisianian* [1912] 2 K. B. 155. The man was on a part of the ship—that is the ship's own solid step gangway; it was an accident to a drunken man in the place of his employment. It was held that the principle of *Frith's Case* [1912] 2 K. B. 155, applied.

In my opinion the cases cited to us are not in conflict with each other, as contended, but are reconcilable as I have endeavoured to explain, and there is not any conflict of authority with regard to them.

The fact that the deceased had not washed the motor car, when going to the loft, which it was part of his ordinary work to do, will not prevent the claim from being sustained.

[110] In my judgment the award of the county court judge was correct, and this appeal should be dismissed.

PHILLIMORE, L. J. read the following judgment:—In this case the county court judge has found that the man met with an injury by accident which caused his death, the accident being that when going up a vertical ladder to a loft, where he had to chop hay to provide feed for the horses in one of the stables under his charge, he slipped and fell sideways and struck his head.

He has further found (a) that the deceased was under influence of drink; (b) that the slipping off the ladder was a risk incidental to his employment; (c) that his accident may or may not have been due to his intoxicated condition; (d) that if he had to decide he should say that it was due to it; and, following the authority of the case of *Frazer v. Riddell* [1914] W. C. & Ins. Rep. 125, 7 B. W. C. C. 841, he has held that though due to the serious and wilful misconduct of the deceased it was none the less an accident arising out of and in the course of his employment, and he has made an award in favour of the applicant.

I think his conclusions of fact cannot be disturbed.

A point was taken for the employers that the man was not acting within his employment because he ought to have been doing some other part of his work first. I see nothing in this point. The work which he was engaged in was part of his work, perhaps taken out of due order. The accident therefore occurred in the course of the deceased's employment. I think also that the county court judge was right in holding that it arose out of his employment.

There was an element of risk in the task on which the deceased was engaged. It was a job in which a careless man might meet with an accident, might slip and fall, and his drunkenness made him careless.

The case is, as the county court judge thought, indistinguishable from *Frazer v. Riddell* [1914] W. C. & Ins. Rep. 125, 7 B. W. C. C. 841, where an intoxicated driver slipped and fell from the footplate of a traction engine. In the argument before us this case was fully discussed, as were [111] the following: *Renfrew v. McCrae* [1914] W. C. & Ins. Rep. 195, 7 B. W. C. C. 898; *Murphy v. Cooney* [1914] W. C. & Ins. Rep. 44; 7 B. W. C. C. 962; *Frith v. Steamship Louisianian* [1912] 2 K. B. 155; *Nash v. Steamship Rangatira* [1914] 3 K. B. 978. In these last four cases the decisions were against the applicants.

Renfrew v. McCrae [1914] W. C. & Ins. Rep. 195, 7 B. W. C. C. 898, is, as is *Frazer v. Riddell* [1914] W. C. & Ins. Rep. 125, 7 B. W. C. C. 841, a decision of the Court of Session, and is a later decision. The Court in deciding against the applicant distinguished the two cases, and I think rightly. The element of intoxication is common to the two; but in the latter case it was unimportant. The deceased, a commercial traveller, might have had business in the town of Beith and said he was going to do business there; but there was no evidence that he did any. He may have gone there merely for a jaunt with his fellow traveller in the dogcart which the latter had hired. Even if he did go there on business and was returning thence to his home by train, the accident of his slipping off the platform on to the rails (if he did slip off) was not one to which his employment particularly exposed him. He was at best like the servant going to the post in *Sheldon v. Needham* [1914] 7 B. W. C. C. 471.

In *Murphy v. Cooney* [1914] W. C. & Ins. Rep. 44, 7 B. W. C. C. 962, the drunken mate of a ship was ordered away from the wheel and it may be off the bridge by the master. As the Court of Appeal in Ireland viewed the facts it was not proved that he met with his accident in obeying this order. The Court thought it consistent with the facts that after leaving the wheel as ordered he just stood about and finally fell or rolled off the bridge on to the deck and got killed; and so the decision was against the applicant. The judgments seem to imply that if the man had got killed while descending the ladder from the bridge in obedience to an order the applicant would have recovered, even though the accident was due to drunken carelessness.

In *Frith v. Steamship Louisianian* [1912] 2 K. B. 155, a drunken sailor who having just managed to get on board had fallen on

to the deck and then attempted clumsily to rise and fallen backwards [112] overboard was held not to have met with an injury arising out of his employment, because he was not employing himself on any part of the ship's work. But the Master of the Rolls said that if he had been ordered aloft and had fallen through drunken carelessness the case might have been different. The supposed case is exactly the present case.

Nash v. Steamship Rangatira [1914] 3 K. B. 978, is perhaps more difficult. But in seeking to deduce a principle of law from a judgment which the Court has rendered upon certain facts, I must take the facts as they appeared to that Court and not as they may possibly appear to me.

In *Nash's Case* [1914] 3 K. B. 978, the majority of the Court thought that the accident did not arise out of the man's attempting to fulfil his employment or arrive at his place of employment, and therefore dismissed the application. Pickford, L. J. took a different view and would have granted it. On the view which the majority took *Nash's Case* [1914] 3 K. B. 978, is not this case.

On the whole none of the four cases relied upon for the employers are authorities for deciding the present case, while on the other hand *Frazer v. Riddell* [1914] W. C. & Ins. Rep. 125; 7 B. W. C. C. 841, is in point and is, I think, sound and right.

I think this appeal should be dismissed.
Appeal dismissed.

NOTE.

Intoxication of Employee as Precluding Recovery under Workmen's Compensation Act.

Introductory, 686.

In General, 686.

Express Statutory Provision, 688.

Introductory.

It is the purpose of the present note to review the recent cases dealing with the question whether the intoxication of an employee will preclude him from claiming the benefit of a workmen's compensation act. For a discussion of the earlier cases see the note to *Nekoosa-Edwards Paper Co. v. Industrial Commission*, Ann. Cas. 1915B 995.

In General.

Under the English compensation act serious and wilful misconduct does not bar the right to compensation for an injury resulting in death or serious and permanent

disablement. Accordingly, if an injury so resulting arises out of and in the course of the employment, the fact that the intoxication of the workman is the proximate cause of the injury will not prevent the award of compensation. See the reported case. But it has been held that where the workman was by reason of his intoxication not engaged in his employment and sustained the injury solely by reason of his intoxication the fact that he was at the time or about the place of employment would not warrant an award. *Nash v. Rangatira* [1914] 3 K. B. 978, [1914] W. C. & Ins. Rep. 490. In that case employers appealed from an award in favor of the dependents of a sailor who met with his death by falling from a gangway when going on board his ship. The gangway was well constructed and lighted. An eyewitness to the accident testified that he saw the sailor coming along the quay, walking unsteadily and staggering; that he got to the gangway and began to mount it, holding on to the ropes on either side, but when part of the way up he let go one of the ropes, twisted suddenly and fell down on the quay resulting in his death. The court in allowing the appeal followed the ruling in *Frith v. Steamship Louisianian* [1912] 2 K. B. (Eng.) 155, 81 L. J. K. B. 701, and said per *Cozens-Hardy, M. R.*: "The county court judge finds as a fact that he was very drunk. I say that he found that the man was very drunk because his language is strong on that point. The witness Jenkins, who was the quartermaster, said, and he satisfied the county court judge, that the man was more or less drunk and that the accident was due to that fact. The county court judge says in the course of his judgment that 'Nash was at least so much under the influence of drink that he was unsteady on his feet and had not such control over his movements as a sober man would have had. Further, I think that the right inference from Jenkins' evidence is that in all probability the accident would not have happened but for Nash being under the influence of drink, and in that sense the accident was due to that fact.' Again, lower down he says, 'I find therefore as a fact that the accident and the death which resulted from it would not have happened but for the fact that Nash was under the influence of drink;' and subsequently he expresses his opinion that 'drunkenness was the primary and effective cause of this accident;' and I think he repeats the same thing again further on in his judgment. But the county court judge further says that the accident was due to two concurrent causes. He says that, drunk as the man was and unable to walk steadily and like a reasonable man, there was a special peril incident to his employment as a sailor, and that but

[1915] 2 K. B. 101.

for the fact that the sailor was on the gangway, which is part of the ship for the purposes of the Workmen's Compensation Act, 1906, the accident would not have happened. Therefore he holds that, while drunkenness was primarily and effectively the cause of the accident, there was a concurrent cause, namely, that he was on the ship with an extra peril attached to it. Is that right? With great respect to the learned judge, I do not think it is. This is not a case in which the section of the act as to serious and wilful misconduct can be relied on. It was admitted by counsel for the respondents that this was so, and he only sought to refer to that provision by way of analogy and to show that there may be cases where a workman or his dependents may claim compensation in respect of injury by accident although the accident does not arise solely from the employment, but is also due to wilful misconduct on the part of the workman. In my view, it would be wrong to take that exceptional section, which it is difficult to justify logically, as throwing light on the scheme and policy of the act. This is not a case where the accident happened to the man through his wilfully doing in a wrong manner something which it was his duty to do, but the man's drunkenness was primarily the cause of the accident, and it would not be right to hold that the accident was one coming under the act. I do not wish to repeat what I said in *Frith v. Steamship Louisianian* but there is not one word of my judgment that I wish to modify or alter. That was the case of a sailor who had gone ashore without leave and was still on shore when his ship was about to start. He was in a hopeless state of drunkenness and was brought along the shore by a negro and pitched like a sack on to the vessel. The vessel was just starting, and when it had only gone a few yards, and before the ship's rail had been replaced after taking in the gangway, the man got up, so drunk that he could scarcely stand, and then fell down and rolled off the ship through the open space and was drowned. We held that the accident had been occasioned by and was due to the man's hopeless drunkenness, and that, although the accident occurred through his being on the ship in that state and being exposed to an extra risk through the rail not being in its place, yet the accident was not brought within the act. I should personally greatly regret if any other view were taken. To say that if a drunken man went in the course of his employment to a place where there was dangerous machinery or some other risk of that kind, and put his hands in the machinery owing to his drunken state, that would be an accident arising out of his employment, would be to my mind very shocking. I do not wish to refer to my own judgment in

Frith v. Steamship Louisianian, but Lord Justice Fletcher Moulton put the matter very clearly in his judgment. There the learned county court judge had held that the accident arose out of the sailor's employment and awarded compensation, and Lord Justice Fletcher Moulton said: "The learned judge appears to have thought that if the sailor was on the ship anything that happened by reason of his being there would bring him within the purview of the act. That is not so. The accident must arise out of his employment. In my opinion this accident had nothing whatever to do with the employment except that it occurred more or less in the place of employment, that is on board the ship." The case reminds me of Dr. Johnson's definition of a ship as a prison with an extra chance of being drowned; but in view of the finding that the effective cause of the accident was drunkenness, it would be wrong to say that this case can be distinguished from the principle laid down in *Frith v. Steamship Louisianian*. I hold therefore that this appeal ought to be allowed on the ground that the sailor's death was not due to an accident arising out of his employment." And see *Murphy v. Cooney* [1914] 2 Ir. R. 76, W. C. & Ins. Rep. 44.

The degree of drunkenness makes no difference once it has been found that such drunkenness was the sole cause of the death. *Nash v. Steamship Rangatira* [1914] 3 K. B. (Eng.) 978, [1914] W. C. & Ins. Rep. 490.

In several American cases the effect of the intoxication of an employee has been considered with respect to his relation to the employment, without reference being made to the question of wilful misconduct. Thus in *Berg v. St. Lakes Dredge, etc. Co.* 173 App. Div. 82, 158 N. Y. S. 718, it appeared that an employee who lived on a dredge went ashore for his own purpose, became, in the language of a witness "staggering drunk," and on his attempt to return, fell from a dock and was drowned. It was held that compensation could not be recovered, since the accident did not arise out of and in the course of his employment. The court said, however: "If he had fallen overboard from the boat which was conveying him from the dock to the dredge a different question would be presented." In *Kiernan v. Friestedt Underpinning Co.* 171 App. Div. 539, 157 N. Y. S. 900, wherein it appeared that an employee reported for work and was informed by the superintendent that he need not work because he was intoxicated and therefore not in a fit condition to engage in a hazardous kind of work which he had been doing, whereupon the employee started to leave and fell receiving the injuries complained of, it was held that he was entitled to the benefit of

the act. *Compare* Matter of Pope, 177 App. Div. 69, 163 N. Y. S. 655.

However, in one case the view has apparently been taken that there could be no recovery of compensation for an injury of which the intoxication of the employee was the proximate cause. See *Hunter v. Colfax Consol. Coal Co.* 175 Ia. 334, Ann. Cas. 1917E 839, 157 N. W. 145, L.R.A.1917D 51, *amending opinion* 175 Ia. 245, Ann. Cas. 1917E 803, 154 N. W. 1037, L.R.A.1917D 15.

The causal connection between the intoxication and the injury has been held to be a question of fact. *Napoleon v. McCullough*, 89 N. J. L. 716, 99 Atl. 385, wherein there was conflicting testimony as to the condition of the workman before the accident. The only eyewitness to the happening of the accident testified that the workman appeared to him to be all right and that a jounce of the wagon (which he was employed to drive) threw him into the street. The court in affirming an award under the compensation act said: "This being the state of the evidence, the trial judge was warranted in making the finding that he did. He was under no legal duty to make an express finding negating the assertion on the prosecutor that the deceased was intoxicated at the time he received his injuries and that such intoxication proximately caused his injuries and death. Such a negative finding was necessarily included in, and will be presumed from, the finding of the trial judge that the accident arose out of and in the course of the employment of the deceased."

It was held in *Ramlow v. Moon Lake Ice Co.* 192 Mich. 505, 158 N. W. 1027, L.R.A. 1916F 955, that the fact that the system of an employee had been so weakened by his intemperate habit, that after he had sustained injuries in the course of his employment he suffered an attack of delirium tremens and died on the following day, did not shift the proximate cause of death from his injury to his intemperate habit. And see *Sullivan v. Industrial Engineering Co.* 173 App. Div. 65, 158 N. Y. S. 970.

In *Von Ette's Case*, 223 Mass. 56, 111 N. E. 696, L.R.A.1916D 641, it was said obiter, that if a workman's fall from a roof was due to a condition of intoxication no recovery could be had under the act.

Express Statutory Provision.

By the *Maryland* act it is specifically provided by section 45, that "notwithstanding anything hereinbefore or hereinafter contained, no employee or dependent of any employee shall be entitled to receive any compensation or benefits under this act, on account of any injury to or death of an employee caused by self-inflicted injury, the wilful

misconduct or the intoxication of such employee." Section 61 provides as follows: "In any proceeding for the enforcement of a claim for compensation under this act, it shall be presumed in the absence of substantial evidence to the contrary . . . (d) that the injury did not result solely from the intoxication of the injured employee while on duty." In *American Ice Co. v. Fitzhugh*, 128 Md. 382, 97 Atl. 999, wherein it appeared that the driver of an ice and coal wagon fell or was thrown from the wagon and was killed, it was held that the fact that his drunken condition was a contributing cause of the accident would not defeat recovery under the act. The court said: "The appellant's first prayer asserted its right to a verdict if the jury found that Seymour Fitzhugh was intoxicated at the time of his death and that such intoxication contributed to his death. The defendant's second prayer asked for the instruction that, if the jury found that Seymour Fitzhugh was intoxicated while on duty and that his death directly resulted from such intoxication, then their verdict should be for the appellant. By its third prayer the jury were instructed that if they found that Seymour Fitzhugh was intoxicated at the time of the accident referred to and that his death directly resulted from such intoxication, and if the jury further believed from the evidence that the accident would not have happened if the deceased had not been intoxicated, than their verdict should be for the appellant. These prayers ignore the provision of the act which disentitles the employee to recover only where intoxication is the sole cause of the injury which results in death. The prayers properly present the defense of contributory negligence applicable to ordinary cases of negligence; but the act in question was designed to abolish the defense of contributory negligence in cases falling within its provisions, and it is only where intoxication is the sole cause, and not the contributing cause of the injury, that it can be relied on as a defense to the claim of the employee or his dependents. In other words, under the terms of the act, the injury for which compensation is sought must be due exclusively or entirely to the intoxication of the employee in order to constitute a defense to the claim. Subsection 7 of section 61 declares that 'death,' referred to as the basis of compensation under this act, means 'only death resulting from such injury,' and where the injury, which results in the death of the employee, results solely from intoxication, the dependents are not entitled to compensation."

The workmen's compensation act of *Rhode Island* expressly provides that "no compensation shall be allowed for the injury or death of an employee where it is proved

that his injury or death . . . resulted from his intoxication, while on duty." In *Collins v. Cole* (R. I.) 99 Atl. 830, it appeared that an employee was engaged as a night watchman and deck hand on a dredge, and as part of his duty he was to take members of the crew to and from the shore on a large yawl belonging to the dredge. On the night of the accident he returned to the dredge in a drunken condition, and there drank more whisky. He was then heard talking about going back to shore for more drink, and shortly afterwards there was a yell, whereupon the other deck hands who had retired for the night rushed out on the deck and found the watchman standing up in a small skiff which did not belong to the dredge and which immediately capsized whereby he was drowned. In dismissing a petition by his widow for compensation the court said: "The petitioner argues that, in order to defeat the petition, the respondent must prove that the death resulted solely and exclusively from intoxication while on duty. If the petitioner means by that that the respondent must exclude every possibility that death might have resulted otherwise than from intoxication, we cannot agree with her. If Collins was in an intoxicated condition, that is, a condition in which he would be unable to look out for his own safety with that degree of care which a person would otherwise naturally exercise, and that, while so influenced, he did something which a person in a normal condition would not be likely to attempt and which brought about the accident, the trial court would be warranted in finding that the accident resulted from the condition into which he had voluntarily brought himself. We do not think that the statute requires that every possibility should be excluded before the evidence becomes sufficient to support the finding that the result was due to intoxication. We think that the intoxicated condition of the decedent is fully substantiated by the evidence, and that his reckless and unnecessary act in going into and standing up in a small boat, easily capsizable, was a dangerous act which would be apparent to any sober person. The very fact that he elected to make use of this small boat, instead of the larger yawl, which was lying close to it and was equally available, is further evidence of his condition and of his inability therefrom to properly care for himself. The trial court having denied the petitioner compensation, and such decision being in our opinion supported by substantial testimony, the petitioner's appeal is dismissed, and the decree of the superior court dismissing the petition is affirmed."

McCRACKEN

v.

MISSOURI VALLEY BRIDGE AND IRON COMPANY.

Kansas Supreme Court—July 28, 1915.

96 Kan. 353, 799; 150 Pac. 832.

Workmen's Compensation Acts — Lump Sum Award — Review.

An appeal from a judgment rendered under the workmen's compensation act, awarding compensation in a lump sum to a dependent upon a workman whose death resulted from personal injuries sustained in a hazardous employment, dismissed for want of merit.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Barton county: BANTA, Judge.

Action by Ellen McCracken, plaintiff, against Missouri Valley Bridge and Iron Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. DISMISSED.

R. A. Campbell for appellant.

F. V. Russell and R. C. Russell for appellee.

[354] BURCH, J.—The action was one for compensation under the act to provide compensation for workmen injured in certain hazardous industries. (Laws 1911, ch. 218; Laws 1913, ch. 216.) The plaintiff recovered and the defendant appeals.

In December, 1914, the defendant was engaged in building a bridge across the Arkansas river near Nettleton in Edwards county. On December 11 the defendant employed George McKinley McCracken as a common laborer to assist in building the bridge. On December 29 the workman sustained personal injuries in the course of his employment which resulted in immediate death. His wages were twenty-five cents per hour, eight hours constituting a day, and the time which he actually work amounted to one hundred and twelve hours. He had previously been employed by the defendant at various times and places but an interval of about a year had elapsed since the last employment. The workman died intestate, leaving no surviving widow or children and leaving as his sole heir at law his mother, Ellen McCracken, who is the plaintiff. At the time of the death of her son the plaintiff resided in the city of Great Bend where she has lived for a number of years. She was wholly dependent upon her son's earnings for her support. She is a widow about sixty-two years of age, entirely

destitute, without resources or income of her own, and physically unable to earn her own living. The son left no other person or persons dependent upon him either wholly or in part.

At the time of his death the workman and the defendant were subject to the provisions of the workmen's compensation act. The plaintiff complied with all the requirements of the statute on her part and the court rendered judgment in her favor for the lump sum of \$1872.

It is said the judgment should have been for \$624, or fifty-two times the workman's average weekly earnings during his employment by the defendant. The statute reads as follows:

"SEC. 5. That section 11 of chapter 218 of the Session Laws of 1911, be and the same is hereby amended to read as follows: Section 11. *Amount of Compensation.* The amount of compensation under this act shall be: (a) Where death results from injury: (1) If the workman leaves any dependents wholly dependent upon his earnings, an amount [355] equal to three times his earnings for the preceding year but not exceeding thirty-six hundred dollars and not less than twelve hundred dollars, provided, such earnings shall be computed upon the basis of the scale which he received or would have been entitled to receive had he been at work, during the thirty days next preceeding the accident; and, if the period of the workman's employment by the said employer had been less than one year, then the amount of his earnings during the said year shall be deemed to be fifty-two times his average weekly earnings during the period of his actual employment under said employer; provided, that the amount of any payments made under this act and any lump sum paid hereunder for such injury from which death may thereafter result shall be deducted from such sum; and provided, however, that if the workman does not leave any dependents, citizens of and residing at the time of the accident in the United States or the Dominion of Canada, the amount of compensation shall not exceed in any case seven hundred and fifty dollars." (Laws 1913, ch. 216, § 5.)

It will be observed that the amount of compensation is three times the workman's earnings for a year. Anticipating that difficulty might be encountered in computing earnings for a year the legislature provided a rule which applies to the facts of the present case. The period of the workman's employment with the defendant was less than a year, in fact less than a month within the year preceeding his death. Therefore the amount of his earnings for a year were deemed to be fifty-two times his average weekly earnings during the period he was in the defendant's

service. His average weekly earnings were twelve dollars. Fifty-two times this amount are \$624, earnings for a year. Three times this sum are \$1872, the amount of compensation and the amount of the judgment.

It is said that judgment should not have been rendered in a lump sum but that the plaintiff should have been awarded periodical payments according to her necessities so that in case of her death any unpaid balance would be saved to the defendant.

The statute leaves the character of the judgment to the discretion of the trial court.

"The judgment in the action, if in favor of the plaintiff, shall be for a lump sum equal to the amount of the payments then due and prospectively due under this act, with interest on the payments overdue, or, in the discretion of the trial judge, for periodical payments as in an award." (Laws 1911, ch. 218, § 36.)

The court has frequently expressed itself on this subject. The question usually arises in cases involving incapacity of a [356] workman. In the very recent case of *Roberts v. Charles Wolff Packing Co.* 95 Kan. 723, 149 Pac. 413, it was said:

"The theory of the legislature manifestly was that cases would arise in which the condition of the employee would be so marked that there would be little reason to anticipate improvement in earning capacity and that the circumstances would be such as would warrant the court in giving judgment for a lump sum available at once rather than for periodical payments as in an award. The kind of judgment that is to be rendered was left to the discretion of the trial court. The question now contended for was presented in *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244. It was there insisted that the theory of the act was that compensation should cease and payments should end when incapacity ceased and the case should be left open so that employers might obtain modification of the payments as the condition of the employee should improve. The answer to that contention was that:

"The workmen's compensation act confers express power upon the trial court to render judgment in a lump sum instead of making an award of periodical payments. In every case the trial court must exercise its judgment and discretion as to the best method of making compensation in the light of all the facts, and the result will not be disturbed on appeal except for an abuse of the power." (Syl. ¶ 5.)

"In the more recent case of *Cain v. National Zinc Co.* 94 Kan. 679, 146 Pac. 1165, it was held that:

"Whether the judgment in such a case shall be for a lump sum, or for periodical

payments, is expressly left to the discretion of the trial court.' (p. 680.)

"In arriving at its judgment the court considers the testimony as to the nature of the injury, its effect on the earning capacity, the duration of the incapacity and the likelihood of cure or improvement, and from all pertinent facts brought to its attention it determines whether the judgment shall be for periodical payments or for a lump sum on which payment may be enforced at once." (p. 728.)

The statute gives precisely the same power to the trial court in cases instituted by persons dependent upon a workman whose death results from an injury.

In many instances the position of the trial court is a difficult one. In the case of *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244, the solution of the problem of how long incapacity to earn wages will continue was discussed. Because the court exercises discretionary power in a matter peculiarly for its consideration its action is practically final. Consequently it is to be expected that district courts will act cautiously and candidly and not render lump-sum judgments for any other reason than that the welfare of the parties requires it. Whenever [357] such a judgment appears to be best under all the circumstances there should be no hesitation in pronouncing it.

In this case there is no possible hope for improvement like restoration of earning capacity to an injured workman. The son is dead.

The mother was entirely dependent upon his earnings for her own continued existence independent of charity. She is utterly destitute. She has no income or sources of income of her own. She is physically unable to earn her own living, and she is sixty-two years old. The statute gave her \$1872. With this sum she must establish herself according to her helplessness and then employ the remainder so that may last to the end of her days, for she will never have any more. It does not take a financier to understand how little she has, nor a sentimentalist to appreciate her needs. Every man has or has had a mother in fortunate or unfortunate pecuniary circumstances. Now an insurance company, using the name of the defendant as appellant, sees in this situation a chance to make some money. Probably the plaintiff cannot attain her life-expectancy and the insurance company wants this judgment doled out to her in installments "as her necessities require"—no comfort, nothing to inspirit or gladden, but as her necessities may require—so that should she die soon part of the judgment will not have to be paid. More than this, it is said that the judge of the district court was so callous of conscience that he abused his official

power in not withholding some of the money from this aged, destitute and helpless woman.

In order to debate a subject with profit the minds of the disputants must be capable of meeting on a common plane in common comprehension. It is useless to discuss the dignity of labor with a professional gambler. It is useless to discuss the rewards and the happiness of virtue with a procuress. In this case the insurance company reveals itself in such a way that it is not necessary for the court to do more than to express its opinion that the district court did not abuse its discretion.

The fact is this is not a lawsuit. It is an abuse of the judicial machinery of the state, set up for the purpose of accomplishing justice, by a contumacious corporation which chooses, to disrespect and to defeat as far as it can a social-welfare statute of this state. There was no controversy between [358] the plaintiff and the bridge company in whose service the plaintiff's son was killed. There was no controversy between the attorneys for the plaintiff and the attorney for the defendant. They knew the law and the facts were not disputed. The case was determined in the district court on admission supplemented by a little oral testimony by the plaintiff. No stenographer was called to take the proceedings, because of their simplicity and uncontroversial character. The case was a typical one for the substantially automatic operation of the workmen's compensation law, and the bridge company was anxious to make compensation at once to the plaintiff for the loss of her sole means of support. But the insurance company informed the defendant that liability should be established in the court of last resort or the indemnity the defendant had purchased would not be paid. So an appeal had to be taken. Five grounds were stated. The first was that the judgment was contrary to the evidence, which, of course, was too frivolous to serve even as make-weight. The other four presented in four different ways the stale subject of judgment for a lump sum. It is submitted that the statute quoted above relating to the form of the judgment in compensation cases is too plain and unambiguous for fair minds of ordinary acumen to differ respecting the power conferred. This court had patiently spelled out time and again the legislative meaning and purpose, which were already too clear to be misconceived, and the attorney for the defendant had too much respect for himself and for the court to argue the matter. The point concerning the amount of the judgment, which is too must dignified by calling it a point, was pressed into service at the hearing.

The court does not possess adequate means of dealing with this kind of lawlessness. The attorney for the defendant who signs the pa-

pers is not amenable to discipline because he was acting under duress of the peril to his client, who he assured the court was and always has been anxious to pay. The real culprit is not in court or subject to process. Because appeals of this kind, serving no purpose except to oppress claimants and to frustrate the law, are common in compensation cases the court has adopted the practice of disposing of them summarily [359] on motion to dismiss for want of merit. In the case of *Cain v. National Zinc Co.* 94 Kan. 679, 146 Pac. 1165, 148 Pac. 251, it was said:

"The workmen's compensation act contemplates the speedy adjustment of claims under it. If the determination of the amount to be paid must await the relatively slow process of litigation through an appellate court its main purpose will be defeated and its beneficent operation thwarted. In a case of this character the plaintiff may well raise the question whether the issue of the appeal is so far doubtful as to require the ordinary routine to be followed; and where upon the preliminary hearing resulting from such challenge the court is fully satisfied that no grounds for a reversal exist, the judgment should be made final without further delay." (p. 681.)

Some time must be consumed even when this course is pursued. In this instance the plaintiff's son was killed on December 29, 1914. The judgment was not rendered in the district court until May 10, 1915. The appeal was taken on June 1. The motion to dismiss was filed on June 29. The case was heard on July 7, and the order of dismissal was entered at the first ensuing consultation of the court, which occurred on July 9. The mandate of this court was ordered to be forwarded to the district court at once. However, by means of an utterly groundless resistance of payment accomplished by an abuse of judicial proceedings, the plaintiff will have been kept out of her money for the greater part of a year.

Insurance companies say they are preyed upon by "snitch" lawyers, who secure lump-sum judgments for permanent injuries to the spine. If this be true in some instances the course pursued in this case is not less disreputable and affords no remedy. It is quite possible that district courts have sometimes hesitated to render judgments for compensation payable in installments, because of the practical certainty that workmen would be hounded into unjust compromises by one proceeding after another brought nominally to test restoration to earning capacity.

It is not considered good form for the court to make suggestions to the legislature, which body has sole authority to make the law, and which reserves to itself the power to regulate practice and proceedings in court, except in the most minor matters. Some disagree-

able facts, however, have been set down in this opinion, plainly and in detail, which not only disclose a condition, but which ought to awaken some interest in some quarters.

ADDENDUM.

[360] The foregoing opinion was filed on July 28, 1915, just before the summer recess of the court. In due time The Fidelity and Casualty Company of New York filed a motion asking for a modification of the opinion. The motion states in substance that the Fidelity and Casualty Company, the insurer of the defendant, The Missouri Valley Bridge and Iron Company, was in fact willing to abide by the judgment of the district court awarding the plaintiff compensation in a lump sum, but that the insurance department of the state of New York, the state of its incorporation, would not permit it to pay the judgment without an appeal being taken. The motion states that the facts presented will be sustained by proof, and a preliminary showing as to the nature of such proof has been made. If upon the hearing of the motion the proof should be as indicated, some of the language of the opinion will not apply to The Fidelity and Casualty Company of New York.

OPINION MODIFYING FORMER OPINION.

(December 11, 1915; 96 Kan. 799.)

Charles A. Baker for Fidelity and Casualty Company of New York.

[799] BURKH, J.—Ellen McCracken commenced an action against the Missouri Valley Bridge & Iron Company for compensation for the death of her son who was an employee of the bridge company. The district court made an award of compensation in a lump sum computed according to the terms of the workmen's compensation act. At the instance of the Fidelity & Casualty Company of New York, which had insured the bridge company, a baseless and contumacious appeal was taken to this court. The appeal was dismissed for want of merit, and in the opinion of the court occasion was taken to comment on the practice of taking such appeals. After the opinion was filed the Fidelity & Casualty Company of New York filed a motion asking that it be relieved from censure on the ground that it was in fact willing to abide the judgment of the district court but that it was coerced by the insurance department of the state of New York to resist the claim of the aged, destitute and helpless plaintiff. Leave to make a showing was granted. [800] (*McCracken v. Missouri Val. Bridge, etc. Co.* 96 Kan. 353, 360, 150 Pac. 832, 834.) The showing has been made and it clearly discloses that the Fidelity & Casualty Company was

not actuated by any desire to delay payment, to speculate upon the plaintiff's misfortunes, or to abuse judicial procedure, in this case. Anything to the contrary contained in the former opinion may be considered as withdrawn.

While the court is pleased to make the foregoing statement it regrets the necessity of adverting to the proof which the Fidelity & Casualty Company has brought upon the record explaining why it acted against its own wishes. As a part of its showing the Fidelity & Casualty Company filed the affidavit of one James J. Hoey, the material portions of which read as follows:

"James J. Hoey, being first duly sworn, upon his oath deposes:

"That at all times hereinafter mentioned, he was second deputy superintendent of insurance of the state of New York. That the principal office of the department of insurance of the state of New York is located at the capital of said state, to wit, Albany, but that affiant's office was located at the city of New York. That affiant, by virtue of the office as such second deputy superintendent of insurance, was charged with the supervision of insurance companies writing workmen's compensation insurance within the state of New York, and among others, with the supervision of The Fidelity & Casualty Company of New York.

"That the said The Fidelity & Casualty Company of New York as a condition precedent to its doing business in the state of New York was required by the department of insurance of the state of New York to promise and undertake not to make lump sum settlements in cases arising under the workmen's compensation statutes of the various states in which The Fidelity & Casualty Company of New York might transact business, without the approval of the department of insurance of the state of New York. That the said pledge was at all times hereinafter mentioned in full force, and that the said department of insurance of the state of New York insisted that no lump sum settlements in cases arising under workmen's compensation acts of the various states should be made without its approval.

"That upon to wit the 30th day of April, 1915, Frank E. Law, Esq., vice-president of The Fidelity & Casualty Company of New York, came to the office of affiant, and asked permission of affiant as representing the Department of Insurance of the State of New York, to make a lump sum settlement of the liability of The Fidelity & Casualty Company of New York in this case. That the said Frank E. Law laid before affiant among other papers a certain letter from the Missouri Valley Bridge & Iron Company to the Chicago office of the Fidelity & Casualty Company of New York, in which letter the Missouri Valley Bridge and Iron Company [801] urged that The Fidelity & Casualty Company of

New York make a lump sum settlement in this case. That affiant stated to Mr. Law that he did not believe that the facts of the case warranted any change in the prior rulings of the Department of Insurance of the State of New York, and that the Department of Insurance of the State of New York would expect The Fidelity & Casualty Company of New York not to make a lump sum settlement in the case, but to resist the same to the utmost."

The workmen's compensation act is a statute of the state of Kansas, duly promulgated by its legislature for the purpose of ameliorating certain social conditions. With the wisdom or unwisdom of the statute this court has nothing to do. The legislature, however, provided that in actions for the recovery of compensation the judgment, if in favor of the plaintiff, "shall be for a lump sum equal to the amount of the payments then due and prospectively due under this act, with interest on the payments overdue." To this legislative command was added the following: "or, in the discretion of the trial judge, for periodical payments as in an award." (Laws 1911, ch. 218, § 36.) That is the law of this state, and so long as it stands on the statute book it is entitled to obedience from anyone who encounters it.

It sometimes occurs that a statute of a state is displeasing to a portion of its citizenship and to others beyond its borders. It is, however, a fundamental principle of the American system of government that when the legislature of a state has registered a decision upon a subject within the scope of its authority the decision is the will of the state to the support of which all moral forces should rally. Those who are dissatisfied may indeed continue to persuade, if they can, successive legislatures to change the law, but so long as the legislation stands public and private welfare demand obedience to it until it can be changed according to lawful methods, because the supremacy of the law is the indispensable condition of any peace, order, or justice whatever.

Upon its own showing The Fidelity & Casualty Company of New York comes into this state to transact its business under an obligation to abide, not the will of the state vesting in its district courts authority to say when lump sums shall be paid in compensation cases, but the will of a department deputy of another state. On April 30, 1915, before the district court [802] of Barton county had an opportunity to examine the facts and to exercise its authority to determine whether or not Ellen McCracken ought to receive a lump sum or periodic payments as compensation for the killing of her son, the deputy issued his fiat to resist a lump sum judgment "to the utmost." The case was one which both the bridge company and The Fidelity & Casualty Company desired to settle by pay-

ing a lump sum. The facts were stated in the former opinion as follows:

"The son is dead. The mother was entirely dependent upon his earnings for her own continued existence independent of charity. She is utterly destitute. She has no income or sources of income of her own. She is physically unable to earn her own living, and she is sixty-two years old. The statute gave her \$1872, with this sum she must establish herself according to her helplessness and then employ the remainder so that it may last to the end of her days, for she will never have any more. It does not take a financier to understand how little she has, nor a sentimentalist to appreciate her needs." (Ante, p. 357.)

The judgment of the district court was that compensation should be made in a lump sum. There was no ground for appeal. Because The Fidelity & Casualty Company of New York was under obligation to submit to something which it accepted as higher law than the statute and rules of procedure of this state, it proceeded to resist to the utmost, and required an appeal to be taken which lacked even the shadow of merit. The result was not a lawsuit, but, as the court indicated before, a demoralizing abuse of the judicial machinery of the state perpetrated in disrespect of its laws and in an effort to thwart the purpose of the legislature expressed in a social-welfare statute. As the former opinion stated, the court does not possess adequate means of dealing with this kind of lawlessness, the real culprit not being in court nor subject to process.

Such being the situation disclosed by the showing made in support of the application to modify the former opinion, the closing words of that opinion are pertinent:

"Some disagreeable facts, . . . have been set down . . . plainly and in detail, which not only disclose a condition, but which ought to awaken some interest in some quarters." (Ante, p. 359.)

NOTE.

Lump Sum Award under Workmen's Compensation Act.

English Act:

In General, 694.

Agreement between Parties, 696.

Recording of Lump Sum Award, 696.

American Acts:

In General, 698.

Construction of Acts, 699.

English Act.

IN GENERAL.

The English Workmen's Compensation Act of 1906 provides for the redemption of week-

ly payments by the payment of a lump sum as follows: "Schedule I, paragraph (17).—Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer, be redeemed by the payment of a lump sum of such an amount as, where the incapacity is permanent, would, if invested in the purchase of an immediate life annuity from the national debt commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to seventy-five per cent of the annual value of the weekly payment, and as in any other case may be settled by arbitration under this act, and such lump sum may be ordered by the committee or arbitrator or judge of the county court to be invested or otherwise applied for the benefit of the person entitled thereto: Provided that nothing in this paragraph shall be construed as preventing agreements being made for the redemption of a weekly payment by a lump sum."

In awarding a lump sum under this section of the act, the question to be decided by the judge is whether the injury is permanent, and not whether the workman will be able to earn higher wages. *Calico Printers' Assoc. v. Booth* [1913] 3 K. B. 662, 82 L. J. K. B. 985, [1913] W. C. & Ins. Rep. 540, 109 L. T. N. S. 123, 6 B. W. C. C. 551; *Marshall v. Prince* [1914] 3 K. B. 1047, [1914] W. N. 330, 7 B. W. C. C. 381; *Swannick v. Congested Dist. Board* [1913] W. C. & Ins. Rep. 96, 46 Ir. L. T. 253, 6 B. W. C. C. 449. In *Carlton Main Colliery v. Clawley* [1917] W. C. & Ins. Rep. 256, the award of a lump sum was set aside, it appearing that the injury sustained was not permanent and that the employee was in receipt of benefits other than the weekly payments.

Where the injury is permanent the judge is required by the schedule to award an amount equal to seventy-five per cent of the actual annual weekly earnings. If the injury is not permanent, the judge may in his discretion award a lump sum, taking into consideration all the evidence in the case. *Calico Printers' Assoc. v. Higham* [1912] 1 K. B. 93, [1911] W. N. 221, 28 Times L. Rep. 53, 56 Sol. J. 89, wherein the court said: "Now, three points are clear: (a) The right to redeem is given to the employer only; there is no corresponding right given to the workman to claim a capital sum. (b) This right cannot be exercised hastily; the weekly payment must have been continued for at least six months. (c) A broad distinction is drawn between an incapacity to work which is 'permanent' and one which is not 'permanent.' This distinction may sometimes be to the benefit of the workman and sometimes to his detriment. The arbitrator has, if the incapacity is 'permanent,' no discretion as to the amount. He cannot award less or more than

seventy-five per cent of the actuarial value. If it is not 'permanent' the arbitrator must fix the lump sum in his discretion, having regard to the evidence before him."

The judge cannot make an optional award. The sum ordered to be paid must be as definite and certain and as capable of execution as any common-law judgment. *Calico Printers' Assoc. v. Booth* [1913] 3 K. B. 652, 82 L. J. K. B. 985, [1913] W. C. & Ins. Rep. 540, 109 L. T. N. S. 123, 6 B. W. C. C. 551. In that case the judge ordered that the weekly earnings "may be redeemed," on payment of seventy-five per cent of the actual annual wages as provided in the act. The workman appealed on the ground that the award was optional. In allowing the appeal the court said: "An arbitrator, under an application by the employer to redeem a payment, must make an award for a lump sum, an award which can be enforced as a judgment, and it makes no difference whatever that there is a direction in the sense that in one event he is to award seventy-five per cent of a sum ascertained in a particular way, and in the second event that he is not bound by any limitation of his discretion. For these reasons I think the appeal must be allowed and the award set aside."

A lump sum may be awarded only when weekly payments have been continued for not less than six months. *Mullholland v. Whitehaven Colliery Co.* [1910] 2 K. B. 278, 79 L. J. K. B. 987, 26 Times L. Rep. 462, 102 L. T. N. S. 663, 3 B. W. C. C. 317, wherein it was held that an infant who had received weekly compensation for five months and then resumed work was not entitled to a lump sum award made by the employers' committee and the amount was ordered to be paid back to the employers.

The right to redeem weekly payments in a lump sum is absolute in the employer. *Gottob v. Petchell* [1914] 2 K. B. 36, 83 L. J. K. B. 429, 110 L. R. N. S. 453, 30 Times L. Rep. 253, 48 Sol. J. 249, [1914] W. C. & Ins. Rep. 115, 7 B. W. C. C. 109; *Kendall v. Pennington*, 106 L. T. N. S. 817, [1912] W. C. Rep. 144, 5 B. W. C. C. 335. In the case last cited it was said: "This is a plain case. The scheme of the Workmen's Compensation Act 1906 is that compensation is to be awarded to a man sustaining injury by an accident arising out of and in the course of his employment. This compensation takes the form of a weekly payment, but a provision is inserted in sched. I, par. 17, enabling the employer, not the man, to apply to redeem the weekly payment. The employer, though he is not compelled to redeem, has a distinct right to do so given to him in certain cases when the payment has continued for six months, and the liability may then be redeemed by the payment of a lump sum. The county

court judge then has the powers conferred on him which are discussed in *Calico Printers' Assoc. v. Higham*, 105 L. T. N. S. 734, [1912] 1 K. B. 93. Then there is this further provision: 'and such lump sum may be ordered by the committee or arbitrator or judge of the county court to be invested or otherwise applied for the benefit of the person entitled thereto.' So that the employer is given a right to redeem by payment of a lump sum; and, on the other hand, the arbitrator has power to say that this lump sum shall not be handed over to the workman, but invested and applied for his benefit. The employer has a right to redeem, and the appeal must be allowed." See also *Castle Spinning Co. v. Atkinson* [1905] 1 K. B. 336, 74 L. J. K. B. 265, 53 W. R. 360, 92 L. T. N. S. 147, 21 Times L. Rep. 192, wherein under the act of 1897 it was held that although the employer had the sole right to redeem he did not have the right to fix the amount to be paid.

Where a county court judge, in fixing the amount of a lump sum award, deducted the amount of weekly payments already paid, and awarded the balance as a lump sum, it was held in *Victor Mills v. Shackleton* [1912] 1 K. B. 22, [1911] W. N. 197, 81 L. J. K. B. 34, 105 L. T. N. S. 613, that the judge should not have considered the payments already received in arriving at the amount of the award.

In *Pattinson v. Stevenson*, 109 L. T. J. 106, 2 W. C. C. 156, decided under the Act of 1897, it was held that in fixing the amount of the lump sum award the possibility of improvement on the part of the workman, and the possibility of his death occurring earlier than the average, should be taken into consideration.

In *Grant v. Conroy*, 6 W. C. C. 153, it was held that lump sum awards should not be based on the actuarial value but on a "business footing" as between employer and workman.

It has been held that no further inquiry as to the permanency of the incapacity from the loss of an arm need be made before ordering a redemption of the weekly payments. *National Telephone Co. v. Smith* [1909] S. C. 1363, 46 Scot. L. Rep. 988. Compare *Stavely Coal & Iron, etc. Co. v. Elson* [1912] W. C. Rep. 228, 5 B. W. C. C. 301.

In *Moreland v. Ely* [1915] 1 K. B. 85, [1915] W. C. & Ins. Rep. 554, an employer's application for redemption and the workman's application for a review and increase of weekly payments were before the judge on the same day, and the application for redemption was dismissed for want of service and the workman's application granted. This was held not to be an abuse of discretion. The court said: "In my opinion the two applications, under clauses 16 and 17 respectively, must be dealt with on the footing that

one application has just as much right to be heard as the other; and as the review has been made, and upon the materials properly made, it is now too late for an application to redeem to proceed with any possibility of success, being dependent, as it is, on the particular weekly payment having continued for not less than six months. The weekly payment has been altered, as the result of the application to review, and 5s. 6d. a week has been paid instead of 2s. 5d. a week since the date when the matter came before the judge. I see no ground for depriving the infant of the right to take advantage of the order made by the learned county court judge under clause 16, and I do not think it is any answer to say that the effect of that order will be to render an application for redemption nugatory. I do not think that the decision which I have arrived at is inconsistent with any of the authorities which have been referred to. It seems to me to be in accordance with good sense, and I think that we should be doing wrong if we said that the effect of an application to redeem necessarily deprived the infant of any right whatever to review. In my view the order made on the review application was right. The appeal against that ought to be dismissed with costs. In the other case, it being conceded that the application to redeem has become useless, counsel for the employers does not ask that it should go back for a rehearing, and, therefore, his appeal as to that must also be dismissed with costs."

AGREEMENT BETWEEN PARTIES.

An agreement between an employer and an injured workman, before any weekly payments have been made, whereby the latter agrees to accept a lump sum for injuries sustained, is a valid agreement under schedule I, (17) quoted in the preceding subdivision. *Ryan v. Hartley* [1912] 2 K. B. 150, 5 B. W. C. C. 407, wherein the court said: "Now is there anything in the act to prevent an adult workman before entering a claim for an award and before any payment of a weekly sum has been made from coming to an arrangement by way of compromise with the employer, that the employer will pay and that he will accept a sum of money in satisfaction of all his claims? All that I find in the act is this: that when there has been either an award of a weekly sum or a recorded agreement for payment of a weekly sum, there is in either case that which is enforceable as a county court judgment, so that execution can be levied, and that in neither of those cases can an agreement for the redemption of the weekly payment by a lump sum be validly made unless the registrar considers the sum adequate. Then by

sched. II, clause 10, 'An agreement as to the redemption of a weekly payment by a lump sum if not registered in accordance with this act shall not, nor shall the payment of the sum payable under the agreement, exempt the person by whom the weekly payment is payable from liability to continue to make that weekly payment . . . unless . . . he proves that the failure to register was not due to any neglect or default on his part.' What do the words 'liability to continue to make that weekly payment' mean? They presuppose that there has been a weekly payment made which would have continued but for the existence of an agreement to pay a lump sum. In my opinion that clause has no application whatever to a case where, as here, no weekly payment has ever in fact been made, even though the gross sum paid was a sum which may be said to have been calculated with reference to the workman's weekly wages. For these reasons I think this appeal fails and must be dismissed with the usual consequences."

There is no power vested in the county court judge in the absence of consent of the parties to make an award which in any way alters the terms of an agreement between the employer and the workman for a lump sum. *Halls v. Furness*, 3 B. W. C. C. 72.

An infant has been held not to be bound by agreement to accept a lump sum from his employer, though the agreement was made before the weekly payments were commenced. *Bates v. Holding* [1914] W. C. & Ins. Rep. 6, 7 B. W. C. C. 80.

It was held in *Hughes v. Vothey Val. Co.* 125 L. T. J. 471, 1 B. W. C. C. 416, that an agreement whereby a workman released his employer from liability under the act did not prevent him from receiving compensation under the act, where the sum stipulated in the contract was paid before the agreement was signed.

Where on an application for review the parties, on dismissal of the application, agreed to redeem the weekly payments, and the award was granted, it was held in *Howell v. Blackwell* [1912] W. C. Rep. 186, 5 B. W. C. C. 293, that the order for redemption, being a consent order, was not subject to appeal.

RECORDING OF LUMP SUM AWARD.

In the English act provision is made for the recording of lump sum awards by the registrar as follows: "Schedule II, paragraphs (9) and (10).— (9) Where the amount of compensation under this act has been ascertained, or any weekly payment varied, or any other matter decided under this act, either by a committee or by an arbitrator or by agreement, a memorandum

thereof shall be sent, in manner prescribed by rules of court, by the committee or arbitrator, or by any party interested, to the registrar of the county court who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a county court judgment. Provided that—(a) no such memorandum shall be recorded before seven days after the despatch by the registrar of notice to the parties interested; and (b) where a workman seeks to record a memorandum of agreement between his employer and himself for the payment of compensation under this act and the employer, in accordance with rules of court, proves that the workman has in fact returned to work and is earning the same wages as he did before the accident, and objects to the recording of such memorandum, the memorandum shall only be recorded, if at all, on such terms as the judge of the county court, under the circumstances, may think just; and (c) the judge of the county court may at any time rectify the register; and (d) where it appears to the registrar of the county court, on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum, or an agreement as to the amount of compensation payable to a person under any legal disability, or to dependents, ought not to be registered by reason of the inadequacy of the sum or amount, or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge who shall, in accordance with rules of court, make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just; and (e) the judge may, within six months after a memorandum of an agreement as to the redemption of a weekly payment by a lump sum, or of an agreement as to the amount of compensation payable to a person under any legal disability, or to dependents, has been recorded in the register, order that the record be removed from the register on proof of his satisfaction that the agreement was obtained by fraud or undue influence or other improper means, and may make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just. (10) An agreement as to the redemption of a weekly payment by a lump sum if not registered in accordance with this act shall not, nor shall the payment of the sum payable under the agreement, exempt the person by whom the weekly payment is payable from liability to

continue to make that weekly payment, and an agreement as to the amount of compensation to be paid to a person under a legal disability or to dependents, if not so registered, shall not, nor shall the payment of the sum payable under the agreement, exempt the person by whom the compensation is payable from liability to pay compensation, unless, in either case, he proves that the failure to register was not due to any neglect or default on his part."

Construing the foregoing provisions of the act it has been held that it is the duty of a registrar to record lump sum awards, unless he believes the amount awarded to be inadequate, and in such a case to refer the matter to the county court judge whose duty it then becomes to pass on the adequacy of the award. *Mortimer v. Secretan* [1909] 2 K. B. 77, 78 L. J. K. B. 521, 100 L. T. N. S. 721; *Kierston v. Thompson* [1913] 1 K. B. 587, 82 L. J. K. B. 920, 108 L. T. N. S. 236, 29 Times L. Rep. 205, 57 Sol. J. 226 [1913] W. C. & Ins. Rep. 140; *Rex v. Bow County Ct. Registrar* [1914] 3 K. B. 266, 83 L. J. K. B. 1806, 111 L. T. N. S. 277, [1914] W. N. 223; *Rex v. Thetford County Ct. Registrar* [1915] 1 K. B. 224, 112 L. T. N. S. 413, 84 L. J. K. B. 291, [1915] W. C. & Ins. Rep. 136, 8 B. W. C. C. 276; *Hudson v. Camberwell*, 116 L. T. N. S. 523, 86 L. J. K. B. 558, [1917] W. C. & Ins. Rep. 144; *Ship Segura v. Blampied*, 4 B. W. C. C. 192.

In *Rex v. Thetford County Ct. Registrar*, supra, it was held that though the compensation had been paid it was the registrar's duty to record the award. *Darling, J.*, said: "I think that if the registrar in this case were upheld in the view that he has taken a grave injustice would be done to these employers who have paid the workman the maximum amount of compensation for his injury and have got a receipt for it. They would be deprived of the means of enforcing against the workman as a county court judgment the agreement which has been come to. The contention of the registrar assumes that the words 'enforceable as a county court judgment' mean enforceable by the plaintiff. I think they mean that it shall be enforceable by either party, by the employer as well as the workman. If the agreement is registered it becomes enforceable in the employer's favor by way of estoppel. I think paragraph 10 shows that if it is not absolutely necessary for the protection of the employer that the agreement should be registered it is very desirable in his interest that it should be so, for where he has applied for registration and been refused he ought not to be afterwards called upon to prove that the failure to register was not due to his default."

In *Rex v. Bow County Ct. Registrar* [1914] 3 K. B. 266, the court, in granting a manda-

mus to compel the registrar to record the agreement, said: "It is not to be wondered at that the registrar declined to proceed further without the decision of this court. Form 38 which is appended to the workmen's compensation rules is misleading in its terms. It is directed to all parties interested. That would include the workman. It says 'If you dispute its genuineness'—i. e., the genuineness of the memorandum—or object to its being recorded, it will not be recorded, except with your consent in writing, or by order of the judge of this court.' That clearly leads the workman to believe that he has the right to object to the recording of the memorandum on any ground, and that if he does object the memorandum will not be recorded. That form led the registrar to think that the workman was entitled to object to the recording of the memorandum either because the amount named in the agreement was inadequate or upon any other grounds, and that, whatever the objection might be, it was not his duty or within his power to record the memorandum or proceed further. In our opinion that was a mistaken view of his duty. By sched. II, s. 9, it is the duty of the registrar on being satisfied of the genuineness of the memorandum to record it, subject to rules of court applicable to that case. There follows a proviso affecting this *prima facie* duty of the registrar to record the memorandum on being satisfied of its genuineness. That proviso is contained in several paragraphs. Paragraph (d) is the material one:—'Where it appears to the registrar of the county court, on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum, . . . ought not to be registered by reason of the inadequacy of the sum, . . . he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge who shall, in accordance with rules of court, make such order . . . as under the circumstances he may think just.' The result is that when such a memorandum is sent to be recorded the registrar, on being satisfied of its genuineness, must either record it, or, proceeding under paragraph (d), he must proceed to ascertain whether the lump sum is adequate and determine that question upon any information which he considers sufficient. One course or the other he must take. In the present case the registrar has refused to take either course. Therefore this rule must be made absolute for a mandamus directed to the registrar commanding him to proceed to enter upon the consideration of the agreement in question in the terms of sched. II, s. 9 (d), of the Workmen's Compensation Act, 1906."

The registrar or county court judge cannot refuse to record an agreement to pay a lump

sum, on the ground of inadequacy of the amount, where the agreement is entered into before any weekly payments are made. *Hudson v. Camberwell* [1917] W. C. & Ins. Rep. 144, 86 L. J. K. B. 558.

In *O'Neil v. Anglo-American Oil Co.* 2 B. W. C. C. 434, it appeared that a workman, having recovered sufficiently to do light work, agreed with his employer to accept a lump sum payment. The county judge refused to record the agreement, believing the amount to be inadequate as a redemption of permanent weekly payments. On appeal, however, the county judge was directed to record the award, it being the court's opinion that the county judge was in error in believing the weekly payments to be permanent.

Where a county court judge refuses to record a lump sum agreement because of the inadequacy of the amount, his decision does not preclude him, on a rehearing of the case, from deciding that the amount is adequate. *Beech v. Bradford Corp.* 4 B. W. C. C. 236.

American Acts.

IN GENERAL.

In most of the American workmen's compensation acts there is a provision for the allowance of a lump sum award in lieu of weekly payments, the usual form of the provision being that such an award may be made if it is deemed to be for the best interest of "the parties" or of the claimant. Provision for a lump sum award has been made in the following jurisdictions:

—United States (Act Sept. 7, 1916, ch. 458, § 14, Fed. St. Ann. Pamph. Supp. No. 8, p. 144);

—Arizona (Rev. St. 1913, p. 1054; only in case of death);

—Colorado (Sess. Laws 1915, ch. 179, p. 515);

—Connecticut (P. A. 1913, ch. 138, § 28, as amended by P. A. 1915, ch. 288);

—Illinois (Hurd's Rev. St. 1915, p. 1272, § 9);

—Indiana (Laws 1915, ch. 106, § 43);

—Iowa (Code Supp. 1913, ch. 8a, p. 938, § 15);

—Kansas (Sess. Laws 1911, ch. 218, §§ 5, 11);

—Kentucky (Acts 1916, ch. 33, p. 354, §§ 25, 26);

—Louisiana (Acts Reg. Sess. 1914, p. 44, § 8);

—Maine (Laws 1915, ch. 295, § 28);

—Maryland (Acts 1914, ch. 800, § 44 et seq. as amended by Acts 1916, chapters 86, 368, 597);

—Massachusetts (Acts 1911, ch. 751, § 22, as amended by Acts 1914, ch. 708);

—Michigan (P. A. 1st Ex. Sess. 1912, Act No. 10, p. 20);

—Minnesota (Laws 1913, ch. 467, as amended by Laws 1915, ch. 207);

—Montana (Laws 1915, ch. 96, § 16 [o]);

—Nebraska (Laws 1913, ch. 198, § 30);

—Nevada (St. 1913, ch. 111, p. 137, §§ 30, 31, St. 1915, ch. 190, p. 279);

—New Hampshire (Laws 1911, ch. 163, § 9);

—New Jersey (Laws 1911, ch. 95, § 21, as amended by Laws 1913, ch. 74);

—New York (Consol. Laws, ch. 67, §§ 25, 27);

—Ohio (103 O. L. 72, § 40);

—Oregon (Laws 1913, ch. 112, § 21k);

—Pennsylvania (Laws 1915, No. 338, p. 736, § 316);

—Rhode Island (Pub. Laws 1912, ch. 831, § 25);

—Texas (Acts 33d Leg. ch. 179, p. 429, § 15);

—Vermont (Acts 1915, No. 164, p. 275, § 20);

—Washington (Laws 1911, ch. 174, § 7);

—West Virginia (Acts Reg. Sess. 1915, ch. 9, p. 52, § 41);

The Wyoming Act (Laws 1915, ch. 124) makes no provision for periodical payments but provides for a lump sum award for every injury.

CONSTRUCTION OF ACTS.

Under the *Connecticut* statute providing for a lump sum award when the commissioner finds it "just or necessary" it has been held that such an award should be made only when in the judgment of the commissioner the best interests of the parties require it. *Clarke v. Bigelow-Hartford Carpet Co.* 1 Conn. Comp. Dec. 166. In *Catto v. Cudemo*, 1 Conn. Comp. Dec. 374, the commissioner awarded a lump sum so that the injured workman could pay his debts and return to his home in Italy. See to the same effect *Pumpanelli v. Aberthaw Constr. Co.* 1 Conn. Comp. Dec. 620. Commutation of weekly payments to a lump sum was awarded in *Riley v. Walsh*, 1 Conn. Comp. Dec. 505, so that the widow of the deceased workman could purchase a small farm and thus maintain herself. In *Cushman v. Rowe*, 1 Conn. Comp. Dec. 574, commutation of weekly payments into a lump sum was refused, it appearing that the claimant had sufficient funds to meet the expense of an operation.

Construing the *Illinois* statute the court in *Staley v. Illinois Cent. R. Co.* 186 Ill. App. 593, discussed the circumstances making it to the interest of the parties that a lump sum award should be made, as follows: "The last question to be considered, and the one which appears really to be the object of this

controversy, is whether the court below had power under the state act to order the whole of the sum of \$3,500 to be paid to appellee in a lump sum. The statute . . . provides that any person entitled to compensation under the act, and any employer who shall be bound to pay that compensation, who desires to have the same or any part thereof paid in a lump sum, may petition the court for that purpose and if, upon proper notice to interested parties and a proper showing made before the court, it appears to the best interest of the parties that such compensation be so paid, the court shall order payment of the same in a lump sum. This provision places the person entitled to compensation and the employer upon the same plane and apparently makes the same rule applicable to both. Appellee made proof tending to show that it was for her best interest to have the amount paid in a lump sum, and the finding of the court that such was the case can readily be acceded to, but appellant, while apparently not opposing the entry of an order which would require it to pay the whole of its indebtedness at once instead of making monthly payments, contends that it is against its best interests and unjust to require it to pay the full sum of \$3,500 at once instead of paying the same in instalments at the rate of about \$50 per month, as it would otherwise be required to pay under the law. It urges in effect that the proper amount to be paid in a lump sum would be the present worth of \$3,500 to be paid in instalments as aforesaid over a term of years, when all the circumstances and contingencies are taken in consideration. It requires no argument or citation of authorities to show that the payment of \$3,500 distributed in monthly instalments over a number of years is less burdensome in a financial way upon appellant than the payment of the full amount in a lump sum at the beginning of that period. The mere matter of the use of the money required to make the deferred payments until such payments were made would be a material item regardless of other contingencies which might occur to the benefit of appellant. The court should not arbitrarily order the full amount to be paid in a lump sum against the pecuniary interest of the employer when the statute plainly provides that before the order can be made it must appear to be to the best interest of the parties, the employer as well as the beneficiary. We are inclined to the belief, however, that the trial court might, within the limits of the law, order an amount paid to the beneficiary in a lump sum, which would be equal to the present value of the total amount distributed in instalments over the whole number of years when all the circumstances are considered. What this amount should be is

probably not altogether easy of ascertainment, but in that connection it is of interest to consider a similar provision in the Employment Act of June 28, 1913, which repeals the act we have under consideration. Section 9 of the new act provides for a petition to the industrial board, established by the act, for the payment of compensation in a lump sum under conditions substantially the same as those providing for the presentation of the petition to the court under the act under consideration, but it also, further provides that if "it appears to the best interest of the parties that such compensation be so paid, the board shall order the commutation of the compensation to an equivalent lump sum, which commutation shall be an amount which will equal the total sum of the probable future payments capitalized at their present value, upon the basis of interest, calculated at three per centum per annum with annual rests." This provision of the new law would seem to afford a reasonable rule for ascertaining the value of compensation to be paid in a lump sum, which might be properly applied in determining the amount due under similar circumstances by the terms of the old law." See to the same effect *Schwarm v. George Thomson, etc. Co.* 281 Ill. 486, 118 N. E. 95; *Matecny v. Vierling Steel Works*, 187 Ill. App. 448. It is not necessary to show that the best interests of both parties require that a lump sum shall be awarded. *Schwarm v. George Thomson, etc. Co. supra.* However, the party applying for redemption must show that it is for his interest that the award shall be made, and if he fails to make out a *prima facie* case, redemption will not be allowed. *Forschner v. Industrial Board*, 278 Ill. 99, 115 N. E. 912; *H. G. Goelitz Co. v. Industrial Board*, 278 Ill. 164, 115 N. E. 855.

Under the *Indiana* act an award of a lump sum for a permanent partial disability was affirmed in *Underhill v. Central Hospital for Insane*, 117 N. E. 870.

Under the *Kansas* act the discretion of the trial court in awarding compensation in a lump sum will not ordinarily be interfered with. Thus in *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244, wherein a lump sum was awarded for the loss of a hand, the court said: "The defendant insists that compensation must cease when the plaintiff's partial incapacity to work as the result of his injury ceases, that the plaintiff is likely to become able to work with his remaining eye, and to secure suitable employment, so that incapacity will end long before the expiration of the time for which he is allowed compensation. Therefore, it is said, an award of periodical payments should have been made instead of judgment for a lump sum. It may be conceded that compensation should cease

when incapacity to work as the result of injury ceases, but the defendant's argument ignores the finding of the trial court that the plaintiff's incapacity is permanent so far as the remedy afforded by the statute is concerned. The statute confers express power to render judgment in a lump sum instead of making an award of periodical payments. In every case the trial court must exercise its judgment and discretion as to the best method of making compensation in the light of all the facts, and the result cannot be disturbed on appeal except for an abuse of the power." See to the same effect the following cases: *Cain v. National Zinc Co.* 94 Kan. 679, 680, 146 Pac. 1165, 148 Pac. 251; *Ackerson v. National Zinc Co.* 96 Kan. 781, 153 Pac. 530; *Halverhout v. Southwestern Milling Co.* 97 Kan. 484, 155 Pac. 916; *Messick v. McEntire*, 97 Kan. 813, 156 Pac. 740; *Roberts v. Charles Wolff Packing Co.* 98 Kan. 750, 160 Pac. 221; *Girten v. National Zinc Co.* 98 Kan. 405, 158 Pac. 33; *McCorkle v. Red Star Mill, etc. Co.* 99 Kan. 131, 160 Pac. 983. See also the reported case.

The *Minnesota* provision for lump sum awards is somewhat unusual, being as follows: "The amounts of compensation payable periodically under the law, either by agreement of the parties, or by decisions of the court, may be commuted to one or more lump sum payments, except compensation due for death and permanent disability. These may be commuted only with the consent of the district court." In *State v. Dist. Ct.* 134 Minn. 16, 158 N. W. 713, it was held that the court had no authority to grant a lump sum award without the consent of the parties. It was said in that case: "We find no statute like ours except in Nebraska, and it seems to us that the court of that state has correctly construed the statute. The whole idea of periodical payments is to give the workman an income payable as his wages were paid. In cases of injuries that are not serious, commutation to a lump sum is left to the agreement of the parties. In cases of more serious injury, the agreement is ineffectual unless the court gives its consent, finding a lump sum payment to be for the best interest of the workman. But in no case can the court commute the payments unless the parties agree. All the authorities agree that the discretion, where it exists, to award a lump sum judgment, should be sparingly exercised. In most cases it is much better for the workman and his family that the compensation be paid in instalments corresponding to the payment of his wages. This is the plan of the act, and it is only in exceptional cases that the court should approve a commutation."

Under the provision for lump sum awards in the *Nebraska* act, which is identical with

that of Minnesota quoted in the preceding paragraph, it is held that the consent of both parties is essential to a lump sum award. *Johansen v. Union Stock Yards Co.* 99 Neb. 328, 156 N. W. 511; *Bailey v. U. S. Fidelity, etc. Co.* 99 Neb. 109, 155 N. W. 237. Where both parties are desirous of commuting the periodical payments to a lump sum the court may direct that the award shall be made in that form. *Pierce v. Boyer-Van Kuran Lumber, etc. Co.* 99 Neb. 321, 156 N. W. 509, L.R.A.1916D 970, wherein it was said: "This court had occasion to consider one phase of this question in the recent case of *Bailey v. U. S. Fidelity, etc. Co.* 99 Neb. 109. In that case the employer and the workman had agreed upon such commutation and the trial court rendered judgment in a lump sum. The question was whether the court had power to do so without the consent of the insurance company, which was also a party to the suit and was objecting to such commutation. This court sustained the trial court in so holding. It may no doubt sometimes happen that the workman, or his dependents, will be placed at a disadvantage by the refusal of the employer to agree to commutation in a lump sum. He may be compelled to receive a much less amount than he is entitled to because of his necessity to have the same paid in a lump sum. In the recent case above cited, the court construed the statute and held that the statute implies 'that a previous agreement must have been reached which will be ratified by the district court, and that without such an agreement the court cannot compel such a commutation of payments. . . . We do not feel at liberty to transpose the language of this section, as plaintiff desires, and change its meaning so as to make commutation compulsory. The meaning is not ambiguous. The fact that the legislature did not express such a thought, while many such statutes do, is significant.' The law provides that 'interested parties shall have the right to settle all matters of compensation between themselves.' Section 3677. Section 3681, which provides that periodical payments may be commuted, is in harmony with this provision. It does not provide that the district court may order commutation at the request of one of the parties, but does provide that the parties themselves cannot agree upon a commutation in certain cases without the consent of the court. If there is doubt in regard to the justice of this provision, there seems to be nothing in the language of the statute that would justify the court in construing it differently, and the remedy, if one is needed, must be by the legislature. It does not appear that the parties had agreed upon commutation, and the court has no authority to order it without such agreement."

Under the *New Jersey* act the court in *James A. Banister Co. v. Kriger*, 84 N. J. L. 30, 85 Atl. 1027, 89 Atl. 924, reversed a lump sum award because the trial judge had, in commuting periodical payments, fixed a sum in excess of the weekly payments to be paid in future instalments. The court held that the award should have been made equal to the present value of the periodical payments. The judgment of the trial court was also reversed in *Mockett v. Ashton*, 84 N. J. L. 452, 453, 90 Atl. 127, wherein the judge in granting a lump sum award failed to determine the periodical compensation or to disclose the manner in which he had arrived at the amount of the award. It was held in *New York Shipbuilding Co. v. Buchanan*, 84 N. J. L. 543, 87 Atl. 86, that an award of a lump sum could not be sustained, when unsupported by any evidence as to the necessity therefor. The court said: "Paragraph 20 of the act requires the 'determination' of the trial judge to be filed in writing, and that there shall be contained in this determination (or in the judgment entered thereon, according as we construe the statute), 'a statement of facts as determined by the trial judge.' Clearly it is intended that the judgment in every phase shall be supported by a specific finding of fact which may be submitted to and considered by a court of review. Accordingly a general finding that petitioner was permanently injured, without stating the nature of the injury, was held insufficient. *Long v. Bergen Pleas*, 86 Atl. 529. So also was the award of a lump sum by way of commutation, without stating the amount of weekly payment and number of weeks as a basis therefor. *Ib.* In the same case a ruling on the question whether facts to support the exercise of the court's discretion in commuting to a lump sum should be stated in the determination or judgment was reserved as not essential to the decision. That question is now fairly before us, and we are clearly of opinion that such a statement of facts should be contained in the written findings of the common pleas. No such facts being stated in the case at bar, the award of a lump sum is without legal support." See also *Long v. Bergen County Ct.* 84 N. J. L. 117, 86 Atl. 529; *Diskon v. Bubb*, 88 N. J. L. 513, 96 Atl. 660, and *Baur v. Essex County*, 89 N. J. L. 128, 95 Atl. 627, wherein the court awarded a lump sum without stating any reason therefor.

In *Adams v. New York, etc. R. Co.* 175 App. Div. 714, 161 N. Y. S. 919, the court, in construing the provisions of the *New York* act respecting lump sum awards, held that the theory of the act was primarily to provide for periodical payments, but that in exceptional cases the sum might be computed, and a lump sum awarded, to be paid either

to the dependents under section 25, or into the state fund under section 27. The court said: "Section 25 provides in certain cases for the payment of a lump sum to the injured employee or in case of death to his dependents, whereas section 27 provides for the payment of such lump sum into the state fund, which fund then becomes liable for the periodical payments. The phraseology of the two sections is somewhat different, but their purpose is substantially the same except that under one section the lump sum payment goes to the injured employee, or in case of death his dependents, whereas under the other section the lump sum payment goes to the state fund. The amount of the payments is the same under either section and it can make no difference to the employer or insurer who receives the payment. The two sections are to be read together, therefore, and each is to be construed in the light of the other, and each is to be regarded as supplementing the other. What has been said in regard to the meaning and effect of section 25 applies also to section 27. It is not the purpose of either section to break down the theory of periodical compensation. It was not the purpose of the legislature to authorize the commission to emasculate this feature of the law or to virtually repeal the provision that 'compensation under the provisions of this chapter shall be payable periodically by the employer, in accordance with the method of payment of the wages of the employee at the time of his injury or death, and shall be so provided for in any award.' That stands as the general policy of the law and the commission is without power to repeal it or authority to ignore it except in particular cases. The commission has by an omnibus resolution destroyed this theory of the law in all death cases where the employer is insured in a mutual compensation insurance company or is a self-insurer. If the commission can do this it can pass a resolution requiring the payment of a lump sum into the state fund or to the injured employee or his dependents in every case and thereby destroy absolutely the theory of periodical payments and accomplish a repeal of an important feature of the law. We do not think that that was the intent of the statute. The purpose of sections 25 and 27 is the same. Particular cases may arise where payment to the employee or his dependents or payment into the state fund of one lump sum may be in the interest of justice. But such cases are exceptional and must be dealt with as they arise. No sweeping set of rules can be enunciated to apply to all cases. Section 25 requires that such a determination shall be 'in the interest of justice,' and section 27 requires that it must be 'possible to compute the present value of all future payments with due regard for life

contingencies.' This latter provision in the statute implies that there are cases where the present value of future payments cannot be properly computed. The commission is not at liberty to guess at the present value of future payments regardless of the contingencies which may arise. The meaning of the statute is that the situation and conditions must be such that the present value of future payments may be arrived at on a scientific basis and with an approximate approach to certainty and fairness and to the monetary equivalent of the payments which the statute requires to be made periodically in the future." In *McCarthy v. McAllister Steamboat Co.* 94 Misc. 692, 158 N. Y. S. 563, an action to recover a lump sum award as provided by the New Jersey statute, the complaint failed to allege that the amount of the award had been determined by the court of common pleas, and the plaintiff was held not to be entitled to recover. See also *Wozneak v. Buffalo Gas Co.* 175 App. Div. 268, 161 N. Y. S. 675, an action to determine whether an award to a deceased workman terminated on his death or passed to his personal representatives, wherein the court held that in the event that a lump sum was awarded, regard should be had to the time in which payments were to be made and that the insurance company should be allowed to discharge its liability for a sum less than the total of the weekly payments.

Under the *Ohio* statute it was held in *State v. Industrial Commission*, 92 Ohio St. 434, Ann. Cas. 1917D 1162, 111 N. E. 299, L.R.A.1916D 944, that though the statute gives the industrial board the power to commute biweekly payments, a decision of the board ordering compensation to be paid biweekly for six years would not be disturbed. The court said: "As the board in this case awarded the dependent the sum of \$1,872 and ordered the same paid in biweekly instalments at the rate of \$6 per week, to continue for six years from the date of the death of the employee. it has, in making the award, fully complied with the law, and the court is without power to require it to commute the balance remaining due to one lump sum. That is a matter, under sections 39 and 40, wholly within the discretion of the board, but the petition shows that the board has refused to pay the relator any part of the award since the death of the dependent or to continue the biweekly payments. The writ therefore must order the board to pay to relator the sum of the biweekly payments which have accrued since dependent's death and to continue such payments until the full amount originally awarded is fully paid unless commutation is ordered by the board."

The *Texas* statute providing for the maturing of an award of instalments has been held not to be applicable to a proceeding pending

at the time of its enactment. *Texas Employers' Ins. Assoc. v. Bryan*, 198 S. W. 342. In *Roach v. Texas Employers' Ins. Assoc.* 195 S. W. 328, it was held that in an action on an award of weekly payments the recovery must be in accordance with the terms of the award and not in a lump sum.

Under the *Washington* act, in *Sinnes v. Daggert*, 80 Wash. 673, 142 Pac. 5, a lump sum award of \$1,200 for the loss of several fingers, being within the statutory amount, was sustained.

DALE

v.

SAUNDERS ET AL.

New York Court of Appeals—April 25, 1916.

218 N. Y. 59; 112 N. E. 571.

Workmen's Compensation Acts — Theory of Liability.

In a case arising under the Workmen's Compensation Act (Consol. Laws, c. 67) the doctrine of respondeat superior has no application, nor do the rules of employers' liability for negligence control, but compensation is awarded workmen injured in certain enumerated occupations.

Who Is "Employee" within Act.

The word "employee" as specifically defined in Workmen's Compensation Act, § 3, subd. 4, means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer.

[See note at end of this case.]

Same.

Where an employer hires the services of his team and employee to another to haul sand, the employee is still working for the original employer when he is loading sand in a pit for the purpose of hauling it, and therefore is entitled to compensation from the employer.

[See note at end of this case.]

Review of Facts.

As provided by Workmen's Compensation Act, § 20, the decision of the workmen's compensation commission is final as to questions of fact, and the court, on appeal from its ruling, is limited to review of questions of law.

[See Ann. Cas. 1916B 475; Ann. Cas. 1918B 647].

Dale v. Saunders, 171 N. Y. App. Div. 528, affirmed.

Appeal from Appellate Division of Supreme Court, Third Judicial Department.

Claim for compensation under workmen's compensation act. Rose Dale, claimant, and Saunders et al., defendants. Claim allowed by State Industrial Commission. Decision affirmed by Appellate Division of Supreme Court. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

Frederick T. Pierson for appellants.

Egburt E. Woodbury and *Harold J. Hinman* for respondent.

[61] POUND, J.—This is an appeal by Saunders Brothers, the general employer, from an order of the Appellate Division, third department, affirming by a divided court an award of the workmen's compensation commission made to Rose Dale, widow, and to the children, for the death of Frank Dale. The only question in the case is whether Dale was employed by Saunders Brothers at the time of his death within the meaning of the Workmen's Compensation Act. Saunders Brothers urge that he was the special employee of one Walsh and that the special employer should pay and the general employer should not. The facts are undisputed and are as follows:

On October 10, 1914, the day when Dale received the injuries resulting in his death, he resided at 26 Cornell street, Auburn, New York, and was on that date, and for several years prior thereto had been, employed as a driver of a team and wagon by Saunders Bros., who were engaged in the business of brick making at Auburn, New York. Saunders Bros. also hired out their teams for trucking purposes and furnished drivers with the teams and received therefor \$5.50 a day for driver, team and wagon. Walsh owned a sand bank adjoining the brick yard of Saunders Bros. one outlet of which was through the property of Saunders Bros. On said date [62] Walsh requested of Saunders Bros. a team, wagon and driver for the purpose of having some sand delivered to Walsh's customers in the city of Auburn. Saunders Bros. sent Dale with a team and wagon. This arrangement was frequently made between Saunders Bros. and Walsh. Upon receiving from Walsh an order for a team, Saunders Bros. selected the driver to go on the work with the team. The wages of Dale were paid by Saunders Bros., namely, \$2.00 per day, Saunders Bros. receiving from Walsh for the team and driver \$5.50 per day. The duties of Dale were to go to the Walsh sand pit, load his wagon with sand, and deliver the sand in the city of Auburn at places designated by Walsh. Walsh had no power to discharge Dale nor any control over him except to direct where the sand should be taken. Saunders Bros. saw Dale about every two hours during the day and sometimes gave directions as to how Dale should drive. On

said date while Dale was assisting in loading the sand into the wagon on Walsh's premises, a sand bank fell on him, and crushed him against the wagon, causing injuries from which he died the same day.

In negligence cases the question often arises as to the proper application of the doctrine of *respondeat superior* when an employee whose negligence causes an accident is at the time in the general pay and service of one and under the control and direction of another. The latter has been held liable as a special employer when it could be said that the employee was his servant at the time of the accident in a sense and degree which served to impose liability for negligence. (Higgins v. Western Union Telegraph Co. 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 699; Howard v. Ludwig, 171 N. Y. 507, 64 N. E. 172.) The question, who is the master, also arises at times in employees' actions for negligent injuries. But the question in this case is not one of responsibility for negligent injury inflicted upon strangers nor upon an employee. The doctrine of *respondeat superior* has no application here, nor are the rules of employers' liability [63] for negligence controlling. Compensation provided for in the Workmen's Compensation Act is payable for injuries sustained or death incurred by employees engaged in specified hazardous employments carried on by the employer for pecuniary gain (Workmen's Compensation Law, § 3, subd. 5), including the operation on streets and elsewhere of wagons drawn by horses. (Workmen's Compensation Law, § 2, group 41.) The word "employee" means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer. (Workmen's Compensation Law, § 2, subd. 4; Post v. Burger, 216 N. Y. 544, Ann. Cas. 1916B, 158, 111 N. E. 351.) Saunders Bros. carried on the business of trucking for pecuniary gain. No claim is made that Walsh was carrying on the business of trucking for pecuniary gain. Dale was working for Saunders Bros. as a teamster when he met the accident that caused his death. He was engaged in teaming, not in "the operation of a sand pit." (Workmen's Compensation Law, § 2, group 19.) The duties of a teamster properly include the loading of his wagon, and are not limited to the driving of the team. (Costello v. Taylor, 217 N. Y. 179, 111 N. E. 755.) All this seems clear, but in any event the decision of the commission is final as to questions of fact. (Workmen's Compensation Law, § 20.) The jurisdiction of this court is limited to the review of questions of law, and if any question is presented upon the facts stated as to

whose employee Dale was it is one of fact only. (Howard v. Ludwig, *supra*; Kellogg v. Church Charity Foundation, 203 N. Y. 191, Ann. Cas. 1913A 883, 96 N. E. 406, 38 L.R.A. (N.S.) 481).

The order of the Appellate Division should be affirmed, with costs.

Willard Bartlett, Ch. J., Collin, Cuddeback, Hogan and Seabury, JJ., concur; Hiscock, J., concurs in result.

Order affirmed.

NOTE.

Who Is "Workman" within Meaning of Workmen's Compensation Act.

Introductory, 704.

English Statutes, 704.

Statutes in United States:

In General, 706.

Distinction between Independent Contractor and Workman, 708.

Employee of Independent Contractor, 709.

Casual Employee, 710.

Introductory.

The present note discusses the more recent cases dealing with the question who is a "workman" or "employee" within the meaning of a workmen's compensation act. The earlier cases on the subject are collected in the notes to Walker v. Crystal Palace Football Club, Ann. Cas. 1913C 25, and Hillestad v. Industrial Ins. Commission, Ann. Cas. 1916B 789.

The question to which the present discussion is addressed presupposes an occupation or industry within the scope of the compensation law. For a discussion of what occupations are so included, see the note to Uphoff v. Industrial Board, Ann. Cas. 1917D 1.

English Statutes.

Under the English workmen's compensation act the members of the crew of a fishing boat who are compensated wholly by a share of the catch are not regarded as workmen, but a member of such a crew is none the less a workman within the act because in addition to his wages he is to receive a bonus in case the catch exceeds a certain amount. Duck v. North Sea Steam Trawling Co. [1915] W. C. & Ins. Rep. 529, 9 B. W. C. C. 83.

So in Newstead v. Steam Trawler Labrador, 114 L. T. N. S. 27, it appeared that the chief engineer of a steam trawler was employed under an agreement containing a stipulation that if the earnings of the vessel exceeded a certain sum he as well as the rest

of the crew was to receive a bonus. Otherwise his wages were fixed. It was held that he was a "workman" within the meaning of the workmen's compensation act. The court said: "It seems that by the custom of this firm and by the understanding and arrangement between the parties, if the vessel made £100 the skipper was entitled to £1, and in that particular case each member of the crew was entitled to half-a-crown. If the vessel made more—£150, for example—it was double, and so on. What was the effect of that? It was not, as it seems to me, any part of the profits, nor was it concerned with the gross earnings of the working of the vessel, because it seems to me that there is an obligation on the part of the owners of the trawler to pay this half-a-crown (to take that as one instance; it will do just as well as any other) in a certain event, which event is measured by the net earnings of the vessel. I see no ground for holding that it was in any sense of the word a share of the gross earnings of the working of the vessel any more than the actual wages which were payable to the seamen could be treated as being a share of the gross earnings of the vessel, although the sum paid both for wages and for this bonus—the half-a-crown—would figure in the ship's accounts as against the receipts on the other side. In my view this case is not within the authorities which can in any way bind us to say that the deceased was not entitled to the benefit of the act. I agree with the decision of the learned county court judge. I think that it was quite right, and the appeal therefore fails and will be dismissed with costs."

In *Oates v. Turner*, 115 L. T. N. S. 186, the court stated the facts and its conclusions as follows: "This is an appeal which deals with a very small pecuniary amount. £4, but which is said to be likely to affect a large body of workmen at Sheffield, men who are called 'jobbing grinders.' The proved facts are these: Turner & Co., who are master cutlers, advertised for a jobbing grinder. A jobbing grinder has to provide himself or to have provided for him tools, and he wants to get power to work the trough, and it is customary at Sheffield to make an arrangement with a jobbing grinder similar to, but not in all respects identical with, that which was made in the present case. Oates replied to the advertisement; he saw Turner & Co.; they asked him whether he would buy the tools which his predecessor had left there; they said £20, I think, was the cost; he said: 'Yes, I will buy them and will pay you at the rate of 5s. a week out of my wages.' He entered into a contract which was not in writing, but the terms of which are sufficiently established by the evidence. He was to pay 10s. 6d. a week for the room or the wheel, it may be called, in which he used to work,

Ann. Cas. 1918B.—45.

and in the winter time he was to pay some small sum per week for the use of gas. He was to do work for Turner & Co. as a jobbing grinder when they had work to give him. At that time and for some time afterwards they had a good deal of work, and I gather that substantially all Oates' time was occupied doing work which Turner & Co. were able to give him. But the time came when trade was slack, when they had not the work for him, and then he, with the knowledge and approval—I care not whether it was with the express consent, but with the knowledge and approval—of Turner & Co., took in work from other master cutlers, which he did in the room that he hired from Turners, and at the troughs that were worked by the power supplied by Turners. The time came when Oates did comparatively little work for Turner & Co. themselves, but did a great deal of work for, amongst others, one Ashton. Ashton is the name which is mentioned here. I have assumed for the moment that it was all Ashton's work. While he was engaged upon the work sent him by Ashton he met with an accident. He was injured, and now he claims against Turner & Co. that he is entitled to compensation for an accident which, he says, arose 'out of and in the course of' his employment. Turner & Co. say: 'This was not an accident which arose "out of or in the course of the employment." You were not at this time doing this work for Ashton as part of our contract of service with you.' If it had occurred while he was doing their work it may be, and for the present purpose I assume it would be, true that Turner & Co. might be liable. But what have they to do with an accident that took place while he was doing Ashton's work? I asked Mr. Hewart what was the relation between Oates, Turner & Co., and Ashton. I think he felt some difficulty in answering that question. In my view it is reasonably clear that Turner & Co. cannot be made liable unless it be proved, or unless there be evidence which justifies the inference, that Turner & Co. lent the man Oates to Ashton, in which case Turner & Co. would be the 'employers' within the definition in the act. But there is no particle of evidence to suggest any such conclusion. The question was not asked of Turner & Co.: 'Did you lend this man to Ashton. Did you know anything about Ashton. Did you know whose work he was doing.' It was not asked of the man Oates, and I think it would be wholly wrong to make an inference of that kind for which there is no foundation of fact in the evidence which was taken before the learned county court judge. The learned county court judge treated himself, I will not say as bound by, but as greatly influenced by, a decision which he himself gave some years ago in an unreported case. There may or may not in that case have been evidence

that there was a lending, or there may have been evidence which justified the inference that there had been a lending, by the employers there to the person in whose service the accident took place. In my opinion the learned county court judge went wrong in the conclusion at which he arrived. I quite accept what Mr. Hewart has put before us very forcibly, that the question is not whether upon reading these notes I should have come to the same conclusion, but it is this: Was there evidence upon which the reasonable inference could be drawn by the learned county court judge? I am bound to say, with the utmost possible respect for His Honor Judge Benson, who has given us a very careful and excellent note, that I think that the award he made cannot be supported, because there was no evidence to justify the finding at which he arrived."

In *Bobbey v. Crosbie*, 114 L. T. N. S. 244, it appeared that Crosbie engaged one Watts to supply a gang of men to unload a vessel. The money paid by Crosbie was equally divided among the men, each of whom made a small allowance to Watts in consideration of his supplying the ladders. In sustaining an award against Crosbie in favor of a member of the gang so employed it was said: "The learned county court judge might reasonably say this: Bobbey was not employed by Watts; he was rather in the nature of a worker with Watts, and that he and the rest of the gang agreed—Watts being the spokesman—to do this work for Messrs. Crosbie; in other words, that they were employed by Crosbie to do this work and therefore came within the workmen's compensation act. I think in substance that is what is found by the learned county court judge, and in my opinion there was material which justified him in coming to that conclusion."

In *Fraser v. Driscoll* [1916] W. C. & Ins. Rep. 222, while the case went off on another point, the court apparently was of the opinion that a temporary cook at a choir boy's school was a casual employee and not within the act.

Statutes in United States.

IN GENERAL.

To bring a person within a workmen's compensation act it has been held that he must not only be employed but must enter on his employment. *Bloomington, etc. R. Co. v. Industrial Board*, 276 Ill. 239, 114 N. E. 517. In that case it appeared that certain men were on Friday employed as railroad section men to go to work on the following Monday. They were on the same day sent to a railroad bunk house and on that day one of them was injured by a passing train. It was held that he was not at that time an employee of the railroad.

In *Cameron v. Pillsbury*, 173 Cal. 83, 159 Pac. 149, involving the status of an agent who was compensated by salary for certain services and by commission for others, the court said: "Petitioner presents the proposition that Trobitz sustained a dual relationship to him, the one, that of employee, the other, that of 'independent contractor or partner;' that, had he been injured while in pursuance of the duties for which he drew a salary of \$60 a month, the award would be correct, but having been injured in the performance of these independent duties petitioner is not liable. We cannot agree with this view. The employer was entitled to all of Trobitz's working hours and was empowered to direct his labor. In either capacity he was an employee. It is not an uncommon thing for retail merchants, for laundrymen, and the like to pay a commission to the drivers of their delivery wagons for all new business which they bring in. It has never been held that this circumstance creates a distinct relationship in law. They are still employees, as was properly held by the court of appeal under similar facts in *Summer v. Nevin*, 4 Cal. App. 347, 87 Pac. 1105. A certain amount of freedom of action was inherent in the nature of the work which the injured man performed, but this, however, did not change the character of his employment, for the employer himself still had general supervision and control over it."

In *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, Ann. Cas. 1917E 390, 156 Pac. 491, it appeared that one Mason was employed as a night watchman by the Western Metal Supply Company. He was also employed in the same capacity at the same time by five other firms. He made regular rounds of the premises of his employers. He had a separate agreement with each employer. He was killed while trying to prevent the commission of a burglary on the premises of the Western Metal Supply Company. It was held that he was an employee of that company. The court said: "The petitioner argues that the facts above recited do not justify the conclusion that Mason was an employee of the petitioner. On the contrary, it is insisted, he was an independent contractor. Section 13 of the act defines the term 'employer' as 'every person, firm, voluntary association and private corporation . . . who has any person in service under any appointment or contract of hire.' The term 'employee' is defined in section 14 as 'every person in the service of an employer . . . under any appointment or contract of hire.' If it be conceded that the relationship thus described is that of master and servant, as defined in section 2009 of the Civil Code, it must nevertheless be held that the evidence before the commission justified the finding that Mason was a servant of the appellant. 'The real

test by which to determine whether a person is acting as the servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control and was liable to be discharged by him for disobedience of orders or misconduct.' (Wood on Master and Servant, § 317.) If Mason had been working for the petitioner alone as night watchman, it could hardly be claimed that he was not to be regarded as a servant of such petitioner. He would have been 'in the service' of the employer 'under a contract of hire,' to use the language of the workmen's compensation act, or, if we look to section 2009 of the Civil Code, it might well have been found that he was 'employed to render personal service to his employer otherwise than in the pursuit of an independent calling,' and in such service remained 'entirely under the control and direction' of the employer. The fact that Mason was working at the same time for different employers is not necessarily inconsistent with the relation of master and servant between any one of such employers and himself. (1 Labatt on Master and Servant, 2d ed. § 2.) The findings and conclusions of the commission on questions of fact are conclusive. (Sec. 84.) If a finding has the support of substantial evidence, it is beyond review here. The most that can be said is that a finding that Mason was an independent contractor might reasonably have been made. But certainly the conclusion to the contrary was one that could have been entertained by a rational mind. It is, therefore, binding upon this application."

In *Bargey v. Massaro Macaroni Co.* 218 N. Y. 410, 113 N. E. 407, it appeared that Bargey was engaged by the defendant to erect a partition on its place of business. While so employed he was killed by the collapse of the building. The defendant was engaged in the manufacture of macaroni. It was held that Bargey was not an employee of the defendant, the court saying: "Bargey, the deceased, was not an employee, because he was not engaged in the preparation of macaroni. The placing of the partition was not an adjunct of or within a department of the employment of preparing macaroni. It was a specific act for which Bargey was specially employed, which had no relation to the hazardous employment except that it made more useful, within the contemplation of the employer, the building in which the employment was carried on. He was not engaged in the preparation of macaroni, even as in partitioning off a part of the residence of a physician as a professional office he would not be engaged in the occupation of practicing medicine. He was not, within the intentment of the law, an employee of the company."

In *Kiernan v. Friestedt Underpinning Co.* 171 App. Div. 539, 157 N. Y. S. 900, it ap-

peared that the deceased had been employed by the defendant for about eight months. His wages were \$3.68 per day payable weekly. He had worked on Monday, the day previous to the accident, and came to work a little late on Tuesday, the day of the accident. The superintendent in charge told him that he need not work any more. As he started to leave he fell and received the injuries which caused his death. It was held that he was an employee at the time of the accident within the meaning of the New York workmen's compensation act.

In *McPhee's Case*, 222 Mass. 1, 109 N. E. 633, it appeared that McPhee was employed by the Atlantic Park Company to protect the latter's property from fire. He organized a fire brigade for that purpose. It further appeared that McPhee was also a regular member of the fire department of the town where the property of the Atlantic Park Company was situated. Prior to the injury a fire broke out in a garage in the vicinity of the company's premises. McPhee went to the fire for the purpose of extinguishing the same and also to protect the company's property. While engaged in extinguishing the fire he was injured. It was held that he was an "employee" of the Atlantic Park Company within the meaning of the Massachusetts workmen's compensation act. The court said: "While the deceased was a member of the town fire department and as such required to attend the fire, it might well be that his paramount duty was owed to the subscriber to protect its property from destruction by fire and to prevent thereby a panic among its patrons and the disaster which might ensue. It does not seem to us possible to say as matter of law that when he had exhausted the chemical of the subscriber and began working in connection with the fire apparatus of the town, he ceased acting primarily in the interests of his employer, who was the subscriber, and began working exclusively for the town. The interests of his general employer in the extinguishment of a fire in such threatening proximity to its property well may have been found to have been so dominant as to absorb the exclusive attention of McPhee and to have rendered him in the direction of his own conduct chiefly concerned to act for its interests as to the means employed and the result to be achieved in the particular service of extinguishing the fire. If this was so, then his efforts were directed to the promotion of the business of that general employer even though it happened that at the same time he was acting in accordance with his obligation to the town fire department."

In *Beckmann v. Oelerich*, 174 App. Div. 353, 160 N. Y. S. 791, it appeared that the claimant, who was acting as foreman for the defendant corporation, was also the vice-

president and a stockholder of that firm. It was held, nevertheless, that he was an employee. The court said: "As to the claim that the claimant was not an employee within the meaning of the act. The claimant spoke of his compensation for services as salary. He was the owner of seven of the 100 shares of stock of the corporation. There is no claim that the payments received by him were dividends upon his stock. The commission found that the weekly payment made him was his weekly wage. Its finding was fully justified by the evidence. While he was vice-president of the corporation his employment was doubtless through the board of directors, of whom he may or may not have been one. Although he was the general foreman, he worked in the various industries of the corporation the same as other workmen, and was doing the work of an ordinary employee at the time he was injured. His being vice-president and a stockholder in no way affected his status as an employee. *Connor Workmen's Compensation Law*, 31, 96; *Aken v. Barnet, etc. Knitting Co.* 118 App. Div. 463, 103 N. Y. S. 1078, *affirmed* 192 N. Y. 554, 85 N. E. 1105."

But in *Bowne v. S. W. Bowne Co.* 221 N. Y. 28, 116 N. E. 364, *reversing* 176 App. Div. 131, 102 N. Y. S. 244, the president and majority stockholder of a corporation, injured while temporarily performing manual labor, was held not to be a workman. The court said: "The words of the statute are not clear. A workman in a broad sense is one who works in any department of physical or mental labor, but in common speech is one who is employed in manual labor, such as an artificer, mechanic, or artisan; while an employee in a broad sense is one who receives salary or wages or other compensation from another (*Gurney v. Atlantic, etc. R. Co.* 58 N. Y. 358), but in common speech the term is usually applied to clerks, laborers, etc., and not to the higher officers of a corporation. The statutory definition speaks of one 'in the service' of an employer. In a broad sense the officers of a corporation serve it, but in common speech they are not referred to as its servants or employees. . . . The claimant in this case is willing, in order to collect a workman's allowance for himself from the insurance carrier, to assume a status that he might be the first to disclaim for any other purpose. Theoretically he was subject to the orders of his corporation and was liable to be discharged for disobedience. Practically he was the corporation, and only by a legal fiction its servant in any sense. Section 30 of the act provides that; 'No benefits, savings or insurance of the injured employee, independent of the provisions of this chapter, shall be considered in determining the compensation or benefits to be paid under this

chapter.' But these words are appropriate to the meager advantages of a workman and not to the comfortable dividends of the stockholder. Upon the most liberal construction contended for, consistent with the purpose of the law, the order should be reversed, with costs in this court and in the appellate division against the industrial commission, and the claim dismissed."

DISTINCTION BETWEEN INDEPENDENT CONTRACTOR AND WORKMAN.

In a number of cases the question has arisen whether an injured person was a "workman" within the meaning of a workmen's compensation act or was an independent contractor for the work on which he was engaged. In cases of that kind the test applied has been whether any power of superintendence or control was retained by the employer.

Thus in *Tuttle v. Embury-Martin Lumber Co.* 192 Mich. 385, 158 N. W. 875, a person contracting to haul logs for a lumber company at a stated price per thousand was held to be an employee and not an independent contractor. The court said: "In our opinion there was such control over the work of Tuttle, by the company, as makes it inconsistent to say that Tuttle was an independent contractor. His work was limited by the right of the company to terminate it at any time, and it was for no definite period or amount. The loading and unloading were under control of the company, both as to time and place. True, he was in charge of his team while going from the skidway to the mill, but that it was true of all the drivers, whether working by the month or the thousand."

In *Hackel v. Serviss*, 167 N. Y. S. 348, it was held that one who for a lump sum agreed to paint a house was a contractor and not an employee.

In *Zeitlow v. Smock (Ind.)* 117 N. E. 665, a person employed to do certain hauling, over whom no control was retained by the employer, was held to be an independent contractor and not a workman.

In *Perham v. American Roofing Co.* 193 Mich. 221, 159 N. W. 140, one who undertook to cover a roof for a stipulated price was held to be not an employee but an independent contractor.

In *Decatur Ry. etc. Co. v. Industrial Board*, 276 Ill. 472, 114 N. E. 915, a person agreeing to unload coal at a stated price per ton, hiring his own help, was held to be an employee and not an independent contractor. The court said: "The plaintiff in error insists that Mulverhill was an independent contractor, because he was not in the unloading of the coal under the supervision and direc-

tion of the plaintiff in error as to the manner in which the work should be done; that he hired and paid his own help and that he was paid by the ton. On the other hand, there was evidence that it was the duty of Mulverhill to keep the bins full; that the head fireman directed him where to scoop the coal, when to quit, and when there was not enough coal in certain bins told him to scoop more, and that Mulverhill was under his orders to keep the bins filled. He was subject to discharge at any time within notice and without a reason. The right to control the manner of doing the work is the principal consideration which determines whether the worker is an employee or an independent contractor. This work was very simple. No control would ordinarily be required except to direct where the coal should be unloaded, and this control was exercised. There was nothing in the contract indicating that the company surrendered the right to control the manner in which the unloading should be done. It retained the right to discharge Mulverhill on the instant. The method of payment was not inconsistent with a contract of hiring, and the retention of hospital dues and the giving of a pass tended to establish the relation of employer and employee. There was evidence from which the industrial board might reasonably find that Mulverhill was an employee of the plaintiff in error."

In *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 159 Pac. 721, it was held that a person furnishing teams and drivers was an independent contractor though he drove one of the teams. The court said: "It is clear that the contract was not one between employer and employee in the sense of section 14 of the compensation act, but one by which Mr. Stevens agreed to furnish facilities for doing a certain sort of work. There was no stipulation between the contractor who was performing the work for the municipality and Stevens regarding wages. A lump sum was paid for each team and Mr. Tittle knew nothing, so far as the testimony reveals, regarding the amount of wages paid Stevens' driver. Neither did he pay Mr. Stevens a certain sum for use of the teams and another sum for personal services. The amount paid was \$12 for two drivers, two teams, and two wagons. After the accident another driver was substituted for the injured man. He continued to perform the work just as his employer had done it, and his name was never given to the Tittle Company nor entered upon the books, but the money due for the two teams was paid to the wife of the injured man."

The case last cited was distinguished in *Yolo Water, etc. Co. v. Industrial Acc. Commission* (Cal.) 168 Pac. 1146, wherein the person by whom a teamster was employed was

held to be a foreman and not an independent contractor. The court said: "In the *Western Indemnity Co.* case it clearly appears that Stevens was engaged in a permanent business of 'teaming and grading,' and contracted to furnish teams and drivers for the work. In the present case Wallace was not by trade a contracting teamster, and the evidence is too vague and indefinite to warrant a finding that Wallace had contracted to furnish teams. The evidence as a whole indicates rather that Wallace regarded himself as foreman, and in that capacity employed men and teams. Wallace could not have sued petitioner for breach of contract for failing to accept teams tendered by him, nor could petitioner have sued Wallace for failure to furnish teams, because of this indefiniteness. Stevens did not act as foreman for Tittle, hiring and discharging his men, as did Wallace here, but worked under the foreman of the general contractor. Had Stevens been discharged, his teams must necessarily have been ruled off the work with him. But for aught that appears here Wallace could have been discharged, and yet the teams secured by him retained. There are other points upon which the cases can be distinguished, but the above are sufficient to deprive the case cited of the force claimed for it by petitioner. To recapitulate: The evidence shows that Wallace was authorized to employ laborers for petitioner, and, acting under that authority and as the agent for the corporation, he did employ the applicant to do work for said petitioner, and while so engaged as such employee in the very work for which he was employed, said applicant was injured."

EMPLOYEE OF INDEPENDENT CONTRACTOR.

In most jurisdictions a person employed by an independent contractor is not an employee of the person for whom the latter works, within the meaning of a workmen's compensation act. *Sturdivant v. Pillsbury*, 172 Cal. 581, 158 Pac. 222; *Western Indemnity Co. v. State Industrial Acc. Commission*, 172 Cal. 766, 158 Pac. 1033; *Packett v. Moretown Creamery Co. (Vt.)* 90 Atl. 638. In the application of that rule the following have been held to be independent contractors:

—a person employed to cut wood at a stated price per cord, *Fidelity, etc. Co. v. Brush* (Cal.) 168 Pac. 890; *Donlon v. Industrial Acc. Commission*, 173 Cal. 250, 159 Pac. 715;

—a company employed to install an oil pumping apparatus, *Western Indemnity Co. v. State Industrial Acc. Commission*, 172 Cal. 766, 158 Pac. 1033;

—a carpenter employed to put up a building, *Connolly v. Industrial Acc. Commission*, 173 Cal. 405, 160 Pac. 239; *Packett v. Moretown Creamery Co. (Vt.)* 90 Atl. 638.

Under the *Illinois* act the principal contractor is liable if he does not require his subcontractors to insure. *Parker-Washington Co. v. Industrial Board*, 274 Ill. 498, 113 N. E. 976.

In *Massachusetts* the owner or principal contractor is required by statute to insure for the benefit of the employees of an independent contractor or subcontractor. *White v. George A. Fuller Co.* 226 Mass. 1, 114 N. E. 829. Apparently, however, that provision does not apply to municipalities. In the case of *In re Clancy (Mass.)* 117 N. E. 347, it appeared that a workman was employed by one McGillicuddy as a teamster. McGillicuddy had an arrangement with the city of Springfield, Mass., by which he was to do hauling for that city at the rate of \$5.25 per day, sending his team and driver to the city yards to do whatever work was to be done. The driver would inquire what work was to be done. If there was any work the city officials would inform him, but they never gave him any direction as to the manner of doing the work. A driver for McGillicuddy while so acting received injuries from which he died. It was held that he was not an employee of the city of Springfield, within the meaning of the Massachusetts workmen's compensation act. The court said: "The pertinent provision is St. 1913, c. 807, § 6, in these words: 'This act shall apply to all laborers, workmen and mechanics in the service of . . . a . . . city . . . under any . . . contract of hire, express or implied, oral or written.' It is plain that there can be no recovery. The deceased had no contract of any kind with the city. His contract of employment was exclusively with McGillicuddy, who alone was responsible for his wages. This is the plain case where the city hired from another horses, cart and driver to carry material from one place to another as its servants or officers might direct; the driver being left to deal with the horses in his own way. As was said in *Peach v. Bruno*, 224 Mass. 447, 113 N. E. 279, nothing is better settled under such circumstances, when nothing more appears, than that as matter of law the driver is the servant of the owner of the horses and not of the one who hires them. *Shepard v. Jacobs*, 204 Mass. 110, 90 N. E. 392. 26 L.R.A. (N.S.) 442, 134 Am. St. Rep. 648; *Tornroos v. R. H. White Co.* 220 Mass. 336, 107 N. E. 1015; *W. S. Quinby Co. v. Estey*, 221 Mass. 56, 108 N. E. 908. This principle of law applies as well to claims arising under the workmen's compensation act as in other branches of the law. *Pigeon's Case*, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A 737. The case at bar is well within the authority of the first point decided in *Comerford's Case*, 224 Mass. 571, 113 N. E. 460. The decision of the industrial accident board was right."

An independent contractor is liable for compensation to his employees in case of injury to them. See the reported case. And see *Kirkpatrick v. Industrial Acc. Commission*, 31 Cal. App. 668, 161 Pac. 274, wherein a contracting teamster was held to be liable to one of his drivers for compensation for injuries received while performing a contract made by the employer to haul for a third person.

CASUAL EMPLOYEE.

It has been uniformly held that one who is casually employed to do odd jobs is not a "workman" or "employee" within the meaning of a workmen's compensation act. *Maryland Casualty Co. v. Pillsbury*, 172 Cal. 748, 158 Pac. 1030 (machinist employed to repair farm tractor); *Blood v. Industrial Acc. Commission*, 30 Cal. App. 274, 157 Pac. 1140 (person employed to paint house and furnish materials for that purpose at agreed price per day); *LaGrande Laundry Co. v. Pillsbury*, 173 Cal. 777, 161 Pac. 988 (carpenter's helper assisting in carpenter work on premises of stockholder of corporation by whom carpenter was employed); *Carter v. Industrial Acc. Commission (Cal.)* 168 Pac. 1065 (laborer employed for four days to load train); *McLaughlin v. Industrial Board*, 281 Ill. 100, 117 N. E. 819 (employment for few hours to assist other workmen); *Solomon v. Bonis*. 167 N. Y. S. 676 (person employed by apartment house owner to do odd jobs of plastering).

In *Blood v. Industrial Acc. Commission*, 30 Cal. App. 274, 157 Pac. 1140, the court said: "Under the British Workmen's Compensation Act of 1906, the word 'workman' 'does not include a person whose employment is of a casual nature and who is employed otherwise than for the purpose of the employer's trade or business.' As to both clauses within the quotation, it will be observed that there is a material difference between the language used in the British act and that of the California statute. Commenting upon a very similar difference between the Massachusetts and the British acts, the supreme court of Massachusetts has said that this difference in phraseology must be regarded as deliberately designed, and that its effect is to narrow the scope of the Massachusetts act as compared with the English act. 'No one whose employment is "casual" can recover here, while the one whose employment is "of a casual nature" comes within the act, provided it is also for the purpose of the employer's trade or business. It is possible that a distinction as to the character of the employment may be founded upon the difference between the modifying word "casual" used in our act, and the words "of a casual nature"

in the English act. The phrase of our own act tends to indicate that the contract for service is the thing to be analyzed, in order to determine whether it be casual, while in the English act the nature of the service rendered is the decisive test. This distinction appears to have been made the basis of decision in *Knight v. Bucknill*, 6 B. W. C. C. 160, [1913] W. C. & Ins. Rep. 175, 57 Sol. J. 245. (In re Gaynor, 217 Mass. 86, 104 N. E. 339, L.R.A.1916A 363.) In the same Massachusetts decision it is noted that the ordinary signification of the word 'casual' as shown by the lexicographers is something which comes without regularity, and is occasional and incidental; that its meaning may be more clearly understood by referring to its antonyms, which are, 'regular,' 'systematic,' 'periodic,' and 'certain.' Tested by this distinction, the contract of employment of Heck by the petitioner to paint his house was casual. It was a mere occasional and incidental contract, not constituting or connected with any regular, systematic, periodic, or certain business. The supreme court of Massachusetts afterward referred to the Gaynor case as follows: 'In addition to what was said there it may be of importance (in determining whether in a particular case the "employment is but casual") to have in mind the reason for this limitation upon the class of persons who are entitled to the benefits of the workmen's compensation act. The scheme created by the workmen's compensation act is a scheme of insurance in which the premiums to be paid by the employer are based upon the wages paid by him to his employees. It may have been thought impracticable to work out a scheme of insurance if persons who are only occasionally employed are to be included among those insured.' *Cheevers's Case*, 219 Mass. 244, 106 N. E. 861. It appears to us that the Massachusetts decisions we have referred to are based upon sound reasoning and may well be applied in the interpretation of our own statute. We, therefore, have reached the conclusion that the employment of the applicant Heck named in the proceedings here under review was of a nature which did not entitle him to compensation for his injury."

In *Thompson v. Twiss*, 90 Conn. 444, 97 Atl. 328, L.R.A.1916E 506. It appeared that Twiss employed Thompson to develop the former's land. Twiss furnished the tools and materials. For five or six years prior to the accident Thompson had frequently done odd jobs for Twiss. During the performance of the last work Thompson hired other men to help him but they were never paid by Twiss. It was held that under these circumstances the employment was not casual. The court said: "As we examine compensation acts, we must remember that they differ in their treatment of

what is casual employment. Some exclude from its benefits all casual employees; others follow the British act and exclude all whose employment is of a casual nature and not for the purposes of the trade or business. The Massachusetts, Michigan, Wisconsin and Ohio acts belong to the first class, while the Minnesota, Rhode Island, California and Connecticut acts follow the British act. . . . The English authorities early concluded that a hard and fast definition of the term casual as used in the compensation act was inadvisable, and time has confirmed the wisdom of this conclusion. As used in our act, the casual employment means the occasional or incidental employment, the employment which comes without regularity. It is in this sense the word is used in our act, rather than in the sense of an employment arising through accident or chance, which the supreme court of New Jersey has held to be the true meaning of casual in their act. *Sabella v. Brazileiro*, 86 N. J. L. 505, 91 Atl. 1032. If the employment be upon an employer's business for a definite time, as for a week, or a month, or longer, it is not a casual employment, whether we regard the contract of service or the nature of the service. So, too, if the employment be for a part of one's time at regularly recurring periods of time, it is not a casual employment, whether we regard the contract of service or the nature of the service. *Dewhurst v. Mather* [1908] 2 K. B. D. 754, 1 B. W. C. C. 328. When the employment continues for a considerable time and promises to continue a considerably longer period, the importance of whether the test is the contract of service or its nature may be large. We need not consider whether under the Massachusetts act, the test of the tenure of the employment whether regular or not, would be met by the facts of this case. We are concerned in determining whether the nature of the employment was an occasional or incidental one, a regular one not measured by tenure of service but by the character of the work. The employment of the plaintiff was in the business of Mr. Twiss, the completion of the work would require at least a number of weeks. If the plaintiff satisfied Mr. Twiss, he would remain to the end. If he choose, he could quit the work at any time. Applying our test to such an employment, we think the common judgment would agree that it was a stable and not an incidental employment, and hence not casual in nature within the meaning of our Act. But the employee who is barred by our act as amended is not merely one whose employment is of a casual nature, but, in addition, one whose employment is not in his employer's trade or business. The development of this land was one of the businesses of Mr. Twiss, not evidently his main business, and yet a very substantial

one. The plaintiff was injured in the pursuit of Mr. Twiss' business, and his employment was not of a casual nature within the meaning of our act."

In *McLaughlin v. Industrial Board*, 281 Ill. 100, 117 N. E. 819, it appeared that one Hiler was engaged to assist other men to clear obstructions. Hiler was not a regular employee of the defendant. He was hired only at odd times. It was held that he was not a "workman" within the meaning of the Illinois workmen's compensation act. The court said: "We are of the opinion, however, that his employment was but a casual employment within the meaning of the statute. From the evidence it appears that the work of dynamiting or blasting stumps had been going on but a few hours, at most, in the morning Hiler was killed, and that work necessarily only could continue for a very short time, and was to end with the blowing out of the stumps on that particular piece of road. The real work for which Hiler was employed in the beginning was to handle a team of Younger in the plowing and grading of the road. Younger had employed at least three teams on the road a part of the time and a part of the time two teams, and at the time Hiler was killed Younger only was employing one team. When Younger had three teams employed he handled one of the teams himself and had another man besides Hiler, who was employed in the same manner that Hiler was to work with a team. When the work of dynamiting was reached only one team was employed, and Hiler was expected to use that team. The work of dynamiting the stumps was a mere casual or incidental employment in connection with the matter of grading and repairing the road, and the evidence does not show that the road district had ever before used dynamite in connection with road grading at any time; and the evidence clearly shows that that work would only continue for a few hours at most. There was no expectancy, so far as the evidence shows, that dynamite would ever be again used by the district in its road work. In the case of *Aurora Brewing Co. v. Industrial Board*, 277 Ill. 142, 115 N. E. 207, this court held that the legislature never intended an employee who was engaged for one job lasting only three or four days to be within the terms of the workmen's compensation act, even though the employee had been employed at irregular intervals during several previous years to perform similar work. It was further held in that case that the contract for service is the thing to be analyzed in order to determine whether it be casual, and not the nature of the service rendered. Applying the same test in this case, it is clear that Hiler's employment in the hazardous occupation in this case was a casual employment, an employment that happened by mere chance. Several cases very

similar to this one are cited in that opinion where the employment was held to be casual, notably the case of *McCarthy v. Norcott*, 2 B. W. C. C. 279. In that case a carpenter was employed to make repairs to a private house, and after those repairs were made was engaged to cut down some trees on the ground near the house, in which latter employment he was killed. The case in hand may be likened to the employment of a farm hand by a farmer to do general farming, such as plowing, planting, hoeing and fencing, and after the employment begins the farmer concludes to employ dynamiters to blow a few stumps from his field and orders this farm hand to assist in that work by boring the holes under the stumps. Irrespective of the question whether or not farmers are exempt from the operation of the workmen's compensation act, the employment of the farm hand by the farmer under the circumstances above set forth would be but a casual employment within the meaning of said act. After a careful consideration of the question we have concluded that the employment of Hiler in this case in the extra-hazardous employment was not a regular or stable employment within the meaning of the statute, but was merely a casual employment. Hiler was therefore not an employee within the meaning of the workmen's compensation act, and the industrial board had no jurisdiction of the case."

An employment "to act as foreman over a number of other carpenters in the erection of a 14-room building, involving an engagement of several months of regular and daily recurring labor" is not casual. *Miller v. Industrial Acc. Commission*, 32 Cal. App. 250, 162 Pa. 651.

In *Dyer v. James Black Masonry, etc. Co.* 192 Mich. 400, 158 N. W. 959, a person employed by a contractor to oversee from time to time the delivery and unloading of glass was held not to be a casual laborer. The court said: "In the instant case it is fair to suppose that the general contractor knew how much glass was to be delivered at the building. It became necessary in the interest of the business of the general contractor to have the delivery of the glass looked after and supervised, and claimant was employed for that purpose; that, as the glass was to be delivered as the work progressed on recurring occasions, it certainly cannot be said any of the necessary work to be done in furthering the job or enterprises was casual, for it was sure to occur and recur in the operation of the job. There was an element of certainty in the work recurring at times, which, though they could not be fixed definitely, yet were fixed generally by the agreement to look after and assist in unloading the glass as it arrived, from time to time. In our opinion, the employment of the claimant was not casual."

VAUGHAN'S SEED STORE

- v.

SIMONINI.

Illinois Supreme Court—October 24, 1916.

275 Ill. 477; 114 N. E. 163.

Workmen's Compensation Acts — Election to Reject Act — Necessity — Non-hazardous Employment.

Workmen's Compensation Act, § 1 (Hurd's Rev. St. 1913, c. 48, § 126), gives to all employers in the state the right to elect to pay compensation to their employees according to the provisions of the act. Section 3 (section 128) provides that in certain enumerated extrahazardous occupations, it shall be presumed that the employer has elected to come under the act, and if he elects not to do so, he is denied the defenses of assumption of risk, contributory negligence, and negligence of fellow servants in actions by his employees for injuries. It is held that the voluntary election under section 1 applies to all employees in any branch of the employer's business, but the presumed election under section 3 applies only to those employees engaged in an extrahazardous occupation, so that a farm hand employed on the farm of a corporation which had made no election under the act and which operated a warehouse and office in the city cannot recover compensation for injuries received while doing ordinary farm work, though the corporation's employees in the city might be within the terms of the act.

[See note at end of this case.]

Employments within Act.

To construe Workmen's Compensation Act, § 3 (Hurd's Rev. St. 1913, § 128), as applying to all the business of an employer, any part of whose business was extrahazardous, would render the act unconstitutional as discriminating against him in that part of his business not extrahazardous.

[See Ann. Cas. 1917D 4.]

Error to Circuit Court, Cook county: TOMLINSON, Judge.

Claim for compensation under workmen's compensation act. Anchise Simonini, claimant, and Vaughan's Seed Store, defendant. Claim allowed by Industrial Board. Decision reversed by Circuit Court. Claimant brings error. The facts are stated in the opinion. **AFFIRMED.**

Samuel G. Hamblen for plaintiff in error.
Henry W. Magee and *E. W. Adkinson* for defendant in error.

[478] DUNN, J.—The circuit court of Cook county having set aside an award of the Industrial Board allowing compensation to Anchise Simonini against Vaughan's Seed

Store and certified that the cause was one proper to be reviewed by the Supreme Court, the claimant sued out a writ of error to reverse the judgment.

The only question argued is the jurisdiction of the Industrial Board, and the facts, so far as material to this question, were stipulated.

Vaughan's Seed Store is a corporation organized under the laws of the State of Illinois for the purpose of growing, buying and selling seeds, plants, bulbs, nursery stock and agricultural implements, buying, building and operating greenhouses, and carrying on and doing a general seed, [479] agricultural implement, farming and florist business in all its branches and everywhere, and the acquiring, holding, mortgaging and conveying of estate incidental thereto. It maintains a salesroom at No. 31 West Randolph street, in the city of Chicago, for the purpose of retailing and wholesaling its goods and has an office there, where it keeps its records and books of account. In the building is a freight elevator with corrugated iron doors and caged in with iron network, which is subject to the provisions of an ordinance of the city of Chicago known as the "Building Code," for the regulating and placing of elevators and the safeguarding of individuals. It also owns and operates a private storeroom or warehouse for the purpose of storing farm products, seeds, shrubs and trees at No. 803 West Randolph street, in Chicago. At Western Springs, in the southwest part of Cook county, outside the limits of Chicago, it owns, operates and farms about 120 acres of land as a truck garden, farm and nursery, on which are greenhouses, storehouses, barns and stables. The work on the farm is managed by a superintendent, who lives there and keeps a separate account of the products raised and expenses incurred upon the farm. The products raised are the usual farm products and various seeds, bushes and trees, some of which are delivered to the retail store of the company and some are sold and delivered from the farm to purchasers. A separate account of receipts of such farm products from the farm is kept, as well as separate accounts of receipts from other farms owned by the corporation. The plaintiff in error began working for the defendant in error about January, 1914, on the farm as a farmhand, doing teaming mostly, and received \$12 a week for his services. He and one other workman on the farm did most of the teaming, each ordinarily driving two horses in the nursery part of the farm, doing such hauling and other work as they were instructed to do and acting as hostlers for the horses. The applicant was never required to and never did leave the [480] farm in the course of his duties, and on or about August 16, 1914, while at work in a stable

on the farm attending the horses, was kicked by one of them on his right leg and injured.

The defendant in error has not filed with the Industrial Board any notice of its election either to provide and pay compensation under the provisions of the Workmen's Compensation act or to the contrary, and was therefore not subject to the jurisdiction of the Industrial Board unless it was engaged in an occupation, enterprise or business mentioned in paragraph (b) of section 3 of that act and declared to be extra-hazardous. It is insisted that it is so engaged within the first, fourth and eighth clauses of that paragraph, which declares the provisions of section 3 are applicable to "an employer engaged in any of the following occupations, enterprises or businesses, namely: 1 The building, maintaining, repairing or demolishing of any structure. . . . 4. The operation of any warehouse or general or terminal storehouses. . . . 8. In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances, or for the protection and safeguarding of the employees or the public therein." (Hurd's Stat. 1913, p. 1207.)

The plaintiff in error argues that the defendant in error was maintaining a structure,—that is, a greenhouse,—on the farm; that it was operating a warehouse,—that is, the storeroom where it kept its farm products, seeds, shrubs and trees, at No. 803 West Randolph street, in Chicago; and that it was engaged in an enterprise where municipal ordinances were imposed for regulating machinery for the protection and safeguarding of employees and the public,—that is, it had a freight elevator in its store at No. 31 West Randolph street, in Chicago, which was subject to the ordinances of the city of Chicago for the regulating and placing of elevators.

[481] The Workmen's Compensation act is elective on the part of the employer. By the first section any employer is authorized to elect to provide and pay compensation for accidental injuries sustained by any employee arising out of and in the course of the employment according to the provisions of the act, and thereby relieve himself from any liability for the recovery of damages except as provided by the act. His election is entirely voluntary. He has entire freedom of choice whether his relation to his employees and their mutual rights and liabilities shall continue under the common-law system or shall be such as are established by the act. If he does not elect the new system his rights under the old are not affected, and he is subject to the same liabilities and entitled to make the same defenses as before the passage of the act. This applies to all employers except those engaged in an occupation, en-

terprise or business declared by section 3 of the act to be extra-hazardous. Such employers have not the free election given to others but are presumed to elect the new system, and if they do elect the old, retain it not in its entirety but at the cost of surrendering that part of it which permitted the defenses of assumed risk, injury by the negligence of fellow-servants and contributory negligence. The injury sustained by the plaintiff in error was not one arising out of or in the course of any employment declared to be extra-hazardous. His employment was not different from that of the ordinary farm laborer. His injury arose out of and in the course of that employment, but had no connection with the business of maintaining a greenhouse or operating a warehouse, or with any enterprise where a municipal ordinance regulated machinery. To sustain the jurisdiction of the Industrial Board it is therefore necessary to hold not only that the defendant in error was engaged in a hazardous occupation, but that the presumption of an election to provide and pay compensation according to the provisions of the Workmen's Compensation act, arising out of such hazardous occupation, [482] applied not only to such hazardous occupation but also to all the business of such employer. Assuming, but not deciding or intimating, that maintaining and using the greenhouse, storehouse and elevator was engaging in an extra-hazardous business, we shall consider the latter proposition only: whether the provisions of the Workmen's Compensation act applied to all the business of the employer, without reference to its connection with the particular extra-hazardous business.

The authority to elect given by the first section of the act extends to every employer in the State. This section refers to the person and not to the business, and the election by the employer subjects him to the act together with all his employees. The third section refers primarily to the business and not to the person of the employer. Its provisions expressly apply only to employers engaged in the specified extra-hazardous occupations, and provide that in any action to recover damages against such an employer it shall not be a defense that the employee assumed the risk or that the injury was caused by the negligence of a fellow-servant or by the contributory negligence of the employee. These provisions cannot be extended to apply to causes of action not having any connection with the extra-hazardous occupations mentioned. If a man who was engaged in the business of a building contractor in Chicago and who had elected not to provide and pay compensation according to the provisions of the act should also be conducting a dry-goods store in Rockford, and should be sued by a clerk in the store

for an injury caused by the negligent arrangement of the stock of goods, the contributory negligence of the clerk, his assumption of the risk or the negligence of a fellow-servant causing the injury would constitute a defense, for this would not be an action against an employer engaged in a hazardous occupation. To give the act any other interpretation would be to render it unconstitutional. [483] The dry-goods merchant who, having no other business, had not elected to provide and pay compensation according to the provisions of the act would not be deprived of these common-law defenses, and it would not be a reasonable classification to allow such defenses to one merchant and deny them to another, under precisely the same circumstances, because the latter was also engaged in an extra-hazardous occupation elsewhere. The reasonable interpretation of paragraph (b) of section 3 is, that the provisions of paragraph (a) shall only apply to an employer engaged in the extra-hazardous occupations mentioned, so far as such extra-hazardous occupations are concerned. The object of section 3 was the better protection of employees exposed to greater danger by reason of their employment in these extra-hazardous occupations, and it was not intended that employers engaged in such extra-hazardous occupations should for that reason be subject to any greater liability to their employees not engaged in such occupations than other employers under the same circumstances. The defendant in error was not an employer of the plaintiff in error in any of the extra-hazardous occupations mentioned in section 3, and plaintiff in error was not exposed to any of the dangers arising from such extra-hazardous occupations. Whether or not the defendant in error, as to any part of its business, was subject to the provisions of the Workmen's Compensation act, it was not subject to such provisions so far as the plaintiff in error was concerned.

The injury to the plaintiff in error was not within the jurisdiction of the Industrial Board, and the judgment of the circuit court setting aside the award was right and is affirmed.

Judgment affirmed.

Rehearing denied December 8, 1916.

NOTE.

Right to and Effect of Election with Respect to Acceptance of Provisions of Workmen's Compensation Act.

Introductory, 715.

Right and Method of Election:

Right to Elect:

Generally, 715.

Infant Employee, 716.

Method of Election:

Notice of Acceptance or Rejection:
In General, 717.

Notice to employees, 718.

Claim for Compensation, 720.

Acceptance of Compensation, 720.

Commencement of Action, 722.

Agreement or Private Scheme for Compensation, 723.

Effect of Election:

On Remedies of Employee, 724.

On Liability of Employer:

In General, 727.

Particular Defenses, 728.

Rule in Illinois, 729.

Introductory.

The purpose of this note is to review the recent cases passing on the right to and the effect of an election with respect to the acceptance of the provisions of a workmen's compensation act. The earlier decisions are collected in the note to *Crooks v. Tazewell Coal Co.* Ann. Cas. 1915C 304.

Right and Method of Election.

RIGHT TO ELECT.

Generally.

Because of the early controversy as to the constitutionality of such legislation, the workmen's compensation acts in most jurisdictions contain some provision rendering it optional with the persons affected to accept the compensation principle provided thereby.

All employers and employees are treated alike by the *Illinois* act so far as the right of election is concerned, and cities, incorporated villages, and other municipal corporations have the same right of election under the act as other employers. *Marshall v. Pekin*, 276 Ill. 187, 114 N. E. 497. So it has been held under that act, which provides that every employer included in the act "is presumed to have elected to provide and pay the compensation according to the provisions of this act, unless and until notice in writing of his election to the contrary is filed with the state bureau of labor statistics," and further that "when such election is made by the employer, the employee shall be deemed to have accepted all the provisions of said act and is bound thereby, unless within thirty days after his hiring and the taking effect of the act he shall file a notice to the contrary with the secretary of the state bureau of labor statistics," there is a presumption of law that both the employer and employee are covered by the provisions of the act unless it appears that one or both parties have filed an election to the

contrary as provided by the act. *Krisman v. Johnston City, etc. Coal, etc. Co.* 190 Ill. App. 612. And see *Gibson v. Industrial Board*, 276 Ill. 73, 114 N. E. 515. But the rejection of the act by an employer precludes his employees from accepting it. *Favro v. Superior Coal Co.* 188 Ill. App. 203. Receivers of a railroad properly appointed to "run and manage" the railroad have authority to elect not to provide and pay compensation according to the provisions of the act, and it is not necessary that they should obtain an order from the United States district court which appointed them receivers to authorize them to reject the provisions of the act, as authority to do so is included in the general management of the business. *Devine v. Delano*, 272 Ill. 166, Ann. Cas. 1918A 689, 111 N. E. 742.

The *Washington* act contains the following provision: "All phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents, is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided." That act has been held to be a provision for compulsory insurance for both the employer and the employee so that neither the master nor the servant has any right of election whether he will come under the act if they are engaged in the kind of work which falls under the provision, and neither can exempt himself from the burdens imposed or waive the benefits. *Shaughnessy v. Northland Steamship Co.* 94 Wash. 325, 162 Pac. 546.

In *Montana* the compensation act provides that no employer shall be bound by its provisions until he has made an election to that effect, and a public corporation such as a city is declared to be an employer within the meaning of the act. By a further provision it is declared that "where a public corporation is the employer, . . . the terms, conditions and provisions of compensation plan number three shall be exclusive, compulsory, and obligatory on both employer and employee." It has been held that although these provisions are inconsistent, public corporations must be deemed to be subject to the act without any election. *Butte v. Industrial Acc. Board*, 52 Mont. 75, 156 Pac. 130.

The *Texas* act provides that the employers' insurance association shall not issue policies unless fifty employers with not less than two thousand employees have subscribed to the

plan. Another part of the act provides that any insurance company lawfully transacting liability and accident business shall have the same right as the association to insure the liability to pay compensation provided for, and that when such a company issues a policy the holder of it shall be regarded as a subscriber. It has been held that under this provision every employer has an election to come under the act though sufficient employers have not subscribed to authorize insurance by the association. *Marshall Mill, etc. Co. v. Scharnberg (Tex.)* 190 S. W. 229.

In *Cox's Case*, 225 Mass. 220, 114 N. E. 281, it was held that an employer could not elect as to a part only of his business. It appeared that a corporation was both a manufacturer and a retail dealer in shoes, and the question was whether in subscribing as an insurer under the workmen's compensation act the business of conducting a shoe store came within the act. In holding that the shoe store was included, the court said: "The workmen's compensation act does not permit an employer to become a subscriber as to one part of its business and to remain a nonsubscriber as to the rest of a business which is in substance and effect conducted as one business. It has been decided that insurance as to one class of employees of a farmer, engaged as drivers and helpers in the distribution and marketing of his produce, does not require insurance of farm laborers who are expressly exempted from the act.

. . . Such cases, if and when they arise, are to be considered on their own merits. We are dealing here with a case where an employer is conducting under a single general administration the business 'of manufacturing, jobbing at the factory and selling at retail in the factory and in stores.' The circumstances that at the retail stores are sold other shoes and rubbers besides those manufactured at the factory, does not render the retail stores a business separate from the general business which is carried on as a unit made up of numerous parts."

Infant Employee.

It has been held that the legislature has the power to remove the disability of infancy so as to permit an infant old enough to go to work under the labor statutes to make an election whether he will work under the Workmen's Compensation Law. *Herkey v. Agar Mfg. Co.* 90 Misc. 47, 153 N. Y. S. 369.

So where a statute makes it lawful to employ an infant over fourteen years of age, an infant so employed has a right to bind himself by an election to participate in the benefits of the act. *Rhodes v. J. B. B.*

Coal Co. (W. Va.) 90 S. E. 796. See to the same effect *Adkins v. Hope Engineering, etc. Co.* (W. Va.) 94 S. E. 506; *Foth v. Macomber, etc. Rope Co.* 161 Wis. 549, 154 N. W. 369.

In *England*, an election to accept compensation under the act, instead of damages, made on behalf of an infant, will be set aside if it is not for the infant's benefit. *Ford v. Wren*, 115 L. T. J. 357, 5 W. C. C. 48. And see *Stephens v. Dudbride Ironworks Co.* [1904] 2 K. B. 225, 73 L. J. K. B. 739, 68 J. P. 437, 52 W. R. 644, 90 L. T. N. S. 838, 20 Times L. Rep. 492, 6 W. C. C. 48. In *M'Feetridge v. Stewarts* [1913] Sc. Ct. Sess. 773, it appeared that a minor workman who was injured in the course of his employment, agreed without consulting his father to accept compensation under the act. The minor was domiciled in Ireland where the contract of a minor is a nullity; but according to the law of Scotland he has some capacity to contract. In an action for damages for the injuries sustained it was held that a plea by the defendant of "*res judicata*" could not be sustained and that the arbitrator's award should be set aside. In *Burton v. Chapel Coal Co.* [1909] Sc. Ct. Sess. 430, it was held that a minor workman who elects to make a claim for compensation under the act is barred by such election from suing for damages at common law where the arbitrator refuses the compensation on the ground that the miner has been guilty of serious and wilful misconduct.

It has been held that since it is not clear whether a minor may accept or reject the New Jersey act it is doubtful whether he may maintain an action at law; hence a complaint for personal injuries will not be stricken out on motion on the ground that the remedy is under the workmen's compensation act. *Young v. Sterling Leather Works* (N. J.) 96 Atl. 1016.

METHOD OF ELECTION.

Notice of Acceptance or Rejection.

In General.

Some workmen's compensation acts require a notice of election to come within the act, while others create a presumption of acceptance and require an affirmative notice of rejection. Under an act of the latter class, if the employee sues at common law he has the burden of showing that the employer has rejected the act by proving that the proper notice has been filed. *Synkus v. Big Muddy Coal, etc. Co.* 190 Ill. App. 602. And see *Krisman v. Johnston City, etc. Coal, etc. Co.* 190 Ill. App. 612.

In *Kleet v. Southern Illinois Coal, etc. Co.* 197 Ill. App. 243, wherein the plaintiff al-

leged that the defendant elected not to provide and pay compensation as provided by the act, it was held that it was competent to prove such election by a copy of the notice filed by the defendant with the industrial board as required by the statute.

A copy of the notice of election certified by the person charged with the custody of the original is admissible as the best evidence to prove that the employer has elected to reject the provisions of the workmen's compensation act. *Synkus v. Big Muddy Coal, etc. Co.* 190 Ill. App. 602. See to the same effect *Bateman v. Carterville, etc. Coal Co.* 188 Ill. App. 357. But the original notice without proof of its being filed in accordance with the provision of the act is insufficient. *Bateman v. Carterville, etc. Coal Co.* 188 Ill. App. 357.

Where an employer files the proper notice rejecting the provision of the act, the notice will stand as a negative election until it is withdrawn; and the fact that the employer does not give a further notice sixty days previous to the first day of the year following, does not constitute an election by him to accept the provisions of the act. *Bateman v. Carterville, etc. Coal Co.* 188 Ill. App. 357; *Synkus v. Big Muddy Coal, etc. Co.* 190 Ill. App. 602.

Under an act providing that every employer who elects to come under the act shall be bound until the beginning of the next succeeding year, and further providing that every employer is presumed to be bound unless notice in writing is filed to the contrary with the industrial board but setting no time for the filing of that notice, it has been held that those who have elected to be bound may withdraw from the act by filing notice sixty days before the expiration of a calendar year, and those employers who are presumed to be bound may file notice to the contrary some time subsequent to the adoption of the act. *Victor Chemical Works v. Industrial Board*, 274 Ill. 11, 113 N. E. 173.

Under the *Minnesota* act an employer is released from liability for an injury to his employees if he posts notices about his place of employment and files a copy of such notices with the commissioner of labor stating that he is insured against liability and by whom he is insured. The statute does not say when the notice shall be filed. It has been held that a notice filed after an accident but three months before a proceeding was instituted to recover compensation was sufficient to bring the employer within the act. *State v. District Ct.* 133 Minn. 402, 158 N. W. 615.

Before an employer can bring himself within the act in *Michigan* the notice accepting its provisions must be approved by the accident board, and the election dates from that approval. *Bernard v. United Traction Co.* 188 Mich. 504, 154 N. W. 565;

Shevchenko v. Detroit United Ry. 189 Mich. 421, 155 N. W. 423; *Bendykson v. Lyons Evangelistic Committee* (Mich.) 161 N. W. 945.

The statute in *Wisconsin* allows thirty days to employees in which to elect whether they will come under its provision. Where a workman was injured on the day following the employer's election to come under the act, it was held not to apply to him since his contract of employment was made before the employer came under the act, and the thirty days within which he might elect had not expired when he was injured. *Green v. Appleton Woolen Mills*, 162 Wis. 145, 153 N. W. 958. Under the provision in that act that an employee becomes subject to the act when "such employee shall have given to his employer notice in writing that he elects to be subject to such provision, or without giving either of such notices, shall have remained in the service of such employer for thirty days after the employer has filed with said commission an election to be subject to the terms of the provision," it has been held that an employee who does not give notice that he elects to be subject to the act becomes subject thereto only when he has remained in the service thirty days after the employer has become subject thereto. *Wiesedeppe v. Zweifel*, 165 Wis. 84, 160 N. W. 1038. And see *Lutz v. Wilmanns Bros. Co.* (Wis.) 164 N. W. 1002. The Wisconsin Act of 1913 provided that every employer should be deemed to have elected to accept the law unless prior to September 1 of that year he had filed a notice of his election not to accept it. Under that provision it was held that a notice dated August 30, mailed on September 2, and received by the commission on September 3, was not effective, not having been filed "prior" to September 1. *Great Northern R. Co. v. King*, 165 Wis. 159, 161 N. W. 371. In that case it was further held that a notice which was not effective because not filed in time and which declared that the employer "elects not to accept the provisions of the law," could not be construed as a withdrawal under the provision allowing an employer to withdraw himself from the operation of the law at the end of the year.

Where the statute provides that its provisions shall not apply unless prior to the injury the employer and employee shall have elected by agreement to be bound by the act, and further that where there is no such express agreement, it shall be implied unless there be an express statement in the contract of hire, made not less than thirty days prior to the accident, that the provisions are not intended to apply, it has been held that a contract of employment which was made less than thirty days before the accident could not contain a notice of election and hence must be governed by the first provision, and

excluded from the operation of the act. *Woodruff v. Producers' Oil Co.* (La.) 76 So. 803.

The statute in *Missouri* requires that all employers who shall elect to come within its provisions shall do so by filing a statement to that effect with the secretary of state. It has been held that the statement need not be in any precise or technical form, and need not be evidenced with the same formality as a deed or other instrument which transfers property. *Piatt v. Swift*, 188 Mo. App. 584, 176 S. W. 434. In that case it was also held that it was not necessary to show affirmatively that the officer who filed the statement of election was authorized by his employer to do so, particularly where notices of the election were posted in all parts of the employer's plant long before the injury, and the question of election was raised by attorneys who claimed to have a lien on the employee's cause of action.

In *De Pasquale v. Mason Mfg. Co.* (R. I.) 97 Atl. 816, it was held that a notice filed with the commissioner of industrial statistics by the treasurer of a corporation accepting the provision of the workmen's compensation act was ratified by the directors of the corporation through their acquiescence and a failure to repudiate the acceptance, although no formal resolution was recorded authorizing the treasurer to file the notice.

Notice to Employees.

By many of the workmen's compensation acts an employer electing to accept the provisions of the act is required to give notice to his employees of that fact, the posting of notices in the place of employment being the method usually prescribed.

In *De Pasquale v. Mason Mfg. Co.* (R. I.) 97 Atl. 816, it was held that a notice in the English language was as a matter of law sufficient.

Under the workmen's compensation act of *Iowa* employers are presumed to have elected to come under the act unless notice in writing to the contrary shall have been given by posting the notice conspicuously at the place where the business is carried on. It is also provided that where an employer has given notice of rejection of the act, that election shall continue in force until such employer shall elect to come under the act by giving notice in writing in the same manner as is required in electing to reject the act, which shall become effective when filed with the industrial commissioner. Under those provisions it has been held that a substantial compliance with the act was required of an employer who elected to accept the act after rejecting it; that the filing of the notice

with the commissioner without posting the notice as required was insufficient although the notice of rejection previously posted was torn down; that the fact that an injured employee could not talk or read English so that a posted notice would have been unavailing to him, made no difference; and that the defect was not cured by the fact that there was a rumor among the employees that the employer had accepted the act. *Pancker v. Enterprise Coal Min. Co. (Ia.)* 184 N. W. 1035.

Under a provision in a statute that "each employer electing to pay the premiums provided by this act into the workmen's compensation fund shall post in conspicuous places about his place or places of business typewritten or printed notices stating the fact that he has made such election, and the same when so posted shall constitute sufficient notice to all his employees of the fact that he has made such election," it has been held that an employer must not only have paid the premiums provided thereby, but that the injured employee must have had actual notice that his employer had elected to pay the premiums; that an excuse by the employer that he had applied to the state authorities for such notices and had not received them at the time of the plaintiff's injuries was insufficient to relieve the defendant of the statutory requirement since the statute made no provision for the furnishing of the notices by the state. *Daniels v. Charles Boldt Co.* 78 W. Va. 124, 88 S. E. 613.

The *Texas* act provides that the employer in order to be relieved from the common-law liability must give written or printed notice to each employee entering his service that he is a subscriber to the act; but no method is prescribed as to how the notice is to be given. It has been held under that provision that the mere posting of a notice in the employer's place of business to the effect that the employer is a subscriber under the act is not as a matter of law notice to the employee but its sufficiency is a question of fact in any particular instance. *Kampmann v. Cross (Tex.)* 194 S. W. 437. An employer when sued for an injury must show that such notice as is required was given or that the employee waived the notice. *Rice v. Garrett (Tex.)* 194 S. W. 667. Proof that a defendant had notices posted around its plant, and that it carried insurance in accordance with the act, has been held not to be subject to the objection that it was an attempt to impress on the jury the fact that an insurance company and not the defendant would be called on to pay the damage assessed. *Southwestern Portland Cement Co. v. Presbitero (Tex.)* 190 S. W. 776.

In *Shafer v. Parke*, 192 Mich. 577, 159 N. W. 304, it appeared that a manufacturer of

drugs maintained a farm chiefly for the preparation of serums. In accepting the compensation act it neither expressly included nor excluded any particular class of its employees, but posted notices of the acceptance of the act in its laboratories, offices, and places of business in the city of Detroit. No notice was placed on or in the vicinity of the farm. Under those facts it was held that the company did not intend to bring itself within the provisions of the act as to its farm laborers. The court said: "To assume that by such acceptance the employer intended to include a class of employees as to whom he still had the right to retain his common-law defenses would be going, we feel sure, beyond the fair meaning of the acceptance. The statute has made it practically compulsory that employers of laborers other than farm laborers and household domestic servants accept the provisions of the act, and such acceptance has usually in view only those employees as against whom the employers' common-law defenses have been taken away. And to hold that an employer by a general acceptance intends to elect to pay compensation under the act to his farm laborers and household domestic servants would be against the fact. To bring such employees within the acceptance must be held to require an express statement to that effect."

Where an act provides that any insurance company may issue policies relieving the employer from liability, besides the insurance association created by the act, and by another provision requires the employer to give notice that he has provided for the compensation for injuries with "the association," it has been held that the provision for notice applies to either class of insurance as the same reason exists for the notice in both cases. *Rice v. Garrett (Tex.)* 194 S. W. 667.

A provision in an act that an employee shall be held to have waived his right of action at common law if he shall not have given notice to his employer at the time of his contract of hire that he claimed such right, has been held not to depend on any other condition or circumstance; and hence that it is not necessary that he should have notice of the fact that the employer is a subscriber. *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1. See to the same effect *White v. George A. Fuller Co.* 226 Mass. 1, 114 N. E. 829.

A notice of rejection of the compensation act printed on the pay envelope which reached the father of a minor employee has been held to be sufficient to satisfy the provision of the *New Jersey* act. *Brost v. Whitall-Tatum Co.* 89 N. J. L. 531, 99 Atl. 315, L.R.A.1917D 71. It has been held, however, that a notice electing not to come under the act by printing the same on a pay envelope was not

sufficient to relieve an employer of a minor in the absence of proof that it came to the notice of the parent or guardian. *Troth v. Millville Bottle Works*, 89 N. J. L. 219, Ann. Cas. 1917C 1031, 98 Atl. 435, *affirming* 86 N. J. L. 558, 91 Atl. 1031.

It has been held that a failure on the part of the employer to give notice to an employee with whom he is about to enter into a contract of hire that he has provided for compensation by becoming a subscriber to the act, and to file a copy of the notice with the industrial board, does not carry with it any penalty either to him or the employee. *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1.

Claim for Compensation.

Where a claimant is refused compensation under a workmen's compensation act because he is not a dependent of the deceased workman he is not thereby barred from suing the employer at common law. *M'Donald v. Dunlop*, Sc. Ct. Sess. 7 F. 533, wherein Lord Adam in his judgment said: "It is quite true that if the option is exercised by a person bringing an action of damages, and the person exercising that option fails in that action, then a claim under the workmen's compensation act must be disposed of by the court at the same time; and for this reason, as it appears to me, that the whole facts of the case are before the court upon which the judge can award compensation; but that is not so in the converse case, and therefore there is no similar provision in the act for dealing with that case. But I see nothing that is to prevent a claim for damages being made." In *Beckley v. Scott* [1902] 2 Ir. R. 504, a like holding was made where a workman proceeded to have compensation assessed under the act and was defeated by reason of a ruling that his case did not come within the provisions of the act.

It has been held that where a claim is made under the act but is withdrawn before there has been any decision on it, the claimant does not lose his right of action, since there has been no real exercise of the option. The purpose of the act is to prevent the master from being liable to pay twice so that when a claim is made which cannot be enforced because the case does not come within the act, the right of the workman to make any other claim is not lost. *Rouse v. Dixon* [1904] 2 K. B. (Eng.) 628, 53 W. R. 237, 73 L. J. K. B. 662, 20 Times L. Rep. 553, 68 J. P. 407, 91 L. T. N. S. 436.

The presentation of a claim after beginning a suit at common law is not an election to take under the act and does not preclude the prosecution of the suit. *Riche v. Garrett* (Tex.) 194 S. W. 667.

Under a provision in the *Ohio* act that "every employee, who makes application for

an award from the state liability board of awards, waives his right to exercise his option to institute proceedings in any court," it has been held that where an employee of an employer who has made payment into the state insurance fund, makes an application for payment out of such fund and this is done on a blank sent to him for that purpose which blank contains the words "First notice of injury and preliminary application," the employee in so acting chooses to accept compensation under the act and cannot thereafter maintain an action against his employer for compensation on account of the same injury. *Zileh v. Bomgardner*, 91 Ohio St. 205, 110 N. E. 459, *affirming* *Bomgardner v. Zileh*, 35 Ohio Cir. Ct. Rep. 292.

Acceptance of Compensation.

The acceptance by an injured workman of compensation offered by the employer under a workmen's compensation act will ordinarily be construed as an election to take under the act.

Thus in *Ryan v. MacLellan*, Sc. Ct. Sess. 2 F. 387, 37 Scott L. Rep. 287, 7 Scott L. T. 313, it appeared that an injured workman received from his employers weekly payments for a period of six months and signed receipts for the payments some of which bore the words "in full satisfaction of amount due to me as compensation under the Workmen's Compensation Act, 1897." The others were on account of "compensation." These receipts were held to import an election to take under the provisions of the act, precluding an action at law for damages. So in *Mehaffey v. Collen*, 36 Ir. L. T. 216, wherein it appeared that an employee gave notice of his injury to his employers and received half wages for which he signed receipts, it was held that he could not subsequently bring an action independently of the act.

In *Mackay v. Rosie* [1908] Sc. Ct. Sess. 174, 45 Scott L. Rep. 178, 1 B. W. C. C. 52, it appeared that at the end of the week in which a workman was injured he was paid a sum in lieu of wages, and was told that for the next two weeks he would get nothing, but that after that he would be paid half wages. Subsequently, for a period of six months he received each week a sum amounting to slightly more than half his average weekly wage. No receipts were taken for these payments. It was held that he had elected to accept compensation under the act and was barred from maintaining an action for his injuries independently of the act.

An acceptance of compensation under a workmen's compensation act, and the execution of a release after the injury, has been held to be a bar to any action under the federal employer's liability act unless it was

shown that the release was not fairly entered into by the parties. *Mitchell v. Louisville, etc. R. Co.* 194 Ill. App. 77.

So it has been held that if an injured seaman subjects himself to the state tribunals and claims and receives the amount awarded under a workmen's compensation act, or if by agreement fairly entered into the amount to be paid under the act is fixed and the seaman accepts it with full knowledge of the extent of his injuries, he cannot later be permitted to maintain an action for the same injuries. *Riegel v. Higgins*, 241 Fed. 718, wherein it was, however, held that a seaman who was paid and who accepted the proper amount under the California act for the few weeks for which he was able to produce a physician's disability certificate, but who was paid nothing for the temporary partial disability following the period for which he was paid, did not by such acceptance make an election to take compensation under the act so as to preclude him from bringing an action for damages in admiralty.

But in *Grand Trunk R. Co. v. Knapp*, 233 Fed. 950, 147 C. C. A. 624, it was held that where a railroad company which was engaged in both intrastate and interstate commerce filed an election to come under the Michigan workmen's compensation act, in a case where the federal employer's liability act applied as an exclusive remedy, the fact that the employer paid the employee's hospital and doctor's bills during the first three weeks after the injury as required by the Michigan act, did not establish the employee's acceptance of the act, there having been no assent on his part that such payment was in compliance with the act. See also *Waters v. Guile*, 235 Fed. 552, 148 C. C. A. 298.

In *Oliver v. Nautilus Steam Shipping Co.* [1903] 2 K. B. (Eng.) 639, 5 W. C. C. 65, it appeared that an employee signed a receipt for the first four weeks' payment "on account of compensation which may be or become due to me under the Workmen's Compensation Act, 1897, in respect of the accident which occurred to me on," etc. The employee was warned by a delegate of his trade union not to accept any future payments without a stipulation that he did so "without prejudice," to which condition the agent of the insurance company who tendered the next payment consented. The condition was not embodied in the receipt. Under the circumstances it was held that the employee had not exercised his option to accept compensation under the act. The court said: "My own view is that, by quietly accepting the reservation or qualification, 'without prejudice,' which he entered in his book and communicated to his principals, the insurance company, without having made any protest or objection to it to the plaintiff, the

agent in fact agreed that the qualification was to override the whole of the receipts. Once you arrive at that conclusion, it seems to me there is an end of the defense set up by the third person here. It may be perfectly true to say that where there is a receipt which, without any qualification, acknowledges the payment of money under the workmen's compensation act, there has been a claim or a proceeding within the meaning of s. 6; but, in my judgment, that cannot properly be so where the receipt for the payment in question is not an unqualified receipt of the money, but a receipt given by a sick man who, at the moment of giving it, expressly states that it is given subject to the qualification of 'without prejudice.'"

In *Puget Sound Traction, etc. Co. v. Schleif*, 220 Fed. 48, 135 C. C. A. 616, two vouchers for a monthly indemnity received by the employee but which he did not execute and on which he received no payment were held not to show that he had made an election to take compensation under the workmen's compensation act.

Where it appeared that a workman who signed receipts, purporting to be payments for compensation, did not know the workmen's compensation act by name or of his rights apart from the act, being imperfectly acquainted with the English language, and the receipts were not read over or explained to him, it was held that there was no evidence to show that the workman had elected to take compensation under the act and hence that he was not barred from maintaining an action at common law. *Valenti v. Dixon* [1907] Sc. Ct. Sess. (Eng.) 695. A like holding has been made where a workman at the time he signed the receipts did not know the difference between his rights at common law and his rights under the act. *Fowler v. Hughes*, Sc. Ct. Sess. 5 F. (Eng.) 394, 40 Scot. L. Rep. 321, 10 Scot. L. T. 583. And where the payments were made under a reservation of any claim the employee might have against the defendant, and on the understanding that should he succeed in obtaining damages he should repay the compensation so received, it was held that the employee was not barred from recovering in an action for the injuries sustained. *Kelly v. North British Co.* [1915] W. C. & Ins. Rep. (Eng.) 516, [1915] 2 Scot. L. T. 247.

In *Huckle v. London County, 4 B. W. C. C.* (Eng.) 113, *affirming* 3 B. W. C. C. 536, 26 Times L. Rep. 580, it appeared that an injured workman received several weekly payments from his employers giving them receipts therefor. He subsequently repaid to the employers the amount he received from them and sued the defendant for damages, and at the trial he stated that he did not understand the nature and the terms of the receipts he had signed. The case was dis-

missed by the county court, holding that the action was barred, because as a matter of law the employee has recovered compensation under the act. On appeal, however, it was held that it was a question for the jury whether the plaintiff understood the nature and effect of the receipts he had signed.

In *Blain v. Greenock Foundry Co.* Sc. Ct. Sess. 5 F. 893, 40 Scot. L. Rep. 639, 11 Scot. L. T. 92, it was held that an award of compensation under the act to certain relatives of a deceased workman did not render an action at law incompetent at the instance of relatives who had no title to claim compensation under the act, so that a son who was only partially dependent on his father was not by reason of his unsuccessful claim to compensation barred from bringing an action for damages independently of the act against the employers.

Commencement of Action.

A suit at common law by an employee against his employer for personal injuries received in the course of his employment has been held to be an election on the part of the plaintiff not to be bound by the provisions of the workmen's compensation act. *Riche v. Garrett* (Tex.) 194 S. W. 667.

Under the *California* statute which makes it optional to the employee either to claim compensation under the act or to maintain an action at law for damages in cases where the injury is caused by the gross negligence or wilful neglect of the employer, the commencement of an action in the superior court has been held not to be a final election of the employee's remedy where the court sustained a demurrer to the allegations of the complaint. *San Francisco Stevedoring Co. v. Pillsbury*, 170 Cal. 321, 149 Pac. 586.

The English Act of 1897 gave an option to a workman either to proceed under the act or to take such proceedings as were open to him before the act was passed and further provided that "where an action has been brought to recover damages for personal injuries no compensation can be awarded under the act in respect of the same injuries except in the single case where, upon failing in an action, the plaintiff may then and there apply to the judge who has tried the action to assess compensation under the act." Like provision is made in some Canadian acts. It has been held under these provisions that where a workman has chosen to bring an action and the action has failed, he cannot obtain compensation under the act, except under the express proviso quoted, and the judge in awarding compensation thereunder may deduct from it all the costs which have been caused by the bringing of the action. *Edwards v. Godfrey* [1899] 2 Q. B. (Eng.) 333, 68 L. J. Q. B. 666, 80 L. T. N. S. 672, 15

Times L. Rep. 365, 47 W. R. 551. See to the same effect *Cattermole v. Atlantic Transport Co.* [1902] 1 K. B. (Eng.) 204, 50 W. R. 129, 85 L. T. N. S. 513, 18 *Times L. Rep.* 102, 71 L. J. K. B. 173, 66 J. P. 4; *Greenwood v. Greenwood*, 97 L. T. N. S. (Eng.) 771, 24 *Times L. Rep.* 24, 1 B. W. C. C. 247; *Henderson v. Glasgow Corp.* Sc. Ct. Sess. 2 F. 1127, 37 Scot. L. Rep. 857, 8 Scot. L. T. 118; *Quinn v. Brown*, Sc. Ct. Sess. 8 F. 855. But no costs should be allowed for subsequent proceedings in the action. *M'Kenna v. United Collieries*, Sc. Ct. Sess. 8 F. 960. See to the same effect *Skeggs v. Keen*, 1 W. C. C. (Eng.) 35; *Cohen v. Seabrook*, 25 *Times L. Rep.* (Eng.) 176; *Ferguson v. Brick*, 7 *Alberta L. Rep.* 337. An application to the court cannot be made where the claimant gives notice of the claim but takes no further proceeding under the act and thirteen months after the accident brings an action for damages which is decided against him. *Cribb v. Kynoch* [1908] 2 K. B. (Eng.) 551, 77 L. J. K. B. 1001, 99 L. T. N. S. 216, 24 *Times L. Rep.* 736, 52 Sol. J. 581.

It has been held that where a plaintiff succeeded at the trial but failed on an appeal, the appellate court could not assess the compensation or make any order directing an assessment, but the court intimated that no good reason appeared why an application might not be made to the trial court. *McCormick v. Kelliher Lumber Co.* 17 *British Columbia* 422.

If judgment is given against the plaintiff dismissing his action, and the plaintiff appeals and obtains a new trial, the action is not dismissed within the meaning of the act and the judge before whom the action is tried has no jurisdiction to proceed to assess compensation. So if the plaintiff whose action is dismissed applies to the judge to assess compensation, and the judge entertains the claim and makes an award in favor of the employer, and the plaintiff takes an appeal against such award, on obtaining an order for a new trial he is not debarred from proceeding with his action either by his application to the judge to assess compensation or by his appeal to the court of appeal, although the appeal has been stayed at his request and is pending at the time of his application for a new trial. *Isaacson v. New Grand* [1903] 1 K. B. (Eng.) 539, 72 L. J. K. B. 227, 88 L. T. N. S. 201, 19 *Times L. Rep.* 150. Following the decision in the foregoing case it has been held that in a case where an action existed at common law and the trial judge merely decided that the employee was entitled to compensation without fixing the same, there was no election by the plaintiff to accept compensation under the act. *Klukas v. Thompson*, 31 *West. L. Rep.* (Alberta) 438, 8 *West W. Rep.* 778, 24 *Dominion L. Rep.* 67.

In *Berge v. Mackenzie*, 24 Dominion L. Rep. (Canada) 575, it was held that where an employee exercised his option to proceed independently of the act and a recovery by the plaintiff was reversed on appeal with a direction to fix the compensation payable to the plaintiff under the act, if the plaintiff's action was not commenced within the statutory period his right to compensation was barred. See to the same effect *Durkin v. Distillers Co.* [1914] W. C. & Ins. Rep. (Eng.) 128. And where the application is made after the dismissal of an action, and the judge accordingly awards such compensation, the plaintiff is estopped by the election to take such compensation and the award thereupon made, from proceeding further with the action, and hence a subsequent application by him for judgment or a new trial in the action will not be entertained. *Neale v. Electric, etc. Accessories Co.* [1906] 2 K. B. (Eng.) 558, 75 L. J. K. B. 974, 95 L. T. N. S. 592, 22 Times L. Rep. 732.

It has been held that where the application for the assessment is made as soon as it is practically possible under the circumstances, there is a substantial compliance with the provision that it shall be made immediately. *Western Trust Co. v. Regina*, 9 Sask. L. Rep. 336, 30 Dominion L. Rep. 548. Where an action for damages was dismissed on February 5 and an application was made to assess damages on February 10, it was held that the application was not made in time as required by the act. *McGowan v. Smith* [1907] Sc. Ct. Sess. 548, following *Stewart v. Higginbotham*, Sc. Ct. Sess. 3 F. 673, 38 Scot. L. Rep. 479, wherein an application for compensation after the action had failed, was refused, the action having been dismissed on November 29, 1900, and the application for assessment having been made on February 14, 1901.

Where the plaintiff fails in his common-law action the court has power in its discretion to deal with the costs of the action or of the proceedings under the act. *Wilson v. Kelly*, 14 British Columbia 436.

Where the plaintiff in an action for damages alleged that the accident happened in the course of his employment and through the inexcusable fault of the defendant, praying that the latter should be ordered to pay him an annual rent under the act of Canada or in default of its applicability to pay him the sum of \$10,000, it was held that he must on a dilatory motion choose between the two rights of action set forth in the complaint. *Lesage v. Henderson*, 15 Quebec Pr. 328. But it was held in *Wentzell v. New Brunswick, etc. R. Co.* 43 N. Bruns. 475, that an action for the death of the plaintiff's relative could proceed under both the compensation act and under *Lord Campbell's* act, and the damages could be assessed under either act as the evidence might warrant. The court said: "Referring

to the claim that the plaintiff should elect whether she would proceed under chapter 79 of the Consolidated Statutes, 1903, or under the workmen's compensation act, in my opinion the action can be brought under both acts, and the damages assessed under either act as the evidence may warrant. The practical difference between the two acts is that under chapter 79 of the Consolidated Statutes, 1903, the defendant company would not be liable if the accident was caused through the negligence of a fellow servant. Under the workmen's compensation act the defendant company would be liable although the accident was caused by the negligence of a fellow servant, and there is some difference in the assessment of damages, but that does not arise in the present case." See to the same effect *Paskroan v. Toronto Power Co.* 25 Ont. W. Rep. 779.

Agreement or Private Scheme for Compensation.

In *Lemieux's Case*, 223 Mass. 346, 111 N. E. 782, it was held that an agreement between an insurer and an employee for specific additional compensation for twenty-five weeks for the loss of three fingers of the right hand which agreement did not state that it was intended to cover all claims for additional compensation under the act, did not bar an award by the board of specific compensation for an injury to the hand rendering it permanently incapable of use.

Where an injured workman agreed with his employer to accept the full compensation due him under the act as long as he was totally disabled by the accident and further agreed to submit to the medical referee of the district in case a dispute arose as to his fitness for employment, his rights to compensation to cease if he refused to assist in the application for such examination by the medical referee, it was held that the penal clause at the end of the contract was a contracting out of the act contrary to its provisions and was invalid. *British, etc. Steam Nav. Co. v. Neil*, 3 B. W. C. C. (Eng.) 413.

It has been held that an agreement for compensation on the understanding that if the employee's hand got worse so that its usefulness was lost, the accident board would see that he received additional compensation, was properly set aside by the board since the act did not contemplate a settlement on a contingency or a condition that might render it inoperative. *Carpenter v. Detroit Forging Co.* 191 Mich. 45, 157 N. W. 374.

A refusal to accept an offer of his employer to pay under the compensation act at the rate of one-half of the average earnings until an employee was able to return to work has been held not to be a bar to a proceeding under the

act if at the time the offer was made there was a dispute between the parties as to whether the disability of the employee was permanent or only temporary, under an express provision in the act that the employee's right to compensation might in default of agreement or arbitration be enforced by an action in any court of competent jurisdiction. *Sillix v. Armour*, 99 Kan. 103, 160 Pac. 1021, *rehearing* 99 Kan. 426, 162 Pac. 278.

An agreement for compensation between the parties may be reviewed by the board and the compensation ended, diminished or decreased according to the law and the facts. On this review the essentials leading up to the award are *res judicata*, except the physical condition of the injured employee. *Winn v. Adjustable Table Co.* 193 Mich. 127, 159 N. W. 372, 163 N. W. 906.

In the *English* act it is provided that an employee may contract with his employer to be bound by and accept compensation under a private scheme of compensation if such scheme has been properly certified by the registrar of friendly societies, and when so certified the scheme is substituted for the act and the employer is to be liable only in accordance with the scheme. Under that provision it has been held that a workman who has joined a scheme duly certified by the registrar, has exercised his option given to him by the workman's compensation act and his personal representatives cannot bring an action under the Employer's Liability Act of 1880. *Taylor v. Hamstead Colliery Co.* [1904] 1 K. B. 838, 73 L. J. K. B. 469, 68 J. P. 300, 52 W. R. 417, 90 L. T. N. S. 363, 20 Times L. Rep. 338. See to the same effect *Horn v. Lords Com'rs of Admiralty* [1911] 1 K. B. 24, 4 B. W. C. C. 1; *Godwin v. Lords Com'rs of Admiralty* [1913] A. C. 638, 6 B. W. C. C. 788, *dismissing appeal* [1912] 2 K. B. 26, 5 B. W. C. C. 229; *Howaith v. Knowles* [1913] 3 K. B. 675.

Where the scheme provides that the decision of the committee shall be final and conclusive, the widow of a workman who was a party to the scheme is bound by the decision of the committee, and having failed to obtain an allowance of her claim by the committee she may not bring an action to recover damages for the death of her husband. *Allen v. Great Eastern R. Co.* [1914] 2 K. B. 243.

The provisions of the scheme are to be read with those of the act and construed together. Thus, a workman who is a member of the scheme is entitled to compensation when he contracts an industrial disease, as the word "accident" which includes such disease under the act also includes such disease under the scheme. *Leaf v. Furze* [1914] 3 K. B. 1068.

It has been held that a scheme of compensation properly certified under the Act of 1897 must be recertified under the Act of 1906

or it cannot be applied to an accident happening after the taking effect of the latter act, although within the six months at the end of which the scheme is declared to be revoked by the latter act. *Moss v. Great Eastern R. Co.* [1909] 2 K. B. 274, 2 B. W. C. C. 168. See to the same effect *Wallace v. Hawthorne*, 1 B. W. C. C. 249.

In *Wilson v. Ocean Coal Co.* 7 W. C. C. 34, 21 Times L. Rep. 631, it appeared that a workman was a member of a scheme of compensation which had expired. When a renewal scheme was certified the employer posted notices that his workmen might enroll under the scheme. The employee did not enroll under the new scheme. The employer deducted a certain amount from the employee's wages as his contribution under the renewal scheme on the ground that this scheme was binding on the employee unless he gave notice that he would not come under it. It was held, however, that the original scheme having expired the workman was not bound by the renewal scheme unless he agreed to accept it.

Such a scheme is not bad because it purports to oust the jurisdiction of the arbitrator under the act; and on a recertification under the new act it is not necessary that a ballot of the workmen shall be taken before the registrar can certify it. *Godwin v. Lords Com'rs of Admiralty* [1913] A. C. 638, 6 B. W. C. C. 788, *affirming* decision of [1912] 2 K. B. 26, 5 B. W. C. C. 229.

A contract to accept a scheme need not be in writing, since it is a question of fact in each case for the judge to decide whether a workman has so contracted. *Berry v. Canteen, etc. Co-operative Soc.* 3 B. W. C. C. 449.

Effect of Election.

ON REMEDIES OF EMPLOYEE.

It is uniformly provided by the elective workmen's compensation acts that with respect to employees coming within their terms the compensation thereby allowed shall be exclusive of all other remedies against the employer.

Thus the *Wisconsin* act provides compensation in lieu of any other liability of the employer for any personal injury sustained by his employee where the latter is performing services growing out of his employment, and where the injury is proximately caused by the accident and is not intentionally self-inflicted. Under that provision it has been held that where the right to compensation under the act exists, it is the exclusive remedy against the employer. *Milwaukee v. Althoff*, 156 Wis. 68, 145 N. W. 238, L.R.A.1916A 327; *Smale v. Wrought Washer Mfg. Co.* 169 Wis. 331, 151 N. W. 803; *Vennen v. New Dells*

Lumber Co. reported ante, this volume, at page 293.

Where an employee takes advantage of the benefits of the act and accepts compensation, he cannot subsequently in an action for the injuries sustained claim that he is ignorant of the act, the act having been in force nearly sixty days before the accident. *Barry v. Bay State St. R. Co.* 222 Mass. 366, 110 N. E. 1031.

An injured workman who, with the advice of counsel and knowing fully that the employer has taken no insurance under the act, files a claim for compensation, cannot subsequently withdraw the claim for the purpose of suing at law for his injuries. *Pavia v. Petroleum Iron Works Co.* 164 N. Y. S. 790, wherein the court said: "With full knowledge of the situation, therefore, before an award was made, and with competent counsel to guide and advise him, the claimant permitted an award to be made in his favor, and thereby most effectually confirmed his election to accept such remedy as was afforded him by the Workmen's Compensation Law. There is no pretense that he did not fully understand his rights before the award was made. A party cannot experiment with the commission for the purpose of ascertaining how much compensation may be awarded him, and then, if dissatisfied, repudiate the award and seek the other remedy permitted by the statute. His election once made, intelligently and with knowledge of the facts, should be conclusive."

In an action for an injury to an employee where the evidence is conclusive that the case is within the workmen's compensation act the court may properly so charge the jury. *Wheeler v. Contoocook Mills Corp.* 77 N. H. 551, 94 Atl. 265. And when an employee has once accepted the provisions of the act he is bound by its terms unless he can bring himself within the provisions that except him from the operation of the act. *Burnes v. Swift*, 186 Ill. App. 460. See to the same effect *Jenkins v. Carman Mfg. Co.* 79 Ore. 448, 155 Pac. 703.

The *English Act* of 1906 provides as follows: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this act. (2.) Provided that . . . (b) When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this act or take proceedings independently of this act; but

the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this act, and shall not be liable to any proceedings independently of this act, except in case of such personal negligence or wilful act as aforesaid." Under those provisions it has been held that where a workman has been injured by an accident under circumstances which would give him, or in case of his death his dependents, a claim for compensation under the act and also for negligence independently of the act, the workman or his dependents can pursue either remedy but not both remedies. The claimant has an option as to which he will choose, and having elected either alternative, he is bound by his election. *Codling v. Mowlem* [1914] 2 K. B. 61, 83 L. J. K. B. 445, 108 L. T. N. S. 1033, 29 Times L. Rep. 619, [1914] W. C. & Ins. Rep. 1, affirmed by court of appeals in [1914] 3 K. B. 1055, 111 L. T. N. S. 1086.

The "option" given by the foregoing act is not an option binding only in the case of success, and when a decision is given either way the workman must be considered as having made his election which is final and conclusive. *Cribb v. Kynock* [1908] 2 K. B. 551, 77 L. J. K. B. 1001, 99 L. T. N. S. 216, 24 Times L. Rep. 736, 52 Sol. J. 581.

It has been held under the act in *New York* which provides for the release of employers from liability on securing compensation through the state fund that an employee after receiving compensation from the employer under the act cannot sue for further compensation for pain and suffering or disfigurement. *Connors v. Semet-Solway Co.* 94 Misc. 405, 159 N. Y. S. 431, wherein the court said: "In view of these sections of the statute it seems to me that the legislature plainly intended to take advantage of the amendment to the constitution and to provide a remedy for the benefit of injured employees exclusive of all other rights and remedies. The wrong which it sought to obviate was the constant litigation between master and servant with the uncertainty of its results. The act was designed to allay class feeling, to protect the master against annoyance and unjust verdicts, to see that the employee injured by the hazards of the business, and those dependent upon him, should not, as so often happened, bear the whole loss. Both gave up something. The master was no longer free if the servant failed to prove that the accident happened because of his negligence or negligence attributable to him. The right of the servant, on the other hand, to recover was limited and defined. The whole object and purpose of the legislature would be overthrown if the servant might, after obtaining compensation from his master, as provided by the statute, then sue

in the courts for further compensation because of disfigurement or pain and suffering."

Contracts by which the parties undertake to deprive themselves in toto of the right to resort to the courts to settle controversies between them, in which are stipulated away all the rights of each or either to resort to the tribunals created by law, have been condemned. See 6 R. C. L. tit. *Contracts*, p. 752. But it does not follow that an acceptance of the workman's compensation act which is a contract to abide by the provisions of the act is objectionable. The acceptance of the statute operates, in a sense, to take from the courts so much of the controversy as is determined by the applying of the statute schedules, through the agency of the statute arbitrators. So where the act is accepted there is a contract which takes some powers from the court but is not an agreement to oust them of all jurisdiction. Hence, where the act is rejected by the parties the courts are in no sense ousted of jurisdiction as the full dispute between the parties is still submitted by ordinary proceedings and tried in the usual way, although some rules of procedure are changed. *Hunter v. Colfax Consol. Coal Co.* 175 Ia. 245, Ann. Cas. 1917E 803, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D 15.

It has been held that when both employer and employee have elected to operate and work under a workmen's compensation act, the act becomes a part of the contract of employment and can be enforced as between the parties as such and each party is bound to perform whatever is required by the contract. A failure on the part of either to do the things required of him by the statute constitutes a breach of contract. *Reese v. Bartlett*, 197 Ill. App. 272.

Where both employer and employee have accepted a workmen's compensation act, an employee who sustains injuries in the course of his employment may maintain an action for breach of contract and need not resort to an action of mandamus to compel the employer to name an arbitrator, if the employer after being requested to do so does not comply with the request. The plaintiff is entitled to the speedy relief afforded by an action of assumpsit if the employer refuses to submit the dispute to arbitrators as required. *Reese v. Bartlett*, 197 Ill. App. 272; *Rushing v. Bartlett*, 197 Ill. App. 278.

An express or implied acceptance of the provisions of a workmen's compensation act, as permitted by its provisions, makes the provisions a part of the contract of employment. The consideration on the part of the employer is to pay the compensation for an injury as provided by the act and that of the employee is to accept such compensation in full for all rights and claims arising out of

the injuries sustained in the course of his employment. *Kennerson v. Thames Towboat Co.* 89 Conn. 367, 94 Atl. 372, L.R.A.1916A 436.

It has also been held that a workmen's compensation act fixes the scope of the insurance so far as the rights of the employee are affected. If the employer becomes a subscriber the rights of the employee cannot be narrowed by a contract between the parties as the terms might be so narrow as not to bring the employer within the act. *Cox's Case*, 225 Mass. 220, 114 N. E. 281.

An attempt by the plaintiff to settle by agreement or arbitration is not necessary to maintain an action under a provision that "a workman's right to compensation under this act may, in default of agreement or arbitration, be determined and enforced by action in any court of competent jurisdiction." The words "in default of agreement or arbitration" mean practically the same as the words "in the absence or omission of an agreement or arbitration." *Halverhout v. Southwestern Milling Co.* 97 Kan. 484, 155 Pac. 916.

Under a provision in a workmen's compensation act that it shall be optional with the employee to settle for such compensation or to retain the right to sue the employer, it has been held that the theory on which the compensation law is to operate is that of contract and the employee's personal consent. So that where a workman has not elected to settle for the compensation provided by the act, his personal representative cannot maintain an action under the act, but is relegated to an action for damages sustained by his estate by reason of his death. *Behringer v. Inspiration Consol. Copper Co.* 17 Ariz. 232, 149 Pac. 1065, wherein the court said: "The remedy under the constitutional provision for compensation is restricted, as we see it, to the workman, and the legislative power under the mandate is limited to legislation for its efficient enforcement by him, or his personal representative, in case he dies after electing to accept compensation. Unless there was an election of this remedy in his lifetime by the deceased, the personal representative cannot maintain the action for compensation: it being a condition of the right to maintain such a suit against the employer that the employee should himself elect that remedy. The employer is entitled to insist, after an election by the employee, upon settlement for compensation, but, when the workman dies without making such election, his rights thereunder die with him. His personal representative is then relegated to an action for damages sustained by his estate by reason of his death under the so-called Lord Campbell's Act (title 23, supra), or an action under the Employers' Liability Act (chapter 6, tit. 14. Civil Code), according as his facts fall within the one or the other."

A provision in the *Oklahoma* act for compensation to employees for injuries received in the course of employment and abrogating the right of action for personal injuries not resulting in death arising and occurring in "hazardous" employments as defined by the act has been held not to cover wilful injuries caused by the employer, but leaves the injured employee to his remedy as it existed when the act was passed. *Adams v. Iten Biscuit Co.* (Okla.) 162 Pac. 938, wherein the court said: "A wilful or intentional injury, whether inflicted by the employer or employee, could not be considered as accidental, and therefore is not covered by the act. If it were merely intended to cover accidental injuries for which the employee had no right of action, no reason is perceived why the legislature would abolish the defenses of contributory negligence, negligence of a fellow servant, or assumption of risk, or why it should abrogate the employee's right of action for damages for injuries not resulting in death occurring in said hazardous occupation. The compensation afforded by the act and the procedure by which the same is determined was intended to be exclusive as to all of the injuries therein embraced, and the right of action theretofore possessed by the injured employee was abolished, leaving to him such right of action in the courts for wilful injuries as he may have had prior to its passage, and the act, as thus construed, does not deprive plaintiff of the equal protection of the laws."

Under a provision in a workmen's compensation act to the effect that the failure to secure the payment of compensation shall authorize the injured employee or his dependents to maintain an action for damages as prescribed by another section of the act, which provides that an injured employee or his legal representatives, in case death results from the injury, may at his option elect to claim compensation or maintain an action in the courts for damages, it has been held that by "legal representatives" is meant the dependents and not the executor or administrator since the legal representatives could have no interest in the award except to represent the estate and among other things to pay debts to creditors; but the object of the act is to provide a speedy mode of relief for the workman and his dependents. *Dearborn v. Peugeot Auto Import Co.* 170 App. Div. 93, 155 N. Y. S. 789.

Where a workmen's compensation act provides that every contract of hiring shall be presumed to have been made under the act and shall be governed thereby unless otherwise provided in the contract, or a notice to that effect shall have been given by one party to the other, and further that the provision for compensation thereunder shall not apply to alien dependents not residents of the United

States, it has been held that on the death of an employee where nothing has been done to prevent the application of the statute, the administrator cannot maintain an action against the employer under any other law and where the dependents are nonresident aliens they cannot recover under the act, that right being purely statutory. *DeBiasi v. Normandy Water Co.* 228 Fed. 234 (construing New Jersey act).

Where a workman at the time of his death was engaged in a class of work to which the act applied and which provided for compensation to a widow or certain next of kin, it was held that brothers and sisters of the deceased who were not entitled to compensation under the act had no right of action under the code for the death of their brother. *Shanahan v. Monarch Engineering Co.* 219 N. Y. 469, 114 N. E. 795, reversing order 172 App. Div. 221, 159 N. Y. S. 257. Following the decision in the foregoing case it was held in *Maloney v. Levy, etc. Co.* 176 App. Div. 470, 163 N. Y. S. 505, that if the injury causing the employee's death and the employment in which the servant was engaged were covered by the act the surviving widow had no right of action or other remedy, but must resort to compensation under the act.

However, it has been held that where the statute provides for compensation to certain relatives and total dependents but makes no provision for partial dependents, one who does not come within that provision but who was entitled to compensation before the act was passed is not barred from recovering at common law. *Lamontagne v. Quebec R. etc. Co.* 50 Can. Sup. Ct. 423.

ON LIABILITY OF EMPLOYER.

In General.

As an inducement to employers to accept the provisions of a workmen's compensation act it is usually provided that those who refuse to accept it cannot interpose the common-law defenses of contributory negligence, assumption of risk and the negligence of a fellow servant in actions for personal injuries.

California.—*Williams v. Southern Pac. Co.* 173 Cal. 525, 160 Pac. 660.

Indiana.—*Hagenback v. Leppert*, 117 N. E. 531.

Massachusetts.—*Dooley v. Sullivan*, 218 Mass. 597, 106 N. E. 604; *Pope v. Heywood Bros. etc. Co.* 221 Mass. 143, 108 N. E. 1058; *Henshaw v. Boston, etc. R. Co.* 222 Mass. 459, 111 N. E. 172; *Bernabeo v. Kaulback*, 226 Mass. 128, 115 N. E. 279. *Compare Ashton v. Boston, etc. R. Co.* 222 Mass. 65, 109 N. E. 820, L.R.A.1916B 1281; *Walsh v. Turner Centre Dairying Assoc.* 223 Mass. 386, 111 N. E. 889.

New Hampshire.—Boody v. K. & C. Mfg. Co. 77 N. H. 208, Ann. Cas. 1914D 1280, 90 Atl. 859, L.R.A.1916A 10; Lezotte v. Nashua Mfg. Co. 100 Atl. 757.

New York.—Grifford v. Patterson, 179 App. Div. 420, 165 N. Y. S. 1043; Lester v. Otis Elevator Co. 90 Misc. 649, 153 N. Y. S. 1058, affirmed in 169 App. Div. 613, 155 N. Y. S. 524. See also Jensen v. Southern Pac. Co. 215 N. Y. 514, Ann. Cas. 1916B 276, 109 N. E. 600, L.R.A.1916A 403.

Ohio.—Gerthung v. Stambaugh-Thompson Co. 34 Ohio Cir. Ct. Rep. 385.

Texas.—Memphis Cotton Oil Co. v. Tolbert, 171 S. W. 309.

Washington.—Peet v. Mills, 76 Wash. 437, Ann. Cas. 1915D 154, 136 Pac. 685, L.R.A. 1916A 358.

West Virginia.—De Francesco v. Piney Min. Co. 76 W. Va. 756, 86 S. E. 777; Daniels v. Charles Boldt Co. 78 W. Va. 124, 88 S. E. 613; Watts v. Ohio Val. Electric R. Co. 78 W. Va. 144, 88 S. E. 659; Adkins v. Hope Engineering, etc. Co. 94 S. E. 506.

Wisconsin.—Cavanaugh v. Morton Salt Co. 152 Wis. 375, 140 N. W. 53.

The court in *Hagenback v. Leppert* (Ind.) 117 N. E. 531, said: "The language of the foregoing sections is clear and definite. The acceptance of the act is not compulsory, but voluntary. There is nothing in the record to indicate or even suggest that either party gave notice of exemption as provided in section 3; and it is therefore conclusively presumed that they accepted the provisions of the act. Having elected to accept the act, every provision thereof became a part of the contract of service. By the terms of the statute the element of tort is eliminated; all remedies at common law or otherwise are excluded, and the employee's right to compensation arises out of the contract. This right, being contractual, accompanies the employee wherever he goes and abides with him until the contract of service is terminated."

The *West Virginia* statute provides that an employer subject thereto who does not elect to pay into the fund the premiums provided, or having so elected shall be in default of payment, is liable to his employees for the damages suffered by reason of personal injuries sustained in the course of their employment, and the employer is not permitted to avail himself of the common-law defenses. *De Francesco v. Piney Min. Co.* 76 W. Va. 756, 86 S. E. 777.

Particular Defenses.

The abolition of the doctrine of assumption of risk as to employers who do not elect to come under the compensation act does not impose liability without negligence on the part of the employer. It merely forbids the applica-

tion of a principle of waiver based on the servant's continuance in the service with knowledge of an act of negligence rendering his service dangerous. So, although the statute abolishes the common-law defense of assumption of risk, the servant assumes the risks incident to his employment other than those occasioned by the master's negligence. *Louis v. Smith-McCormick Constr. Co.* (W. Va.) 92 S. E. 249. See to the same effect *Spevak v. Independent Sash Co.* 173 Cal. 438, 160 Pac. 565; *Stornelli v. Duluth*, etc. R. Co. 193 Mich. 674, 160 N. W. 415; *Lindebauer v. Weiner*, 94 Misc. 612, 159 N. Y. S. 987. So it has been held that there must be some duty to perform before there can be negligence. A workmen's compensation act does not enlarge the duty of an employer who is not a subscriber or transform into negligence conduct which, apart from the statute, would impose no liability on him. *Mammott v. Worcester Consol. St. R. Co.* 228 Mass. 282, 117 N. E. 336.

A provision in a workmen's compensation act abrogating the common-law defenses of contributory negligence and the fellow-servant rule does not enlarge the basis of recovery on the grounds of negligence beyond that which existed at common law and the employer is required to exercise only ordinary care under all the circumstances of the case. *Gerthung v. Stambaugh-Thompson Co.* 34 Ohio Cir. Ct. Rep. 385.

In *Iowa* an employer who rejects the workmen's compensation act is presumed to be guilty of negligence in case of an injury to an employee in the course of employment; and the burden of proof to overcome the presumption is on the employer. *Mitchell v. Phillips Min. Co.* (Ia.) 165 N. W. 108, wherein the court said: "The legislature, in passing the Iowa law, did not make it compulsory, but rather an elective plan. Before the passage of the law, an injured workman had the burden of proving negligence. In many instances this was difficult or impossible. Ordinarily, the facts and conditions were within the knowledge of the employer, unless it was in the employee's working place. Under the act, the employer was given the right to elect whether he would reject the compensatory features of the law, and in that case he was deprived of the benefit of certain common-law defenses." See to the same effect *Mitchell v. Des Moines Coal Co.* (Ia.) 165 N. W. 113.

The *Wisconsin* act as enacted in 1911 abolished the defense of assumption of risk and also that of the negligence of a fellow servant causing the injury, but the defense of contributory negligence was left open to employers. The defense of contributory negligence was abolished by the legislature at the next session by an express enactment that it should not be a defense in an action within the scope of the statute "that the injury or death was

caused in whole or in part by the want of ordinary care of the injured employee where such want of ordinary care was not wilful." It has been held, however, that the amendment did not benefit an employee who brought his action under the original provision. *Besnys v. Herman Zohrlaut Leather Co.* 157 Wis. 203, 147 N. W. 37.

In *Watts v. Ohio Val. R. Co.* 78 W. Va. 144, 88 S. E. 659, it was held that if there was evidence that a fellow servant was negligent the employer was liable although there was no proof that he himself was negligent or that he omitted to perform any duty he owed the plaintiff and although there was proof of the plaintiff's negligence, since under the West Virginia act the defense of contributory negligence was abolished.

Assumption of risk has been abolished as a defense by the *Massachusetts* workmen's compensation act for such employers as are not subscribers and are not excepted from its operation. *Bernabeo v. Kaulback*, 226 Mass. 128, 115 N. E. 279. It has been held, however, that although an employer who is not a subscriber to the act cannot avail himself of any common-law defense, if the evidence shows that the employee assumed the risk attached to the employment, by virtue of his contract of hiring, the removal of such defenses under the act has no application. *Ashton v. Boston R. Co.* 222 Mass. 65, 109 N. E. 820, L.R.A.1916B 281. See also *Walsh v. Turner Centre Dairying Assoc.* 223 Mass. 386, 111 N. E. 889. It has also been held that a voluntary assumption of risk as distinguished from a contractual assumption of risk was a matter of defense where the master was negligent in respect to some matter outside of the risk assumed under the servant's contract of hiring; that in such a case the conduct of the servant in assuming the risk was a voluntary assumption and he could not recover for the injuries received. *Ashton v. Boston, etc. R. Co.* 222 Mass. 65, 109 N. E. 820, L.R.A.1916B 281. In an action for the death of a freight conductor it has been held that the defense of a contractual assumption of risk could not be relied on if the contract of hire did not refer to the particular defects in the employer's works or machinery, where the employer was not a subscriber to the act which makes the defense of contributory negligence unavailable to employers who do not subscribe. *Boston, etc. R. Co. v. Baker*, 236 Fed. 896, 150 C. C. A. 158 (construing *Massachusetts Act*.)

Under a provision in the *Michigan* act that an employer electing not to be governed by it cannot defend on the ground of assumption of risk arising from the failure of the employer to provide and maintain safe premises and suitable appliances, an employer cannot defeat an action for the wrongful death of the employee on the ground that the employee,

who was injured by the defendant's mule, knew that the mule which kicked him was vicious. *Robbins v. Magoon, etc. Co.* 193 Mich. 200, 159 N. W. 323, wherein the court said: "But to hold that conduct which is not negligent because the employee assumes or consents, impliedly or actually, to share a risk, is not negligent in view of the statute is to allow a defense which the statute refuses. The employer may not now safely invite the employee to share with him 'the risks . . . arising from the failure of the employer to provide and maintain safe premises and suitable appliances.' It is said the cause of death is purely conjectural. There was, however, testimony supporting the conclusion that the cause of death was that alleged, namely, a kick by a vicious mule."

Rule in Illinois.

In Illinois no penalty for a failure to accept the workmen's compensation act is imposed on employers other than those engaged in an extrahazardous business. An employer so engaged who elects not to accept the act may not in an action for personal injuries avail himself of the defenses of contributory negligence or assumption of risk or of the fellow-servant doctrine, except that these may be shown to reduce the damages. *Devine v. Delano*, 272 Ill. 166, 111 N. E. 742; *Bell v. Toluca Coal Co.* 272 Ill. 576, 112 N. E. 311; *Von Boeckmann v. Corn Products Refining Co.* 274 Ill. 605, 113 N. E. 902; *Price v. Clover Leaf Coal Min. Co.* 188 Ill. App. 27; *Favro v. Superior Coal Co.* 188 Ill. App. 203; *French v. Cloverleaf Coal Min. Co.* 190 Ill. App. 400; *Synkus v. Big Muddy Coal, etc. Co.* 190 Ill. App. 602; *Erickson v. American Well Works*, 196 Ill. App. 346; *Kleet v. Southern Illinois Coal, etc. Co.* 197 Ill. App. 243; *Bednar v. Mt. Olive, etc. Coal Co.* 197 Ill. App. 251. And see the reported case.

It has been held that an employer who has elected to reject the provisions of the act is deprived of his common-law defenses although the employee has not elected to come under the act. *Synkus v. Big Muddy Coal, etc. Co.* 190 Ill. App. 602. An employer who is engaged in an extrahazardous occupation and who has made no election to come under the workmen's compensation act cannot be subjected to the forfeiture of defenses imposed by the act as to an employee injured in an occupation not deemed extrahazardous under the act simply because such employer is also engaged in an extrahazardous employment in which the employee is not engaged. *Marshall v. Pekin*, 276 Ill. 187, 114 N. E. 497.

An agreement between employer and employee that the latter shall assume all risk attached to an employment of an extrahazardous nature relieving the employer from liability, has been held to be against public

policy. *Chicago Rys. Co. v. Industrial Board*, 276 Ill. 112, 114 N. E. 534, wherein the court said: "The workmen's compensation act is the declared public policy of the state upon the subject embraced in the statute, and provides a method by which employers may exempt themselves from providing and paying compensation under the act to employees for accidental injuries sustained and arising out of and in the course of the employment. It is contrary to the policy of the act to allow an employer, while choosing to come under the provisions of the statute by not filing an election in writing to the contrary, to relieve itself from liability under the act by private agreement or contract with the employee."

One of the hazardous occupations brought under the Illinois act in the absence of an election is "carriage by land or water and loading and unloading in connection therewith." It has been held that street railways are included in that provision and the words "loading and unloading" in common use and understanding apply as well to passengers as to freight and to street railways as well as to steam railways; so that persons engaged in such employment are within the provisions of the act. *Chicago Rys. Co. v. Industrial Board*, 276 Ill. 112, 114 N. E. 534.

The provision in the statute making the "business or enterprise of carriage by land" a hazardous employment has been held to include an employer engaged in hauling crushed stone for paving, which is to be done by another, since hauling is not a mere incident to the business but is the enterprise itself in which the employer is engaged. *Parker-Washington Co. v. Industrial Board*, 274 Ill. 498, 113 N. E. 976.

ADLEMAN

v.

OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, ET AL.

Maryland Court of Appeals—June 26, 1917.

180 Md. 572; 101 Atl. 529.

Workmen's Compensation Acts — Termination of Allowance — Marriage of Beneficiary.

Under Workmen's Compensation Law (Acts 1914, c. 800), § 35, fixing compensation for partly dependent persons, and providing for determination of questions of dependency according to the facts existing at the time of the injury resulting in death to the employee, section 42, providing that on marriage of a dependent widow her compensation shall cease,

and section 53, giving the commission power to change or modify former findings or orders, the subsequent marriage of a partly dependent sister of a deceased employee does not determine her right to compensation awarded her by the commission and authorize the commission to abate it.

[See note at end of this case.]

Appeal from Circuit Court, Washington county: KEEDY, Judge.

Claim for compensation under workmen's compensation act. Mary Brenner Adleman, claimant, and Ocean Accident and Guarantee Corporation, Limited, et al., defendants. Claim allowed by State Industrial Accident Commission. Decision reversed by Circuit Court. Claimant appeals. The facts are stated in the opinion. REVERSED.

Frank G. Wagaman for appellant.

Frank Gosnell and Alexander Armstrong, Jr., for appellees.

[573] THOMAS, J.—On the 5th of December 1914, Morris Brenner, an employee of the Reliable Junk Company, of Hagerstown, Maryland, died as the result of an accidental injury arising out of and in the course of his employment by said company. His mother, Toba Brenner, and his sister, Mary Brenner, filed a claim for compensation as dependents under the Act of 1914, Chapter 800, known as the Workmen's Compensation Law, and the State Industrial Accident Commission, on April 7th, 1915, passed an order awarding them as partly dependent upon the deceased, the sum of \$12.50 per week, which the Commission apportioned between the claimants, giving each of them \$6.25 per week, payable weekly, for the period of four years and thirty-two weeks from the 5th day of December, 1914.

On the 10th of June, 1916, the Ocean Accident & Guarantee Corporation, Limited, the insurer in the case, filed a [574] petition alleging that Mary Brenner was married to Nathan Adleman on the 19th of June, 1915, and that she had concealed her marriage from the petitioner until the 1st day of June, 1916, and praying that the compensation awarded her be abated by the Commission as of the 10th of June, 1915. After a hearing, at which the facts stated in the petition, except the alleged concealment of the marriage, were admitted, the Commission passed an order denying the relief prayed and dismissing the petition. From that order the petitioner appealed to the Circuit Court for Washington County, and that Court on the 10th of January, 1917, passed an order reversing the order of the Commission and abating the compensation awarded Mary Brenner as of the 19th day of June, 1915.

This appeal is from the order of the Circuit Court, and the single question involved is whether the *subsequent marriage* of a partly dependent sister of a deceased employee determines her right to compensation awarded her by the Commission and authorizes the Commission to abate it. The answer to this question must, of course, be found in the provisions of the Act under which the award was made. The Commission took the view that if it had no authority to grant the relief prayed, while the Circuit Court held that under a proper construction of the Act the subsequent marriage of Mary Brenner determined her right to the compensation, and that the Commission, and the Circuit Court on appeal, were authorized to abate it.

The Act, after declaring its purpose to provide "sure and certain relief for workmen injured in extra-hazardous employments and their families and dependents . . . regardless of questions of fault and to the exclusion of every other remedy," except as therein provided, and after providing for a commission to administer the law, declares in section 14: "Every employer, subject to the provisions of this Act, shall pay or provide as required herein compensation according to the schedules of this Act for the disability or death of his employee, resulting from an accidental personal injury sustained [575] by the employee, arising out of and in the course of his employment, without regard to fault as a cause of such injury," etc.

Other sections of the Act require the employer to secure the payment of the compensation referred to in Section 14, and provide how he may do so.

Section 35 declares that, "Each employee (or in case of death his family or dependents), entitled to receive compensation under this Act shall receive the same in accordance with the following schedule, and except as in this Act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever." After providing for permanent and temporary total disability and permanent and temporary partial disability, this section contains the following provisions for cases where the injury causes the death of the employee within two years:

"If there are wholly dependent persons at the time of the death, the payment shall be fifty per cent of the average weekly wages, (of the employee), and to continue for the remainder of the period between the date of the death and eight years after the date of the injury, and not to amount to more than a maximum of four thousand two hundred and fifty dollars, nor less than a minimum of one thousand dollars."

"If there are partly dependent persons at the time of the death, the payment shall be fifty per cent of the average weekly wages

and to continue for all of such portion of the period of eight years after the date of the injury, as the Commission in each case may determine, and not to amount to more than a maximum of three thousand dollars."

"The following persons shall be presumed to be wholly dependent for support upon a deceased employee: A wife or invalid husband ('invalid' meaning one physically or mentally incapacitated from earning), a child or children under the age of sixteen years (or over said age if physically or mentally incapacitated from earning) living with or dependent upon the parent at the time of the injury or death."

[576] "In all other cases, questions of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in the death of such employee, but no person shall be considered as dependent unless such person be a father, mother, grandfather, grandmother, stepchild or grandchild, or brother or sister of the deceased employee, including those otherwise specified in this section."

Under these sections, where the employee, engaged in any one of the employments covered by the Act, dies as the result of an "accidental personal injury . . . arising out of and in the course of his employment," within two years, leaving at the time of his death persons within the class mentioned who were, at the time of the injury, partly dependent upon him, the Act imposes upon the employer a liability to pay to such dependents fifty per cent of the average weekly wages of the employee, to continue for all or such portion of the period of eight years after the date of the injury as the Commission may determine, not to amount to more than a maximum of three thousand dollars. Except as to those presumed to be wholly dependent, the question of dependency, in whole or in part, and the portion of the period of eight years after the date of the injury during which fifty per cent of the average weekly wages of the employee is to be paid to those partly dependent, is left to the determination of the Commission, but when so determined the obligation of the employer to pay, and the right of the beneficiaries to receive the compensation provided, becomes definite and certain. This obligation to pay and the right to receive are not, by the terms of the Act, made conditional upon the beneficiary remaining unmarried, or dependent upon his or her subsequent state of dependency, and nowhere in the Act is there found express authority to the Commission to abate the compensation. The relief to the dependents of the deceased employee provided by the Act is in lieu of that afforded by the common law, and sub-section 11 of section 62 of the [577] Act defines 'Beneficiary' as

"a husband, wife, child, children or dependents of an employee in whom shall vest a right to receive payment under the Act." The Act defines the duties and powers of the Commission, and in the absence of a clear grant of such power, we would not be justified in holding that it is authorized to abate compensation expressly provided by the Act as "sure and certain relief" for those who were partly dependent upon a deceased employee, and whose right thereto has been determined and has vested in accordance with the terms of the Act. When we speak of the right to the compensation as vesting in the beneficiary we do not mean to indicate that the right of those partly dependent to the compensation awarded them is a vested right in the sense that if they should die before the completion of the weekly payments allowed them their right to the same would devolve upon their personal representatives. That question is not presented by the record and we are not to be understood as expressing any opinion in regard to it. But that the right to the compensation provided by the statute vests in such beneficiaries in the sense that it is not conditional upon their remaining unmarried, and that the marriage of such a beneficiary does not authorize the abatement of the compensation by the Commission we think is free of doubt.

The appellee relies and the learned Court below based its conclusion upon section 53, which provides that: "The powers and jurisdiction of the Commission over each case shall be continuing and it may from time to time make such modifications or change with respect to former findings or orders with respect thereto as in its opinion may be justified." A reference to several other sections of the Act will show the purpose and application of this section. For instance, under section 41 compensation may be suspended by the Commission where an employee refuses to submit to a medical examination. Under section 42, in case of aggravation, diminution or termination of disability, the Commission may readjust the rate of compensation, and, in a proper case, terminate [578] the payments, and under section 43, if a beneficiary has been a non-resident of the State for one year the Commission may convert weekly payments into a "lump sum payment." These and other provisions indicate the power granted to the Commission in the exercise of its continuing jurisdiction, but they afford no support for the contention here made by the appellee. If we assume that under section 53 the Commission may make such modifications or change in its former findings in reference to those partly dependent upon a deceased employee, or its orders in respect thereto, as in its opinion may be justified, the change or modification made must nevertheless be such as is

authorized by the Act. Sub-section 4 of section 35 declares in explicit terms that in all cases, other than those in which the law presumes the claimants to be wholly dependent, the question of dependency, in whole or in part, *shall be determined in accordance with the facts existing at the time of the injury resulting in the death of the employee.* It is clear that if the question of dependency is to be determined upon the facts existing at the time of the injury, any modification or change by the Commission of its former finding upon that question must likewise be based upon the facts existing at the time of the injury, and cannot be made to rest upon or to conform to conditions arising and existing subsequent to the date of the injury, provided, of course, the award is to those living at the time of the death of the injured employee. Here the application is not for a correction or modification of the finding of the Commission upon the facts existing at the date of the injury, but the petitioner, in the face of the express terms of the statute, seeks to have the question of dependency of Mary Brenner determined by the Commission upon a state of facts arising after the injury, the death of the employee and the award of the Commission, and to have the former finding an order of the Commission changed accordingly. In dealing with a similar provision in the Ohio statute, where it was claimed that it conferred upon the Board of Awards [579] power to abate an award to one wholly dependent upon a deceased employee, the Supreme Court of Ohio said in *State v. Industrial Commission*, 111 N. E. 299: "If section 39 could be construed as giving the board power to abate an award made under paragraph 2 of section 35, in case of the death of a dependent prior to completion of payments, it necessarily follows that it could be construed also as giving the board power and jurisdiction to determine dependency at any time during the period covered by the payments; instead of having its determination expressly limited by the statute, although it is, to dependency at the time of death, and, as the statute is inflexible as to amount of award, abate the award at any time the person to whom the compensation was granted ceased to be a dependent. This construction would be directly contrary to the statutory requirements."

Section 49 provides: "The benefits in case of death shall be paid to such one or more of the dependents of the decedent for the benefit of all the dependents as may be determined by the Commission, which may apportion the benefits among the dependents in such manner as it may deem just and equitable." It is suggested that under this section and section 53 the Commission may reapportion the compensation among the de-

pendents, and it is argued that if the Commission has the power to change the award to one of the beneficiaries it may abate it entirely. We are not required in this case to determine whether the Commission has the power to change its award for the purpose of reapportioning the compensation among the dependents. The statute fixes the amount of the weekly payments the employer is required to make to the beneficiaries at fifty per cent, of the average weekly wages of the deceased employee. *That amount* cannot be changed by the Commission, but must be paid to one or more of the dependents for the benefit of all, or may be apportioned among them as the Commission may deem just and equitable. Toba Brenner, the other beneficiary, is not asking for a reapportionment of the weekly payment fixed [580] by the statute, but the petitioner, the insurer, is in effect seeking to have the statutory allowance reduced to the extent of one-half. The terms "just and equitable" used in section 49, relate not to the amount of compensation to be paid by the employer or insurer, but to the *apportionment of the same among the beneficiaries*. In that the petitioner can have no interest.

Section 42 provides that "In case of the remarriage of a dependent widow of a deceased employee without dependent children, all compensation under this act shall cease," etc., but there is no such provision in reference to other dependents mentioned in the Act, and it is reasonable to conclude that if the Legislature, while dealing with the subject of abatement of compensation, had intended the compensation provided for a sister to abate upon her marriage it would have so declared in plain terms.

We have examined the other cases cited by counsel but they furnish very little aid in arriving at the proper conclusion in the case before us. Those determining the effect of the marriage of a dependent are based upon statutes unlike the Maryland law, while in the others the question involved was the right of the personal representatives of a deceased dependent to the compensation awarded or provided by statute.

As the Maryland Act does not provide for the abatement of compensation awarded to a partly dependent sister of a deceased employee upon her marriage, or authorize the Commission to abate it on that ground, we must reverse the order of the Court below.

Order reversed, with costs to the appellant, Mary Brenner Adleman.

NOTE.

Increase, Decrease, Termination or Suspension of Allowance under Workmen's Compensation Act.**Introductory, 733.****Increase:**

Jurisdiction, 734.

Circumstances Warranting Increase, 734.

Allowance to Minor, 735.

Decrease, 735.**Termination:**

In General, 737.

Retroactive Termination, 741.

Termination of Allowance to Dependent, 742.

Suspension:

Jurisdiction to Order Suspension, 742.

Circumstances Authorizing Suspension, 742.

Nominal Award, 743.

Declaration of Liability, 745.

Surgical Operation, 745.

Burden of Proof, 746.

Introductory.

The purpose of this note is to review the recent decisions on the right to obtain an increase, decrease, termination or suspension of an allowance of compensation made under a workmen's compensation act. The earlier cases are collected and discussed in the note to *Beckwith v. Spooner*, Ann. Cas. 1916E 886.

Sections of the various workmen's compensation acts which permit a review of an award on the application of an employer or an employee, and provide that an award may be varied on such a review, are not intended to afford a method of correcting errors made in fixing the amount of an original award, but are designed to afford a means of enabling a workman or his employer to obtain an increase, decrease, termination, or suspension of the award, because of a change in the workman's physical condition or a change of circumstances subsequent to the entry of the original award. *Crossfield v. Tanian* [1909] 2 Q. B. (Eng.) 629, 69 L. J. Q. B. 790, 82 L. T. N. S. 813, 48 W. R. 609, 16 Times L. Rep. 476, 2 W. C. C. 141; *Mead v. Lockhart*, 2 B. W. C. C. (Eng.) 398; *Corbet v. Haines* [1912] W. C. Rep. (Eng.) 288, 5 B. W. C. C. 372; *State v. District Ct.* 136 Minn. 147, 161 N. W. 391.

An award to an injured workman may not be varied to meet the fluctuations of wages paid to workmen in the class of work in which he was engaged before the injury. *James v. Ocean Coal Co.* [1904] 2 K. B. (Eng.) 213, 73 L. J. K. B. 915, 80 L. T. N. S. 834, 20 Times L. Rep. 483, 68 J. P. 431, 52 W. R. 497, 6 W. C. C. 128.

But a general increase or decrease of wages in an occupation is a sufficient change of circumstances to authorize the assumption of jurisdiction of an application for a review of a prior award. See *infra*, the subdivision *Increase—Circumstances Warranting Increase*.

Increase.

JURISDICTION.

In construing the first and second sections of schedule two of the English Workmen's Compensation Act of 1897, it has been held that, on the objection of either an injured workman or his employer to a review of its original award by a committee chosen by the workman and employer under a provision of that act, a county court judge may assume jurisdiction of an application to review and increase the award before the committee meets to consider the matter. *Rex v. Templer* [1912] 2 K. B. (Eng.) 444, 81 L. J. K. B. 805, [1912] W. C. Rep. 209, 5 B. W. C. C. 455, 106 L. T. N. S. 855, [1912] W. N. 135, 28 Times L. Rep. 410, 56 Sol. J. 501.

CIRCUMSTANCES WARRANTING INCREASE.

The various workmen's compensation acts make provision for an increase of an allowance awarded because of an increased disability, or a change in the circumstances, of an injured workman warranting such action. The circumstances warranting such an increase have been discussed in the following recent cases:

England.—*Irons v. Davis* [1899] 2 Q. B. 330, 333, 1 W. C. C. 26, 68 L. J. Q. B. 673, 80 L. T. N. S. 673, 47 W. R. 616; *Chandler v. Smith* [1899] 2 Q. B. 506, 516, 68 L. J. Q. B. 909.

California.—*Hey v. Pacific Casualty Co.* 1 Cal. I. A. C. Dec. 38 [cited in *Honnold on Workmen's Compensation*, vol. 1, page 679]; *Karas v. Northwestern Pac. R. Co.* 2 Cal. I. A. C. Dec. 84 [cited in *Honnold on Workmen's Compensation*, vol. 1, page 679]; *Manfredi v. Union Sugar Co.* 2 Cal. I. A. C. Dec. 920 [cited in *Honnold on Workmen's Compensation*, vol. 1, page 678]; *Massachusetts Bonding, etc. Co. v. Industrial Acc. Commission*, 168 Pac. 1050.

Illinois.—*Arnold, etc. Co. v. Industrial Board*, 277 Ill. 295, 115 N. E. 137; *Casparis Stone Co. v. Industrial Board*, 278 Ill. 77, 115 N. E. 822.

Michigan.—*Winn v. Adjustable Table Co.* 193 Mich. 127, 159 N. W. 372, 163 N. W. 906.

Minnesota.—*State v. Nye*, 136 Minn. 50, 161 N. W. 224; *State v. District Ct.* 136 Minn. 147, 161 N. W. 391.

New Jersey.—*Safety Insulated Wire, etc. Co. v. Hudson County*, 90 N. J. L. 114, 100 Atl. 846; *E. I. Du Pont Nemours Powder Co. v. Spocidio*, 90 N. J. L. 438, 101 Atl. 407.

-New York.—*Wozneak v. Buffalo Gas Co.* 175 App. Div. 268, 273, 161 N. Y. S. 675.

Washington.—See *Chalmers v. Industrial Ins. Commission*, 94 Wash. 490, 162 Pac. 576.

The failure of an employer to find employment for an injured workman, which was made a condition of the award, is justification for an increase of the allowance. *Thomas v. Fairbarn*, 4 B. W. C. C. (Eng.) 195.

The inability of a workman to obtain employment because of injuries received in a former occupation entitles him to an increase of an allowance previously reduced to a nominal award on his recovery from his injury. *Brown v. Thornycroft*, 5 B. W. C. C. (Eng.) 386; *MacDonald v. Wilson, etc. Coal Co.* [1912] A. C. (Eng.) 513, 5 B. W. C. C. 478, 81 L. J. P. C. 188, [1912] W. C. Rep. (Eng.) 302, 106 L. T. N. S. 905, 56 Sol. J. 550, 28 Times L. Rep. 431.

The inability of a workman to establish increased disability is sufficient to bar an allowance of increased compensation. *Holt v. Yates*, 3 B. W. C. C. (Eng.) 75; *Henshaw v. Fielding* [1914] W. C. & Ins. Rep. (Eng.) 326; *Paulizky v. Wandsworth, etc. Gas Co.* 9 B. W. C. C. (Eng.) 206, [1916] W. C. & Ins. Rep. 127; *Bloomington, etc. R. Co. v. Industrial Board*, 276 Ill. 120, 114 N. E. 511.

Thus, in the case last cited, the court said: "On the hearing before the board Parks was permitted to prove his condition from the time of the injury until the hearing. From his testimony it appears that he was in the same condition at the time of this hearing as he was at the time of the hearing before the committee of arbitration and that he had grown no worse since that time. In that state of the record, even had the transcript of the proceedings before the committee of arbitration been introduced in evidence, the industrial board should have dismissed the petition upon the motion of plaintiff in error, for the reason that Parks did not show that his disability had recurred since the hearing which resulted in the decision of July 3, 1915."

The failure to give the employer the notice required by the statute before filing a claim for increased compensation is a fatal error, justifying a dismissal of the application. *Casparis Stone Co. v. Industrial Board*, 278 Ill. 77, 115 N. E. 822.

The failure of an injured employee to enter a claim in his original application for compensation for all of the injuries received by him, does not justify favorable action on a subsequent petition for an increase of the allowance granted, because of the omitted injuries. Such claims must be fully presented in the original application and within the period allowed by the act. *Erhart v. Industrial Acc. Commission*, 172 Cal. 621, 158 Pac. 193; *McCarthy's Case*, 226 Mass. 444, 115 N. E. 764.

A general increase of the wages in the claimant's occupation has been held not in itself sufficient to entitle him to an increase of an allowance granted to him because of injuries sustained in his employment. *Malcolm v. Spowart* [1913] W. C. & Ins. Rep. (Eng.) 523. See also *Woodilee Coal, etc. Co. v. McNeill* [1917] W. C. & Ins. Rep. (Eng.) 129; *Cory v. Tarr* [1917] W. C. & Ins. Rep. 271.

In *Ogden v. South Kirby, etc. Collieries* [1913] W. C. & Ins. Rep. (Eng.) 463, 6 B. W. C. C. 1, the court refused an increase of compensation on the ground that the workman was malingering.

ALLOWANCE TO MINOR.

The English Workmen's Compensation Act of 1906 provides that the weekly compensation of a workman injured during his minority may be increased, not sooner than twelve months after the award has been made and after the workman has attained his majority, to fifty per cent of the weekly amount which he would have been capable of earning at that age had he remained uninjured. *Edwards v. Alyn Steel, etc. Co.* 3 B. W. C. C. 141; *Evans v. Vickers* [1910] 1 K. B. 554, 3 B. W. C. C. 196, *affirmed* [1910] A. C. (Eng.) 444, 3 B. W. C. C. 403, 79 L. J. K. B. 954, 103 L. T. N. S. 292, 26 Times L. Rep. 548, 54 Sol. J. 651.

As to female employees, the increased allowance under this section of the act apparently may be granted when the employee reaches the age of eighteen. *Ambridge v. Good*, 5 B. W. C. C. 691, [1912] W. C. Rep. 374.

However, this section was not considered by the court in a case in which the employee was sufficiently recovered to perform light work and was offered suitable employment at wages greater than she was receiving before the injury, though the facts seemed to bring the case within its provisions. *Clarke v. Knox* [1913] W. C. & Ins. Rep. 664, 57 Sol. J. 793, 6 B. W. C. C. 695.

In construing this section of the act it has been held that on an application to review and increase an allowance, the compensation need not be determined with reference to the work in which the injured employee was engaged at the time of the injury, but he may be awarded the percentage provided by the act of the better wages which he probably would have been capable of earning in any other occupation for which he was qualified, had it not been for the injury sustained. *Evans v. Vickers* [1910] 1 K. B. 554, 3 B. W. C. C. 196, *affirmed* [1910] A. C. 444, 3 B. W. C. C. 403, 79 L. J. K. B. 954, 103 L. T. N. S. 292, 26 Times L. Rep. 548, 54 Sol. J. 651.

An arbitrator is not bound, under this section, to limit his award to the difference between what the workman actually earned

before he received his injury and the amount which he is probably capable of earning at the time of his application for a review and increased compensation. *Edwards v. Alyn Steel, etc. Co.* 3 B. W. C. C. 141.

Decrease.

A decrease of an allowance made under a compensation act is ordinarily proper on a showing that the injured workman has recovered sufficiently to enable him to perform light work.

England.—*Chandler v. Smith* [1899] 2 Q. B. 506, 516, 68 L. J. Q. B. 909; *Fife Coal Co. v. Davidson* [1907] Sc. Ct. Sess. 90, 44 Scott. L. Rep. 108; *O'Neill v. Ropner* [1908] 43 Ir. L. T. 2, 2 B. W. C. C. 334; *Cammell v. Platt*, 2 B. W. C. C. 368; *Taff Vale R. Co. v. Lane*, 3 B. W. C. C. 297; *Anglo-Australian Steam Nav. Co. v. Richards*, 4 B. W. C. C. 247; *Carlin v. Stephens* [1911] Sc. Ct. Sess. 901, 5 B. W. C. C. 486, 48 Scott. L. Rep. 862; *Warwick Steamship Co. v. Callaghan*, 5 B. W. C. C. 283; *Pryde v. Moore & Co.* [1913] W. C. & Ins. Rep. 100, [1913] Sc. Ct. Sess. 457, 50 Scott. L. Rep. 302, 6 B. W. C. C. 384; *Wallis v. McNeice*, 6 B. W. C. C. 445; *Cargo Fleet Iron Co. v. Funck* [1916] W. C. & Ins. Rep. 87, 9 B. W. C. C. 318; *Jenkinson v. Steiner & Co.* 9 B. W. C. C. 571, [1917] W. C. & Ins. Rep. 104; *Woodilee Coal, etc. Co. v. McNeill* [1907] W. C. & Ins. Rep. 129; *Gotobed v. Petchell* [1914] 2 K. B. 36, 83 L. J. K. B. 429, [1914] W. C. & Ins. Rep. 115, 110 L. T. N. S. 453, 58 Sol. J. 249, 30 Times L. Rep. 253.

California.—*Acrey v. City of Holtville*, 2 Cal. I. A. C. Dec. 587 [cited in *Honnold on Workmen's Compensation*, vol. 1, page 677]; *Lindh v. Toyland Co.* 2 Cal. I. A. C. Dec. 646 [cited in *Honnold on Workmen's Compensation*, vol. 1, page 677].

Michigan.—*Winn v. Adjustable Table Co.* 193 Mich. 127, 159 N. W. 372, 163 N. W. 906.

Minnesota.—*State v. Nye*, 136 Minn. 50, 161 N. W. 224; *State v. District Ct.* 136 Minn. 147, 161 N. W. 391.

New Jersey.—*Safety Insulated Wire, etc. Co. v. Hudson County*, 90 N. J. L. 114, 100 Atl. 846; *E. I. Du Pont Nemours Powder Co. v. Spocidio*, 90 N. J. L. 438, 101 Atl. 407.

New York.—*Wozneak v. Buffalo Gas Co.* 175 App. Div. 268, 273, 161 N. Y. S. 675.

Where there has been a change of circumstances justifying such action, an allowance may be decreased. *Taff Vale R. Co. v. Lane*, 3 B. W. C. C. (Eng.) 297; *Guest v. Winsper*, 4 B. W. C. C. (Eng.) 289.

But, where there has been no improvement in the injured workman's condition, it is not proper ordinarily to reduce the compensation awarded. *Southampton Gas-Light, etc. Co. v. Stride*, 115 L. T. N. S. 498, 9 B. W. C. C. 555, [1916] W. C. & Ins. Rep. 285, 32 Times L. Rep. 680.

However, though the workman remains incapacitated and shows no sign of improvement, if such continued disability is due even partly to his failure to act on the advice of his physicians, his compensation should be decreased. *Rouse v. Hutchinson* [1917] W. C. & Ins. Rep. (Eng.) 299.

The burden of proving a change in a workman's condition enabling him to perform light work, justifying a reduction of compensation, is, in the case of an application for a review of a previous allowance, on the employer. *Thornber v. Durkin* [1914] W. C. & Ins. Rep. (Eng.) 341, 7 B. W. C. C. 548; *Round v. Wathen* [1917] W. C. & Ins. Rep. (Eng.) 134, 116 L. T. N. S. 97. See also *Williams v. Ruabon Coal, etc. Co.* [1914] W. C. & Ins. Rep. (Eng.) 32, 7 B. W. C. C. 202.

Thus, in the case last cited, the court, by way of dictum, said: "There is a great distinction between an original application for compensation and an application to review the compensation which has previously been awarded. In the latter case the employer comes for a review and says in effect that the workman is no longer suffering from total incapacity, but can do light work. He has to show such a change in the condition of the workman since the original award that the man can do light work, and then, if the man's position is that he is such an 'odd lot' that the range of the labor market open to him is restricted, the employer has to show that there is work available for him to do."

The burden of proving that the injured employee is able to obtain light work is on the employer, and compensation may not be reduced until that fact is established. *Anglo-Australian Steam Nav. Co. v. Richards*, 4 B. W. C. C. (Eng.) 247; *Osborne v. Tralee*, etc. R. Co. [1913] 2 Ir. R. (Eng.) 133, [1913] W. C. & Ins. Rep. 391. However, this does not relieve the employee entirely from giving evidence as to his capacity for work and the prospects of obtaining it. *Gray v. Reed* [1913] W. C. & Ins. Rep. 127, 108 L. T. N. S. 53, 6 B. W. C. C. 43.

It is not necessary for an employer, in order to make out a *prima facie* case justifying a reduction of compensation, to guarantee the injured workman suitable employment, even where the possibility of his obtaining light work at his trade elsewhere is very remote. *Gray v. Reed*, 108 L. T. N. S. 53, [1913] W. C. & Ins. Rep. (Eng.) 127, 6 B. W. C. C. 43.

Under the *California* act, to justify a reduction of compensation from that for total disability to compensation for partial disability, it has been held that it is necessary to prove that the disability of the injured workman does not entirely prevent his obtaining employment elsewhere. *Raily v. Island*

Transp. Co. 2 Cal. I. A. C. Dec. 608 [cited in *Honnold on Workmen's Compensation*, vol. 1, page 678].

An offer of employment in another city, some distance from that in which the injured workman resides, has been held to be an offer of suitable employment justifying a reduction of compensation, in view of the facts that the employer had closed his establishment in the latter city, and the workman's condition had improved. *Wallis v. M'Neice*, 6 B. W. C. C. (Eng.) 445.

It is not proper to reduce the compensation awarded where, though there is a sufficient recovery of the workman so that he is able to perform work of a different nature, no such suitable work has been offered him by the employer. *Bryce v. Connor*, Sc. Ct. Sess. 7 F. (Eng.) 193, 42 Scott. L. Rep. 154; *Dinnington Main Coal Co. v. Bruins* [1912] W. C. Rep. (Eng.) 173, 5 B. W. C. C. 367. And, where the possibility of a workman's obtaining employment elsewhere has been lessened as a consequence of his injuries, it has been held on an application for a review of an allowance previously decreased that the allowance should be restored. *Clark v. Gas Light, etc. Co.* 21 Times L. Rep. (Eng.) 184. Compare *Arnott v. Fife Coal Co.* [1912] Sc. Ct. Sess. (Eng.) 1262, [1912] W. C. & Ins. Rep. 355, 6 B. W. C. C. 281; *Gray v. Shotts Iron Co.* [1912] Sc. Ct. Sess. (Eng.) 1267, [1912] W. C. & Ins. Rep. 359, 6 B. W. C. C. 287.

But in order to justify the refusal of a reduction of an award, the inability to obtain employment must be the result of the incapacity due to the injury and not to the condition of the labor market. *Dobby v. Wilson*, 2 B. W. C. C. (Eng.) 370.

When an injured employee has become established in a private business of his own, on an application to decrease an allowance awarded to him under the workmen's compensation acts, the action of the arbitrator should be determined, not by the amount of the profits from the former employee's business enterprise, but by the value of any services being rendered or capable of being rendered by the former workman in his business, or, in his stead, by some one else employed by him. *Norman v. Walder* [1904] 2 K. B. (Eng.) 27, 73 L. J. K. B. 461, 90 L. T. N. S. 531, 20 Times L. Rep. 427; *Paterson v. Moore*, 47 Scott. L. Rep. (Eng.) 30, [1910] Sc. Ct. Sess. 29, 3 B. W. C. C. 541; *Duberly v. Mace* [1913] W. C. & Ins. Rep. (Eng.) 199, 6 B. W. C. C. 82; *Moore v. Peet Bros. Mfg. Co.* 99 Kan. 443, 162 Pac. 295. See also *Calico Printers' Assoc. v. Higham* [1912] 1 K. B. (Eng.) 93, 81 L. J. K. B. 232, 105 L. T. N. S. 734, 28 Times L. Rep. 53, 5 B. W. C. C. 97.

It has been held that the fact that an injured workman's present wage, and the allowance awarded to him under the workmen's

compensation act, do not equal his average earnings before his injury, is not in itself sufficient to justify a refusal to decrease the allowance. *Pryde v. Moore* [1913] Sc. Ct. Sess. (Eng.) 457, [1913] W. C. & Ins. Rep. 100, 50 Scott. L. Rep. 302, 6 B. W. C. C. 384.

To authorize a reduction of compensation it is not necessary to show the specific wage which the injured man is capable of earning. *Carlin v. Stephen* [1911] Sc. Ct. Sess. (Eng.) 901, 5 B. W. C. C. 486, 48 Scott. L. Rep. 862.

On an application to diminish an allowance to an injured workman, the arbitrator should take into consideration a general increase in the wages paid to those in like occupations. *Woodilee Coal, etc. Co. v. McNeill* [1917] W. C. & Ins. Rep. (Eng.) 129.

The fact that an injured workman is earning, at the time of an application for a review, nearly as much wages as he earned before the injury, is not in itself a change of conditions such as would justify a reduction of the compensation awarded because of the injury. *Bryson v. Dunn*, Sc. Ct. Sess. (Eng.) 8 F. 226, 43 Scott. L. Rep. 236.

As to the date from which an arbitrator may reduce an allowance, *Kennedy, L. J.*, said in *Tyne Tees Shipping Co. v. Whilock* [1913] 3 K. B. (Eng.) 642, [1913] W. N. 237, 6 B. W. C. C. 559, [1913] W. C. & Ins. Rep. 579, 109 L. T. N. S. 84, 57 Sol. J. 716, 82 L. J. K. B. 1091: "On these applications it is certainly open to the employer to ask for not only a reduction of the amount of the weekly payment from the date of the hearing, but he is entitled, as I think this court has decided, to get a reduction at any rate from the date of the application if the improvement in the workman's condition is shown to have existed at that date. Although I am not sure whether there is a decision to that effect, it has certainly not been decided that, if the claim for review gave precisely an earlier date than the date of application as the date on which the incapacity had ceased or been diminished, he might not get an order for reduction as from that earlier date." See also *Morton v. Woodward* [1902] 2 K. B. (Eng.) 276, 4 W. C. C. 143, 71 L. J. K. B. 736, 86 L. T. N. S. 878, 51 W. R. 54, 66 J. P. 660.

An agreement between an employer and employee to reduce the compensation awarded does not preclude a review for the purpose of obtaining an additional reduction of the award. *Cawdor, etc. Collieries v. Jones*, 3 B. W. C. C. 59.

An application by an employer for a review and modification of an award must be heard notwithstanding there has been no change of circumstances since the original award. *Thranmere Bay Development Co. v. Brennan*, 2 B. W. C. C. (Eng.) 403.

Ann. Cas. 1918B.—47.

Termination.

IN GENERAL.

If it can be established that the workman's incapacity no longer exists, an allowance made to him under a workmen's compensation act because of such incapacity, resulting from injuries received while employed, may be terminated.

England.—*Cranfield v. Ansell*, 4 B. W. C. C. 57; *Emerson v. Donkin*, 4 B. W. C. C. 74; *Reyners v. Makin*, 4 B. W. C. C. 267; *Jobson v. Cory*, 4 B. W. C. C. 284; *Jones v. Tirdonkin Colliery Co.* 5 B. W. C. C. 3; *Edmondsons v. Parker*, 5 B. W. C. C. 70; *McAvan v. Boase Spinning Co.* Sc. Ct. Sess. 3 F. 1048, 38 Scott. L. Rep. 772; *Husband v. Campbell*, Sc. Ct. Sess. 5 F. 1146, 40 Scot. L. Rep. 822; *Simpson v. Byrne* [1913] W. C. & Ins. Rep. 240, [1913] 47 Ir. L. T. 27, 6 B. W. C. C. 455; *Watson v. Beardmore* [1914] W. C. & Ins. Rep. 240, [1914] Sc. Ct. Sess. 718; *Cross, etc. R. Co. v. Boots* [1909] 2 K. B. 640, 2 B. W. C. C. 385, 78 L. J. K. B. 1115, 101 L. T. N. S. 53, 25 Times L. Rep. 683; *Green v. Cammell* [1913] 3 K. B. 665, 6 B. W. C. C. 735, 29 Times L. Rep. 703; *Chandler v. Smith* [1899] 2 Q. B. 506, 516, 68 L. J. Q. B. 909; *Baird v. Dempster* [1909] Sc. Ct. Sess. 127, 46 Scott. L. Rep. 119, 2 B. W. C. C. 144; *Gray v. Shotts Iron Co.* [1912] W. C. Rep. 359, [1912] Sc. Ct. Sess. 1267, 6 B. W. C. C. 287; *Cunningham v. McNaughton* [1910] Sc. Ct. Sess. 980, 47 Scot. L. Rep. 781, 3 B. W. C. C. 577; *Rosie v. Mackay* [1910] Sc. Ct. Sess. 714; 47 Scott. L. Rep. 654; *Cadenhead v. Ailsa Shipbuilding Co.* [1910] Sc. Ct. Sess. 1129, 47 Scott. L. Rep. 784, 3 B. W. C. C. 581; *Westcott, etc. Lines v. Price* [1912] W. C. Rep. 280, 5 B. W. C. C. 430; *Darroll v. Glasgow Iron, etc. Co.* [1913] W. C. & Ins. Rep. 80, 50 Scott. L. Rep. 226, 6 B. W. C. C. 354, [1913] Sc. Ct. Sess. 387; *Smith v. Foster* [1913] W. C. & Ins. Rep. 420, 6 B. W. C. C. 499; *Harlock v. Steamship Coquet* [1914] W. C. & Ins. Rep. 73; *Wardell v. Cargo Fleet Iron Co.* [1917] W. C. & Ins. Rep. 77.

California.—*Brandt v. Globe Indemnity Co.* 1 Cal. I. A. C. Dec. 309 [cited in *Honnold on Workmen's Compensation*, vol. 1, page 682]; *Finley v. San Francisco Stevedoring Co.* 2 Cal. I. A. C. Dec. 174 [cited in *Honnold on Workmen's Compensation*, vol. 1, page 681].

Connecticut.—*Simonelli v. Sargent*, 1 Conn. Comp. Dec. 553.

Indiana.—*Highfield v. Duffy*, 115 N. E. 347.

Kansas.—*Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244.

Michigan.—*Limron v. Blair*, 181 Mich. 76, 147 N. W. 546; *Winn v. Adjustable Table Co.* 193 Mich. 127, 159 N. W. 372, 163 N. W. 906.

New York.—Wozneak v. Buffalo Gas Co. 175 App. Div. 268, 273, 161 N. Y. S. 675.

Where the incapacity resulting from an injury received in his employment by a workman is prolonged because of a disease contracted by him before the injury, payments to him under the workmen's compensation acts may be terminated. *Westcott, etc. Lines v. Price*, 5 B. W. C. C. (Eng.) 430, [1912] W. C. Rep. 280; *Cianetti v. Fremont Consol. Min. Co.* 2 Cal. I. A. C. Dec. 947 [cited in *Honnold on Workmen's Compensation*, vol. 1, page 679].

It has also been held that the death of an injured employee, from causes other than the injuries sustained by him in his employment, terminates his employer's liability to make further periodical payments awarded under the workmen's compensation acts. *Kilbride v. Pratt, etc. Co.* 1 Conn. Comp. Dec. 688; *Erie R. Co. v. Callaway* (N. J.) 102 Atl. 6.

The workmen's compensation act of Illinois (§ 21) specifically provides for the abatement of an unpaid allowance to an injured workman on his death occurring from causes having no relation to the injury sustained. *Ticzkus v. Standard Office Co.* Bulletin No. 1, Ill. 176 [cited in *Honnold on Workmen's Compensation*, vol. 1, page 675].

It has been held that an award of a specific sum, to be apportioned and paid in periodical instalments to an injured workman during a definite period, terminates on his death, from causes unconnected with the injury, before the expiration of the period during which the allotment was to continue. *Wozneak v. Buffalo Gas Co.* 175 App. Div. 268, 161 N. Y. S. 675.

Also, where death, though not immediate, is the result of an injury, a periodical allowance to an injured workman during his incapacity terminates at his death. *Burns's Case*, 218 Mass. 8, Ann. Cas. 1916A 787, 105 N. E. 601.

An unreasonable refusal to accept light work is justification for ending the compensation awarded. *McNamara v. Burtt*, 4 B. W. C. C. (Eng.) 151; *Braithwaite v. Cox*, 5 B. W. C. C. (Eng.) 77, 648; *Potts v. Guildford Syndicate* [1914] W. C. & Ins. Rep. 330.

Where a workman's injured fingers were still tender the compensation has, nevertheless, been held to have been properly terminated. *Goodall v. Kramer*, 3 B. W. C. C. (Eng.) 315.

An award has been terminated where it was found that a workman, whose knee had been injured, was fit for work provided he wore a knee cap, though the injury would recur if the use of the knee cap were discontinued. *Anderson v. Darnagvil Coal Co.* [1910] Sc. Ct. Sess. (Eng.) 456, 47 Scot. L. Rep. 342.

Where the prolonged unfitness of a workman to perform his former heavy work was due to the softened condition of his muscles resulting from his long idleness, it has been held that the employer properly terminated compensation paid to the workman, during his incapacity, without any award or recorded agreement. *David v. Windsor Steam Coal Co.* 4 B. W. C. C. (Eng.) 177.

Where an incapacity has not been shown to have been removed, the compensation allowed may not properly be discontinued.

England.—*McCallum v. Quinn*, 2 B. W. C. C. 339, 46 Scott. L. Rep. 141, [1909] Sc. Ct. Sess. 227; *Malcolm v. Bowhill Coal Co.* 3 B. W. C. C. 562, [1910] Sc. Ct. Sess. 447, 47 Scott. L. Rep. 449; *White v. Harris*, 4 B. W. C. C. 39; *Jamieson v. Fife Coal Co.* [1903] Sc. Ct. Sess. 5 F. 958, 40 Scott. L. Rep. 704; *Hull v. Brady* [1913] 47 Ir. L. T. (Eng.) 211, [1913] W. C. & Ins. Rep. 706; *Wall v. Steel* [1915] W. C. & Ins. Rep. 117, 84 L. J. K. B. 1599, 112 L. T. N. S. 846; *Dempsey v. Caldwell* [1913] W. C. & Ins. Rep. 738, [1913] Scott. L. Rep. 267; *North-Eastern Marine Engineering Co. v. Davison* [1915] W. C. & Ins. Rep. 65; *Barron v. Blair* [1915] W. C. & Ins. Rep. 333, 8 B. W. C. C. 501.

California.—*United States Fidelity, etc. Co. v. Pillsbury*, 174 Cal. 198, 162 Pac. 638.

Illinois.—*Simpson Constr. Co. v. Industrial Board*, 275 Ill. 366, 114 N. E. 138.

Kansas.—*Moore v. Peet Bros. Mfg. Co.* 99 Kan. 443, 162 Pac. 295.

Compensation may not be terminated while a disability lasts, unless the employer can establish that the continued incapacity of an injured workman is not the result of his injury, but is due to some other cause. *McCallum v. Quinn*, 2 B. W. C. C. (Eng.) 339, 46 Scott. L. Rep. 141, [1909] Sc. Ct. Sess. (Eng.) 227.

In *Brown v. George A. Fuller Co.* (Mich.) 163 N. W. 492, it was held that the fact that the defendant had no further work for the plaintiff did not entitle it to terminate the weekly payments awarded to him under the workmen's compensation act for injuries sustained while in the defendant's employ. The court said: "Defendant elected to take claimant back into its employment, and up to the time that it discharged him, in September, 1915, it complied with the order. After that date it has not complied with the order, but for some reason assumes that its duty was at an end when the hotel was finished and it had no further work for the plaintiff. It is said he was given work as long as defendant had work to give him. The fact that it did or did not have employment for claimant would not terminate his right to compensation. The fact that it did not have any further work for claimant after September, 1914, would, doubtless, change the method of complying with the order; but it

would not take away claimant's right to the compensation allowed him by the board."

Where a refusal to exercise an injured member is found not to be unreasonable, as where the workman's own physician advised him that the exercise would not better his condition, interference with an award has been refused. *Burgess v. Jewell*, 4 B. W. C. C. (Eng.) 145; *Moss v. Akers*, 4 B. W. C. C. (Eng.) 294.

It has been held to be error for an arbitrator to terminate an allowance to an injured workman without any consideration of the effect of his injured condition on his ability to obtain future employment. *Arnott v. Fife Coal Co.* 4 B. W. C. C. (Eng.) 361, [1911] Sc. Ct. Sess. 1029, 48 Scott. L. Rep. 828; *Petrie v. Smith* [1913] W. C. & Ins. Rep. (Eng.) 378. *Compare* *Gray v. Shotts Iron Co.* [1912] Sc. Ct. Sess. (Eng.) 1267, [1912] W. C. Rep. 359, 6 B. W. C. C. 287.

An arbitrator is without jurisdiction to terminate an employer's liability where such action has not been requested by the employer. *Henshaw v. Fielding* [1914] W. C. & Ins. Rep. (Eng.) 326.

It has been held to be error for an arbitrator to terminate an award of compensation for injuries received by a workman, on the ground that a disease subsequently contracted, and not the injury, was the cause of the continued incapacity, without first determining whether the illness itself was in fact a result of the injury within the meaning of the workmen's compensation act. *Ystradowen Colliery Co. v. Griffiths* [1909] 2 K. B. (Eng.) 533, 78 L. J. K. B. 1044, 100 L. T. N. S. 869, 25 Times L. Rep. 622, 2 B. W. C. C. 357.

In reviewing an award, on an application to terminate an allowance of compensation under a workmen's compensation act, an arbitrator should take into consideration the nervous and mental condition of the workman as well as his physical condition in estimating the extent of his recovery. *Wall v. Steel* [1915] W. C. & Ins. Rep. (Eng.) 117, 84 L. J. K. B. 1599, 112 L. T. N. S. 846.

Where such nervous and mental condition is not considered, it is error for an arbitrator to terminate an award. *Southampton Gas Light, etc. Co. v. Stride* [1916] W. C. & Ins. Rep. (Eng.) 285, 115 L. T. N. S. 498, 32 Times L. Rep. 680, 9 B. W. C. C. 555; *Eaves v. Blaenlydach Colliery Co.* [1909] 2 K. B. (Eng.) 73, 78 L. J. K. B. 809. Thus, in the case last cited, the court said: "The learned judge says he thinks that, although the man honestly believes he is not able to do the work, and although he is not shamming or malingering, it is sufficient for the employers to show that the muscular mischief is at an end. I am entirely unable to assent to that view. The effects of an accident are at least twofold: they may be merely muscular effects

—they almost always must include muscular effects—and there may also be, and very frequently are, effects which you may call mental, or nervous, or hysterical, whichever is the proper word to use in respect of them. The effects of this second class, as a rule, arise directly from the accident from which the man suffered just as much as the muscular effects do, and it seems to me entirely a fallacy to say that a man's right to compensation ceases when the muscular mischief is ended, though the nervous or hysterical effects still remain."

However, in the United States, the contrary opinion has been held and compensation has been discontinued where, though the workman had recovered physically, he still suffered from mental depression due to his injury and was incapacitated for work because thereof. *Tatta v. Capitol City Lumber Co.* 1 Conn. Comp. Dec. 161, wherein it was said: "I might add that cases of lassitude, mental depression, imaginary pain and kindred neurotic conditions are of occasional occurrence among employees accustomed to active work who have sustained an injury, or been subjected to an operation. Assuming that such a condition resulted from an injury arising out of and in the course of employment, compensation might under certain circumstances be awarded. The human organism is a unit, and the mind cannot be disassociated from the body; but in this case, as in a great majority of such cases, the proper treatment is a gradual return to normal activities. For the commissioner to adopt a policy of awarding compensation on the basis of psychic depression would not only be a wrong to the employees whom the policy was intended to benefit, but would also open the door to grave abuses of the principles of the act."

Where the condition of an injured workman was the result of constitutional nervousness intensified by the accident causing his injury, it was held that compensation was improperly ended. *Smith v. Coed Taton Colliery*, 2 W. C. C. (Eng.) 121.

The fact that an injured employee at the time of a review is earning the same wages as he received before the injury, is not conclusive of the employer's right to a termination of the compensation awarded to him. *Warwick Steamship Co. v. Callaghan*, 5 B. W. C. C. (Eng.) 283; *Keevans v. Mundy* [1914] W. C. & Ins. Rep. (Eng.) 180. *Compare* *Bowhill Coal Co. v. Malcolm*, 3 B. W. C. C. (Eng.) 562, [1910] Sc. Ct. Sess. 447, 47 Scott. L. Rep. 449. However, it has been held that this is true only in case the injured employee is a minor. *Bowhill Coal Co. v. Malcolm*, 3 B. W. C. C. (Eng.) 562, [1910] Sc. Ct. Sess. 447, 47 Scott. L. Rep. 449.

Unpaid compensation to an injured workman, which has accrued prior to his death,

may be collected by his personal representative as a part of his estate. *Kilbride v. Pratt*, etc. Co. 1 Conn. Comp. Dec. 688; *Schoenreiter v. Quincy Min. Co.* Mich. Wk. Comp. Cas. [1916] 32 [cited in *Honold on Workmen's Compensation*, vol. 1, page 674].

On an application to review weekly payments allowed under the workmen's compensation act, it has been held in England that an arbitrator has no jurisdiction to make a prospective award terminating the said payments on a certain future date. *Baker v. Jewell* [1910] 2 K. B. 673, [1910] W. N. 180, 79 L. J. K. B. 1092, 103 L. T. N. S. 173, 3 B. W. C. C. 503; *Allan v. Spowart*, Sc. Ct. Sess. 8 F. 811, 43 Scott. L. Rep. 599. Compare *Evans v. Barrow Hematite Steel Co.* [1914] W. C. & Ins. Rep. 355. Thus, in *Baker v. Jewell*, supra, the court said: "In my opinion it is not competent for an arbitrator to make such an award. It has two defects, and it has two results. One is that the arbitrator is taking upon himself the function of a prophet, which is not what he ought to do; and the next is this, which to my mind is a more serious matter: it shifts the onus of proof in a mode which is, or which may be, very unfair to the workman. The duty of the arbitrator is to say what, upon the evidence adduced before him at the time of the hearing for a review, is the condition of the workman, and on that footing he ought to make an award of so much per week during the incapacity. Then, if there is a change, if the man is getting better, it is for the employer to seek to review the weekly payments on the ground that the incapacity has ceased or determined, or whatever the case may be. The burden is thus thrown upon the employer to show that there is a change of circumstances. If, however, the award is made in the manner in which it is made here, namely, so much a week for a certain time, and then only a penny a week, and if the man's condition should, at the end of the first period, be substantially the same as before, the burden is thrown upon the workman, and not upon the employer, and the workman would in that case have to get the award reviewed."

However, in the United States, in *Hunnewell's Case*, 220 Mass. 351, 107 N. E. 934, such an award appears to have been made.

After the expiration of the period allowed by the act within which to take an appeal from the decision of an arbitrator terminating an award to an injured workman, the matter is *res judicata*. *Green v. Cammell* [1913] 3 K. B. (Eng.) 665, 6 B. W. C. C. 735, 29 Times L. Rep. 703; *Linthorpe Dinsdale Smelting Co. v. Hoy* [1917] W. C. & Ins. Rep. (Eng.) 212, 86 L. J. K. B. 995; *Cadenhead v. Ailsa Shipbuilding Co.* [1910] Sc. Ct. Sess. 1129, 47 Scott. L. Rep. 784, 3 B. W. C. C. 581; *Evans v. Barrow Hematite Steel Co.* [1914] W. C. & Ins. Rep. (Eng.) 355.

Thus, after a finding on an original application that the incapacity for which compensation was sought was the result of an injury received by a workman in his employment, and an award was made accordingly, it has been held that a court has no jurisdiction at the instance of an employer to entertain an application for a review and termination of the award on the ground that the incapacity resulting from the injury has ceased, where it developed subsequent to the award that the cause of the disability may have been an illness which the workman contracted during infancy and not the accident and injury. *Linthorpe Dinsdale Smelting Co. v. Hoy* [1917] W. C. & Ins. Rep. (Eng.) 212, 86 L. J. K. B. 995.

On an application for a review and termination of an award under a workmen's compensation act, it has been held to be erroneous for an arbitrator to take the view that his holding on the original application that the employee was suffering from a "permanent partial incapacity" was *res judicata*, and dismiss the application. *Dundee, etc. Shipping Co. v. Wilcock* [1916] W. C. & Ins. Rep. (Eng.) 225, 9 B. W. C. C. 471.

It is not necessary, in order to give an arbitrator jurisdiction of an application for a review and termination of an award, that a dispute shall have arisen between the parties thereto. *Tyne Tees Shipping Co. v. Whilock* [1913] 3 K. B. (Eng.) 642, [1913] W. N. 237, 6 B. W. C. C. 559, [1913] W. C. & Ins. Rep. 579, 109 L. T. N. S. 84, 57 Sol. J. 716, 82 L. J. K. B. 1091; *Malcolm v. Bowhill Coal Co.* 3 B. W. C. C. 562, [1910] Sc. Ct. Sess. 447, 47 Scott. L. Rep. 449.

The fact that an injured workman, believing himself recovered, returns to his work and continues to perform his duties for a considerable period thereafter, without any agreement as to further compensation in the event of a recurrence of his disability, does not warrant a finding by the arbitrator of an implied agreement to terminate the weekly payments which the workman was allowed, and to end the liability of his employer incurred as a result of the injury. *Williams v. Vauxhall Colliery Co.* [1907] 2 K. B. (Eng.) 433, 76 L. J. K. B. 854, 23 Times L. Rep. 591, 97 L. T. N. S. 559, 51 Sol. J. 582, 9 B. W. C. C. 120; *O'Callaghan v. Martin*, 38 Ir. L. T. 152; *Baird v. Dempster* [1906] Sc. Ct. Sess. 722, 46 Scott. L. Rep. 119, 1 B. W. C. C. 62.

However, under a similar statement of facts, the compensation was held to have been terminated by mutual consent. *Bradbury v. Bedworth Coal, etc. Co.* 2 W. C. C. (Eng.) 138.

In an answer to an application by a workman to increase his compensation under the workmen's compensation act, the employer may properly request a termination of such

payments. *Paulfziky v. Wandsworth, etc. Gas Co.* [1916] W. C. & Ins. Rep. (Eng.) 127, 9 B. W. C. C. 206; *Linthorpe Dinsdale Smelting Co. v. Hoy* [1917] W. C. & Ins. Rep. (Eng.) 212, 86 L. J. K. B. 995.

In entering a judgment on an application to diminish or terminate an award of compensation, it has been held to be error for an arbitrator to base his decision even partly on the result of a private interview had with the workman, during which the employers or their legal representatives were not present, and a new trial should be granted. *Earle's Shipbuilding, etc. Co. v. Walker* [1917] W. C. & Ins. Rep. (Eng.) 54, 10 B. W. C. C. 73.

RETROACTIVE TERMINATION.

It has been held in *England* that an arbitrator under the workmen's compensation act has no jurisdiction to terminate the compensation awarded to an injured workman as from a date antecedent to an application for a review thereof, where the workman's capacity or incapacity for any period prior to the said application is not disputed and the point is not raised before the arbitrator on the review of the former award. *Upper Forest etc. Steel, etc. Co. v. Thomas* [1909] 2 K. B. (Eng.) 631, 2 B. W. C. C. 414, 78 L. J. K. B. 1113; *Charing Cross, etc. R. Co. v. Boots* [1909] 2 K. B. (Eng.) 640, 2 B. W. C. C. 385, 78 L. J. K. B. 1115, 101 L. T. N. S. 53, 25 Times L. Rep. 683.

Thus, in *Upper Forest, etc. Steel, etc. Co. v. Thomas*, supra, the court said: "I think that the arbitrator had no jurisdiction to make this award. It was not referred to him to ascertain what was the state of the injured man at a previous date. It is really unnecessary for the court to consider whether, if the matter had been referred to the arbitrator, it would have been competent to him to decide that the incapacity had ceased at a previous date. I desire to leave that an open question, and I must not be taken as indicating a view one way or the other upon the point. That was not the question referred to the arbitrator upon this application."

However, where there is a dispute between the workman and his employer as to the time when the former's incapacity ceased, and that point is raised before the arbitrator, that official has jurisdiction to inquire at what date since the making of the original award the workman's incapacity diminished, and to make his award accordingly. *Morton v. Woodward* [1902] 2 K. B. (Eng.) 276, 4 W. C. C. 143, 71 L. J. K. B. 736, 86 L. T. N. S. 878, 51 W. R. 54, 66 J. P. 660. See also *Tyne Tees Shipping Co. v. Whilock* [1913] 3 K. B. (Eng.) 642, [1913] W. N. 237, 6 B. W. C. C. 569, [1913] W. C. & Ins. Rep. 579,

109 L. T. N. S. 84, 57 Sol. J. 716, 82 L. J. K. B. 1091.

The early decisions of the courts of *Scotland* held that the authority of an arbitrator to end compensation allowed under the workmen's compensation act exists only as from the date of his decision on an application for a review of such allowance, where an agreement between the employer and his workman providing for such compensation has been recorded as required by the act. *Southhook Fire-Clay Co. v. Laughland*, 1 B. W. C. C. (Eng.) 405, [1908] Sc. Ct. Sess. 831, 45 Scott. L. Rep. 664; *Baird v. Stevenson* [1907] Sc. Ct. Sess. (Eng.) 1259, 44 Scott. L. Rep. 864; *Steel v. Oakbank Oil Co.* 40 Scott. L. Rep. (Eng.) 205, Sc. Ct. Sess. 5 F. 244; *Pumpherson Oil Co. v. Cavoney*, 40 Scott. L. Rep. (Eng.) 724, Sc. Ct. Sess. 5 F. 963; *Fife Coal Co. v. Lindsay* [1908] Sc. Ct. Sess. 431, 45 Scott. L. Rep. 317, 1 B. W. C. C. 117. But the foregoing decisions were subsequently overruled, and the law as laid down by the session court of *Scotland* is that, in the case of recorded agreements, compensation may be terminated as from the date of the application for a review, but not before then. *Donaldson v. Cowan*, 2 B. W. C. C. (Eng.) 390, 46 Scott. L. Rep. 920, [1909] Sc. Ct. Sess. 1292. It appears, however, that in the case of an unrecorded agreement between an employer and an injured workman affecting his compensation, the payments may be terminated as from the date on which the incapacity ceased, and such ending of the payments may antedate the filing of the application for a review. *Tigue v. Coleville*, Sc. Ct. Sess. 8 F. 179, 43 Scott. L. Rep. 129; *Lochgelly Iron, etc. Co. v. Sinclair* [1909] Sc. Ct. Sess. 922, 46 Scott. L. Rep. 665; *Nelson v. Summerlee Iron Co.* [1910] Sc. Ct. Sess. 360, 47 Scott. L. Rep. 344; *Rosie v. Mackay* [1910] Sc. Ct. Sess. 714, 47 Scott. L. Rep. 664; *Thomson v. Watson* [1916] Sc. Ct. Sess. 23, [1916] W. C. & Ins. Rep. 498; *Finnie v. Fulton*, 46 Scott. L. Rep. 665, [1909] Sc. Ct. Sess. 938. See also *Keevans v. Mundy* [1914] W. C. & Ins. Rep. 180.

Where the aggravated disability of the injured workman is due to his own negligence, an award of compensation may be terminated as of the date on which the workman probably would have recovered were it not for his negligence. *Smraker v. Pacific Lumber Co.* 2 Cal. I. A. C. Dec. 87 [cited in *Honnold on Workmen's Compensation*, vol. 1, page 680]; *Kelliher v. Great Western Power Co.* 2 Cal. I. A. C. Dec. 378 [cited in *Honnold on Workmen's Compensation*, vol. 1, page 678]; *Sczerbowicz v. New Britain*, 1 Conn. Com. Dec. 671; *Powell v. Crow's Nest Pass Coal Co.* 22 British Columbia 514, 26 Dominion L. Rep. 317, 34 West. L. Rep. 32, affirming 23 Dominion L. Rep. 57, 32 West. L. Rep. 218.

TERMINATION OF ALLOWANCE TO DEPENDENT.

It appears that an award of a lump sum to a dependent relative under a workmen's compensation act, to be paid in instalments periodically, terminates on the death of such dependent, though it is not so provided in the act. *Ivey v. Ivey* [1912] 2 K. B. (Eng.) 118, 81 L. J. K. B. 819, [1912] W. C. Rep. 293, 106 L. T. N. S. 485, 5 B. W. C. C. 279; *Matecny v. Vierling Steel Works*, 187 Ill. App. 448; *Murphy's Case*, 224 Mass. 592, 113 N. E. 283.

Thus, in *Matecny v. Vierling Steel Works*, supra, the court said: "The appellee contends that, even if it be held that the mother was the sole beneficiary, still her right to the entire compensation became vested upon the death of Joseph Matecny, and the appointment of an administrator for his estate, and that this right would survive her death and inure to the benefit of her estate. After a careful consideration of this question, we have arrived at the conclusion that the contention of the appellant is correct, and that the obligation of the appellant to pay compensation to the administrator would be extinguished on the death of the mother. We do not believe that the act contemplates that the employer shall pay any money to nondependent heirs."

However, it has also been held that, on the death of such a dependent relative, in the absence of any provision in the act to the contrary, his or her personal representatives are entitled to recover any unpaid balance of a lump sum, or weekly allowance for a definite period, awarded to such deceased dependent under a workmen's compensation act. *Darlington v. Roscoe* [1907] 1 K. B. 219, 9 W. C. C. (Eng.) 1; *In re Jones*, 217 Mass. 192, 104 N. E. 556; *State v. Industrial Commission*, 92 Ohio St. 434, Ann. Cas. 1917D 1162, 111 N. E. 299, L.R.A.1916D 944. Thus, in the case last cited, the court said: "We hold that when the award is once made to a sole dependent the right to the compensation vests, and once vested there can be no condition attached except as to the time of payment, and it is equally immaterial whether the dependent subsequently dies or becomes independent."

Under the English act, it has been held that notwithstanding the death of a sole dependent relative of a workman shortly after the latter's death in the course of his employment, the personal representative of the said deceased dependent, even though the latter never presented a claim which he or she was entitled to make under the said act, may recover the compensation allowed thereby to dependent relatives. *United Collieries v. Simpson* [1909] A. C. 283, 78 L. J. K. B. 129, 101 L. T. N. S. 129, 25 T. L. Rep. 678, 53 Sol. J. 630, 2 B. W. C. C. 308, [1909] Sc. Ct. Sess. 19, 46 Scott. L. Rep. 780.

In the reported case it is held that a weekly allowance for a definite period under a workmen's compensation act to the dependent sister of a workman who had been killed in the course of his employment could not be abated because of her subsequent marriage. See also *State v. Industrial Commission*, 92 Ohio St. 434, 454, Ann. Cas. 1917D 1162, 111 N. E. 299, L.R.A.1916D 944.

Compensation which accrues to a dependent of a workman, killed in his employment, between the death of the workman and that of the dependent which occurs at a subsequent date, becomes part of the dependent's estate which the legal representative may recover. *In re Towle*, Op. Sol. Dept. of Labor 565.

As to whether an award vests in the beneficiary, see the note to *State v. Industrial Commission*, Ann. Cas. 1917D 1162.

Suspension.

JURISDICTION TO ORDER SUSPENSION.

As to the jurisdiction to suspend an allowance under the English workmen's compensation act, *Cozens-Hardy, M. R.*, in *Vessel Tynron v. Morgan* [1909] 2 K. B. 66, 78 L. J. K. B. 857, 100 L. T. N. S. 641, 2 B. W. C. C. 406, said: "Then it is said on behalf of the employers that it has never been decided that there is any jurisdiction to make a suspensory award, and that the Scots courts in one case have expressed a doubt whether it is competent to do so. All I can say is that the court of appeal, to my certain knowledge, for many years has taken the view that it is competent to make such an award. There is probably not a county court judge in the country who has not acted on that view, and I think it would be entirely wrong for us now to raise any doubt whatever as to the jurisdiction of a county court judge, or of this court, in a proper case, to make what is called a suspensory award."

In the following cases also, the jurisdiction was sustained: *Weir v. North British R. Co.* 5 B. W. C. C. 595, [1912] Sc. Ct. Sess. 1073, 49 Scott. L. Rep. 772, [1912] W. C. Rep. 332; *Dempsey v. Caldwell* [1914] Sc. Ct. Sess. 28; *Clelland v. Singer Mfg. Co.* Sc. Ct. Sess. 7 F. 975, 42 Scott. L. Rep. 757.

CIRCUMSTANCES AUTHORIZING SUSPENSION.

Under the English act, compensation awarded to a workman may be suspended on his emigration to a foreign country. See *Harrison v. Dowling* [1915] 3 K. B. 218, 8 B. W. C. C. 544, [1915] W. C. & Ins. Rep. 351, 113 L. T. N. S. 622, [1915] W. N. 262, 31 Times L. Rep. 480.

But it has been held that this rule does not apply to the case of a workman who has enlisted in the military forces of the United

Kingdom and been sent on foreign service. *Harrison v. Dowling* [1915] 3 K. B. 218, 8 B. W. C. C. 544, [1915] W. C. & Ins. Rep. 351, 113 L. T. N. S. 622, [1915] W. N. 262, 31 Times L. Rep. 480. In that case it was said: "That it is said that the workman is no longer in the United Kingdom. Of course he is physically not within the United Kingdom; he is at Cawnpore. But the act does not say, and I am satisfied that it does not intend to say, that the mere fact that an injured workman is for the moment not in truth physically in the United Kingdom deprives him of his right to compensation or authorizes suspension. It contemplates the case of a workman having gone from this country, say as an emigrant to Canada, the United States, or what not."

Where an employer has been prejudiced by the delay of an injured workman in reporting the fact of his injury to the employer, compensation may be suspended during the period intervening the date of the injury and on which it is so reported. *Sezerbowiez v. New Britain*, 1 Conn. Comp. Dec. 671.

A workman's compensation may be suspended during the period of a refusal by him to submit to medical treatment provided for him, *Dowds v. Bennie*, Sc. Ct. Sess. 5 F. (Eng.) 268; *Hill v. Guardian Casualty, etc. Co.* 1 Cal. I. A. C. Dec. 415 [cited in *Honnold on Workmen's Compensation*, vol. 1, page 678]; or on his unreasonable refusal to accept light work offered to him by his employer, *Furness v. Bennett*, 3 B. W. C. C. (Eng.) 195; *Potts v. Guildford Syndicate* [1914] W. C. & Ins. Rep. (Eng.) 330; *Jenkinson v. Steiner* [1917] W. C. & Ins. Rep. (Eng.) 104. See also *Keevans v. Mundy* [1914] Sc. Ct. Sess. 525, [1914] W. C. & Ins. Rep. 180.

It has been held that compensation to an injured workman may be suspended while he is in prison. *Clayton v. Dobbs*, 2 B. W. C. C. (Eng.) 488.

If the claim of a workman on a recorded memorandum under the English act, for injuries arising out of his employment, is for an amount which his employers have already paid him because of such injuries, a suspension of payments at the instance of the employers may properly be allowed. *Wilson's etc. Coal Co. v. Cairnduff* [1911] Sc. Ct. Sess. 647.

Where a workman is not shown to have completely recovered, a suspension of an allowance is properly refused. *Fife Coal Co. v. Davidson* [1907] Sc. Ct. Sess. 90, 44 Scott. L. Rep. 108.

Also, where there is no probability of a recurrence of the injurious effects of an accident and a subsequent incapacity for work, a suspensory award is not an appropriate remedy, but the compensation should be terminated. *Leverington v. Dodman* [1916] 1

K. B. 964, [1916] W. C. & Ins. Rep. 109, 114 L. T. N. S. 582, 85 L. J. K. B. 832; *Wardell v. Cargo Fleet Iron Co.* [1917] W. C. & Ins. Rep. 77.

A suspension has been held to be improper where the workman continued paralyzed in his legs as the result of his injuries. *Southampton Gas-Light, etc. Co. v. Stride* [1916] W. C. & Ins. Rep. 285, 115 L. T. N. S. 498, 32 Times L. Rep. 680, 9 B. W. C. C. 555.

An appeal from a decision of an arbitrator refusing to award compensation on an original application, on the ground that a suspensory award should have been made, has been dismissed for the reason that the record did not show that such an award had been requested. *Harlock v. Steamship Coquet* [1914] W. C. & Ins. Rep. 73.

The suspension of an allowance to a workman under the English workmen's compensation act, on an application to review the said allowance on the ground that the workman, having enlisted in the military forces, had made it impossible to determine the extent of his recovery and his present capacity for work in his former employment, has been held to be error, inasmuch as, admitting the profession of a soldier not to be a "suitable employment" contemplated by the act, the arbitrator should have determined the value of any service which the workman was able to render in any industrial or commercial employment and made his award accordingly. *Thomas v. Watson* [1916] Sc. Ct. Sess. 23, [1915] W. C. & Ins. Rep. 498.

NOMINAL AWARD.

In *England* arbitrators under the workmen's compensation act, for the purpose of suspending compensation without risking the possibility of absolutely terminating the liability of an employer in cases wherein the employee, while completely recovered from his injury, may suffer a recurrence of his disability or a prejudicial change in his circumstances, have resorted to the device of what is probably erroneously termed, a "suspensory" award, to wit, the reduction of a previous allowance to a nominal award, usually of one penny a week. The effect of such an award is to keep alive the claim of the workman and, in case of a subsequent incapacity resulting from the injury, or change of circumstances, to obtain a review and continuance or increase of the original allowance. The object attained is the effectual termination of the employer's liability, conditioned on the continued capacity of the workman to perform his former or other duties, which capacity was lessened by the injury from which, however, he has apparently completely recovered. Suspensory awards of a nominal allowance were made in the following cases:

Hill v. Ocean Coal Co. 3 B. W. C. C. 29; Jones v. Cawdor, etc. Collieries, 3 B. W. C. C. 59; Wells v. Cardiff Steam Coal Collieries Co. 3 B. W. C. C. 104; Griga v. Steamship Harelda, 3 B. W. C. C. 116, 26 Times L. Rep. 272; Thomas v. Fairbairn, 4 B. W. C. C. 195; Braithwaite v. Cox, 5 B. W. C. C. 77; Brown v. Thornycroft, 5 B. W. C. C. 386; Potts v. Guildford Syndicate [1914] W. C. & Ins. Rep. 330; Chapman v. Sage [1915] W. C. & Ins. Rep. 472, 113 L. T. N. S. 623, 8 B. W. C. C. 559; Paulizky v. Wandsworth, etc. Gas Co. [1916] W. C. & Ins. Rep. 127, 9 B. W. C. C. 206; Freeland v. Macfarlane, Sc. Ct. Sess. 2 F. 832, 37 Scott. L. Rep. 599; Ferrier v. Gourlay, Sc. Ct. Sess. 4 F. 711, 39 Scott. L. Rep. 453; Morton v. Woodward [1902] 2 K. B. 276, 4 W. C. C. 143, 71 L. J. K. B. 736, 86 L. T. N. S. 878, 51 W. R. 54, 66 J. P. 660; James v. Ocean Coal Co. [1904] 2 K. B. 213, 73 L. J. K. B. 915, 90 L. T. N. S. 834, 20 Times L. Rep. 483, 68 J. P. 431, 52 W. R. 497, 6 W. C. C. 128; Vessell Tynron v. Morgan [1909] 2 K. B. 66, 78 L. J. K. B. 857, 100 L. T. N. S. 641, 2 B. W. C. C. 406; Evans v. Vickers [1910] 1 K. B. 554, 3 B. W. C. C. 196, *affirmed* [1910] A. C. 444, 3 B. W. C. C. 403, 79 L. J. K. B. 954, 103 L. T. N. S. 292, 26 Times L. Rep. 548, 54 Sol. J. 651; Calico Printers' Assoc. v. Higham [1912] 1 K. B. 93, 81 L. J. K. B. 232, [1912] W. C. Rep. 104; Rex v. Templer [1912] 2 K. B. 444, 81 L. J. K. B. 805, [1912] W. C. Rep. 209, 5 B. W. C. C. 454, 106 L. T. N. S. 855, [1912] W. N. 135, 28 Times L. Rep. 410, 58 Sol. J. 501; Green v. Cammell [1913] 3 K. B. 665, 6 B. W. C. C. 735, 29 Times L. Rep. 703; Irons v. Davis [1899] 2 Q. B. 330, 68 L. J. Q. B. 673; Ogden v. South Kirby, etc. Collieries [1913] W. C. & Ins. Rep. 463, 6 B. W. C. C. 573; Duberley v. Mace [1913] W. C. & Ins. Rep. 199, 6 B. W. C. C. 82; Thayne v. Gray [1915] W. C. & Ins. Rep. 64.

In *Vessel Tynron v. Morgan* [1909] 2 K. B. 66, 78 L. J. K. B. 857, 100 L. T. N. S. 641, 2 B. W. C. C. 406, it appeared that a seaman met with an accident while on a voyage and was ruptured. By wearing a truss, he sufficiently recovered to enable him to resume his work. In considering an application to reduce or terminate an allowance made to the seaman, the court said: "That the workman is now able to resume his work as mate is not seriously disputed by Mr. Hogg; but he says that the award ought to be made in a shape which would not end the workman's right to compensation forever by terminating absolutely the liability, but that it ought to be made in such a shape as to keep alive the employers' liability if it should appear, as is extremely probable, that the effects of the original accident, quite apart from a subsequent accident, would so far develop themselves hereafter that the workman might

be entitled to have the award reviewed in his favor, just as it is now being reviewed in favor of the employers. The county court judge was asked on behalf of the workman to make what is sometimes called, not quite accurately, a suspensory award—that is to say, to award a nominal sum of a penny per week, or to make a declaration of liability, it does not matter which way you put it. I feel no doubt whatever in the case of an accident of this kind—in the case of rupture, when at the very moment it was before the learned judge the workman was wearing a truss—a suspensory award ought to be made."

The authority to make a suspensory award of a penny a week is not confined to the consideration of applications for a review of an original award of compensation. In determining the action to be taken on an original application, an arbitrator may keep alive a claim against an employer by making such an award in a case in which he is not willing at the time of the hearing to award a substantial allowance. *Thomas v. Fairbairn*, 4 B. W. C. C. 195; *Chapman v. Sage* [1915] W. C. & Ins. Rep. 472, 8 B. W. C. C. 559, 113 L. T. N. S. 623; *Paulizky v. Wandsworth, etc. Gas Co.* [1916] W. C. & Ins. Rep. 127, 9 B. W. C. C. 206; *Green v. Cammell* [1913] 3 K. B. 665, 6 B. W. C. C. 735, 29 Times L. Rep. 703. Thus, in the case last cited, it was said: "It was contended by Mr. Rigby Swift that there is no power to make, on an original application, what is known as a suspensory award for 1d. a week, and that Green could not have appealed from the first award. I am unable to agree with this contention. It seems to me that whether under an original application or under an application to review it is equally competent to the court to make an award of 1d. a week. The case of *Griga v. Steamship Harelda*, 3 B. W. C. C. 116, is a clear authority in this court on the point. I do not think it is open to us to depart from that decision. But having now heard the point fully argued, I may say that I feel no doubt that 1d. a week may be awarded on an original application, and that if no such award is made it is competent to the workman to appeal against the award."

While the authority to make a suspensory award of a nominal sum was definitely established by the decision of the English House of Lords in *Taylor v. London, etc. R. Co.* [1912] A. C. 242, 81 L. J. K. B. 541, [1912] W. C. Rep. 95, 106 L. T. N. S. 354, 56 Sol. J. 323, 28 Times L. Rep. 290, cited in the original note, the courts of Scotland in cases antedating that of *Taylor v. London, etc. R. Co. supra*, denied that the authority existed, *Clelland v. Singer Mfg. Co. Sc. Ct. Sess. 7 F. 975*, 42 Scott. L. Rep. 757; *Rosie v. Mackay* [1910] Sc. Ct. Sess. 714, 47 Scott.

L. Rep. 654; and disapproved the following decisions which held the opposite view: *Freeland v. Macfarlane*, Sc. Ct. Sess. 2 F. 832, 37 Scott. L. Rep. 599; *Ferrier v. Gourlay*, Sc. Ct. Sess. 4 F. 711, 39 Scott. L. Rep. 453.

DECLARATION OF LIABILITY.

The award, however, need not be in the form of a nominal allowance in order to save the workman from possible injury by prematurely absolving his employer from further liability. The employee is sufficiently protected if the award takes the form of a "declaration of liability" without any pecuniary allowance. *Furness v. Bennett*, 3 B. W. C. C. 195; *Braithwaite v. Cox*, 5 B. W. C. C. 77; *Corbet v. Hains*, 5 B. W. C. C. 372, [1912] W. C. Rep. 288; *Parry v. Rhymney Iron, etc. Co.* 5 B. W. C. C. 632, [1912] W. C. & Ins. Rep. 331; *Howards v. Wharton*, 6 B. W. C. C. 614, [1913] W. C. & Ins. Rep. 594; *Burt v. Fife Coal Co.* 8 B. W. C. C. 350; *Beath v. Ness*, Sc. Ct. Sess. 6 F. 822, 41 Scott. L. Rep. 631; *Chandler v. Smith* [1899] 2 Q. B. 506, 68 L. J. Q. B. 909; *Vessel Tynron v. Morgan* [1908] 2 K. B. 66, 78 L. J. K. B. 857, 100 L. T. N. S. 641, 2 B. W. C. C. 406; *Nimmo v. Fisher* [1907] Sc. Ct. Sess. 890, 44 Scott. L. Rep. 641; *Baird v. McWhinnie* [1908] Sc. Ct. Sess. 440, 45 Scott. L. Rep. 338; *Clarke v. Knox* [1913] W. C. & Ins. Rep. 664, 57 Sol. J. 793, 6 B. W. C. C. 695; *Dempsey v. Caldwell* [1913] W. C. & Ins. Rep. 738, [1913] Scott. L. T. 267; *Chapman v. Sage* [1915] W. C. & Ins. Rep. 472, 113 L. T. N. S. 623, 8 B. W. C. C. 559; *Thomson v. Watson* [1915] W. C. & Ins. Rep. 498, [1916] Sc. Ct. Sess. 23.

Thus, in *Chandler v. Smith*, *supra*, the court said: "It seems to me that the county court judge in this case might and should have made a declaration of liability and adjourned the question of the amount and duration of compensation. This seems to me to be in accordance with the spirit of the provisions of clause 12 of Sched. I, which provides that the weekly payment may be reviewed at the request either of the employer or of the workman, and on such review the weekly payment may be ended, diminished, or increased. If you may review the award when the facts have been ascertained for certain, it seems only reasonable that you may postpone the fixing of the amount of compensation until the facts are ascertained to which the measure is to be applied, and I prefer this course to that of awarding a weekly payment of a penny and then applying the provisions of clause 12 of Sched. I."

This latter practice has been followed in the United States, in *Hunnewell's Case*, 220 Mass. 351, 107 N. E. 934, wherein an industrial accident board awarded compensation to an injured employee and filed its

finding to the effect that "total incapacity for work on account of said personal injury will cease . . . on October 19, 1913, subject to the right of the said employee to compensation on account of partial incapacity for work under § 10, Part II, of the workmen's compensation act, depending upon his ability to earn wages." In opposition to an application for a continuance of the award after the date on which the board found that the total incapacity of the injured workman would cease, it was urged that "because all weekly payments in fact stopped, there was nothing further for the board to deal with under Part III, § 12 [of the workmen's compensation act], and that it could not end, diminish or increase a weekly payment which had ceased to exist six months before the hearing." The court said: "That contention would be unanswerable if the earlier decision had been that weekly payments should end finally. But, as has been pointed out, that was not the earlier decision and the board in its decision now under review was proceeding strictly in accordance with the lines left open by express reservation in its former decision. . . . In substance the decision was that total disability was over, but whether there would be a partial disability arising out of the injury was a question as to which they were not at that time prepared to give a decision either way, but desired to leave it open still as a question to be answered as the facts might warrant at some future time. This course is justified by the act. It has been the custom under the English act to award compensation at the rate of a penny a week under these circumstances. . . . That course never has been followed, so far as we are aware, under our act. But it is not necessary even in England that this be done in order to keep the case alive, provided the purpose is plain not to terminate the claim definitively, but to keep it open for further consideration and order. . . . *Taylor v. London, etc. R. Co.* [1912] A. C. 242, 245."

SURGICAL OPERATION.

If, by undergoing a slight surgical operation which any reasonable person would submit to in his own interest, regardless of the effect it would have on his prospects of obtaining an award under a workmen's compensation act, an injured workman's capacity for work would be increased, or his full capacity restored, it is proper to suspend his allowance on his refusal to permit the operation to be performed. *Paddington v. Stack*, 2 B. W. C. C. (Eng.) 402; *Warneken v. Moreland* [1909] 1 K. B. (Eng.) 184, 78 L. J. K. B. 332, 100 L. T. N. S. 12, 25 Times L. Rep. 129; *Anderson v. Baird*, Sc. Ct. Sess. 5 F. 373; *Nimmo v. Fisher* [1907] Sc. Ct. Sess.

890, 44 Scott. L. Rep. 641; *Donnelly v. Baird* [1908] Sc. Ct. Sess. 536, 45 Scott. L. Rep. 394, 1 B. W. C. C. 95; *Gordon v. Evans*, 1 Cal. J. A. C. Dec. 94 [cited in *Honnold on Workmen's Compensation*, vol. 1, page 681]; *Sezerbowicz v. New Britain*, 1 Conn. Comp. Dec. 671; *McNally v. Hudson*, etc. R. Co. 87 N. J. L. 455, 95 Atl. 122.

Thus, in *Anderson v. Baird*, supra, the court said: "If risk to life or permanent deterioration of health would be occasioned by the operation, I do not think the workman is bound to submit to it in order to entitle him to the continuance of compensation. But where, as here, the operation is one not attended with serious risk or pain I am of opinion that if the workman refuses to submit to a remedy which would remove or lessen his incapacity for wage earning he must take the consequences." And in *Donnelly v. Baird* [1908] Sc. Ct. Sess. 536, 45 Scott. L. Rep. 394, 1 B. W. C. C. 95, it was said: "In view of the great diversity of cases raising this question, I can see no general principle except this, that if the operation is not attended with danger to life and health, or extraordinary suffering, and if, according to the best medical or surgical opinion, the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him."

However, where an operation would be attended with risk to life or health, the refusal of a workman to undergo such an operation is not unreasonable, and a suspension of his allowance under such circumstances has been held to have been properly refused. *Rothwell v. Davies*, 19 Times L. Rep. (Eng.) 423, 5 W. C. C. 141. See also *Anderson v. Baird*, Sc. Ct. Sess. 5 F. 373.

Also, where there is a difference of opinion among medical authorities as to the existence or nonexistence of a risk to life or health attendant on a surgical operation, an allowance under a workmen's compensation act may not properly be suspended because of an injured employee's refusal to undergo such an operation. *Sweeney v. Pumpherston Oil Co.* Sc. Ct. Sess. 5 F. 972, 40 Scott. L. Rep. 721. See also *Dowds v. Bennie*, Sc. Ct. Sess. 5 F. 268, 40 Scott. L. Rep. 239.

However, where there was admittedly no risk to life or health attendant on the performance of an operation, but an injured workman had been advised by his own physicians that the operation would be useless,

and acting on such advice had refused to submit thereto, it has been held that, by such refusal, he was precluded from claiming a continuance of the compensation awarded to him. *O'Neill v. Brown* [1913] Sc. Ct. Sess. 653 [1913] W. C. & Ins. Rep. 235, 6 B. W. C. C. 428.

BURDEN OF PROOF.

It appears that the burden of proof, that the liability of a workman to suffer from a recurrence of an affection, common among workers in his occupation, and with which he became afflicted in his employment, is due to the original attack and not to a constitutional predisposition, is on the employee, and unless this burden is discharged he is not entitled to a suspensory award, to keep alive a claim against his employer under a workmen's compensation act. *Darroll v. Glasgow Iron, etc. Co.* [1913] Sc. Ct. Sess. 387, [1913] W. C. & Ins. Rep. 80, 50 Scott. L. Rep. 226, 6 B. W. C. C. 354. See also *M'Ghee v. Summerlee Iron Co.* [1911] Sc. Ct. Sess. 870, 48 Scott. L. Rep. 807, 4 B. W. C. C. 424. Compare *M'Callum v. Quinn* [1909] Sc. Ct. Sess. 227, 46 Scott. L. Rep. 141, 16 Scott. L. T. 501, 2 B. W. C. C. 339.

Thus in *Irons v. Davis* [1899] 2 Q. B. (Eng.) 330, 333, 1 W. C. C. 26, 68 L. J. Q. B. 673, 80 L. T. N. S. 673, 47 W. R. 616, the court said: "It is therefore understood that if in the future the ability of the respondent to earn wages is affected by this accident, the county court judge will have power, under clause 12, to review the award and to increase the amount of the weekly payment."

And in *Safety Insulated Wire, etc. Co. v. Hudson County*, 90 N. J. L. 114, 100 Atl. 846, it was said: "By section 21 of the Workmen's Compensation Act of 1911, p. 143, it is, among other things, provided that an award of compensation may be modified at any time after one year from the time when it became operative, and may be reviewed upon the application of either party on the ground that the incapacity of the injured employee has subsequently increased or diminished. It is to be observed that the term 'incapacity of the injured employee' is used. The legislature has thereby established the test of 'incapacity' as the determining factor whether an award shall be diminished or increased, as the case may be. The incapacity which the legislature had in mind was the incapacity to perform labor."

BLANTON

v.

**WHEELER AND HOWES COMPANY
ET AL.**

Connecticut Supreme Court of Errors—December 19, 1916.

91 Conn. 226; 99 Atl. 404.

Workmen's Compensation Acts — Procedure — Motion to Recommit.

Upon appeal from award of compensation commissioner, a motion that the finding and award be recommitted with direction should be in writing, where it appears that neither side will produce evidence.

Form of Findings.

A finding should contain the facts found, not the evidence from which they are to be found.

Same.

A finding that certain testimony is true is not the same thing as finding that some fact as testified to is true.

Same.

A finding that a claimant for compensation under the Workmen's Compensation Act (Pub. Acts 1913, c. 138) relied upon sums sent her by a deceased employee "for expenses" is not equivalent to a finding that she relied on them for living expenses necessary and proper for her class and station in life.

Who Is "Dependent."

Dependency is to be determined in accordance with the fact as the fact may be at the time of the injury.

[See note at end of this case.]

Same.

A married daughter living with her husband and supporting herself with his aid is not "dependent" upon her father, where she received no contributions from him for six months prior to his death.

[See note at end of this case.]

Same.

Under the workmen's compensation act, a dependent cannot be said to be one who has sufficient means at hand for supplying present necessities according to the class and position in life of the alleged dependent.

[See note at end of this case.]

Same.

Mere ability to earn a livelihood will not prevent one from being considered a "dependent" under the workmen's compensation act, even though the person furnishing the support possesses less income than the alleged dependent; the test being whether the alleged dependent relied upon contributions of the employee, wholly or partially, for living expenses necessary and proper to the class and position in life of the claimant.

[See note at end of this case.]

Absence of Dependents — Award to State.

The failure of the court, after finding claimant was not a dependent of a deceased em-

ployee, to award the sum of \$750 to the state treasurer can be objected to only by the state, and not by the claimant.

Appeal from Superior Court, Fairfield county: GAGER, Judge.

Claim for compensation under workmen's compensation act. Bertha L. Blanton, claimant, and Wheeler and Howes Company, et al., defendants. Claim disallowed by Compensation Commissioner. Decision affirmed by Superior Court. Claimant appeals. The facts are stated in the opinion. **AFFIRMED.**

James P. Pigott for appellant.

William Brosmith and Robert C. Dickenson for appellees.

[227] WHEELER, J.—The appeal from the Compensation Commissioner was heard in the Superior Court at short calendar on an oral motion that the finding and award be recommitted with direction either that compensation be awarded to the claimant or to the State Treasurer.

The motion should have been in writing. Upon appeals of this nature it is preferable that reasons of appeal and an answer thereto be filed forthwith, and, if testimony is to be introduced upon the hearing, that the hearing be had speedily; if it appears that neither side [228] will produce evidence, a written motion for judgment for the short calendar should be filed and heard.

The questions upon this appeal are twofold: Did the Superior Court err in dismissing this appeal and in confirming the commissioner in holding that the claimant was not a dependent? Did the Superior Court, having confirmed the commissioner in his holding, err in not awarding \$750 to the State Treasurer?

The claimant concedes that the question of dependency under the Compensation Act (Public Acts of 1913, Chap. 138) is one of fact. Her claim is that under the statutory definition of a dependent and the decision in *Powers v. Hotel Bond Co.* 89 Conn. 143, 93 Atl. 245, the conclusion of the commissioner that the claimant was not a dependent of her father is contrary to the subordinate facts of the finding, and that these facts require the conclusion that she was a partial dependent.

The claimant was the only daughter of a Mr. Garner of New Haven, and his employer was one of the respondents, and both were within the Compensation Act. Mr. Garner suffered an injury arising out of and in the course of his employment with the respondent, from which he died on July 7th, 1914. Mr. Garner left a small amount of property. His weekly wage had been \$11.88. The claimant had enjoyed good health for a long time

preceding her father's decease. She lived with her husband in Scranton, Pennsylvania, and he earned \$40 a month. She herself earned about \$10 a month, and she and her husband made a small profit from taking lodgers.

Mr. Garner, at the time of his wife's death, thirty-five years before, had promised her that he would look out for their daughter, the claimant. He told the claimant from time to time he would take care of her, and if she needed a home she could come to him. For [229] a number of years he had sent her every month or two sums varying from \$2 to \$5. In the holiday season of 1913 he sent her \$5, but sent her no money thereafter, writing her that of she would come to New Haven in May he would give her money. The claimant and her husband have no property, and no one dependent upon them, and live in a small house, paying \$13 a month rent. The claimant used the moneys received by her from her father upon her ordinary living expenses.

The finding quotes part of the testimony of the claimant, in which she says she relied upon the support sent her by her father, and used it to help meet her different expenses, and the court finds this testimony to be true.

Accepting, in this branch of his argument, the test of dependency to be as announced in *Powers v. Hotel Bond Co.* 89 Conn. 143, 152, 93 Atl. 245—"whether the contributions were relied upon by the dependent for his or her means of living, judging this by the class and position in life of the dependent"—counsel for the claimant insists that the subordinate facts require "a conclusion that claimant was a partial dependent of her father." Whether the claimant relied upon the contributions of her deceased father did not appear in the finding as originally made. All that appeared was that the moneys received were used by the claimant upon her ordinary living expenses.

Upon motion of claimant an amendment of the finding was made that "included in the testimony of the claimant were the following answers to questions as indicated, which testimony is found to be true." Then follows in some detail an excerpt from the testimony, a part of which was: "Q. You were asked if you relied upon the support which your father is supposed to have sent you, and you promptly answered yes? A. [230] Yes. . . . Q. Do you know the meaning of the word 'rely'? Will you please tell us? You have been asked if you relied upon the money which your father sent you, and you answered 'Yes,' now I want to know what the meaning of the word 'rely' is. A. Yes. Depend on. I always looked forward to what I got from him for certain expenses. Q. What expenses? A. I didn't always use it

for just the same thing, but of course we had expenses and I always knew when we got that it would help out."

This excerpt has no place in the finding; that should contain the facts found by the court, not the evidence from which the facts are to be found. Finding that certain testimony is true is not the same thing as finding that some fact as testified to is true. Were we to consider these answers as the equivalent of each fact capable of being found from them, we should not inevitably be constrained to hold that the contributions were relied upon for the living expenses of the claimant. They may, so far as appears, have been used for expenses which were not properly in this class. Then, again, it does not appear in this testimony that the contributions were relied upon for living expenses which were necessary and proper for her class and station in life. They may have been neither necessary nor proper. We do not know, because the finding does not tell us. The finding does not disclose that these contributions affected her means of living, judging these by her class and station in life. Some of the facts found are inconsistent with the conclusions which must be found to meet this test. In the memorandum of decision, made a part of the finding, the trial court describes these contributions as mere offerings of affection, not as necessary and proper elements of support.

Dependency is to be determined "in accordance [231] with the fact as the fact may be at the time of the injury." *Mahoney v. Gamble-Desmond Co.* 90 Conn. 255, 257, 96 Atl. 1025, L.R.A.1916E 110. The claimant had received no contributions from her father for six months prior to his death. During that time she had been supported wholly by the joint efforts of her husband and self. We do not intend to imply that dependency cannot exist unless support is continued to the very time of injury, but a cessation of support for so protracted a period as six months, under the conditions and circumstances of this case, would not justify a finding of dependency to exist; and if the testimony were considered as the equivalent of the facts which might be drawn from it, and these taken in connection with the rest of the finding, they would admit of the conclusion that the trial court might reasonably have found that the claimant was not a dependent.

The claimant treats our test, that the contributions must have been relied upon by the dependent for his or her living expenses, as equivalent to contributions used for the living expenses. Under this interpretation, a condition of dependency might exist although the dependent was possessed of large present means of providing for the living expenses.

The Compensation Act does not contemplate support for any save the dependent, and one cannot be said to be a dependent who has sufficient means at hand for supplying present necessities, judging these according to the class and position in life of the alleged dependent.

The test we have adopted regards the fact that what is a necessity for one may be a luxury for another. What may be ample support for one may be a bare and wretched existence for another. We apply the same principle as would be applied in determining what would, for example, be necessities furnished a [232] minor. Each case is governed by ascertaining what, in the given circumstances, would be necessities, having due regard for the class and position in life of the claimant. As the application of this principle excludes the case where support has been given those who have at hand the present means of supplying their living expenses in their class and station in life, so it excludes the restriction of support to provision for the bare wants of existence.

We agree with the claimant, that mere ability to earn a livelihood will not prevent one from becoming a dependent; even though the person furnishing the support possess less income than the alleged dependent, this will not necessarily prevent the existence of a condition of dependency. An adult daughter, for example, entirely capable of earning her living, may be the dependent of a father in poor health and barely able to earn enough to support himself in reasonable comfort. The test is not what he possessed, not how great a sacrifice he made to aid his daughter, but rather whether she relied upon his contributions for her living expenses, wholly or partially, judging these by those which would be reasonable for one in her class and position in life. The test is not in a comparison between the relative ability of the contributor and the dependent, but in her reliance for her living expenses in whole or part.

The claimant further contends that dependency is not governed by the class and position in life of a claimant, and that so much of the test as makes the means of living dependent upon the class and position in life of the dependent is against authority and contrary to sound principle.

Lord Justice Collins first approved of the test we have adopted in *Simmons v. White* [1899] 1 Q. B. 1005, 1 W. C. C. 89. It was later repudiated [233] in *Main Colliery Co. v. Davies* [1900] App. Cas. 358, in an opinion by the Chancellor, Lord Halsbury, which seems to hold that no standard of living can be considered and hence no standard of dependency, but that each case is to be decided as a fact. If this doctrine be sound, it would follow that the mere use of the contributions, as Lord Shand points out, would be conclusive of dependency, irrespective of whether

the alleged dependent was possessed of ample present means. We think Master of the Rolls Collins correctly diagnoses the later English decisions as negating the existence of any standard of dependency, and we share his difficulty in applying this rule. *Howells v. Vivian*, 85 L. T. N. S. 529, 4 W. C. C. 106.

Whether or not one is a dependent depends, as we think, upon first ascertaining what a dependent is and then applying the facts at hand to the standard found. As well might we abolish the standard of contributory negligence as that of dependency. The claimant will not be benefited by the change in our test which counsel urges, unless it be held that the mere use of the contributions for living expenses by the claimant makes the claimant a dependent; and this doctrine we consider unfair to the employer.

We have before indicated our reasons for making the means of living dependent upon the class and position in life of a claimant. Our view finds support in *Dazy v. Apponaug Co.* 36 R. I. 81, 85, 89 Atl. 180.

The trial court did not err, after finding claimant was not a dependent of her father, in failing to award the sum of \$750 to the State Treasurer (Public Acts of 1913, Chap. 138, Part B, § 9). No such claim was made by any one in behalf of the State; indeed, at no stage of the case has the State been represented. And no appeal from the decision of the Compensation Commissioner, or that of the trial court, was taken by the [234] State. The State, and not the claimant, is the only party which could have made this claim, and, upon its overruling, which could have appealed to this court.

There is no error.

In this opinion the other judges concurred.

NOTE.

Who Is "Dependent" within Workmen's Compensation Act.

Introductory, 750.

In General, 750.

Members of Family Generally, 751.

Parent, 752.

Child:

Generally, 754.

Illegitimate Child, 754.

Posthumous Child, 755.

Adopted Child, 755.

Stepchild, 756.

Grandchild, 756.

Wife:

Generally, 756.

Wife Absent from Husband, 757.

Brother or Sister, 759.

Partial Dependency, 760.

Devolution of Dependent's Right, 762.

Person Entitled to Receive Payment, 763.

Apportionment of Compensation, 763.

Introductory.

It is intended in this note to review the recent cases involving the question who is a "dependent" within a workmen's compensation act. The earlier decisions are collected in the note to *Lee v. Ship Bessie*, Ann. Cas. 1913E 477.

With respect to nonresidence as affecting the rights of a beneficiary see the notes to *Krutz v. Crow's Nest Pass Coal Co.* Ann. Cas. 1912D 862, and *Victor Chemical Works v. Industrial Board*, reported ante, this volume, at page 627.

In General.

It is generally held that unless a workmen's compensation act specifically sets forth who shall be considered wholly or partially dependent on the earnings of an employee, dependency and the extent thereof are to be determined as questions of fact in accordance with the facts as they exist at the time of the injury to the employee.

England.—*Simms v. Lilleshall Colliery Co.* [1917] W. C. & Ins. Rep. (Eng.) 218; *Dobbis v. Egypt, etc. Steamship Co.* [1913] Sc. Ct. Sess. 364, W. C. & Ins. Rep. 75, 50 Scott. L. Rep. 222, 6 B. W. C. C. 348.

California.—*Garcia v. Industrial Acc. Commission*, 171 Cal. 57, 151 Pac. 741.

Connecticut.—*Mahoney v. Gamble-Desmond Co.* 90 Conn. 255, 96 Atl. 1025, L.R.A.1916E 110. And see the reported case.

Indiana.—*In re Carroll*, 116 N. E. 844; *In re Peters*, 116 N. E. 848; *In re Lanman*, 117 N. E. 671.

Massachusetts.—*Coakley's Case*, 216 Mass. 71, Ann. Cas. 1915A 867, 102 N. E. 930; *In re Bentley*, 217 Mass. 79, 104 N. E. 432; *In re Herrick*, 217 Mass. 111, 104 N. E. 432; *In re Nelson*, 217 Mass. 467, 105 N. E. 357; *Gallagher's Case*, 219 Mass. 140, 106 N. E. 558; *Caliendo's Case*, 219 Mass. 498, 107 N. E. 370; *Kenney's Case*, 222 Mass. 401, 111 N. E. 47; *Fierro's Case*, 223 Mass. 378, 111 N. E. 957; *Veber's Case*, 224 Mass. 86, 112 N. E. 485; *Murphy's Case*, 224 Mass. 592, 113 N. E. 283; *In re Gorski*, 226 Mass. 456, 116 N. E. 811.

Michigan.—*Miller v. Riverside Storage, etc. Co.* 189 Mich. 360, 155 N. W. 462; *Finn v. Detroit, etc. R. Co.* 190 Mich. 112, 155 N. W. 721; *Roberts v. Whaley*, 192 Mich. 133, 158 N. W. 209; *Moll v. City Bakery*, 165 N. W. 649.

New Jersey.—*Miller v. Public Service R. Co.* 84 N. J. L. 174, 85 Atl. 1030; *Havey v. Erie R. Co.* 87 N. J. L. 444, 95 Atl. 124; *Connors v. Public Service Electric Co.* 89 N. J. L. 99, 97 Atl. 782.

New York.—*Walz v. Holbrook, etc. Corp.* 170 App. Div. 6, 155 N. Y. S. 703; *Matter of Bylow*, 179 App. Div. 555, 166 N. Y. S. 874.

Rhode Island.—*Sweet v. Sherwood Ice Co.* 100 Atl. 316.

Wisconsin.—*Jackson v. Industrial Commission*, 164 Wis. 94, 159 N. W. 561.

In the case of *In re Carroll* (Ind.) 116 N. E. 844, the court said: "Our act does not define dependency, and does not specifically indicate who are dependents, except as to persons included within the conclusive presumption of total dependency features of the act. Courts as a rule, in determining questions of dependency and who are dependents, resort to description, to an outlining of the elements, rather than to definition. Stated generally, a dependent is one who looks to another for support and maintenance; one who is in fact dependent—one who relies on another for the reasonable necessities of life. *Jackson v. Erie R. Co.* 86 N. J. L. 550, 91 Atl. 1035; *Tirre v. Bush Terminal Co.* 172 App. Div. 386, 158 N. Y. S. 883. To confine the inquiry to the question whether the family of the deceased workman could have supported life without any contribution from him, or whether such contributions were absolutely necessary in order that the family might be reasonably maintained, is not a fair test of dependency, but rather the inquiry should include the question whether contributions from the workman were looked to, or depended and relied on, in whole or in part, by the family for means of reasonable support. *Howells v. Vivian*, 85 L. T. N. S. (Eng.) 529; *Hotel Bond Co.'s Appeal*, 89 Conn. 143, 93 Atl. 245. Among the elements that are indicia of a state of dependency are an obligation to support, the fact that contributions have been made to that end, that the claimant in any case is shown to have relied on such contributions and their continuing, and the existence of some reasonable grounds as a basis for a probability of their continuance, or of a renewal thereof, if interrupted. We would not be understood as indicating that all these elements must exist in each case, in order that there may be a state of dependency. As a rule, to which there are exceptions, however, the fact that contributions have been made is an essential element of a state of dependency within the meaning of the act."

Where the statute provides that all questions of dependency shall be determined as of the time of the accident the question of the dependency of a mother on her married son is to be determined as of the time of his death without regard to the subsequent condition of the family or the contributions of the son before his marriage. *Birmingham v. Westinghouse Electric, etc. Co.* 167 N. Y. S. 520.

But it has been held that dependency is not based solely on a present legal obliga-

tion to support. The fact that the mother of a deceased workman has sufficient to live on for a few weeks or months does not take her out of the dependent class notwithstanding the statutory provision that the dependency is to be determined as of the date of the accident, since the legislature could not have contemplated a construction so literal and unreasonable. *Parson v. Murphy* (Neb.) 163 N. W. 847.

The word "dependent" has been held to mean dependent for the ordinary necessities of life for one of the claimant's class and social station in life, considering his financial and social position. The extent of the dependency is not important and if dependency exists at all the right to participate in the fund is established. *Poccardi v. State Compensation Com'r* (W. Va.) 91 S. E. 663, wherein the court said: "The question in these cases is not whether by skimming the claimant could have maintained himself or his family with the bare necessities of life, or have maintained himself without the assistance of the earnings of the injured or deceased employee, but whether he was actually dependent on such earnings at the time of the injuries for his reasonable support and maintenance."

It has been held that the test of dependency was not whether the petitioner by reducing his expenses below a standard suitable to his condition in life could secure a subsistence for his family without the contribution of the workman, but whether such contributions were needed to provide the family with the ordinary necessities of life suitable for persons in their class and position. *Dazy v. Apponaug Co.* 36 R. I. 81, 89 Atl. 160. So it has been said that a dependent is not necessarily one to whose active livelihood the contributions made on the employee are necessary; the test being whether the contributions are relied on by the dependent for his or her means of living, judging this by the class and position in life of the dependent. *Hotel Bond Co.'s Appeal*, 89 Conn. 143, 93 Atl. 245.

The reported case decides that one who has sufficient means at hand for supplying present necessities, judging those according to the class and position in life of the alleged dependent, is not within the act, but that the mere ability to earn a livelihood will not prevent one from being considered a dependent though the person furnishing the support possesses less income than the alleged dependent.

Members of Family Generally.

A provision in a workmen's compensation act that the compensation shall be distributed among the "actual dependents" of a deceased workman has been interpreted to

mean dependents in fact and the fact that the provision is followed by the enumeration of certain relatives was held not to make them presumptively dependent. *Miller v. Public Service R. Co.* 84 N. J. L. 174, 85 Atl. 1030.

It has been held that testimony tending to establish that an employee gave his wages to his father and that such wages were devoted to the support of the family was sufficient to afford a legal basis for a finding that the family were actually dependent. *Harvey v. Erie R. Co.* 87 N. J. L. 444, 95 Atl. 124.

Under a provision that "dependents" should mean members of the employee's family or next of kin who were wholly or partially dependent on his earnings for support at the time of the injury, it has been held that a half brother in whose family the employee lived and who was partially dependent on him for support was not entitled to an award where he was not the next of kin. *In re Kelley's Case*, 222 Mass. 538, 111 N. E. 395.

It was held in *Murphy's Case*, 224 Mass. 592, 113 N. E. 283, that where a workman had no family of his own his mother was the next of kin who was entitled to compensation under the act, if she was dependent on him at the time of his death. The fact that the mother died subsequently was held not to warrant sending the case back for an award to members of the family of the mother. The court said: "The act provides that in case the employee dies of his injury, compensation shall be awarded to those persons who were in fact his next of kin or members of his family at the time of the injury and who in fact were dependent upon him for support at that time. It does not authorize an award of compensation to be made, for example, to persons who would have been his next of kin if his sole next of kin had been dead, and who were not in fact dependent upon him but might have been dependent upon him had it been that the next of kin who was dependent upon him had died. It follows that in the case at bar no order in favor of any one else could be made now."

Where a workmen's compensation act provides compensation if a workman leaves any widow, child, parent, grandparent, or other lineal heir, to whose support he contributed within four years previous to the time of his injury, it is not necessary that the surviving parent or heir shall have been dependent on the deceased, nor is it necessary to show that there was any regularity in the support furnished. *Commonwealth Edison Co. v. Industrial Board*, 277 Ill. 74, 115 N. E. 158.

In *Walz v. Holbrook, etc. Corp.* 170 App. Div. 6, 155 N. Y. S. 703, it appeared that a workman lived with his family, the mem-

bers of which were his father, mother, sister, and a younger brother. The father was old and earned very little; the sister was a delicate school girl; the brother was nineteen years old earning about nine dollars a week, out of which he paid five dollars to his mother for his board. The weekly wage received by the workman in question was about thirteen dollars, out of which he paid into the hands of his mother about ten dollars each week to assist in maintaining the family. Under the circumstances it was held that his contributions were in excess of the cost of his maintenance and that the family were to a considerable extent dependent on such contributions for their maintenance and support.

It has been held that where the father's earnings were sufficient to cover the family expenses when the amount necessary to support a son was deducted, no compensation would be allowed for the death of the son although he contributed to the family fund, the fundamental principle underlying the law being compensation. *Moll v. City Bakery (Mich.)* 165 N. W. 649.

Where it appeared that a workman's father and sister worked and contributed their earnings to the general family support and his earnings were also used for that purpose, the amount contributed by him exceeding the cost of his board, lodging, and other expenses, it was held that there was a legitimate inference that the family received such substantial support as to justify an award of compensation. *Conners v. Public Service Electric Co.* 89 N. J. L. 99, 97 Atl. 792.

In *Huard v. Clarke*, 45 Quebec Super. Ct. 397, it was held that the widow of a deceased workman could claim the entire indemnity only by showing that there were no other persons who had a right to benefit under the law. *Compare Croteau v. Victoriaville Furn. Co.* 40 Quebec Super. Ct. 44; *Roberge v. Jacobs Asbestos Min. Co.* 45 Quebec Super. Ct. 304.

Parent.

Where a workman and his wife lived with his parents, giving his mother each week no more than the fair equivalent of what he and his wife received, and the mother's husband was earning sufficient to support her, it was held that the mother was not dependent on her son for any part of her support within the workmen's compensation law. *Birmingham v. Westinghouse Electric, etc. Co.* 167 N. Y. S. 520.

Under a provision in a workman's compensation act that in case of death compensation to the amount of fifty per centum of the wages of the deceased shall be paid to the widow and the father or mother, a moth-

er who is an actual dependent is entitled to the award although the son leaves no widow. *Blanz v. Erie R. Co.* 84 N. J. L. 35, 85 Atl. 1030, affirmed 85 N. J. L. 367, 91 Atl. 1070. See to the same effect *Quinlan v. Barber Paving Co.* 84 N. J. L. 510, 87 Atl. 127; *McFarland v. Central R. Co.* 84 N. J. L. 435, 87 Atl. 144; *Tischman v. Central R. Co.* 84 N. J. L. 527, 87 Atl. 144. Under the same provision a father who had no other income or means of support has been held to be an actual dependent of the son and entitled to twenty-five per centum of his wages, although the son left no widow. *Reardon v. Philadelphia, etc. R. Co.* 85 N. J. L. 90, 88 Atl. 970.

Where it appeared that a minor eighteen years old lived with his mother, who had seven small children and whose husband earned only eleven dollars a week, the son contributing five dollars each week to the family fund, the mother was held to be an actual dependent of the son. *Krauss v. Fritz*, 87 N. J. L. 321, 93 Atl. 578.

By the Minnesota act it is provided as follows: "Any . . . husband, mother, father, grandmother, grandfather, sisters and brothers who were wholly supported by the deceased workman at the time of his death and for a reasonable period of time immediately prior thereto shall be considered his actual dependents." In *State v. District Ct. 131 Minn. 27*, 154 N. W. 509, it was held that a widowed mother, without means, who was supported by her son, partly by his wages and partly by the yield of his land, was wholly dependent on him for support, and that it was not necessary that she should be supported wholly out of his wages to be totally dependent within the meaning of the act.

Under a statute providing that parents who were wholly supported by the workman at the time of his death should be considered "actual dependents" and that if they derived part of their support from the wages of the workman they should be considered partial dependents, it has been held that parents who were helpless invalids and derived their support principally from a son who contributed about fifty dollars a month to their support and an unmarried daughter who paid four dollars per week for her board were wholly dependent on the support of the son within the meaning of the act. *State v. District Ct. of Hennepin Co.* 128 Minn. 338, 151 N. W. 123.

In *Smith v. National Sash, etc. Co.* 96 Kan. 816, 153 Pac. 533, it appeared that a boy eighteen years old turned over all his wages to his mother and received from her money for his expenditures. The mother was supported by her husband but was an invalid and required medical and surgical attention,

the expense of which was paid in part out of the wages of the son. It was held that the mother was partly dependent on her son's earnings.

A mother seventy-seven years old unable to work on account of illness and extreme old age has been held to be a dependent of her unmarried son although he had not actually contributed to her support before the date of the accident. *Parson v. Murphy* (Neb.) 163 N. W. 847.

A provision in a workman's compensation act that the parent of a minor workman should receive a fixed amount per month after his death until the time at which he would have arrived at the age of twenty-one years has been interpreted to apply only to cases of nondependency by the beneficiaries, so that where the parent was actually dependent the allowance should continue as long as the dependent condition continued. *Boyd v. Pratt*, 72 Wash. 306, 130 Pac. 371.

Where a mother lived apart from her son at the time of his death, and did not depend on him for support, though he could have been compelled under a statute to contribute to her support, it was held that she was not "dependent" on him within a workman's compensation act, if no order had been entered at the time of his death requiring him to contribute to her support. *Pinel v. Rapid R. System*, 184 Mich. 169, 150 N. W. 897.

Evidence showing that an employee's mother had no property, that the employee and his sister took care of her, and that they all kept house together, the expenses being paid from his wages, has been held to be sufficient to show that the mother was dependent on her son for support. *Stevenson v. Illinois Watch Case Co.* 186 Ill. App. 418.

In *Dazy v. Apponaug Co.* 36 R. I. 81, 89 Atl. 160, it appeared that a son lived at home with his parents and that all three of them worked, the father earning about \$11.50 per week and the mother and son about \$8 per week each; that the parents owned considerable real estate; and that at the time of the son's death the family savings were from \$10 to \$12 per week. Under the circumstances it was held that the parents were not dependent on the son's earnings within the act and could not recover.

Where a workman's compensation act provides that the compensation to a parent shall be fifteen per cent if the amount payable to the surviving wife and children of a deceased employee shall be less than two thirds of his earnings, the parents are entitled to compensation although the deceased leaves no wife or children surviving him. *Friscia v. Drake Bros. Co.* 167 App. Div. 496, 153 N. Y. S. 392.

An award to a dependent father and mother may be without limitation as to time where the workmen's compensation act providing

for the award contains no limitation. *Walz v. Holbrook Cabot, etc. Corp.* 170 App. Div. 6, 155 N. Y. S. 703.

In *Tirre v. Bush Terminal Co.* 172 App. Div. 386, 158 N. Y. S. 883, it was held that the mere fact that a workman had sent some money to his mother in a foreign country was not sufficient to show that it was necessary for her support or that it was sent for that purpose.

It has been held that a parent can be dependent on the support of a minor child just as much as on the support of an adult child. *Friscia v. Drake Bros. Co.* 167 App. Div. 496, 153 N. Y. S. 392.

In *Wainwright v. Crichton*, 117 L. T. J. (Eng.) 2, it appeared that a father suffered from lumbago as the result of an old wound. His son agreed to maintain the father, who ceased to work. Medical evidence was offered as to the father's earning capacity after the son's death, but the county court decided that the evidence could not be received by reason of the decision of the court of appeal in the case of *Pryce v. Penrikyber Nav. Colliery Co.* [1902] 1 K. B. 221, 85 L. T. N. S. (Eng.) 479, cited in the original note. On appeal, however, it was held that the *Pryce* case was to be distinguished, the holding in that case being that a sum of money received by the dependent and after the death of the workman did not alter the dependency, and the evidence directed to the subsequent earning power of the person alleged to be wholly dependent was held to be admissible.

In *Quebec* it has been held that a father was not entitled to compensation under the workman's compensation act if the son was not his sole means of support. *Thompson v. Kearney*, 25 Quebec K. B. 220; *Lafamme v. Levis Ferry Co.* 47 Quebec Super. Ct. 201. See also *Lamontagne v. Quebec R. Light, etc. Co.* 50 Can. Sup. Ct. 423, affirming 23 Quebec K. B. 212, but referring to a subsequent amendment of the statute changing the rule in future cases.

Where the evidence to prove dependency showed that the workman had sent money on two occasions to his parents, but they had in the first instance assisted him by advancing money for his passage to Canada, it was held that the parents had failed to show that they had any reasonable expectation of benefit from the son if he had lived. *Brown v. British Columbia Electric R. Co.* 15 British Columbia 350.

Where a workmen's compensation act does not specify a certain class of persons to be considered as wholly or partially dependent on the deceased at the time of his death, but provides that the dependency shall in all other cases be determined in accordance with the fact as the fact may be at the time of the death, nonresident parents are not conclusively presumed to be dependent, and

in the absence of proof to that effect no compensation will be awarded. *Garcia v. Industrial Acc. Commission*, 171 Cal. 57, 151 Pac. 741.

Child.

GENERALLY.

A provision in a workmen's compensation act that a child under eighteen years of age shall be presumed to be dependent on the parent with whom he is living at the time of the death of the parent, there being no surviving dependent parent, has been construed to mean that the conclusive presumption of dependency of children is conditioned on the nonexistence of a surviving dependent parent. In *re McNicol*, 215 Mass. 497, 102 N. E. 697, L.R.A.1916A 306. So under the same act it has been held that a child of a former marriage is conclusively presumed to be wholly dependent on the parent because in her case there is no surviving dependent parent. *Coakley's Case*, 206 Mass. 71, Ann. Cas. 1915A 867, 102 N. E. 930.

A daughter who received practically all of her father's wages has been held to be wholly dependent on him for support although according to her own testimony she might have earned enough for her own support, had she not devoted herself to the care of her father. In *re Herrick*, 217 Mass. 111, 104 N. E. 432. See also *Simms v. Lilleshall Colliery Co.* [1917] W. C. & Ins. Rep. 218.

In *Carter's Case*, 221 Mass. 105, 108 N. E. 911, it was held that where a daughter for three years before her father's death had no income except money allowed her by her father and two weeks' pay of her own earning, and was too ill to continue to work, she was wholly dependent on her father at the time of his death within the workman's compensation act, and that the fact that at her father's death she had \$100 saved from the money given her by her father should not prevent a finding of total dependence.

An act providing that "if there be surviving child or children of the deceased under the age of eighteen years," an additional amount shall be provided for such child or children until such child or children arrive at the age of eighteen years," and making no reference to the question of dependency has been held to create a presumption that children are dependent on their parent up to the age of eighteen years. *Matter of Bell*, 163 N. Y. S. 733.

In *Roberts v. Whaley*, 192 Mich. 133, 158 N. W. 209, it was held that a daughter of a deceased workman who went to live in another home when her mother was taken to an insane asylum, at which home she was

cared for and supported by the family with which she lived, her father not contributing anything to her support, was not a "dependent" on the father at the time of his death.

In *Dobbie v. Egypt, etc. Steamship Co.* [1913] Sc. Ct. Sess. 364, [1913] W. C. & Ins. Rep. 75, 50 Scott. L. Rep. 222, 6 B. W. C. C. 348, it was held that since dependency is always a question of fact, children who were deserted by their father three years before his death and received no support from him during that time might still be held to be partially dependent on him if there was a reasonable probability that had he lived he would in the future have contributed to their support.

In *Montgomery v. Blows* [1916] 1 K. B. (Eng.) 899, it appeared that a workman lived with his daughter, paying 13s. a week for his board and lodging, bought clothing for her children and always mended their boots. The daughter's husband was earning an average of 2l. 9s. a week but allowed his wife only 23s. a week for the upkeep of the family, to which she added the profits of her father's payment for his board and lodging. It was held that the daughter was not a dependent of her father within the meaning of the Workman's Compensation Act of 1906 since the pecuniary loss arising from the death of her father fell not on her, but on her husband.

Under a statutory provision which gave compensation to members of the workman's family, limiting the members of the family to husband and wife and children under eighteen years, a married son twenty-six years old living with his wife and children has been held not to be dependent on his mother for support where he was not physically disabled and had earned as much as \$60 a month. The fact that the mother contributed to the support of the son's family while he was out of employment was held not to bring him within the statute as a dependent. *Taylor v. Sulzberger, etc. Co.* 98 Kan. 169, 167 Pac. 435.

The reported case holds that a married daughter who had received no contributions from her father for six months prior to his death, during which time she had been supported wholly by the joint efforts of her husband and herself, was not dependent on her father for support.

ILLEGITIMATE CHILD.

The fact of dependency within the meaning of a workmen's compensation act may be established regardless of any promise on the part of the father to support an illegitimate child where the statute expressly provides that a child born out of legal wedlock is entitled to compensation if the child is depend-

ent on the earnings of the father. Lloyd v. Powell Duffryn Steam Coal Co. [1914] A. C. (Eng.) 733, 83 L. J. K. B. 1054, [1914] W. C. & Ins. Rep. 450, 111 L. T. N. S. 338, 58 Sol. J. 514, 30 Times L. Rep. 456, *reversing* decision of the court of appeals [1913] 2 K. B. (Eng.) 130.

It has been held that if the statute does not specifically provide for illegitimate children an intent to exclude them will be implied. So, under a provision that a "child" shall include a posthumous child and a child legally adopted prior to the injury of the employee," illegitimate children are not included. Matter of Bell, 177 App. Div. 123, 163 N. Y. S. 733. The *New York* statute, however, as amended in 1917, declares that the word "child" shall include an "acknowledged illegitimate child dependent upon the deceased."

Where a claim was made by a girl who alleged that she was an illegitimate child of the deceased workman, it was held that it was the duty of the arbitrator in determining the question whether the claimant was a dependent, to decide incidentally her relationship to the deceased. Johnstone v. Spencer [1908] Sc. Ct. Sess. 1015, 45 Scott. L. Rep. 802, 1 B. W. C. C. 302.

Where a woman lived with a workman ostensibly as his wife for a number of years, it was held that the children although illegitimate, having been born out of legal wedlock, were nevertheless to be considered as legitimate under the workmen's compensation act, where the evidence of either the father or the mother proving their parentage was corroborated. Smith v. C. N. R. 7 West W. Rep. 596.

A mother of an illegitimate child who has obtained an order of filiation against the father of the child has been held to be entitled to compensation on behalf of the child on the death of the father through an accident, although the father managed to evade payment of the amount awarded in the filiation proceedings by concealing his identity. Bowhill Coal Co. v. Neish, 2 B. W. C. C. (Eng.) 253, 46 Scott. L. Rep. 250.

In Roberts v. Whaley, 192 Mich. 133, 158 N. W. 209, it appeared that the wife of a workman had been taken to an insane asylum nine years before his death. During the wife's absence he and his housekeeper lived together as husband and wife and two children were born. The children continued to live with the father and were cared for and supported by him and considered as members of his family. Under the circumstances it was held that the children were entitled to compensation as actual dependents under the act, though they were illegitimate. The court said: "They were actually cared for and supported by the deceased, and they had a right

to expect a continuation of the support and care had he lived. This brings them clearly within the statute, and establishes as a matter of fact that they were dependent, and therefore entitled to the fund. But it is said they are illegitimate children, and that the law will not encourage the immoral and unlawful relation of the parents by recognizing them. The children are in no wise responsible for their existence or status. They are here, and must be cared for and supported. They were cared for and supported by the deceased up to the time of his death. It was his legal and moral duty to support them, and he was responding to that duty when death overtook him. We think they are clearly within the class entitled to the fund, and it must be passed to them."

POSTHUMOUS CHILD.

A child born after the death of its father is entitled to compensation, where the statute includes children in being and those to be born. Lloyd v. Powell Duffryn Steam Coal Co. [1914] A. C. (Eng.) 733, [1914] W. C. & Ins. Rep. 450, 111 L. T. N. S. 338, 58 Sol. J. 514, 30 Times L. Rep. 456, 83 L. J. K. B. 1054, *reversing* [1913] 2 K. B. (Eng.) 130. See to the same effect Villar v. Gilbey [1907] A. C. (Eng.) 139, 7 Ann. Cas. 130.

ADOPTED CHILD.

Under a provision in the compensation act of *Minnesota* that in case of the remarriage of a widow who has dependent children, the unpaid balance of compensation which would otherwise become due her shall be paid to such children, a child adopted by the widow after the death of her husband is not entitled to compensation. State v. District Ct. 134 Minn. 131, 158 N. W. 250, wherein the court said: "We need not determine what children come within the statutes in general, for we are here only concerned with the status of petitioner, though it may be remarked that the statute includes all children of the deceased, and other children who have legal claims to his support and the right to inherit in his estate. This might perhaps include children of his wife by a former husband, or children taken into the family and formally adopted by deceased in his lifetime. But we are of opinion that a child having no such relationship or status to the deceased does not come within the statute and is not entitled to the allowance there provided for. The whole purpose of the compensation act was to make pecuniary provision for those having lawful claims upon the workman, particularly his widow and his children. The petitioner in the case at bar was not the

child of the deceased, nor of his widow. She made him her child after the death of decedent, but that fact cannot bring him within the statute. The statute must be construed as having reference and application to conditions existing at the time of the death of the workman, and not to relationships created by the widow after his death. And though the statute might be construed to include children of the widow by a former marriage, who at the time of his death were living with and dependent upon the workman for support, it cannot well be construed to include children coming into an adopted relationship to the widow after his death."

Where a compensation act providing for an award to children includes children by "legal adoption" it has been held that a child which is taken into the family and treated as a natural offspring under an agreement to adopt does not come within the act if the agreement to adopt is not performed. *Ellis v. Nevius Coal Co.* 100 Kan. 187, 163 Pac. 654, wherein the court said: "While the expression 'legal adoption' has become common, it is really tautological. The full meaning would be expressed by the single word 'adoption,' because taking a child into a family and treating it as natural offspring is not adoption. If, however, some legislative purpose must be found for qualifying the word 'adoption' by the word 'legal,' it must have been to exclude all grafting of children upon another family stock otherwise than by adoption proceedings conforming to the law governing the subject."

STEPCHILD.

The word "children" under a statute providing for compensation to children who are actual dependents of a workman has been held to include stepchildren where the evidence shows that the stepfather supported them. *Newark Paving Co. v. Klotz*, 85 N. J. L. 432, 91 Atl. 91, *affirmed* in 86 N. J. L. 690, 92 Atl. 1086, wherein the court said: "It is urged that the court erred in allowing compensation, as in case of four children, when two of the four were only stepchildren. The evidence shows that the deceased supported the stepchildren and bought their clothes and shoes. We think this fact justified the judge in allowing for them as actual dependents. *Mulhern v. McDavitt*, 16 Gray (Mass.) 404. The amendment of 1913 (Pamph. L. p. 305) removes all doubt on this point for cases arising since its passage, and we find nothing in the language of the Act of 1911 to prevent us from adopting the same construction. The important words are 'actual dependents.' The word 'children' may well be held to include dependent stepchildren."

GRANDCHILD.

It has been held that where a workman supported a child of his deceased daughter for eight years during which time the father of the child was not heard from, and it was not known whether he was alive or dead, and nothing was known about the child's paternal grandparents, the child was a dependent of the workman within the English Workmen's-Compensation Act of 1897. *Cooper v. Fife Coal Co.* [1907] Sc. Ct. Sess. 564.

Wife.

GENERALLY.

It has been held that notwithstanding a provision in a workmen's compensation act that all questions of dependency shall be determined as of the time of the accident, a woman who marries a workman after the injury which subsequently causes his death, is entitled to compensation, as her right to it is based not on her dependency but on her wifehood. It is not the dependent wife but the "surviving wife" who is entitled to the reward. *Crockett v. International R. Co.* 176 App. Div. 45, 162 N. Y. S. 357, wherein the court said: "One of the fundamental rules in the construction of a statute is to consider the effects or consequences of the interpretation placed on such statute. The reasoning which would exclude this wife from the benefits of this statute simply because she was not a wife until after her husband received the injury which eventually caused his death would likewise in some cases exclude children from the benefits of the statute. A child under the statute includes a posthumous child. Section 3, subd. 11. But suppose a man married before an injury, lives a year or longer after such injury, and then dies in consequence thereof, and in the meantime a child or children be born to him before his death, such child or children would have to be excluded from the benefits of this statute if the widow in this case is to be excluded therefrom. It is unthinkable that the legislature intended such a result."

But under a similar provision in *Wisconsin* it has been held that the compensation was properly awarded to the surviving father to the exclusion of the alleged widow and of the employee's minor son where at the time of the accident the employee was not married. *Kuetbach v. Industrial Commission (Wis.)* 165 N. W. 302.

It has been held that the widow of a deceased employee was entitled to recover although at the time of his death he was not supporting her, where the act provided for compensation if the employee left any widow, child or children whom he was under legal obligation to support, the basis of recovery

being not the dependency of the beneficiaries, but the obligation of the deceased to support. *Goelitz Co. v. Industrial Board*, 278 Ill. 164, 115 N. E. 855.

Where according to the evidence a wife was living with her husband, and had no other means of support than the money he gave her, it was presumed that at the time of his death she was as a matter of law totally dependent on him for support. *Muncie Foundry, etc. Co. v. Coffee (Ind.)* 117 N. E. 524.

In *Hall v. Industrial Commission*, 165 Wis. 364, 162 N. W. 312, L.R.A.1917D 829, it appeared that the claimant procured a divorce from her husband in Illinois where the law forbade a remarriage within one year. Within that period she went to Indiana and there married which marriage was not recognized in the state of Wisconsin. Shortly thereafter the claimant settled in Wisconsin with her alleged husband where the latter was killed by an accident arising out of his employment. Under the circumstances it was held that the claimant was not entitled to compensation as a dependent wife living with her husband at the time of his death since the marriage was in fact invalid.

In *Armstrong v. Industrial Commission*, 161 Wis. 530, 154 N. W. 844, there was involved an act providing as follows: "No person shall be considered a dependent unless a member of the family of the deceased employee, or one who bears to him the relation of husband or widow, or lineal descendant, or ancestor, or brother, or sister." The plaintiff who was living with a workman as his wife was held not to be a member of the family within the act where he was incompetent to contract the marriage because he had a former wife from whom he had not been divorced for one year; and it was held to be immaterial that the plaintiff was dependent on him for her support, since under the statute she could not be considered a member of his family.

Where there is no presumption of dependency the question of the dependency becomes one of fact, and if the evidence shows that the wife was not actually dependent on her husband at the time of his death her claim for compensation cannot be maintained. *Sweet v. Sherwood Ice Co. (R. I.)* 100 Atl. 316.

Under the *Illinois* act which provides that if an employee leaves any widow, child or children whom he was under legal obligation to support at the time of his injury, they shall be entitled to compensation, it is not required that there shall be proof of dependency by a surviving wife. The duty to support is imposed by law on the husband and this duty does not depend on the adequacy of the wife's means but on the marriage rela-

tion. *American Milling Co. v. Industrial Board*, 279 Ill. 560, 117 N. E. 147.

In *Smith v. Cope* [1913] W. C. & Ins. Rep. (Eng.) 460, 6 B. W. C. 569, it appeared that a wife was living with her husband at the time of his death. The husband earned but a few shillings a week, while immediately before his death the wife had been earning 14s. a week for cooking besides earning a few shillings for sewing. But shortly before her husband's death the wife had injured her hand since which time she had been unable to earn anything. A ruling by the county judge that the wife was in no degree dependent on her husband during the last year or two of his life was held to be erroneous.

WIFE ABSENT FROM HUSBAND.

Under an act providing that a husband and wife are presumed to be solely dependent on each other for support at the death of either if they live together, a "living together" has been held to contemplate only the subsistence of the marital relation, and the spouses may be living together though there is a physical separation. The question does not turn on time or distance, but on the nature of the separation and the intention of the parties. *Northwestern Iron Co. v. Industrial Commission*, 154 Wis. 97, Ann. Cas. 1915B 877, 142 N. W. 271, L.R.A.1916A 366.

In the case of *In re Gorski*, 226 Mass. 456, 116 N. E. 811, it appeared that a workman left his wife in Poland on a farm. He never sent any money home but a minor son who was with his father gave him some money to send to his mother on two different occasions. When her husband left, the wife continued to live on the farm and hired a man to do the work. It was also shown that the deceased stated that he "intended to have her come over later on." A finding that the wife was living with the husband at the time of his death and entitled to compensation under the act was set aside.

Where the wife and child of a workman were both living apart from him at the time of his death, it was held that neither of them were conclusively presumed to have been wholly dependent on him for support; so that a finding that the wife was not dependent on the deceased for support but that the child was partially so dependent would not be disturbed. *In re Bentley*, 217 Mass. 79, 104 N. E. 432.

A provision for compensation to actual dependents has been held not to include the deserted wife of a workman who at the time of his death had been away from his wife for six years, during which time she supported herself and had no knowledge of his where-

abouts until she read of his death. *Batista v. West Jersey, etc. R. Co.* (N. J.) 88 Atl. 954.

Where a workmen's compensation act provides that "dependents' shall mean members of the employee's family or next of kin who were wholly or partly dependent upon the earnings of the employee for support at the time of the injury," a wife living apart from her husband at the time of the injury may properly be included as a member of his family within the meaning of the provision. *Newman's Case*, 222 Mass. 563, 111 N. E. 359, L.R.A.1916C 1145.

It has been held that the presumption of dependency of a wife and child is not rebutted by evidence showing that the employee did not work steadily and was given to dissipation where there was also evidence that when he did work he contributed a substantial part of his earnings toward the support of his wife and daughter, and that he and his wife were not living in a state of legal separation. *Taylor v. Seabrook*, 87 N. J. L. 407, 94 Atl. 399.

A wife who does not live with her husband at the time of his death and who has been granted a divorce for nonsupport, although no final decree has been entered, is not presumed to be dependent under an act providing that the wife of an employee shall be conclusively presumed to be wholly dependent for support on him. *Sweet v. Sherwood Ice Co.* (R. I.) 100 Atl. 316.

In the case of *In re Nelson*, 217 Mass. 467, 105 N. E. 357, it appeared that a husband and wife were voluntarily living apart, and each was earning a living. One lived in Boston and the other in Nova Scotia. There was never any talk of legal separation or divorce between them. There was no correspondence between them, and the husband sent the wife no money. It was held that the wife was not dependent on her husband's support within a statute which provided that if husband and wife were living together at the time of his death she should be conclusively presumed to be wholly dependent on him. The court said: "But words which signify living together do not aptly describe such a situation. These words are used in antithesis to living apart. They exclude a condition where there is neither a home nor an actual dwelling together, and where the suspension of this relation is something more than a mere temporary incident of a changing family habitation. It seems plain that upon the facts disclosed on this record the deceased employee cannot be described rightly as 'a husband with whom she' (the wife) was living 'at the time of his death' in the sense in which these words are used in the workmen's compensation act. We are constrained not to follow *Northwestern Iron Co. v. Industrial*

Commission, 154 Wis. 97, so far as its reasoning is inconsistent with this conclusion."

In *Fierro's Case*, 223 Mass. 378, 111 N. E. 957, it appeared that a workman was a native of Italy and had been in the United States about eight years. The wife lived in Italy but received money from the husband at different times amounting in all to \$161, but there was no evidence to show that he had contributed anything else to her support during the eight years preceding his death. The facts were held to be insufficient to support a finding by the board that the wife was totally dependent on her husband within the meaning of an act which provided compensation for a wife who lived with her husband at the time of his death unless the living apart was due to a justifiable cause, or because the husband had deserted her.

A wife who became insane and had been in an insane asylum nine years before the death of her husband, during which time she was supported by the state, the husband having contributed nothing to such support, has been held not to be dependent on him for support at the time of his death. The fact that the wife did not voluntarily separate from her husband was held to be immaterial since the object of the statute was to provide for those only who depended on the wages of the workman at the time of his death. *Roberts v. Whaley*, 192 Mich. 133, 158 N. W. 209.

It has been held that where a woman had been living apart from her husband for fourteen years and was supported by her illegitimate son, not being wholly or in part dependent on the earnings of her husband, she was not entitled to compensation under the act in case of his death by accident. *Turners v. Whitefield*, Sc. Ct. Sess. 6 F. 822, 41 Scott. L. Rep. 631.

It has been held that a provision that a wife who lives apart from her husband for a justifiable cause shall be presumed to be dependent on her husband's earnings, does not apply to a woman who obtains a decree of divorce, with a weekly allowance, three years before the death of the husband. *In re Gallagher*, 219 Mass. 140, 106 N. E. 558.

To constitute a "living apart for a justifiable cause" so as to entitle a wife to compensation as a total dependent on the husband's earnings, it has been held that the cause need not be such as to entitle her to a divorce, but may be a misconduct of a lesser degree. If she lives apart from him with his consent, the law imposes on the husband the obligation to support her. So the law imposes the obligation of support where the separation is caused by the husband's ill treatment of the wife. *Newman's Case*, 222 Mass. 563, 111 N. E. 359, L.R.A.1916C 1145.

Under a statute giving compensation to a wife living with the employee at the time

of the injury, it has been held that a wife was entitled to an award where the evidence showed that she was compelled to live apart from the deceased and that she was partially supported by him during the separation, and a state of dependency was not conclusively negated by the fact that the wife furnished the substantial means of her support and that the support furnished by the husband was irregular both as to intervals and amount. *In re Carroll (Ind.)* 116 N. E. 844.

In *Veber's Case*, 224 Mass. 86, 112 N. E. 485, it appeared that a husband and his wife lived together occasionally only and for short periods of time, at different places where he was employed as a common laborer. Their living apart was due to the husband's inability to secure remunerative employment and not to his wilful neglect. There was evidence that the husband paid doctors' and grocers' bills and gave money to the wife. A few months before her husband's death the wife obtained employment. Under the circumstances it was held that a finding by the board that the wife was living apart from her husband for justifiable cause was erroneous, as the board should have determined as a fact whether she was dependent on her husband at the time of his death in conformity with the provision of the act.

In a case wherein it appeared that several years before the death of the husband he and his wife separated by mutual consent and there was no evidence that the husband ill treated his wife or that there was any reason for their agreeing to live apart except that he was not supporting her as she needed to be supported, as he was earning \$11 a week only, it was held that this did not constitute a living apart for a justifiable cause within the meaning of the act so as to entitle her to compensation. *Newman's Case*, 222 Mass. 563, 111 N. E. 359, L.R.A.1916C 1145.

In *Finn v. Detroit, etc. R. Co.* 190 Misc. 112, 155 N. W. 721, it appeared that the claimant abandoned the home of her husband of her own volition and resumed her former occupation of school teacher in another state. The evidence tended to show that she severed her marital relations for an indefinite period of time. It was held that she was not a "dependent." Touching the rule governing the presumption of dependency in the case of husband and wife the court said: "Dependency in whole or in part is primarily and as a rule a question of fact to be determined as evidence may disclose, with the exception of an absolute presumption of dependency (irrespective of the facts) in case of husband and wife or minor children under specified conditions. No distinction is made between husband and wife in that particular. If a wife living with her

husband is fatally injured in an employment coming under the act, the husband living with her at the time of her death is likewise conclusively presumed to be wholly dependent for support upon her, irrespective of what the real facts are. If the parties in this case were reversed, and it was the husband demanding in his favor conclusive presumption that he was wholly dependent upon his wife because living with her at the time of her death, he would be equally entitled to it under the statute, but that he was living with her must be established before the presumption can be invoked."

Where a wife voluntarily left her husband several years before his death taking with her their daughter, and the workman did not contribute to the support of either, it was held that there was evidence sufficient to support a finding of the county court judge that neither the wife nor the daughter was dependent on the workman at the time of his death. *Polled v. Great Northern R. Co.* 5 B. W. C. C. (Eng.) 620, [1912] W. C. Rep. 379.

Brother or Sister.

Evidence that a workman left "brothers and sisters under the age of fourteen years." has been held to afford a fair inference that several of them were of tender age and that such children would not at the expiration of three years have reached the age of sixteen years, the age fixed by the statute when payment on account of children should cease. *State v. Dist. Ct. (Minn.)* 163 N. W. 509.

It has been held that a finding that a sister of an employee was wholly dependent on her for support would not be disturbed merely because the dependent had a life interest in a house estimated to be worth about two thousand dollars. *Buckley's Case*, 218 Mass. 354, Ann. Cas. 1916B 474, 105 N. E. 979.

In *Kenney's Case*, 222 Mass. 401, 111 N. E. 47, it appeared that the claimant who was a sister of a workman was induced by him to remain at home and keep house, he promising to support her. Another sister paid fifteen dollars a month for her board. The brother furnished all other money needed to support the household, giving to the claimant every month twenty dollars and every week three dollars as rental received from a house owned by the three children in common. The claimant had six hundred dollars in the bank at the time of her brother's death. Under the circumstances it was held that while a finding that the claimant was a "dependent" was warranted by the facts, she was not "wholly dependent" on the employee's earnings at the time of the injury within the meaning of the act. The case was distinguished from the *Buckley* case, *supra*, in that the real estate was of considerable value, unincumbered and productive.

In the case of *In re Lanman*, (Ind.) 117 N. E. 671, it appeared that a workman had supported his sister for a number of years under an agreement by which she kept house for him doing no other work. Though she was a competent stenographer, her health was poor and she could not perform the work of a stenographer. This arrangement was held to have created a relationship of total dependency as a basis for compensation, the brother being under a moral if not under a legal obligation to support his sister.

It has been held that a sister of a deceased employee who left a minor daughter, would not be considered as his next of kin, unless she was a member of his family and partly dependent on his earnings for support at the time of his death. *In re Murphy* (Mass.) 117 N. E. 794. In that case it appeared that the sister, her minor son and the employee lived together in a house formerly owned by the mother. The evidence tended to show that she had the exclusive management of the household affairs. It was held that she could not be considered as a member of the family of the deceased. The fact that nothing was said about board and that the deceased had purchased some incidental household furnishings and supplies and cultivated the garden was held not to make him the head of the family of which his sister and his nephew could be deemed members.

It has been held that a sister was entitled to compensation for the death of her brother where the money contributed by him was for the general support of the family, but was spent in part for her support. *Walz v. Holbrook, etc. Corp.* 170 App. Div. 6, 155 N. Y. S. 703.

Where a brother took his sister, a working girl, to their uncle's home and agreed to pay for her board before and after the birth of her child, the brother having shown a general disposition to aid, it was held that the sister was partially dependent on the brother for support within the workmen's compensation act, although the uncle was not fully compensated for the board and the care furnished to her. *Jackson v. Industrial Commission*, 164 Wis. 94, 159 N. W. 561.

Under an act providing for compensation to actual dependents, a sister with whom a workman lived and to whom he paid five dollars each week for board and lodging, although he never remained at the house more than thirty-six hours a week, was held to be an actual dependent and partially supported by her brother's contributions since the payments were materially greater than the mere value of the board and lodging. *Hammill v. Pennsylvania R. Co.*, 87 N. J. L. 388, 94 Atl. 313.

Under an act providing that the compensation under a workmen's compensation act

shall be distributed according to the law providing for the distribution of other property of a deceased, the words "legal beneficiaries" have been held not to apply to brothers and sisters, the statute expressly providing that the action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been caused. *Vaughan v. Southwestern Surety Co.* (Tex.) 195 S. W. 261. See to the same effect *Southern Surety Co. v. Moore*, (Tex.) 196 S. W. 187. Neither will a brother and grandmother be allowed to recover under this provision as legal beneficiaries. *Cole v. Mallory Steamship Co.* (Tex.) 197 S. W. 326.

So where the act makes no provision for adult brothers and sisters, such brothers and sisters are not entitled to compensation. *Shanahan v. Monarch Engineering Co.* 219 N. Y. 469, 114 N. E. 795.

Where an employee who was of age turned over all his wages to his father, and the sister of the deceased was substantially benefited by the contribution, an award of compensation to her regardless of whether she was a minor or an adult has been held to be justifiable since she was an actual dependent. *Connors v. Public Service Electric Co.* 89 N. J. L. 99, 97 Atl. 792.

A clause in the *New Jersey Act of 1913* providing for the distribution of compensation to "orphans and other children" has been held to apply only to children of a deceased workman and not to his brothers and sisters. *Connors v. Public Service Electric Co.* 89 N. J. L. 99, 97 Atl. 792.

Partial Dependency.

Where a compensation act provides for compensation to "actual dependents" of a workman, the fact that the workman's family is not entirely dependent on him does not preclude compensation. *Muzik v. Erie R. Co.* 85 N. J. L. 129, 89 Atl. 248, *judgment affirmed* 86 N. J. L. 695, 92 Atl. 1087; *Jackson v. Erie R. Co.*, 86 N. J. L. 550, 91 Atl. 1035. And see also *Havey v. Erie R. Co.* 87 N. J. L. 444, 95 Atl. 124.

It has been held that in determining the compensation to be awarded to a partial dependent, the amount contributed to the dependent through the entire period during which contributions were made might be considered. *In re Carroll*, (Ind.) 116 N. E. 844.

Where a sister was induced by her brother to remain at home and keep house, he to furnish the support for the household, it was held that this arrangement made her a dependent as a basis for compensation. *Kenney's Case*, 222 Mass. 401, 111 N. E. 47, wherein it was said that in view of the fact that she

had six hundred dollars in the bank and was the owner of a third interest in a property of considerable value at the time of her brother's decease she was only "partially dependent."

Where a father earns \$15 per week and his son earns \$12.75 per week both sums going toward the support of the family, the father is only partially dependent on the contributions made by the son. *Bloomington-Bedford Stone Co. v. Phillips (Ind.)* 116 N. E. 850.

Under a statute providing that a child shall be considered a partial dependent of a workman if he derives part of his support from his wages, a daughter thirty years of age whose husband is dead, and who derives part of her support from her father, has been held to be a partial dependent within the statute, and entitled to compensation. *State v. District Ct. 134 Minn. 131, 158 N. W. 798.*

In accordance with the rule that dependency must be determined by the facts in each case, it has been held that partial dependency may exist, though the contributions have been made at irregular intervals and in irregular amounts and though the dependent may have other means of support. *Hotel Bond Co's Appeal, 89 Conn. 143; 93 Atl. 245.*

In *Ford v. Oakdale Colliery Co. [1915] W. C. & Ins. Rep. (Eng.) 46*, the evidence showed that the deceased son paid his mother 10s. a week, and her two daughters who lived with her each paid her 6s. a week, out of which they were provided with food and clothing. An award by the county court judge on the basis of partial dependency was held to be proper under the evidence. The court said: "There were a number of reasons for the decision of the county court judge; one of them was that these girls, the daughters of the applicant, were themselves claimants as having benefited by the funds which were sent by their brother to the house. The county court judge had to determine whether any compensation was due to them, and he decided that no compensation was due to them. Having got so far, and found that the cost to the mother of each of the girls' feeding, clothing, and share of rent did not exceed 6s. a week, it is an easy step to go beyond that and infer that in the opinion of the county court judge the 6s. contributed by the girls to the mother was more than she spent on them, for in these very humble circumstances the cost of living is very little. I agree that the appeal fails."

In *Hotel Bond Co's Appeal, 89 Conn. 143, 93 Atl. 245*, the evidence showed that a workman before his death had contributed to the support of his mother who, though not immediately dependent, was liable to become so because of old age, condition of mind, lack of regular employment and property. It was held that a condition of partial de-

pendency was shown and that the mother was entitled to compensation.

In *Miller v. Riverside Storage, etc. Co. 189 Mich. 360, 155 N. W. 462*, a sister testified that she received \$6 a week from her brother regularly for a period of time before his death and that he gave her other sums of money from time to time which she used to regain her impaired health. A finding by the accident board that she was partly dependent on the brother was held not to be wholly unsupported by the testimony, although her own average earnings were \$10 per week. The court said: "Unless a standard of independence for unmarried women who work for and live upon wages can be set up which classes as independent all who earn \$10 or even \$12 a week, or more, it cannot be said there was no testimony tending to prove the dependency of claimant. It is manifest there are many women who regard themselves as independent, who live wholly upon their wages, who receive a smaller weekly wage. According to the report of the commissioner of labor published in 1915, there were employed in Detroit 1,974 female stenographers who received wages; the average daily wage being \$2.22. In two cities only out of sixty in the state reported is there paid a higher average daily wage. Assuming six days a week's work, the average wage per week was \$13.32. This is more than claimant ever received, and more than \$3 per week more than she was earning when her deposition in this case was taken. That she can maintain herself upon the wages she is getting is probably true, at least with good, or fair, health. She says she has not good health, and an agent of her former employer testified that she is nervous and excitable."

In the case of *In re Peters (Ind.) 116 N. E. 848*, it appeared that a father was earning \$15 a week which went to the family fund. A son earned \$12.75 which also went for the support of the family. On the death of the son the father was held to be only partially dependent on the son's earnings. It was further held that the cost of maintaining his minor son should not be considered in determining the amount of compensation to which the father was entitled under the act since the father was entitled to the wages of his minor child. See to the same effect *Mahoney v. Gamble-Desmond Co. 90 Conn. 255, 96 Atl. 1025, L.R.A.1916E 110.*

In a case where the evidence, though weak and unsatisfactory, showed that a workman contributed to the support of his sister, it was held that a finding that the sister was a partial dependent would not be interfered with. *State v. District Ct. 132 Minn. 249, 156 N. W. 120.*

It has been held that partial dependency is sufficient to justify an award, and since the question of dependency is one of fact the

decision of the commission on the evidence is final. *Matter of Bylow*, 179 App. Div. 555, 166 N. Y. S. 874.

Where a woman whose husband had deserted her cohabited with another man and a child was born, it was held that the child was totally dependent on the earnings of the father, although the mother, when her husband deserted her, was awarded a separation allowance of 23s. per week for the support of herself and the legitimate children. Even if the separation allowance was mixed with the earnings of the father as a common fund to be used in the same manner, it was held, the child could not be regarded as only partially dependent on a precarious allowance made for the purpose of maintaining the mother and the other children. *Taylor v. Powell Duffryn Steam Coal Co.* [1916] 2 K. B. (Eng.) 765, [1916] W. C. & Ins. Rep. 325, 115 L. T. N. S. 409, 60 Sol. J. 665, 85 L. J. K. B. 1680.

In *Rhyner v. Hueber Bldg. Co.* 171 App. Div. 56, 156 N. Y. S. 903, it was held that the claimant need not be reduced to absolute want in order to come within the provision of the act, but that partial dependency was sufficient. Hence, the fact that a mother had some small means and some other sources of revenue at the time her son died, was held not to preclude her from being a "dependent" within the act. See also *Carter's Case*, 221 Mass. 105, 108 N. E. 911; *Parson v. Murphy* (Neb.) 163 N. W. 847; *Dazy v. Apponaug Co.* 36 R. I. 81, 89 Atl. 160. And see the reported case.

In *Rintoul v. Dalmeny Oil Co.* [1908] Sc. Ct. Sess. (Eng.) 1025, 45 Scott. L. Rep. 809, it appeared that a widow who had five sons, four of whom were married and had children, lived with her unmarried son and was entirely supported by him. On a claim for compensation for the death of that son it was held that although she had a right to relief from the four other sons, who were able to contribute to her support, she was wholly dependent on the earnings of the deceased within the meaning of the act. The court per Lord McLaren said: "Given the relationship, then I think the injury must always be, did the deceased in fact maintain his mother or child, or whoever the person may be, who is making the claim, and if he did so, I think it is irrelevant to consider whether there are others against whom a claim might have been made upon the same ground of relationship."

It has been held that where the statute does not require that a person shall be wholly dependent in order to be entitled to the death benefit, a sister who is in part dependent for her support on other sources than the contributions of a workman is nevertheless entitled to the benefit under the statute. Actual partial dependency of a person bearing one

of the several relationships specified in the statute is sufficient. *Walz v. Holbrook, etc.* Corp. 170 App. Div. 6, 155 N. Y. S. 703.

Where an employee left surviving him two sisters under eighteen years and a mother to whom he gave \$20 a month which the mother used for her support and that of her minor children, a finding by the compensation commissioners that she was partially dependent on him was sustained although the mother received other support from her husband who earned \$50 a month. *Kennerison v. Thames Towboat Co.* 89 Conn. 367, 94 Atl. 372, L.R.A.1916A 436. See to the same effect *Smith v. National Sash, etc. Co.* 96 Kan. 816, 153 Pac. 533; *Reardon v. Philadelphia, etc. R. Co.* 85 N. J. L. 90, 88 Atl. 970; *Connors v. Public Service Elec. Co.* 89 N. J. L. 99, 97 Atl. 792; *Walz v. Holbrook*, 170 App. Div. 6, 155 N. Y. S. 703.

In *Caliendo's Case*, 217 Mass. 498, 107 N. E. 370, it appeared that a mother and sister of an employee lived in Italy. By reason of failing eyesight they became incapacitated to follow their usual occupations and were consequently forced to rely on him for their means of subsistence. It also appeared that an aunt of the employee contributed small gratuitous remittances and another member of the family earned six or seven cents a day. It was held that the mother and sister were wholly dependent on the employee for their support within the act.

In *Quebec* a relative in the ascendent line is apparently not entitled to compensation for the death of an employee by whom he was not wholly supported. *Laflamme v. Levis Ferry Co.* 47 Quebec Super. Ct. 291; *Lamontagne v. Quebec R. Light, etc. Co.* 50 Can. Sup. Ct. 423, affirming 23 Quebec K. B. 212, but referring to a subsequent amendment of the act.

Devolution of Dependent's Right.

An award to a wholly dependent person vests in the dependent when the award is made, and when the dependent dies his or her personal representatives are entitled to the balance remaining unpaid. See *State v. Industrial Commission*, Ann. Cas. 1917D 1162 and note.

Under a statute providing for the payment of compensation to the heirs of a workman to whose support he had contributed, it has been held that an employer could not be compelled to make payment to the estate of a workman's mother who was his only dependent although the statute provided that the compensation should be distributed in accordance with the laws relating to descent and distribution of personal property. The statute must be construed to mean, it was held, that the distribu-

tion was to be made to those only to whose support the employee contributed during his lifetime. *Matecny v. Vierling Steel Works*, 187 Ill. App. 448, wherein the court said: "In refusing the first proposition of law submitted by the appellant, the trial court interpreted the word 'beneficiaries' in paragraph e as meaning all the heirs of the deceased, regardless of whether they were dependent or not. We cannot agree with this interpretation. Such a construction, in our judgment, does violence to the plain purpose and spirit of the act, and it would work a grave injustice in this and many other cases arising under the act. The word 'beneficiary' means, 'one for whose benefit a trust is created, a cestui que trust.' Black's Law Dictionary; Bouvier's Law Dictionary. Keeping in mind the purpose of the act, it is not difficult to interpret paragraph e. The beneficiaries contemplated by the paragraph are the particular heirs who have suffered pecuniary loss by reason of the cutting off of the wages of the deceased employee. These are the heirs who are entitled to the compensation under the act. Paragraph e simply prescribes the method of determining the respective shares of the dependent heirs in the trust fund in the hands of the administrator."

In *Ivey v. Ivey* [1912] 2 K. B. (Eng.) 118, 5 B. W. C. 279, it was held that where an award was made in favor of a workman's widow and four children in allotted shares, and the widow died before her share was exhausted, the unexhausted portion did not pass to her legal personal representatives but could be varied and allocated to the children.

It has been held that where the deceased left two children who were conclusively presumed to be dependent on him and one of the children subsequently died, a decree that the benefit should be divided between the administrator of the deceased and the administrator of the minor child, which decree was not appealed from by the dependents, would not be disturbed at the instance of the insurer since it was obliged to pay the amount and the person to whom the payments must be made were the same whether the surviving child was entitled to the entire payment or whether there was a division. The court, however, refused to give an opinion as to the soundness of the decree. In *re Janes*, 217 Mass. 192, 104 N. E. 556.

Person Entitled to Receive Payment.

Where a workmen's compensation act provides that the "legal representative" shall have a right of action for the compensation in case of the death of the employee, "legal representative" has been held to mean the dependent and not the executor or administra-

tor. *Dearborn v. Peugeot Auto Import Co.* 170 App. Div. 93, 155 N. Y. S. 760.

So where an act provides that the compensation and benefits shall be paid to employees or their dependents, any payments accruing after the death of a workman are payable to the dependents and not to the workman's personal representatives. *Wozneak v. Buffalo Gas Co.* 175 App. Div. 268, 161 N. Y. S. 675.

In *Woodcock v. Walker*, 170 App. Div. 4, 155 N. Y. S. 702, it was held that where the act authorizes the widow as the principal dependent to make an agreement with the employer subject to the approval of the commission as to the payment of the award both to herself and to her children, the moneys allotted to infant children in the case of the death of the employee may be paid to the widow since it does not seem probable that it was the intention of the legislature to require an appointment of a general guardian with an additional expense in order to enable the children to collect.

Apportionment of Compensation.

Under a provision that if there shall be more than one person wholly dependent the benefit shall be divided equally among them, it has been held that a child of the deceased by a former wife, who is presumed to be dependent, is entitled to share equally with the surviving wife, although the provision, technically speaking, applies only to cases where the dependency is not presumed or where the presumed dependents are all children under eighteen years. *Coakley's Case*, 216 Mass. 71, Ann. Cas. 1915A 867, 102 N. E. 930.

It has been held that where a son contributed to the support of his parents and the claim for compensation was made in the name of both the father and the mother, it was not necessary that the mother should file a waiver of her claim. *Buhse v. Whitehead etc. Iron Works* (Mich.) 160 N. W. 557.

In *Matter of Bylow*, 179 App. Div. 555, 166 N. Y. S. 874, it was found that the deceased who was unmarried and without children, left surviving and partially dependent on him for support at the time of the accident his mother, three half sisters, and one half brother. All the children were under the age of sixteen and going to school. An award by the commission of \$1.45 per week for each was held to be a proper award where the evidence was that at the time of his death the deceased was earning one dollar per day although in previous employments by other employers he had worked for a smaller wage.

Under a provision giving compensation to the deceased's widow, child or children, or parents or other lineal heirs, it has been held that where an employee left a dependent

mother and a nondependent brother and sisters, the compensation was to be awarded to the mother alone, the brother and sisters not being entitled to share with the mother in the compensation allowed. *Mateeny v. Vierling Steel Works*, 187 Ill. App. 448.

In *State v. District Ct.* 133 Minn. 454, 158 N. W. 792, the statute involved was as follows: "Partial dependents shall be entitled to receive only that proportion of the benefits provided for actual dependents which the average amount of the wages regularly contributed by the deceased to such partial dependent at, and for a reasonable time immediately prior to the injury, bore to the total income of the dependent during the same time." It was held that the monthly contributions of the deceased to his mother should be considered as a part of her total income in determining the amount she was entitled to recover as a partial dependent.

EUGENE DIETZEN COMPANY

v.

INDUSTRIAL BOARD OF ILLINOIS ET AL.

Illinois Supreme Court—June 21, 1917.

279 Ill. 11; 116 N. E. 684.

Workmen's Compensation Acts — What Is Accident Arising Out of Employment.

Under Workmen's Compensation Act, § 1 (Hurd's Rev. St. 1915-16, c. 48, § 126), providing for compensation for accidental injuries "arising out of and in the course of the employment," it is not sufficient that the injury occurs in the course of the employment, but it must also arise out of the employment; that is, it must be an accident resulting from a risk reasonably incidental to the employment.

[See note at end of this case.]

Same.

Where a servant is employed to do a certain service and is injured in the performance of a different service voluntarily undertaken, the master is not liable.

[See note at end of this case.]

Same.

Where a servant voluntarily and without direction from the master, and without his acquiescence, goes into hazardous work outside of his contract of hiring, he puts himself beyond the protection of the master's implied undertaking, and, if injured, must suffer the consequences.

[See note at end of this case.]

Same.

A master is not liable for injuries to a servant unless the servant was at the time in the performance of some duty for which he was employed; and a "volunteer" is one who introduces himself into matters which do not concern him, and does, or undertakes to do, something which he is not bound to do or which is not in pursuance or protection of any interest of the master, and which is undertaken in the absence of any peril requiring him to act as in an emergency.

[See note at end of this case.]

Same.

The scope of a servant's duties is determined by what he was employed to do and what he actually did with his employer's knowledge and consent, and an employee injured when performing the services he was in the habit of performing is not a volunteer in performing such duties.

[See note at end of this case.]

Same.

An employee is engaged in the course of his employment when injury occurs within the period of his employment, at a place where he may reasonably be, and while he is reasonably fulfilling the duties of his employment or is engaged in doing something incidental to it.

[See note at end of this case.]

Same.

A workman was employed to polish small metal articles on a buffing machine, to which was attached an exhaust pipe containing a fan to carry away dust from the work. The exhaust system was entirely separate from the buffing machine and in charge of a special responsible man. The workman disregarded his instructions not to meddle with the exhaust system, and took off a cover on the pipe near the fan and reached down to recover a metal piece he had accidentally dropped into the system below the buffing wheel, and was cut on the hand by the fan. It is held that the accident was not incidental to the work in which he was employed, and he could not recover compensation.

[See note at end of this case.]

Review of Findings.

While the industrial board's findings of fact are conclusive on the supreme court, the legal conclusions of that board, based on their findings, are subject to that court's supervision.

[See Ann. Cas. 1916B 475; Ann. Cas. 1918B 647.]

Same.

If it is clear upon the facts found by the industrial board that as a legal conclusion an injury was not accidental or that it did not arise in the course of the employment, a contrary conclusion awarding compensation will not be allowed to stand.

Error to Circuit Court, Cook county:
TORRISON, Judge.

Claim for compensation under workmen's compensation act. Giuseppe Cappucio, claimant, and Eugene Dietzen Company, defendant.

Claim allowed by Industrial Board. Decision affirmed by Circuit Court. Defendant brings error. The facts are stated in the opinion. **REVERSED.**

Thomas C. Angerstein and George W. Angerstein for plaintiff in error.

[12] **CARTER, C. J.**—Giuseppe Cappucio, while in the employ of plaintiff in error on July 15, 1914, sustained a serious injury to his right hand, for which he filed a claim before the Industrial Board. Upon hearing before the committee of arbitration an award was entered in his favor. On petition for review filed by plaintiff in error, the Industrial Board, without the introduction of additional evidence, entered an award in Cappucio's favor, requiring plaintiff in error to pay him five dollars a week for 112 weeks. The case was duly taken by *certiorari* to the circuit court of Cook county, which, after a hearing, affirmed the award of the Industrial Board, [13] the trial judge certifying that in his opinion the cause was one proper to be reviewed by this court. The case was thereafter brought here by writ of error.

Cappucio began work for plaintiff in error on June 27, 1914. He first worked at nickel-plating, but a few days before his injury was put to work on a buffing machine. This machine consisted of an upright stand, shaped somewhat like the letter T, along the top of which was a revolving spindle. At one end of the spindle was a soft buffing wheel and at the other end a hard buffing wheel. Cappucio was employed to work on the soft buff, his sole duty at the time being to polish small metal handles for tape lines, these handles being about three inches in size each way and shaped similar to a stirrup. His work was to take one of these metal pieces out of a box, hold it against the cloth buff and polish it and place it in another box. When one box was completed it was taken away and another box brought. Just below the buffing wheel at which he worked was a small box-like receptacle into which the dust from the work fell. The receptacle was supported by a tripod of three iron rods attached to the floor but was not in any way attached to or a part of the buffing machine. From this receptacle a pipe, something like a jointed stovepipe, led downward and away from the operator as he stood facing the machine, this pipe curving to connect with a larger exhaust pipe. This larger pipe in turn connected with a large case of sheet metal, which was fully enclosed and in which was a fan, a few feet distant from the buffing machine. The pipe connecting with the box-like receptacle could be detached from the exhaust system if by chance any piece of metal that was being polished

should be accidentally dropped into it. There was a similar arrangement below the hard buffing wheel, connecting in the same manner with the exhaust system. Between the buffing wheel and the fan there was located on the top of the larger pipe an opening, covered by a tight cover. The only [14] proper way to get into the exhaust system near the fan was to take off this tight cover and reach down into the pipe and then over into the case in which the fan was located. The evidence shows, without contradiction, that the exhaust system was entirely separate from the buffing machine. This exhaust system was in charge of a special, responsible man for the purpose of cleaning and oiling, which work, the evidence tends to show, was done by this man on Saturday of each week. Before he began this polishing work Cappucio was instructed by another employee, Anders, an expert metal polisher of about nineteen years' experience. Anders testified that he told Cappucio his sole duty was to take the metal pieces and hold them against the buffing wheel; that he should not lift the cover and reach into the exhaust pipe. He testified that he instructed Cappucio, if anything went wrong, to notify him. Cappucio stated in his testimony that he had been instructed by Anders that if anything went wrong to come and see him, and that he had notified Anders on several occasions when things went wrong. Cappucio knew that the exhaust system was to carry away the dust and dirt, and there was a loud noise made in the case, so it is argued he must have known that a fan or some other revolving machinery was in the large part of the exhaust system where the fan was located. Anders testified that on a previous occasion he had seen Cappucio take the cover off of the hole in the large exhaust pipe and start to reach into the pipe and that he had instructed Cappucio not to do it; that he (Anders) would attend to that. Cappucio denied receiving such orders and instructions, although two witnesses called on behalf of the plaintiff in error testified that while Cappucio was in the hospital recovering from the injuries he told them he had been so instructed by Anders. Cappucio testified that on the day he was injured he accidentally dropped one of these metal pieces that he was polishing, into the receptacle immediately below said buffing wheel; that he did not notify [15] anyone but went to the opening in the pipe to which we have referred, took off the cover and reached his hand down into the exhaust pipe and around inside, and was injured by the fan, which broke and cut his hand.

Section 1 of the Workmen's Compensation Act provides, among other things, that the employer is required to pay "compensation for accidental injuries sustained by any em-

ployee arising out of and in the course of employment," etc. (Hurd's Stat. 1916, p. 1272.) It is conceded this injury was accidental and that the award is not unjust if an award of any nature should be allowed. The sole question raised here is whether the injury arose "out of and in the course of the employment" of Cappucio. It is not sufficient that the injury occurs in the course of the employment. It must also arise out of the employment. These words are used conjunctively, and the circumstances of the accident must satisfy both the one and the other. "The words 'out of,' point, I think, to the origin or cause of the accident; the words 'in the course of,' to the time, place and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident; the latter words relate to the circumstances under which an accident of the character or quality takes place." (Fitzgerald v. Clarke, 1 B. W. C. C. (Eng.) 197; Boyd on Workmen's Comp. sec. 472.) It must be an accident resulting from a risk reasonably incidental to the employment. "An accident arises 'in the course of' the employment if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing." (Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458. See also 1 Honnold on Workmen's Comp. sec. 113.) "An accident arises 'out of' the employment when it is something the risk of which might have been contemplated by a reasonable person, when entering the employment, as incidental to it. . . . A risk is [16] incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service. . . . It may be incidental to the employment when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected therewith." (Bryant v. Fissell, supra, on p. 461.) It is stated that it may be "difficult to conceive of any injury which arises 'out of' the employment which does not arise 'in the course of' it; but the converse, however, is not true. . . . The determination of this question presents one of the most difficult problems in connection with the act. It has been said that each case must depend upon its own circumstances and cannot be solved by reference to any formula or general principle." (Glass on Workmen's Comp. Law, 40.) "An accident only arises out of and in the course of a workman's employment when it arises from his doing or omitting to do some act within the sphere of his employment. If he chooses to step outside the sphere of his employment and to do something he is not

expected or required to do, he does so at his own risk and is not under the protection of the act. . . . A sharp distinction is drawn between doing of a thing recklessly or negligently which a workman is employed to do and the doing of a thing altogether outside and unconnected with what he is employed to do, and if an accident happens in the former case it arises out of and in the course of the employment but in the latter case. 'There are prohibitions which limit the sphere of employment and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent the recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere.'" (Elliott on Workmen's Comp. Act (7th ed.) 50. See also 1 Honnold on Workmen's Comp. sec. 114.) "If the [17] act which caused the injury was within the scope of the servant's employment, the mere fact that he had been expressly forbidden to do that act will not necessarily be fatal to his claim." (Glass on Workmen's Comp. Law, 52.) "Ordinarily, where workmen are not employed to work with machinery or in close proximity thereto, they are held not entitled to compensation for injuries received where they voluntarily put themselves in a position to be injured thereby. . . . An accident does not arise out of the employment if, at the time, the workman is arrogating to himself duties which he was neither engaged nor entitled to perform. But the courts are inclined not to be too severe upon workmen who are injured by attempts to further the master's business, although the attempt is in a line somewhat outside the precise scope of the employment." (Glass on Workmen's Comp. Law, 48.) Where a servant is employed to do a certain service and is injured in the performance of a different service voluntarily undertaken, the master is not held liable; also where a servant voluntarily and without direction from the master, and without his acquiescence, goes into hazardous work outside of his contract of hiring he puts himself beyond the protection of the master's implied undertaking, and if he is injured he must suffer the consequences. (1 Bradbury on Workmen's Comp. 458, 459.) A master is not liable for the injuries to his servant unless the servant was at the time in the performance of some duty for which he was employed. (Stagg v. Edward Weston Tea, etc. Co. 169 Mo. 489, 69 S. W. 391.) A volunteer is one who introduces himself into matters which do not concern him, and does, or undertakes to do, something which he is not bound to do or which is not in pursuance or protection of any interest of the master, and which is undertaken in the ab-

sence of any peril requiring him to act as on an emergency. (*Kelly v. Tyra*, 103 Minn. 176, 114 N. W. 760, 115 N. W. 636, 17 L.R.A. (N.S.) 334.) The scope of a servant's duties is determined by what he was employed to do and what he [18] actually did with his employer's knowledge and consent, and an employee who was performing the same services he was in the habit of performing when he was injured is not a volunteer in performing such duties. (*Dixon v. Chiquola Mfg. Co.* 86 S. C. 435, 68 S. E. 643.) These rules were briefly summed up in *Moore v. Manchester Liners* [1910] A. C. (Eng.) 498, where it was stated an accident to an employee occurs in the course of employment when it takes place "while he is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing."

It is the rule that an employee is engaged in the course of his employment when the injury occurs within the period of his employment, at a place where he may reasonably be and while he is reasonably fulfilling the duties of his employment or is engaged in doing something incidental to it. Where a workman sustained an injury while attempting to regain his pipe, which had fallen, it was held that his action in attempting to recover his pipe, under the circumstances, seemed to satisfy all the conditions. He was within the period of his employment, at a place where he might reasonably be. It was held "he had a right to be at the place, riding on or walking beside the wagon; he was within the time during which he was employed, because the accident happened during the actual period of transit; and he was doing a thing which a man, while working, may reasonably do. A workman of his sort may reasonably smoke, he may reasonably drop his pipe, and he may reasonably pick it up again." (*M'Lauchlan v. Anderson*, 4 B. W. C. C. (Eng.) 376.) A boy who had charge of the handle of a machine lifted off the cover over some pinion wheels and played with them, with the result that his hand was caught in the wheels and the end of one of his fingers was torn off. He had orders not to lift the cover or touch the pinion wheels. It was held that the accident did not arise out of and in the course of his employment. (*Furnias v. Gartaide* [19] [1910] 3 B. W. C. C. (Eng.) 411.) A boy employed in a spinning mill injured himself while cleaning the machinery when it was in motion. He was not employed to clean the machinery, and it was held that the accident did not arise out of the employment. (*Naylor v. Musgrave Spinning Co.* 4 B. W. C. C. (Eng.) 286.) A lad fourteen years of age was employed as a bobbin boy at a spinning mill. His duty was to take off the

bobbins and he had been fully instructed for the work. While the machine was in motion he attempted to put on some weights which had fallen off, and was injured. The duty of putting on weights belonged to men employed for that purpose. It was held that the master was not liable for the injuries received. (*Michael v. Henry*, 209 Pa. St. 213, 58 Atl. 125.) A boy employed in a boot factory, who was directed to take an insole down-stairs to have it remolded, and in the absence of the operator of the molding machine attempted to remold it himself and was injured, was held entitled to compensation where he had not been expressly forbidden to touch the molding machine. (*Tobin v. Hearn*, 44 Ir. L. T. (Eng.) 197.) A woman injured while cleaning a part of the machinery that it was not her duty to clean was held to have suffered an injury arising out of and in the course of the employment, where she was not expressly forbidden to clean the machinery. (*Greer v. Thompson*, [1912] B. W. C. C. (Eng.) 272.) Authority for a servant to act on an emergency, in his master's interest, may be implied. Where a workman was injured in attempting to stop his master's runaway horse it was held that the accident arose out of and in the course of the employment although his work was wholly unconnected with the horses. (*Rees v. Thomas*, [1899] 1 Q. B. (Eng.) 1015, 68 L. J. Q. B. (Eng.) 539.) A workman was employed to look after baggage, clean out lion cages and generally make himself useful, but it was no part of his duty to feed the lions. One afternoon this workman was left in sole charge of the cages of lions, with orders to see that no harm came to the lions or to anyone by reason of their fierceness. One of [20] the lions got out of a cage and into a dressing room, but there was no evidence to show how it happened. The workman went into the dressing room and tried to drive the lion back into the cage, when the lion killed him. It was held that as he had been left in charge it was his duty to get the lion back into the cage, and that as he was killed in the discharge of his duty the accident arose out of and in the course of his employment. (*Hapelman v. Poole* [1908] 2 B. W. C. C. (Eng.) 48.)

These cases all serve to illustrate the principles as to when a workman is acting in the scope of his duties and when the accident arises out of and in the course of the employment. The difficulty arises only in applying these principles to the special facts of a given case. Cappuccio testified that he had seen Anders put his hand in the pipe when articles had dropped in and that he (Cappuccio) had never been forbidden to do the same thing, while Anders testified that he had at one time seen Cappuccio start to reach inside the pipe and had forbidden him to

do so, and that he told Cappucio to call on him if anything went wrong. The Industrial Board found that the weight of the testimony showed Cappucio had been forbidden to reach into said pipe to recover articles that were dropped. It can hardly be said that the evidence shows that there was any emergency in order to protect the property of the employer that would justify Cappucio in reaching into the exhaust pipe. There is no evidence tending to show that there was any danger from the piece of metal being left in the exhaust pipe. Had the piece fallen upon the floor, there can be no question that it might well be considered as in the line of his duty for Cappucio to have picked it up, as that would ordinarily involve no danger and would be naturally incidental to the work in which he was employed. Of course, it can readily be understood that he desired to have his box complete and all the handles there and not to be criticised because he had lost one; but it is plain from the construction of the [21] exhaust system, in connection with the machinery at which he was working, that he must move with deliberation in order to step around to the large pipe, take off the tightly fitting cover and then reach in some distance,—far enough to bring his hand in contact with the fan. It certainly cannot be said that there was an emergency and that he was acting under a sudden impulse to protect the property of the employer. It is plain from the evidence and from the photograph in the record showing the construction of the machinery and the exhaust pipe, that they were totally distinct; that there was nothing in the construction that would tend in the slightest degree to lead Cappucio to think his work was in any way connected with cleaning the exhaust pipe or taking anything therefrom that had fallen into it, when in doing so he would be required to take off the tightly fitting cover of the pipe in order to reach into the opening. Whether this is true or not, we think the conclusion necessarily follows from this record that the act of opening this exhaust pipe to get the piece of metal out had no such reasonable connection with his work as to justify him in the conclusion that it was his duty to take off this cover and attempt to recover the article. In *Bischoff v. American Car, etc., Co.* 190 Mich. 229, 157 N. W. 34, it was held that "notice must be taken that a factory of to-day usually includes within the fields of its operations many fairly distinct lines of work, from that of the roustabout engaged in the ordinary labor that almost anyone may perform, to that of the expert mechanic, which can be done safely by those only with skill and experience. The difference between these various kinds of work was always recognized by the common law, and it was held to be negligence

for the master to require of the servant, without warning and instructing him, the performance of work outside and more dangerous than that which the latter had contracted to perform. Such classification of work exists in the very nature of things, and as much under the statute as at common law. Its recognition [22] is required by any proper organization of a factory, not only for efficiency but as well for the purpose of guarding against accident and injury. And if a workman, when there is no emergency, should of his own volition see fit to intermeddle with something entirely outside the work for which he is employed, he ought not to be allowed compensation upon the mere plea that he thought his act would be for the benefit of his employer. That plea may be of value under some circumstances, but it cannot authorize an employee to voluntarily take upon himself the performance of work for which he was not employed." The reasoning in that case is clearly applicable to the work which Cappucio was employed to do,—that is, the work of polishing was clearly different from the act of putting his hand into the pipe to clean it out or remove an article from it.

While the Industrial Board's findings of fact are conclusive on this court, the legal conclusions of that board, based upon their findings, are subject to the supervision of this court. The Workmen's Compensation act does not make the board's legal conclusions binding upon this court. If it is clear upon the facts that as a legal conclusion an injury was not accidental or that it did not arise in the course of the employment, a contrary conclusion awarding compensation will not be allowed to stand. (*Bell v. Hayes-Longia Co.* 192 Mich. 90, 158 N. W. 179.) It seems manifest from the uncontroverted testimony in the record that Cappucio was not acting within the scope of his employment at the time he was injured.

The judgment of the circuit court will be reversed and the cause remanded, with directions to enter an order setting aside the award of the Industrial Board.

Reversed and remanded, with directions.

NOTE.

What Is Accident Arising Out of and in Course of Employment within Meaning of Workmen's Compensation Act.

I. Introductory, 769.

II. In General, 769.

III. Burden of Proof:

1. General Rule, 770.

2. Burden Not Sustained, 771.

3. Burden Sustained, 777.

IV. Risk of Accident:

1. In General, 786.
2. Risk Incidental to Employment, 787.
3. Risk Not Incidental to Employment, 794.

V. Scope of Employment:

1. In General, 800.
2. Act Not within Scope of Employment, 801.
3. Act within Scope of Employment, 806.

VI. Disobedience or Negligence of Workman:

1. In General, 809.
2. Disobedience or Negligence Precluding Recovery, 809.
3. Disobedience or Negligence Not Precluding Recovery, 812.

VII. Beginning of Employment:

1. In General, 813.
2. Employment Begun, 814.
3. Employment Not Begun, 815.

VIII. Interruption of Employment:

1. In General, 815.
2. Seaman Returning to Ship, 816.
3. Other Cases, 816.

IX. End of Employment:

1. In General, 819.
2. Employment Not Terminated, 819.
3. Employment Terminated, 822.

I. Introductory.

The earlier cases discussing the question what is an "accident arising out of and in the course of the employment" within the meaning of a workmen's compensation act, are treated in the notes to *Parker v. Hambrook*, Ann. Cas. 1913C 1; *Plumb v. Cobden Flour Mills Co.* Ann. Cas. 1914B 495; and *Parker v. Ship Black Rock*, Ann. Cas. 1916B 1290. This note reviews the recent cases on the subject, arranged in accordance with the scheme adopted in the previous notes.

As to whether a disease is an accident within the meaning of a workmen's compensation act, see the notes to the following cases: *Brintons v. Turvey*, 2 Ann. Cas. 137; *Broderick v. London County Council*, 15 Ann. Cas. 885; *Sullivan v. Modern Brotherhood of America*, Ann. Cas. 1913A 1116; and *Vennen v. New Dells Lumber Co.* Ann. Cas. 1918B 293.

The question what is an "injury" or a "personal injury" within the meaning of a workmen's compensation act is treated in the notes to *Hurle's Case*, Ann. Cas. 1915C 919, and *Stertz v. Industrial Ins. Commission*, Ann. Cas. 1918B 354.

II. In General.

The courts are practically unanimous in holding that the words "accident arising out of" Ann. Cas. 1918B.—49.

of and in the course of the employment," as used in a workmen's compensation act, should be given a broad and liberal construction in order that the humane purpose of the enactment may be realized. *Holland-St. Louis Sugar Co. v. Shraluka* (Ind.) 116 N. E. 330; *United Paperboard Co. v. Lewis* (Ind.) 117 N. E. 276; *Haskell, etc. Car Co. v. Brown* (Ind.) 117 N. E. 555; *Heitz v. Ruppert*, 218 N. Y. 148, 112 N. E. 750, L.R.A.1917A 344, *affirming* order 171 App. Div. 961, 155 N. Y. S. 1112, *reargument denied* 218 N. Y. 702, 113 N. E. 1057. See also *Duffield v. Peers*, 37 Ont. L. Rep. 652, 32 Dominion L. Rep. 339.

"The workmen's compensation act was designed to furnish compensation whenever employees suffer injury or death in the course of the employment from accidents arising out of it. It was intended to let those employers and employees, who so have chosen, escape from the harsh consequences which so often result from the application to their status of the common-law rule of negligence, contributory negligence, assumption of risk and the negligence of fellow servant. And every person who is entitled to avail himself of the compensation law is presumed to have so done when the relation of employer and employee was assumed. As remedial legislation it should not receive a narrow construction, but should be applied fairly and broadly with a view to confer the benefits intended. It may be that in some particular case, remedies afforded by the law outside of this act would be to the servant's advantage. But where both employer and employee have concluded to be bound by the compensation act, in respect to accidental injuries suffered in the employment, courts should not be too prone to exclude an accident when it does occur from the operation of the compact. It will not do to adopt a rule excluding an accidental injury from the compensation act, if the servant may recover more damages under other provisions of law, and including it only when otherwise no compensation is attainable. Both employer and employee must be treated with the same fairness." *Mahowald v. Thompson-Starratt Co.* 134 Minn. 113, 158 N. W. 913, *rehearing denied* 134 Minn. 117, 159 N. W. 565.

To entitle a workman to an award of compensation under a workmen's compensation act, his injuries must result from an accident both arising out of and in the course of his employment. The two elements must coexist. They must be concurrent and simultaneous. The one without the other will not sustain an award. Yet the two are so entwined that they are usually considered together in the reported cases, and a discussion of one of them involves the other. *Holland-St. Louis Sugar Co. v. Shraluka* (Ind.) 116 N. E. 330.

"In the course of" points to the place and circumstances under which the accident takes place and the time when it occurred. In order

to restrict beyond the reach of question the words "in the course of the employment," the words "arising out of" were added, so that the proof of the one without the other will not bring a case within the act. The term "arising out of" in the act points to the origin or cause of the injury. It presupposes a causal connection between the employment and the injury. *Larke v. John Hancock Mut. L. Ins. Co.* 90 Conn. 303, 97 Atl. 320, L.R.A. 1916E 584.

The words "out of" involve the idea that the accident is in some sense due to the employment. *Griffith v. Cole* (Ia.) 165 N. W. 577.

"The statute does not provide an insurance against every accident happening to the workman while he is engaged in the employment. The words 'arising out of and in the course of employment' are conjunctive, and relief can be had under the act only when the accident arose both 'out of' and 'in the course of' employment. The injury must be received (1) while the workman is doing the duty he is employed to perform, and also (2) as a natural incident of the work. . . . On the other hand, the act has not been applied to accidents resulting from the chances of life in general to which the victim of misfortune was exposed in common with all mankind rather than as employee. . . . Injuries received through skylarking or horseplay during working hours and at the place of work have been considered by the courts, and it has been held that an accident caused to a workman, while engaged in his work, by the wrongful act of a fellow workman, entirely outside the scope of his employment, has no relation to the employment and is not within the act. . . . Altercations and blows may, however, arise from the act of a fellow servant while both are engaged in the employer's work and in relation to the employment. The employer may be badly or carelessly served by two men engaged in his work, and yet it may be inferred, when one injures the other in a quarrel over the manner of working together in a common employment, that the accident arose out of the employment and was not entirely outside of its scope, if it was connected with the employer's work and in a sense in his interest. Such cases necessarily present close questions of fact." *Heitz v. Rupert*, 218 N. Y. 148, 112 N. E. 750, L.R.A. 1917A 347, *affirming* order 171 App. Div. 961, 155 N. Y. S. 1112, *reargument denied* 218 N. Y. 702, 113 N. E. 1057.

A contention that the provision in the Ohio Workmen's Compensation Act (103 Ohio Laws, pp. 72, 82, § 27) with reference to an injury "in the course of employment" permits

an award to be made to one whose injury did not arise out of the employment, has been held not to be well taken. *Fassig v. State*, 95 Ohio St. 232, 116 N. E. 104, wherein the court said that it was plainly the intention of the framers of the constitutional amendment, in which the language was found as well as in the statute, to provide for compensation only to one whose injury was the result of or connected with the employment, and that the language used would not cover any case which had its cause outside of and disconnected with the employment, although the employee might at the time have been actually engaged in doing the work of his employer in the usual way.

The Federal Workmen's Compensation Act of 1908 (Act of May 30, 1908, c. 236; 35 Stat. 556; Fed. Stat. Ann. 1909 Supp. p. 330) was of but limited scope, and is now superseded by the Federal Act of 1916 (Act Sept. 17, 1916, c. 458; 38 Stat. 742; Fed. Stat. Ann. Pamph. Supp. No. 8, p. 141). However, the former act applied to injuries received "in the course of employment" merely, so that it was held to suffice if the injury giving rise to the compensation resulted from an accident which occurred in the course of the employment, provided it was an injury within the meaning of the act, without holding that the injury must result from an accident which arose out of, as well as in the course of, the employment. See the various opinions of the solicitor, department of labor, cited throughout this note.

A wide departure from the legislation of the other states and from the English act is shown by the terms of the Washington Act (Laws 1911, c. 74). It is not an employers' liability act, or a compensation act of the ordinary type. It uses the far stronger terms, "fortuitous event," and "injured in extra-hazardous work" in place of the phrases "accident," injury arising "during and in the course of employment," and "personal injury by accident arising out of and in the course of employment." The intention to get rid of judicial controversies and include every form of industrial accident is apparent throughout the act. *Stertz v. Industrial Ins. Commission*, Ann. Cas. 1918B 354.

III. Burden of Proof.

1. GENERAL RULE.

The onus rests on an applicant for compensation under a workmen's compensation act to furnish evidence showing not only the fact of an accidental injury, but also that it arose out of and in the course of the employment. *Renfrew v. McCrae* [1914] W. C. & Ins. Rep. 195, [1914] Sc. Ct. Sess. 539; *Ford v. Gaiety Theatre* [1914] W. C. & Ins. Rep. (Eng.) 53,

279 Ill. 11.

7 B. W. C. C. 197; Kettle v. McKay [1916] W. C. & Ins. Rep. (Eng.) 297, 115 L. T. N. S. 397, 85 L. J. K. B. 1490, 9 B. W. C. C. 544; Brownlee v. Coltness Iron Co. [1917] W. C. & Ins. Rep. (Eng.) 235; Joy v. Phillips [1916] 1 K. B. (Eng.) 849, 114 L. T. N. S. 577, [1916] W. C. & Ins. Rep. 67, 85 L. J. K. B. 770, [1916] W. N. 142, 9 B. W. C. C. 242; Murphy v. Cooney [1914] 2 Ir. R. 76, [1914] W. C. & Ins. Rep. 44; Rourke v. Holt [1917] 2 Ir. R. 318; Western Grain, etc. Co. v. Pillsbury, 173 Cal. 135, 159 Pac. 423; Armour v. Industrial Board, 273 Ill. 590, 113 N. E. 138; Chicago, etc. R. Co. v. Industrial Board, 274 Ill. 336, 113 N. E. 629; Bloomington, etc. R. Co. v. Industrial Board, 276 Ill. 454, 114 N. E. 939; Ohio Bldg. Safety Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149; Albaugh-Dover Co. v. Industrial Board, 278 Ill. 179, 115 N. E. 834; H. G. Goelitz Co. v. Industrial Board, 278 Ill. 164, 115 N. E. 855; Savoy Hotel Co. v. Industrial Board, 279 Ill. 329, 116 N. E. 712; Peoria R. Terminal Co. v. Industrial Board, 279 Ill. 352, 116 N. E. 651; Northern Illinois Light, etc. Co. v. Industrial Board (Ill.) 117 N. E. 95; Union Sanitary Mfg. Co. v. Davis (Ind.) 115 N. E. 676; Haskell, etc. Car Co. v. Brown (Ind.) 117 N. E. 555; Sugar Valley Coal Co. v. Drake (Ind.) 117 N. E. 937; Griffith v. Cole (Ia.) 165 N. W. 577; Von Ette's Case, 223 Mass. 56, 111 N. E. 696, L.R.A.1916D 641; De Mann v. Hydraulic Engineering Co. 192 Mich. 594, 159 N. W. 380; Draper v. Regents of University (Mich.) 161 N. W. 956.

However, it is not indispensable that the proof should be made by direct and positive evidence that the injury was due to an accident arising out of and in the course of the employment. It may be made by circumstantial evidence from which such an inference can fairly and legitimately be drawn. Western Grain, etc. Co. v. Pillsbury, 173 Cal. 135, 159 Pac. 423; Chicago, etc. R. Co. v. Industrial Board, 274 Ill. 336, 113 N. E. 629; Albaugh-Dover Co. v. Industrial Board, 278 Ill. 179, 115 N. E. 834; Von Ette's Case, 223 Mass. 56, 111 N. E. 696, L.R.A.1916D 641.

But the proof must be based on competent, legal evidence, and must amount to something more than mere guess, conjecture or surmise. Bloomington, etc. R. Co. v. Industrial Board, 276 Ill. 454, 114 N. E. 939; Ohio Bldg. Safety Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149; Albaugh-Dover Co. v. Industrial Board, 278 Ill. 179, 115 N. E. 834; H. G. Goelitz Co. v. Industrial Board, 278 Ill. 164, 115 N. E. 855; Savoy Hotel Co. v. Industrial Board, 279 Ill. 329, 116 N. E. 712; Peoria R. Terminal Co. v. Industrial Board, 279 Ill. 352, 116 N. E. 651; Von Ette's Case, 223 Mass. 56, 111 N. E. 696, L.R.A. 1916D 641.

"The decision in workmen's compensation cases show, especially where death occurs,

that very slender evidence may be sufficient to justify an inference that an injury has been caused by an accident in the course of employment." Cherry, L. J., in Wright v. Kerrigan [1911] 2 Ir. R. 301, 45 Ir. L. T. 82.

If the incapacity of the workman is due to a supervening cause, he must establish a causal connection between this *novus actus interveniens* and the original injury. Brownlee v. Coltness Iron Co. [1917] W. C. & Ins. Rep. (Eng.) 235.

Where, however, a workman has been injured by what was admittedly an accident arising out of and in the course of his employment, and claims compensation under the act, the onus of proving that the subsequent existing incapacity is no longer due to the accident, but is attributable to a *novus actus interveniens*, such as improper medical treatment owing to an incorrect diagnosis, is on the employer. Bower v. Meggitt [1917] W. C. & Ins. Rep. (Eng.) 40, 116 L. T. N. S. 178, 86 L. J. K. B. 463, 10 B. W. C. C. 146; Brownlee v. Coltness Iron Co. [1917] W. C. & Ins. Rep. (Eng.) 235.

Where a watchman claims compensation for injuries arising out of the operation of a hazardous business, the burden of proof rests on the employer to show that the plant was not in operation and hence that the employee was not exposed at the time of his injury to the hazards of the business. Kobyra v. Adams, 176 App. Div. 43, 162 N. Y. S. 269.

2. BURDEN NOT SUSTAINED.

In each of the following cases, on the facts as set forth, it was held that the burden of proof had not been sustained by the applicant:

Porter Walking Three Miles with Seventeen Pound Parcel.—A porter, twenty-six years of age and in good health, was sent by his employers on a very hot day with a parcel weighing seventeen pounds a distance of about three miles. He was given money for a train fare. He arrived at his destination between three and four o'clock in the afternoon, when he knocked at the door but was not answered, as no one was in. He then sat down on a coping at the top of the steps leading to the door. After sitting there a little time he fell into the area below, receiving injuries from which he died later. It was held that the applicant for compensation had not discharged the burden which rested on him of showing that the accident, which admittedly happened in the course of the deceased's employment, arose out of the employment in any sense in which those words could properly be applied. Kettle v. McKay [1916] W. C. & Ins. Rep. (Eng.) 297, 115 L. T. N. S. 397, 85 L. J. K. B. 1490, 9 B. W. C. C. 544.

Workman Opening Window Fastened by Employer.—An employer in anticipating and

guarding against his employees passing over the top of dye tubs, which were filled with hot water and constantly emitted steam, caused the lower or bottom sashes in the windows back of the dye tubs to be "nailed down so that the men would not be reaching over the tubs to open the windows." The claimant, after passing over the dye tubs, was attempting to remove the fastening of the window in question by the use of a chisel and hammer, when he "was struck in the eye by a piece of the chisel," broken off by a blow of the hammer. It was held that he had failed to show that the accident arose out of his employment. *In re Borin*, 227 Mass. 452, 116 N. E. 817.

Blood Poisoning.—A workman on returning home from work one evening showed his wife a scratch or mark behind one ear. He continued to work, but continually complained of pain, and after a fortnight died of acute blood poisoning. Evidence was given on behalf of the employer that the workman had a pimple behind his ear and that if he scratched it and dirt got in, blood poisoning would be caused. It was held that the facts in evidence supported the decision of the county court judge that he was not satisfied that there was "personal injury by accident arising out of and in the course of the man's employment." *Fitzgerald v. Murphy*, 45 Ir. L. T. 200.

In his particulars of claim, a dependant alleged that the workman was moving scenery "when a splinter was driven into the middle finger of his right hand," and that he died of blood poisoning following on this injury. The doctor who attended the workman stated that he saw a place where a small wound had been in the middle finger of his right hand, and that the inflammation was in his right arm. But a fellow workman, who saw the workman with a splinter in his finger and who removed it with a knife, said that the splinter was in the tip of the middle finger of the left hand. It was held that there was no evidence from which the arbitrator could find that there was an accident arising "out of and in the course of" the employment. *Ford v. Gaiety Theatre* [1914] W. C. & Ins. Rep. (Eng.) 53, 7 B. W. C. C. 197.

Chill—Brusher Waiting in Mine Pit.—A brusher went to the bottom of the pit shaft to be taken to the surface just at the time of the beginning of the daily statutory shaft inspection, of which he knew. The inspection took an hour that morning instead of the usual half-hour, owing to the breakdown of the bell wire, and during that time the workman stood about in a strong current of cold air. He contracted a chill and died of pneumonia. It was held that the evidence supported the finding by the arbitrator that the workman had not been injured by an accident

arising out of and in the course of his employment. *Lyons v. Woodilee Coal, etc. Co.* 117 L. T. N. S. (Eng.) 65, 86 L. J. P. C. 137, [1917] W. N. 151, 61 Sol. J. 490, *affirming* [1916] Sc. Ct. Sess. 719, 9 B. W. C. C. 655.

Heart Disease.—In arbitration proceedings to recover compensation, the arbitrator found that the claimant, while in the course of his employment lifting a derailed hutch, felt a sharp pain near the heart, followed by palpitation and shortage of breath, and that on being examined the claimant was found to be suffering from advanced disease of the heart, which was of long standing, was in its nature progressive, and bound to manifest itself sooner or later. He thereupon held that it was not proved that the lifting of the hutch accelerated the disease. It was held that the arbitrator was entitled to find that the claimant had not proved that he had sustained an "accident arising out of and in the course of his employment." *Spence v. Baird* [1912] Sc. Ct. Sess. 343, 49 Scott. L. Rep. 279, [1912] W. C. & Ins. Rep. 18, 5 B. W. C. C. 542.

A workman employed in a colliery took two empty tubs down an incline having a slope of one in twenty. He went in front of them to hold them back. Shortly afterwards the tubs were found about thirty feet down the slope, with the man lying dead with his feet under the foremost tub, and its wheel against his right leg. Each tub was provided with an iron bar or "scotch" which could be inserted into the wheels to prevent its moving. There was a dispute whether the tubs had been "scotched" or whether they had been stopped by the fall of the man himself and the obstruction caused by his leg being under the wheel. The man had a weak heart, far advanced, with an almost total destruction of the mitral valve, and the evidence was to the effect that his death might have been occasioned by the pressure on his leg or by the extension of the disease. It was held that the county court judge properly dismissed the application for compensation on the ground that the burden of proof which lay on the applicant to show that the death of the workman was due to an accident arising out of and in the course of the employment had not been discharged. *Maxwell v. Ruabon Coal, etc. Co.* [1917] W. C. & Ins. Rep. (Eng.) 36, 116 L. T. N. S. 176, 86 L. J. K. B. 428, 10 B. W. C. C. 138.

Pneumonia — Conflicting Testimony.—A workman died of pneumonia. His dependants contended that the pneumonia resulted from lowered vitality caused by an accident to him arising out of and in the course of his employment. The medical referee reported that pneumonia could not have been caused by the alleged accident, the only evidence of which consisted of several inconsistent statements made by the workman to various persons on

the day after the accident, which were admitted in evidence without any objection being taken. It was held that there was no evidence that there was any accident arising out of and in the course of his employment. *Langley v. Reeve*, 3 B. W. C. C. (Eng.) 175.

Rupture.—A workman was engaged at the moment of his injury, a rupture, in his usual and ordinary employment in the usual and ordinary way. In the course of his employment it was his duty to lift an iron bar about three feet long and weighing about ninety pounds, once in about every fifteen minutes, ninety or one hundred times a day. It was held that the evidence conclusively showed that he had not suffered an accident or received an injury arising out of and in the course of his employment. *Kutschmar v. Briggs Mfg. Co.* (Mich.) 163 N. W. 933.

A workman was employed as an engineer in the capacity of an "engine tamer," it being his duty to take locomotives which had been overhauled and repaired and break them in before they were put into regular service. This was done by running the engine back and forth in the yard limits. The fireman testified that in handling one engine they ran it back and forth along a two-mile track about twenty-five times; that in throwing the reverse lever it worked hard, and on one occasion the workman requested him to assist him in throwing it; that it required considerable exertion for the two of them to throw the lever; that the workman made no complaint of being hurt that day, and that the next day they handled another engine, and the next time he saw the workman was two days later when the latter complained of not feeling well and stated that he was going home. The workman died following an operation for strangulated or incarcerated hernia. It was held that excluding certain testimony improperly admitted there was nothing on which to base the conclusion that death was caused by an accidental injury arising out of and in the course of his employment. The court held that the burden rested on the administratrix to prove that the injury was so received, and that it would not be inferred that the injury had been so received from the mere fact that the workman, in his employment, was engaged in work which caused him to undergo a severe physical strain. *Chicago, etc. R. Co. v. Industrial Board*, 274 Ill. 336, 113 N. E. 629.

A workman suffering from hernia was employed as an underground hauler in a colliery, to regulate the supply of empty trains at or near the pit bottom. After hauling the allotted quantity of trains from one heading, occupying about an hour in so doing, he led his horse into another heading to do similar work there. Shortly afterward he was heard to call out, complaining of being very ill and that he had a lump coming in his groin.

He died of strangulation of a right scrotal hernia of the ordinary inguinal type. On appeal, it was held that the evidence was not sufficient to justify the finding of the county court judge, that the strangulation was the result of some act of exertion which the workman underwent while he was at work lifting a train or some other act. *Perry v. Ocean Coal Co.* 106 L. T. N. S. (Eng.) 713, [1912] W. C. Rep. 212, 5 B. W. C. C. 421.

Tuberculosis—Struck by Box.—The workman whose death was the subject of inquiry and another were wheeling a load of castings in a box on a truck down an inclined runway, the other man being at the upper end, holding the handles of the truck, and the workman in front of it, holding it back. The other man slipped and fell, and the truck ran against the workman and pushed him over and swung him around against a door. The box hit him on the left side, between the navel and the hip and a little lower than the direct line. In reply to the question of the straw boss as to whether he got hurt, he replied that he did not but got a strain as though they had put an electric wire on him or an electric shock, and continued to work. Later he developed a suppurating sinus in the region of the epididymis, which was remote from the point of injury, and died of miliary tuberculosis of the lung. The medical evidence was unanimous that a tubercular condition resulting from a blow would develop at the point of the blow as the seat of the condition and could not develop from a strain. It was held that the evidence failed to sustain a finding that the workman met with an accident arising out of the employment. *Albaugh-Dover Co. v. Industrial Board*, 278 Ill. 179, 115 N. E. 834.

Dazed Condition—Fall.—The workman was employed to operate a coring saw on the second floor of a factory, and was in general good health. One day he was not well, was slow at his work, had no appetite and threw away his lunch. He did not leave work with the rest of the men. There were some pipes lying on the floor near his work. Half an hour later the night watchman found him wandering on the second floor, apparently sick and dazed and unable to speak. In leaving the building he had a fall, but not hard, on the last step of the back stairway. When he arrived home, after a trip involving two transfers, his clothes were covered with dust and he was pale. He had a broken collar bone, and after remaining in bed in a semi-conscious condition for nearly two weeks, died. It was held that there was no evidence to support an award on the ground that he received an injury arising out of and in the course of his employment which had caused his death. *Peterson v. Industrial Board*, 281 Ill. 326, 117 N. E. 1033.

Seaman—Drinking Poison for Water.—A seaman by mistake drank from a tin, which he thought contained drinking water put there to cool, a solution of caustic soda, which the owner of the can, another member of the crew, had put into the tin for the purpose of cleaning it, and was severely injured. It was the practice of the crew to take the water in tins or cans to a cool place and leave it to cool and partake of it as required, a practice sanctioned by the officers, but not done by their orders. It was held that there was no evidence that the accident arose out of the employment. *Hutchinson v. McKinnon* [1916] A. C. (Eng.) 471, 114 L. T. N. S. 570, [1916] W. C. & Ins. Rep. 17, 85 L. J. P. C. 98, 60 Sol. J. 320, [1916] W. N. 46, 9 B. W. C. C. 147, 32 Times L. Rep. 283, *reversing* [1915] W. C. & Ins. Rep. 386, [1915] Sc. Ct. Sess. 867, [1915] Scot. L. T. 22.

Stable Boy—Kicked by Horse.—A stable lad was found lying unconscious in his employer's stable, having been kicked in the head by a horse. He died without recovering consciousness. The horse which had kicked the boy was quiet and had no vice. The boy had a halter in his hand when found, which he was clutching, and he was lying with his legs nearer the horse than his head. There was evidence that the boy had been employed to sweep up the stables and yard and put the head collars up, when the horses were out. The stable had been swept out and the broom put back in place at the time of the accident, and the boy had nothing to do with the halter at that time, as he was nothing to do in the stable after the sweeping up. The boy was not wrong in being in the stable. He had been caught teasing the horses with the broom and a halter on previous occasions. It was held that there was evidence on which the county court judge could act to show that at the time when the accident happened the boy had no business in the stable at all with the halter, and therefore that the accident did not arise out of his employment. *Joy v. Phillips* [1916] 1 K. B. (Eng.) 849, 114 L. T. N. S. 577, [1916] W. C. & Ins. Rep. 67, 85 L. J. K. B. 770, [1916] W. N. 142, 9 B. W. C. C. 242.

Porter Riding on Footboard of Train.—A porter fell under a train leaving a station, with the result that he was severely injured. He claimed compensation from his employers, alleging that the accident happened while he was carrying out his duties as porter, securing the handle of a door of the train. His employers, however, deny liability on the ground that the accident happened owing to his getting on the footboard of the train for his own pleasure, to talk to some passenger friends. It was held that there was sufficient evidence to support the conclusion of the county court judge that the man was riding

on the footboard for his own pleasure, and that the accident did not therefore arise out of the employment. *Parsons v. South-Western, etc. Rys.* [1916] W. C. & Ins. Rep. (Eng.) 254, 9 B. W. C. C. 532.

Seaman—Fall from Bridge.—On the evening of this accident the first mate of a steamship, heavily under the influence of drink, reached his vessel at the quay when the ladder and gangway had been pulled on board, the vessel being about to sail and having delayed her departure owing to his late arrival, and was helped on board. It was his duty to come on the bridge and take the wheel when the vessel left port, but, after taking the wheel, he was navigating the vessel so dangerously that the captain took the wheel from him and ordered him to go below as he was "not fit to be about the decks." The descent from the bridge was by means of a narrow, almost upright ladder some six feet in height. He staggered across the bridge, and instead of immediately going below, as ordered by the captain, remained standing at the head of the ladder for eight or ten minutes. Shortly afterwards a thud was heard, and he was found at the bottom of the ladder with a wound in his head from which his death followed. No one, however, actually saw him fall. On appeal it was held that the evidence failed to sustain the finding of the recorder that the accident had arisen out of and in the course of the employment. *Murphy v. Cooney* [1914] 2 Ir. R. 76, [1914] W. C. & Ins. Rep. 44, 48 Ir. L. T. 13, *following* *Frith v. Steamship Louisiana* [1912] 2 K. B. (Eng.) 155, [1912] W. C. Rep. 285.

Larking—Shot by Fellow Servant.—A domestic servant whilst in the course of her employment was accidentally shot and injured by a farm laborer who was carrying a gun from the house to the fields, where it was required by the employer for the purpose of shooting crows. In reply to the question: "Did he present it at you in a joke?" put by the county court judge, she stated: "He might have pointed it at me; it was not intended." It was held that her evidence was sufficient to justify the conclusion that the injury was caused by the larking or fooling of the laborer and that therefore it was not an accident arising out of the employment. *Hillis v. Shaw* [1913] W. C. & Ins. Rep. 744, 47 Ir. L. T. Rep. 221.

Night Watchman—Mistaking Sheriff for Robber.—A night watchman of a construction company with a bridge operator whose station was near the construction company's buildings, and a deputy sheriff and his assistant mistook each other for robbers whom they knew to be in the vicinity, and in the darkness and fog shots were exchanged and the watchman was fatally injured. It was held that there was no evidence to support the

finding that the watchman's injury "arose out of" his employment. *Harbroe's Case*, 223 Mass. 139, 111 N. E. 709, L.R.A.1916D 933.

Circus Employee—Leaving Team.—A hostler employed in a show was driving a team and was engaged in hauling equipment from the show ground to the railroad and in loading cars. About an hour after midnight he temporarily left his team in the care of a fellow workman and "went to the sleeping car to go to the toilet and get a drink of water." While crossing the tracks on his way back to his team, he was knocked down by a moving car and injured. It was held that the evidence did not warrant the finding that the injury by accident arose out of and in the course of his employment. *Hagenback v. Leppert (Ind.)* 117 N. E. 531.

Hospital Superintendent—Going Home for Dinner.—It was the custom of the superintendent of a hospital to take his noon and evening meals at the hospital, unless he was called home for some reason or unless he had business down town which took him away from the hospital. One evening he called up his home and said that he would be home for the evening meal. Half an hour later he was killed by a street car as he was about to enter the campus, which was directly between the hospital and his home, from the direction of the hospital. It was not shown that he had any business to transact on the way or what the nature of the business might be. It was held that there was not sufficient evidence to show that the accident arose out of and in the course of his employment. *Draper v. Regents of University (Mich.)* 161 N. W. 956.

Miner Leaving Work by Permission—Crossing "Jig Brow".—One of the authorized ways by which the workmen employed in a colliery left the pit was by a jig brow, along which full tubs were let down and empty tubs drawn up by means of a jig-wire rope to which they were hooked. At two o'clock in the afternoon, the usual time for the colliers to leave the pit by the jig brow, the running of tubs up and down thereon was stopped, and at the rear of any empty tubs remaining stationary on the jig-brow "level" a "stop block" was let down, which prevented them from running backwards down the jig brow. Consequently, at that time, the jig brow and jig-brow "level" were made safe for colliers using the same, and they could then pass with safety either behind or between the stationary trucks in the jig-brow "level." A workman left his working place two hours before the usual time with permission and went to the jig-brow "level." As soon as the empty tubs had become stationary, but before the process of "jigging" was completed—that is to say, before the "stop block" had been let down or there had been time to let it down—he forced the two center tubs part in order to make

a gap through which he could pass. The movement of the tubs released the hook by which they were attached to the jig-wire rope, and the four tubs began to move backwards down the incline, dragging him with them, he receiving injuries which caused his death. If he had not pushed the tubs apart, they would not have moved; and if he had waited a few seconds the "stop block" would have been let down and he could have passed between the tubs with perfect safety; or if he had walked three and a half yards he could have gone around the front of the first tub with perfect safety. It was held that the evidence warranted the finding of the county court judge that the accident had not been shown to have arisen "out of and in the course of" the employment, but that the workman exposed himself to an added risk or peril which was not incidental to his employment, but was due entirely to his own conduct. *Baker v. Bradford* [1916] W. C. & Ins. Rep. (Eng.) 177, 114 L. T. N. S. 1144, 85 L. J. K. B. 1031, 60 Sol. J. 493, [1916] W. N. 202, 9 B. W. C. C. 436, affirming [1915] W. C. & Ins. Rep. 576, 85 L. J. K. B. 263.

Returning from Use of Convenience Other than That Provided.—The applicant was employed at a colliery as a laborer in a fitting shop on the surface, and on the day of the accident was suffering from diarrhoea and had to go to relieve himself on several occasions. There were four sets of privies provided for the use of surface men on the employer's premises, some of which, including one specially provided for the fitters and consisting of four privies, could be reached from the fitting shop without crossing any railway lines. There was, however, one set of conveniences on a dirt tip some distance away which could only be reached by crossing the lines in a busy part of the yard. On the last occasion, instead of going to any of the conveniences provided, the applicant went on to the slope of the dirt tip amongst some bushes and there relieved himself. In returning to the fitting shop he was knocked down and run over while crossing the rails. By a statutory regulation, a copy of which was posted up in the mines and on the premises, it was provided that "No person shall relieve his bowels on the surface except in one of the conveniences provided." The only reason given by the applicant for not using the conveniences provided was that he thought they might be full, but he admitted that he did not go to look. It was held that there was ample evidence to sustain the finding of the county court judge that the accident did not arise out of the applicant's employment. *Senior v. Brodsworth Main Colliery Co.* [1917] W. C. & Ins. Rep. (Eng.) 284.

Unexplained Death—Commercial Traveler.—A commercial traveler in the course of his employment met a customer, and both visited

two public houses at which they had some form of alcoholic refreshment. Thereafter they went to another town, where the commercial traveler did not attempt to transact any business, but became intoxicated, and while in this condition found his way to the station, where he was last seen alive sitting in a seat some ten feet from the edge of the platform. A non-stopping goods train passed, and shortly after he was found lying on the rails with his head outwards and his feet towards the platform, having received injuries from which he died in a few hours. It was held that the evidence did not support the finding of the arbitrator that the accident arose out of the employment. *Renfrew v. McCrae* [1914] Sc. Ct. Sess. 539, [1914] W. C. & Ins. Rep. 195, [1914] 1 Scott. L. T. 354.

Unexplained Death—Dock Laborer.—A dock laborer was engaged to assist in discharging a vessel's cargo. The only intervals given dock laborers by their employers was an hour for breakfast and an hour for dinner, but it was within the knowledge of employers that these men were in the habit, without asking leave, of going at other times to a public house nearby for liquid refreshment. The employer's clerk considered the laborer as unfit to continue to work owing to his drunken condition, the result of several visits to the public house, and directed him to sit down in the shed, where his money would be brought to him. When the clerk returned with the money he could not find him. The body was shortly afterward, and before the expiration of the working hours, found in the water about opposite the place where he had been working. It was held that there was not sufficient evidence to show that this accident arose out of the employment or in the course of that employment. *M'Intyre v. Stewart* [1915] W. C. & Ins. Rep. 550, [1916] Sc. Ct. Sess. 91, 9 B. W. C. C. 430, [1915] 2 Scott. L. T. 288.

Unexplained Death—Porter.—A porter, when last seen, was in an intoxicated condition. Later his body was found in his porter's uniform in a sitting position in one corner of the freight elevator of the hotel in which he was employed, with his legs lying across a small two-handled baggage truck. An examination disclosed that his neck was broken, and that he had suffered a cut in the jaw, and an abrasion on the right leg near the knee. There was a small pool of blood beside him. The elevator had been used two hours previously by another porter, and there were no marks of any kind on the elevator beam or the sides of the elevator shaft. He had apparently finished his work for the day, and his fellow employees and the clerk supposed that he had gone home, as was his custom. It was held that there was no proof fairly tending to show that the death resulted

from an accidental injury received arising out of and in the course of the employment. *Savoy Hotel Co. v. Industrial Board*, 279 Ill. 329, 116 N. E. 712.

Unexplained Death—Seaman.—A seaman disappeared while he was on duty at the wheel of a steamship in the wheelhouse in the center of the flying deck, while the first and third officers were also on the flying deck on look-out, one on the starboard, and the other on the port side. There were two doors to the wheelhouse, one at the port and the other at the starboard side, and there was a solid railing round the flying deck over three feet high. The night was not stormy; it was rough, dark and drizzling, and the sea was choppy, but the ship was not rolling and was quite steady. The county court judge found as a fact that the death was not the result of an accident arising out of and in the course of the employment. On appeal it was held that as the post of duty of the seaman was at the wheel, the onus of proof on the applicant was not met by an assumption that he was at his allotted employment when he fell overboard, since the natural inference from the facts would be that he was not. *Rourke v. Holt* [1917] 2 Ir. R. 318.

A fireman on a ship, having no work to do until the next day, when the ship was to sail, went ashore with another man at 6:30 P.M. They went to the theatre and stayed there until 8:30 P.M. There they met a friend, and after stopping at a public house for some drinks, returned towards the ship. When still some distance away from the ship, the fireman's companion collapsed and had to be helped along. A little further on, the fireman turned back, saying that he was not going on board at present. He was never seen again, and some two months later his body was found in the dock a little forward of the place where the bow of his ship had been. There was evidence that he was a steady, sober and capable man, and that during the five years he had been employed on the ship he had never stayed a night ashore. It was held that there was no evidence to establish that the accident happened in the course of his return to the ship, and hence that such an inference drawn by the county court judge and his conclusion that the accident arose out of and in the course of the deceased's employment were without support. *Spencer v. Liberty* [1917] W. C. & Ins. Rep. (Eng.) 293.

Unexplained Death—Ship's Cook.—The ship's cook was in the galley, which was on the bridge deck, about 6:45 A.M., and after looking for something there and directing the second cook to have the porridge on at 7 A.M., remarked, "This is a hell of a job." He thereafter left the galley and was never seen again by anybody on board. The bridge deck on

which the galley was situated was fenced by a strong iron railing about three feet high with uprights about four feet apart. There was no observable grease on the deck that morning. The arbitrator found that there were no facts proved or admitted from which it could be inferred that he met his death by accident arising out of and in the course of his employment, and this decision was affirmed on appeal. *Lynch v. Crown Steamship Co.* [1916] W. C. & Ins. Rep. 194, [1916] Sc. Ct. Sess. 695, [1916] 1 Scott. L. T. 370.

Finding—Contradictory Evidence.—A finding by the industrial accident board that an employee left his machine "temporarily to go to the toilet or for some other purpose incidental to his employment," based on the mere fact that the toilet and water tank were in the direction of the machine by which he was injured, overruled a finding by the arbitration committee that the workman was injured while acting as a volunteer in fixing the machine of another, which latter finding was supported by the testimony of every eyewitness to the accident. It was held that there was no evidence whatever to sustain the finding of the board that the accident arose out of the employment. *In re Dube*, 226 Mass. 591, 116 N. E. 234.

3. BURDEN SUSTAINED.

In each of the following cases, on the facts as set forth, it was held that the burden of proof had been sustained by the applicant:

Aneurism.—There were two accidents, one in October, when a workman fell into an excavation and sustained bruises of the chest and ribs; the second in November, when he fell dead while doing some heavy lifting. After the first accident he was examined by the employer's physician who found heart irregularity and aneurism of the aorta. The trial court inclined to the view that the accident in October produced a condition that brought on the death under the strain of November, although he held that it could reasonably be found that the strain of November in his diseased condition was the cause of death, and therefore found that the workman came to his death by an accident arising out of and in the course of his employment. The latter theory was held to be sufficiently sustained and the finding was affirmed. *Winter v. Atkinson-Frizelle Co.* 88 N. J. L. 401, 96 Atl. 360.

The workman and another were engaged in unloading steel sheets from a car. Each sheet weighed from 465 to 485 pounds and was moved by means of a crane. The sheets stood on edge in the car and sometimes became jammed together so that their separation required a great deal of physical effort. The morning of his injury, the workman came

to his work feeling well. Later he was seen to put his hand to his throat, to stagger, and to complain of feeling sick. He was found to be suffering from an aneurism of which the medical evidence was to the effect that the strain was the exciting or aggravating cause. It was held that the evidence was sufficient to sustain the finding that he suffered personal injuries by accident "arising out of and in the course of the employment." *Haskell, etc. Car Co. v. Brown (Ind.)* 117 N. E. 555.

Blood Poisoning.—A workman employed in "spreading sod, cultivating, and doing work in the line of improving the grounds," received a scratch on the back of his hand which became infected, and he died of blood poisoning. It was held that the evidence sustained a finding that the injury arose out of and in the course of his employment. *In re Bean*, 227 Mass. 558, 116 N. E. 826.

A workman was employed to assemble brake and clutch pedals, in which employment abrasions were a common form of injury. Shortly before quitting time, he went to the foreman and exhibited his thumb, which was dirty, torn up and clotted over the nail with blood, and was sent by the latter to a doctor. The abrasion was treated, but was infected, septicaemia followed, and the workman died therefrom. It was held that the facts supported the inference that the injury arose out of and in the course of the employment. *Kinney v. Cadillac Motor Car Co. (Mich.)* 165 N. W. 651.

In the discharge of his duties a fireman was required to take out clinkers from the combustion chamber, clean the boilers and fixtures, polish the same, clean the engine, and oil it. One day he was attended by a physician who discovered two little cuts through the skin on the thumb, about an eighth of an inch apart and half an inch long, around which there was some redness and from the condition of which he judged that he was suffering from streptococcus infection. Two days later the hand was more swollen; the next day he had chills and his temperature had gone up. He was removed to a hospital, grew worse, and died four days later of septicaemia. It was held that there was evidence to sustain the finding of the commission that the death was due to an injury received in the course of his employment. *William Rahr Sons Co. v. Industrial Commission (Wis.)* 163 N. W. 169.

Rupture of Blood Vessel.—A mason's helper started with his wheelbarrow and tools for another place of work a short distance away. His wheelbarrow was of iron and weighed some eighty pounds and the tools weighed perhaps fifty pounds. A block and a half of the distance was up a steep grade, and the alley into which he then turned was rough and full of holes. He was suddenly stricken

with severe pain and paralysis of the lower limbs, found to be due to the rupture of a blood vessel caused by the muscular strain or exertion to which he was subjected in propelling the wheelbarrow. It was held that the finding that his death was accidental and arose out of and in the course of his employment was sustained by the evidence. *State v. District Ct. (Minn.)* 162 N. W. 678.

The workman was assisting in cutting a large piece of granite, using a twenty-pound hammer. The blows were required to be struck from the side, necessitating the striker's assuming a crouching position. The day was very cold. He struck about 130 blows in an hour and a quarter with the heavy hammer, after which he was considerably exhausted and perspired freely. After lunch he resumed the work of striking for about half an hour with a fifteen-pound hammer. After this, while engaged in manipulating an overhead traveler, he fell over a pile of stone, his head striking a piece of granite, cutting a large gash over his right eye, and died a few minutes thereafter. It was found that the cause of death was cerebral hemorrhage due to a ruptured blood vessel, and that he came to his death as the result of an accident arising out of and in the course of his employment. The evidence was held to be sufficient to justify this finding and to support an award. *State v. District Ct. (Minn.)* 163 N. W. 667.

A fireman on board ship was seen frequently drinking water while in the stokehole. Soon afterwards he was found to be very ill; later he became unconscious and died. The medical evidence as to the cause of death was conflicting. The county court judge came to the conclusion, there being medical evidence to that effect, that the cause of death was cerebral hemorrhage, caused by the heat and drinking of excessive quantities of water, and that the fireman had sustained a "personal injury by accident arising out of and in the course of the employment." On appeal, the finding was sustained. *Johnson v. Steamship Torrington*, 3 B. W. C. C. (Eng.) 68.

Gonorrheal Infection—Substance in Eye Removed by Fellow Workman.—A workman employed by a manufacturing company was working on a rear axle with another employee, when a piece of steel flew and struck him in the right eye. At once, after the accident, a fellow workman examined the eye, using for that purpose a match wrapped in a piece of cloth. A gonorrheal infection set in and he lost the sight of the eye. It was held that the evidence warranted the finding that the loss of sight was attributable to an accident arising out of and in the course of his employment. *Cline v. Studebaker Corp.* 189 Mich. 514, 155 N. W. 519, L.R.A.1916C 1139.

While a miner was breaking up a large chunk of iron ore with a hammer, a particle of ore flew into his left eye, cutting through the cornea and embedding itself in the eyeball. A fellow workman removed the particle from the eye at the time, using in his efforts a match and handkerchief. The eye was immediately thereafter washed in water from a trough which was used daily by other miners for the purpose of washing their hands and faces. Thereafter a gonorrheal infection set in and the workman lost his sight. It was held that the finding that the accidental injury arose out of and in the course of the employment was sustained by the evidence. *State v. District Ct. (Minn.)* 163 N. W. 755.

A workman got a cinder from a passing locomotive in his eye, which a fellow workman removed from the eye with a piece of cotton. Later a gonorrheal infection developed in the eye, blinding him. It was held that the evidence sustained the finding that the accident occurred by reason of and in the course of his employment. *Canadian Pac. R. Co. v. Flore*, 24 Quebec, K. B. 55, 24 Dominion L. Rep. 710.

Heart Disease.—A workman was descending the side of a ship by a rope ladder. The ladder twisted suddenly, he gave a cry, fell into the water and was dead when picked up. The medical evidence was that death was due to heart failure and not to drowning, and that the heart was in such a state that any slight exertion might have caused its failure. It was held that there was evidence to support the finding of the county court judge that death was due to "accident arising out of and in the course of employment." *Trod-den v. McLennard*, 4 B. W. C. C. (Eng.) 190.

A workman was employed in loading heavy bags on to trucks and then pushing the loaded trucks on to a railway. The work was heavy, and three men were employed on it so that one man might rest while the other two worked except that all three pushed a truck. The workman had been working all morning, and in the afternoon he had just joined with the other two men in pushing a truck, when he fell, and died soon afterwards. The medical evidence was that the workman was suffering from fatty degeneration of the heart, but that the disease was not so far advanced that he would have died without being subjected to certain strain. It was held that there was evidence to support the finding of the county court judge that the man died of a strain arising "out of and in the course of" his employment. *Doughton v. Hickman* [1913] W. C. & Ins. Rep. (Eng.) 143, 6 B. W. C. C. 77.

The workman, who was employed on a "band press," a machine used to press copper bands around shells, slipped on a T-rail extending about an inch above the level of the

floor, as he took a shell and started toward the press. He fell and hit his breast against the lever that operated the press, an iron rod with a steel handle, and was injured. After the injury there was found a mark over his heart about five inches long, and his attending physician testified that the fall brought on a condition of the heart known as "pericarditis," which caused the death. It was held that the evidence was sufficient to show an injury by accident arising out of and in the course of the employment, which proximately caused the death. *Bugyrus Co. v. Townsend* (Ind.) 117 N. E. 656.

Osteomyelitis—Blow While Moving Rail.—A workman was engaged in moving rails in a colliery, and on April 18, while dragging a rail along, he backed into a prop, with the result that the rail struck him a blow on the inside of the thigh. He went on working until May 29, when he suffered so much pain in the thigh that he had to stop work. His panel doctor treated him for contused tissue. He grew worse, and on June 10, a consulting doctor was called in, who diagnosed the case as osteomyelitis and septicaemia, and operated at once, but the man died that night. It was held that there was evidence on which the county court judge was justified in finding, as he did, that the workman met with his death as the result of an accident arising out of and in the course of his employment. *Mills v. Dinnington Main Coal Co.* [1917] W. O. & Ins. Rep. (Eng.) 11, 116 L. T. N. S. 181, 86 L. J. K. B. 231, 61 Sol. J. 202, 10 B. W. C. C. 153.

Paralysis—Miner Struck by Mine Prop.—The plaintiff testified that a mine prop struck him while engaged in mining coal, on the side of the head, midway between the center of the top of his head and the top of his ear, and knocked him fifteen feet away; that the top of his head was affected and his skull fractured; that he was taken to the hospital where they took out pieces of his skull and "bruised blood;" that the injury caused all his strength to leave him, that he could not use his right hand or his right leg, and that the right side of his body was paralyzed; and that he could scarcely walk. His evidence was supported by that of three physicians to the same effect. It was held that the evidence amply sustained the finding that he was injured while in the course of his employment. *Frey v. Kerens-Donnewald Coal Co.* 271 Ill. 121, 110 N. E. 824.

Pneumonia — Unexplained Accident.—A healthy and steady workman was employed to pick up cotton waste on the deck of a ship. At 1 P.M. he was sent to work in No. 6 hold; at 3 P.M. he climbed up the ladder of the hold, apparently in great pain, and was sent home. He was medically attended, and marks were found on his ribs; three days later he

developed pneumonia, attributed by the doctor to the injury to his sides, of which he died. It was held that there was evidence that the workman had died from "personal injury by accident arising out of and in the course of the employment." *Lovelady v. Berrie*, 2 B. W. C. C. (Eng.) 62.

Pulling Waste out of Cogs of Machine.—The applicant was employed in filling cans of jute from a machine and her hand was caught in the cog wheels of the machine, with the result that she sustained serious injury. She gave evidence that about a month before the date of the accident a piece of waste jute fell among the cog wheels of the machine and brought it to a stop, breaking some of the cogs. The foreman warned her that if such a thing happened again she would be dismissed. On the day of the accident she was about to stop the machine, as it was near closing time, when a piece of waste fell through the guard onto the cogs. She at once tried to snatch it out, and her hand was caught in the machinery. She knew this was a dangerous thing to do. The waste must have been thrown on the machine but the girls working near her denied having thrown it. Another can filler confirmed the applicant's evidence of the incident a month before the accident. The county court judge dismissed the application, saying: "I am unable to accept the story told by the applicant as to the way this accident happened. The onus is upon her to satisfy me upon this. This is sufficient to dispose of the applicant's case. But if I was able to accept her account, I think even then she would have been doing something she was not employed to do, and that the accident happened through an added peril to which she exposed herself by placing her hand where she had no right to place it, and not through a peril invoked in her contract of service." On appeal it was held that there must be a new trial. *McNally v. Bootle Jute Factory Co.* [1916] W. C. & Ins. Rep. (Eng.) 64, 114 L. T. N. S. 816, 85 L. J. K. B. 774.

Rheumatism.—A mine brusher was directed to bale out of the pit the water which had accumulated owing to the breakdown of the pump. This necessitated his standing immersed in water up to his chest for eight hours. Thereafter he was incapacitated for work for several days by rheumatism owing to the extreme and exceptional exposure to cold and damp which his work of bailing had entailed. On these facts, the arbitrator held that there was evidence that the workman was incapacitated by an injury caused by accident arising out of and in the course of his employment. And on appeal, it was held that there was evidence on which the arbitrator could so find. *Glasgow Coal Co. v. Welsh* [1916] 2 A. C. (Eng.) 1, Ann. Cas. 1916E 161, 114 L. T. N. S. 809, [1916] W. C. & Ins.

Rep. 79, 85 L. J. P. C. 130, 32 Times L. Rep. 359, 60 Sol. J. 336, 9 B. W. C. C. 371, [1916] W. N. 109, *affirming* [1915] W. C. & Ins. Rep. 463, [1915] Sc. Ct. Sess. 1020, [1915] 2 Scott. L. T. 123.

The applicant was employed as a pilot to take a ketch out of the harbor on a rough night with a high wind. Having piloted the ketch out of the harbor, and having been paid, the applicant attempted to get into his own boat, which was being towed astern of the ketch, for the purpose of going ashore. He jumped into the boat, alighting somewhere near the bows, with the result that they went under water, and he got wet up to his thighs. He was pulled up on board the ketch again, and later rowed ashore. Subsequently he suffered from sciatica. The county court judge found that the applicant's boat filled with water by accident, that he got wet by accident when he first jumped into the boat to go ashore, that the sciatica was the result of this accident, and that the accident arose out of and in the course of his employment. On appeal, it was held that there was sufficient evidence on which the county court judge would find as he did. *Barbeary v. Chugg* [1915] W. C. & Ins. Rep. (Eng.) 174, 112 L. T. N. S. 797, 84 L. J. K. B. 504, 3 Times L. Rep. 153, 8 B. W. C. C. 37.

Rupture.—A workman employed to paint gas engines, was ruptured by the extra strain caused by a 600 pound engine, which he was moving, sticking to the floor. It was held that the evidence supported a finding that he suffered an accidental injury arising out of and in the course of his employment. *Robbins v. Original Gas Engine Co.* 191 Mich. 122, 157 N. W. 437.

A brewer's assistant was lifting a heavy cask standing on a shelf five feet from the ground, when he felt a severe internal pain and became faint and sick. Afterwards he found that he had ruptured himself. Twenty-two years before he had had a rupture in the same place, for which he wore a truss for many years, but during the last four or five years he had left it off, having found that he could do his work without it. The county court judge held that although there was "injury by accident," it did not arise "out of the employment," but was the result of a gradual weakening and not of any unusual strain. It was held that "accident" having been found, the evidence proved that it arose "out of the employment." *Brown v. Kemp* [1913] W. C. & Ins. Rep. (Eng.) 595, 6 B. W. C. C. 725.

A workman accidentally ruptured himself in the course of his employment and was obliged to undergo an operation for hernia. In the course of the operation he was discovered to be suffering from another hernia of long standing, and both hernias were operated on at the same time. He subsequently died, the

cause of death being found to be heart weakness and degeneracy "set up by the strain of the accident." The employers maintained in defense to the claim for compensation that, death being due to an operation part of which was rendered necessary by the accident, the operation was a *novus actus* intervening to break the chain of causation between the accident and the death. It was held that on the facts stated there was evidence to justify the arbitrator in finding that death was the result of the accident the workman had sustained in the course of his employment. *Thomson v. Mutter* [1913] Sc. Ct. Sess. 619, 50 Scott. L. Rep. 447, [1913] 1 Scott. L. T. 213, [1913] W. C. & Ins. Rep. 241, 6 B. W. C. C. 424.

A workman, who was employed in lifting weights in a sawmill, went to his work about 6 A.M. He returned home about three hours later and was seen by his wife at 10 A.M. lying on his bed and vomiting. He was also seen with his hand on his stomach and vomiting blood in a place close to his work, but not part of the place where he was working. He died nine days later of a strangulated hernia. No one was produced who saw him at work, and the foreman of the sawmill who was in court during the hearing was not examined by either side. It was held that while the facts afforded evidence from which the county court judge could have drawn the inference that the accident (if any) arose out of and in the course of the employment, there must be a new trial because the judge had allowed his mind to be influenced by inadmissible evidence. *Shea v. Wilson* [1916] W. C. & Ins. Rep. (Eng.) 197, 50 Ir. L. T. Rep. 73.

Tuberculosis.—Jumping into River to Avoid Injury.—While the claimant was working for his employer operating a crane, one of the timbers broke, and to save himself from injury he jumped into the river, a distance of some ten feet, the water coming up to his knees. He waded to the shore, contracted a heavy cold and pleurisy, which developed into pulmonary tuberculosis. It was held that the evidence sustained the finding that his condition was the result of an accidental injury arising out of and in the course of his employment. *Rist v. Larkin*, 171 App. Div. 71, 156 N. Y. S. 875.

Frost Bite.—A workman was cutting a roadway on railway construction work, in the open air for from ten to eleven consecutive hours, without shelter, when the temperature was sixty degrees below zero. As a result his feet were badly frozen. It was held that there was ample evidence to support the finding of the trial judge that the injury was from an accident arising out of and in the course of his employment, and that the workman was, by reason of his employment, ex-

posed to a greater risk of frost bite than persons not so employed. *Nikkiczuk v. McArthur*, 9 Alberta L. Rep. 503, 34 West L. Rep. 674, 28 Dominion L. Rep. 279.

A workman was employed as a swamper in cutting and hauling timber, and making roads. He used an axe and handled the timber with his hands, and they came in contact with the snow. The weather was severely cold, he had no facilities for warming or protecting himself, and his thumb was frozen so that amputation was necessary. It was held that the evidence fairly sustained a finding that the character of the workman's employment subjected him to a risk of freezing not shared by the generality of the community, and therefore that the freezing was a personal injury by accident arising out of the employment. *State v. District Ct. (Minn.)* 164 N. W. 585.

It was the duty of the claimant, who was employed by a coal dealer, to assist the driver in caring for the horses and in carrying coal. On a very cold stormy day, while engaged in carrying coal, all the claimant's fingers and toes were frostbitten. It was held that the evidence supported the finding that the claimant, by reason of his employment in handling wet coal in the storm, was specially affected by the severity of the weather, and that his injuries were accidental and arose out of his employment. *Days v. Trimmer*, 176 App. Div. 124, 162 N. Y. S. 603.

A longshoreman had both his hands more or less frozen, losing parts of the fingers, on a day when the thermometer fell to four degrees below zero. It was held that the evidence sustained the finding that he was exposed "to materially greater danger and a likelihood of getting frozen than the ordinary person or outdoor worker on the date" in question by reason of the nature and the place of his work, and therefore that he had suffered an injury arising out of his employment. *McManaman's Case*, 224 Mass. 554, 113 N. E. 287.

A janitor, as part of his duties, was required to shovel the snow from the sidewalk in front of the building. While so engaged in very cold weather, he froze his big toe, with the result that the amputation of his leg became necessary. It was held that his work so exposed him to freezing that the finding that it was an accident arising out of his employment was sustained by the evidence. *State v. District Ct. (Minn.)* 164 N. W. 917.

Belt Boy—Stone Thrown by Another Boy.—A boy of fourteen was employed at a colliery to pick stones and dirt out of the coal in one of three parallel slow-moving belts conveying coal. He was hit in the eye by a stone thrown by another boy employed at a neighboring belt, and lost the sight of his eye. At the top of the stairs leading to the belts there was a notice board prohibiting stone throw-

ing in the mine, but the boys sometimes threw stones at each other to attract attention. The county court judge found that the stone was mischievously thrown, though whether it was aimed at the boy who was hurt he did not know, and he thought that it did not matter, as the act was tortious; but he thought that the circumstances of the boy's employment were such as to expose him to special risk, the special risk being stones thrown by other boys; and therefore made an award in favor of the injured boy. The court of appeal were of the opinion that it was not an accident arising out of the employment, and set aside the award. On appeal to the House of Lords, it was held that there was evidence sufficient to support the finding of the county court judge. *Clayton v. Hardwick Colliery Co.* [1916] W. C. & Ins. Rep. (Eng.) 33, 114 L. T. N. S. 241, 85 L. J. K. B. 292, 32 Times L. Rep. 159, 60 Sol. J. 138.

Compositor—Going on Roof for Fresh Air.—A newspaper compositor towards midnight or early in the morning went from the room in which he was working, the room being hot and the work slack, and he being in need of fresh air, out on the roof of a building on the employer's premises. While on the roof, he accidentally walked over the edge, or became dizzy and slipped off into the areaway, and fell to his death. One of the office rules forbade any employee to leave the composing room during working hours except on office business, and with the permission of the man in charge. However, there was an established custom among the employees, known to the employer, to go on the roof for the purpose of obtaining fresh air. It was held that the evidence sustained the finding that the injury arose out of and in the course of the employment. *Von Ette's Case*, 223 Mass. 56, 111 N. E. 696, L.R.A.1916D 641.

Employee Guarding Ice Pond.—A workman was employed in the business of harvesting ice on a certain pond. On the morning of the day of his death, he was sent by his employer to the pond, with directions to remain there until three o'clock in the afternoon, and to prevent all persons from cutting holes and fishing through the ice on the central portions of the pond. He was not directed as to how he should perform that duty or at what place on the pond or its shores he should station himself. At about noon, while the workman was alone on the center of the pond, the ice on which he was walking broke, and he was precipitated into the water and drowned. It was held that there was legal evidence in support of the conclusion that the injury and death arose out of and in the course of the employment. *Jillson v. Ross*, 38 R. I. 145, 94 Atl. 717.

Employee Working Overtime—Answering Personal Telephone Call.—The employee was to be manager of a store, but his predecessor

was still in the store and was to conclude his service the next day. He was getting through when the employee came to work, but at the latter's request was relieving him of the duty of making out the daily report at the time of the injury. The employee was working overtime taking account of stock, and was injured by falling downstairs at eight o'clock in the evening while answering a telephone call from his daughter who asked when he was coming home. It was held that the evidence warranted the conclusion that it was the employee's duty to answer telephone calls even outside the usual business hours, and hence that the fact that the call happened to be a personal one, would not prevent his conduct in attending to it, from being service issuing out of and in the course of his employment. So, it was held that the finding that he received an injury in the course of and arising out of his employment was supported by the evidence. *Cox's Case*, 225 Mass. 220, 114 N. E. 281.

Fireman—Fall from Engine.—A fireman, while firing on a switch engine, fell therefrom and death resulted. On an autopsy, the physicians found a portion of the brain soft and that a hemorrhage apparently had emanated from that portion of the brain, and it was found that the workman died from hemorrhage of the brain and fracture of the skull, but it was uncertain whether the hemorrhage was caused by the fracture. One physician then present testified that this strain on the brain was caused by a ruptured blood vessel; that in his judgment the fall could not have produced that condition; that the cause of the condition was syphilis, that the scars on the other parts of the workman's body indicated that condition; that the fall would aggravate such a condition and hasten results; and that the exercise of shoveling would cause blood pressure, and might cause a ruptured blood vessel. It was held that the evidence justified a finding that the injury resulted from an accident arising out of the employment. *Peoria R. Terminal Co. v. Industrial Board*, 279 Ill. 352, 116 N. E. 651.

Laborer on Dam—Struck by Lightning.—While a workman was at work on a dam during a rain storm he received a stroke of lightning which resulted in his death. It was found that he came to his death while performing services growing out of and incidental to his employment, and that at the time and place of his death he was not exposed to a hazard from lightning stroke peculiar to the industry or differing substantially from the hazard from lightning stroke of any ordinary outdoor work. And on appeal it was held that there was substantial basis for the findings in the evidence. *Hoenig v. Industrial Commission*, 159 Wis. 646, 150 N. W. 996, L.R.A.1916A 339.

Laborer Unloading Coal—Fall from Trestle.—A workman was engaged in shoveling coal from one of two cars on a trestle. The next day at about six minutes before seven o'clock a laborer working with him found the planks covered with frost and footprints thereon as far as the ladder which was used to get into the coal car. His left hand mitten was found in the corner of the car next to the ladder. About seven o'clock he was found unconscious on the ground directly below the ladder, where he would naturally be if he had fallen from the trestle, more than thirty-six feet above. It was held that the finding that the death resulted from an injury arising out of and in the course of the employment, was warranted by the evidence. *Uzzio's Case*, 228 Mass. 331, 117 N. E. 349.

Riding on Footboard of Engine.—The applicant was working under a contract for unloading coal at a power plant. He was in the habit of directing the switching crew about the placing of the cars of coal. One day after all the coal had been unloaded, he went down to the railroad yards to see about getting more. He saw a train of about thirty cars coming with coal, with a switchman standing on the front of the engine. He stepped on the footboard on the rear of the engine and soon after was jerked or fell off and was run over and injured. It was held that there was credible evidence to sustain the finding that the injury arose out of and in the course of his employment. *Decatur R. etc. Co. v. Industrial Board*, 276 Ill. 472, 114 N. E. 915.

Oiling Machine after Usual Hours.—The applicant for compensation was employed as a baker by a master baker and grocer, "to take charge of" a dough-mixing machine in the latter's bakery. After finishing his day's work, he later came back to the bakehouse, went upstairs to the dough-room and proceeded to oil the machine, in the course of which several of his fingers were caught in the machine and injured. The applicant's evidence showed that it was the general practice for the man in charge of the machine as doughmaker to oil and lubricate it, and he understood it to be his duty so to do when employed. But there was evidence for the employers that some five years before they had assigned a special man for the work of oiling and lubricating the machines, intending that he alone should have that duty. It was held that the evidence supported the holding of the recorder that the accident arose out of and in the course of the applicant's employment. *Sexton v. Horsford* [1916] W. C. & Ins. Rep. 216, 50 Ir. L. T. Rep. 90.

"Jounce" of Wagon Throwing Workman to Street—Intoxication.—The only eyewitness to the happening of the accident testified that

the workman appeared to be all right, and that a "jounce" of the wagon threw him to the street. There was conflicting testimony as to whether the workman was in a state of intoxication. It was held that the evidence was sufficient to support the finding that the accident arose out of and in the course of the employment. *Napoleon v. McCullough*, 89 N. J. L. 716, 99 Atl. 385.

Drowning—Seaman Getting Boat.—The skipper and the mate of a barge went ashore in its boat, the skipper landing at the causeway and directing the mate to move the boat to the railing of a floating stage lying against a pier. On returning to the pier the skipper sent the mate down the pier to fetch the boat round to the causeway. The mate went down the pier and shortly afterwards fell into the water and was drowned. It was a very dark night and there were no lights on the pier, the skipper being able to see the mate for a dozen yards only and the latter having fifty yards to go to the boat. After a time long enough for the mate to have reached the boat, the skipper heard a splash. The mate would have had to get over the railing to reach the boat, which apparently had not been touched since it had been made fast. The arbitrator found that an accident had happened to the mate arising out of and in the course of his employment, drawing the inference from the evidence that the mate had reached the boat and had arrived within the ambit of his employment. It was held that the facts were sufficient to justify the inference drawn. *Harman v. Crow* [1915] W. C. & Ins. Rep. 536, 9 B. W. C. C. 88.

Fall on Slippery Platform.—A number of employees worked at a table trimming the viscera of cattle. The table was about waist-high, about forty-five feet long, and about two feet higher at one end than at the other end. The workmen stood on a platform which sloped with the table, and both were wet and slippery. While standing there, a workman fell backward, and later died. It was held on demurrer to the evidence, that the evidence tended to prove that he met his death as the result of an injury by accident arising out of his employment. *Madey v. Swift*, 101 Kan. 771, 168 Pac. 1105.

Mine Explosion.—A workman was employed to blast and then shovel the loose earth and ore, using for blasting dynamite, fuses, and dynamite caps. Shortly after he had started work one morning, he left his work and went to a "crosscut," a usual thing for that time of day. In a few minutes an explosion was heard and the workman was found about a hundred feet from his place of work, his chest and vitals badly torn by the explosion. The evidence not being conclusive of suicide, it was held that it supported the finding of death caused by accident arising out of and

in the course of the employment. *State v. District Ct. (Minn.)* 164 N. W. 582.

Teamster—Caring for Other Team.—A teamster employed to deliver ice and coal, at the time of the accident, was feeding a team in the barn when one of the horses kicked him with such violence that he died about three weeks thereafter. The team was a new one which had not been assigned to any of the teamsters. There was testimony that it was the duty of each teamster to feed his own team only and no other. There was also testimony to the effect that, when a teamster came back to the barn early from the afternoon's work, it was his duty to care for any extra horses that happened to be in the barn. It was held that the evidence was sufficient to support the finding that the accident arose out of and in the course of the employment. *Suburban Ice Co. v. Industrial Board*, 274 Ill. 630, 113 N. E. 979.

Teacher—Moving Desk.—A teacher, in attempting to get a book from a bookcase, put her weight on a desk which was out of its proper position and which prevented her from opening the case, in order to move it, and was injured. It was held that the evidence supported a finding that the accident whereby she was injured arose out of and in the course of her employment as a teacher. *Elk Grove Union High School Dist. v. Industrial Acc. Commission (Cal.)* 168 Pac. 392.

Undertaker's Employee Struck by Coffin.—A workman employed by an undertaker to lift coffins out of vans, went out to work on a particular day with no physical injuries on his person and returned home the evening of the same day bearing marks which were consistent with his having been struck by a coffin. These marks consisted of a black mark on his chest and right side, and on the stomach, and his leg was strained and swelled, and were seen by his wife and his physician. He died of pneumonia supervening on traumatic pleurisy. It was held that there was sufficient evidence to justify the conclusion of the recorder that the death was the result of injuries caused by an accident which arose out of and in the course of his employment. *Wright v. Kerrigan* [1911] 2 Ir. R. 301, 45 Ir. L. T. 82, 4 B. W. C. C. 432.

Workman Killed While Waiting to Resume Work.—One of a gang of men employed to wheel stone and cement to a concrete mixer, went to his work at 7 o'clock in the morning. On his arrival it was found that the pipes of the concrete mixer had frozen and that no work could be done until they had been repaired. At 7:40 o'clock, and at least an hour before the mixer was fixed so as to permit the resumption of work, he was struck by a street car and killed. It was held that the evidence justified a finding that his death was due to an accident arising out of and in

the course of his employment. *Newark Paving Co. v. Klotz*, 85 N. J. L. 432, 91 Atl. 91.

Sawing Timber—Dust Blown in Eye.—Where a workman stated in his application for compensation that dirt or sawdust or some other foreign substance entered his left eye while he was sawing timber, and in his testimony he said that he was sawing some timber, and the wind was strong and the dust flew in his left eye, it was held that it could fairly be inferred that the dust caused by his sawing flew into his eye, and that the injury arose out of the employment. *Dickinson v. Industrial Board* (Ill.) 117 N. E. 438.

Using Motorcycle on Employer's Business.—A workman was in the custom of coming to his work on a motorcycle, owned by him and which he used from time to time for going to and from jobs, with the knowledge and consent of his employer. He was not paid extra for the use of the motorcycle by the employer. After arriving at his employer's place of business one morning, he proceeded to clean the clutch in order to put the machine in proper working order, and while so doing he caught his fingers in the chain guard and had to have parts of them amputated. It was held that, under the evidence, a finding that the accident was one arising out of and in the course of the employment was not unreasonable. *Kingsley v. Donovan*, 169 App. Div. 828, 155 N. Y. S. 801.

Watchman—Altercation with Employee of Tenant.—The applicant, a night watchman employed by a company engaged in drying lumber and operating planing mills, agreed to watch the motorcycle of an employee of a tenant of the company which was left in the blacksmith's shop. Although such an agreement was outside the scope of his employment, it had terminated at the time the accident occurred, for the testimony showed conclusively that the owner had taken his motorcycle from the blacksmith shop and had it out in the street at the time of the accident, and that the altercation between him and the applicant, in which the latter was injured, came about by reason of the applicant becoming suspicious of the movements of the owner of the machine and taking measures to keep him out of the blacksmith shop. It was held that the evidence supported the finding that the accident arose out of and in the scope of the employment. *Chicago Dry Kiln Co. v. Industrial Board*, 276 Ill. 556, 114 N. E. 1009.

Watchman—Death by Violence.—A watchman employed on a company's premises entered on his customary duties at about 10 P.M. and was never seen again. On the next morning three pools of fluid partly reddish and partly grey were found on the wharf on the property of the company. There were drops of fluid staining the wharf to its edge. There were marks such as might have been

made by dragging a body from these pools over the edge of the wharf and into the water. The watchman's cap was found in or near one of these pools, with a tear in the back part of the cap at a place which, when the cap was worn, would be at the base of the skull, but the tear did not extend through the lining. His unopened knife lay just at the edge of the wharf. In the engine room was found the card in which he checked off his hourly rounds, the entries indicating that he had made his last tour of duty about midnight. A door near the boiler room was found open. On the outside of the fence which partially surrounded the property were marks which might have been made by the feet of persons endeavoring to climb over it. His home life was happy. It was held that the evidence warranted the finding that the death was accidental and in the course of the watchman's employment. *Western Grain, etc., Products Co. v. Pillsbury*, 173 Cal. 135, 159 Pac. 423.

Watchman—Intentionally Shot by Third Person.—A watchman was employed by six corporations to make regular rounds of their premises, his employment being by a separate agreement with each of his employers, and not by any joint agreement or joint employment. One morning his body was found on the premises of one of the corporations, death having been caused by gunshot wounds inflicted by unknown persons engaged at the time of the murder in committing burglary on the premises. It was not disputed that the evidence warranted the inference that the killing had occurred while he was "performing services growing out of and incidental to his employment and acting within the course of his employment as such." It was held that the killing was accidental, even though the shooting was the wilful and intentional act of a third person. *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, Ann. Cas. 1917E 390, 156 Pac. 491.

The body of a night watchman was found on a path. He had been shot and had died instantly. It was his duty to keep loiterers who were in the habit of going into the plant of his employers at night to get warm off the premises. It was held that the evidence warranted the finding that some marauder who was suddenly surprised at meeting the night watchman killed him because he was the night watchman, and therefore that his death resulted from an accident arising out of and in the course of his employment. *Mechanics' Furniture Co. v. Industrial Board*, (Ill.) 117 N. E. 986.

Unexplained Death—Floatman.—It was the duty of a floatman to take records of the cars on the float, to see that the cars were properly charged up, that the brakes were applied and placed under the wheels, and that the tugboats were properly tied.

He was directed by his superior to take his lamps and other gear and go aboard a float then at the pier, which was loaded with cars, and to stand by until the tug which had brought another float over should return to take his float to the bridge, when the cars on the float would be run on the railroad tracks. He was not seen alive subsequent to the giving of these directions. That he followed them and went on the float was proven by the fact that about twenty minutes later, when the tug came to take the float to the bridge, his lanterns and gear were on the float. Two days later his body was found floating in the slip. It was held that the evidence was sufficient to justify the finding that the death was accidental and arose out of the employment. *Tirre v. Bush Terminal Co.* 172 App. Div. 386, 158 N. Y. S. 883.

Unexplained Death—Seaman.—The chief engineer of a steamship gave orders that he should be called earlier than usual. He got up, dressed in his working clothes, and was seen going to the after end of the ship until he passed behind the wheelhouse in the stern, which was the last time he was seen. The sea was calm. It appeared from the evidence that the ship was a new vessel, this being her second voyage, and that the engines were not working satisfactorily; that the propeller tips had been bent, and later broken off, as he thought, and that the propeller tips and the ship's draught could be seen if a man put his head through the rails at the stern, or climbed over them and leaned outwards, and that such a thing was sometimes done, but was risky. It was held that the evidence supported the conclusion of the county court judge that the death was caused by an accident arising out of and in the course of the employment. *Serbino v. Proctor* [1916] 1 A. C. (Eng.) 464, 114 L. T. N. S. 431, [1916] W. C. & Ins. Rep. 30, 85 L. J. K. B. 599, [1916] W. N. 46, 9 B. W. C. C. 182, 32 Times L. Rep. 280, *affirming* [1915] 3 K. B. 344, 113 L. T. N. S. 640, [1915] W. C. & Ins. Rep. 425, 84 L. J. K. B. 1381, [1915] W. N. 262, 31 Times L. Rep. 524, 59 Sol. J. 629.

Unexplained Death—Watchman.—The duties of a night watchman employed by a brewing company consisted mainly of cleaning up after the day force had left, and turning on the steam in the pasteurizing machines some time between midnight and four o'clock in the morning, which could be done from the basement floor. His hours were from six o'clock in the evening until six o'clock in the morning, including the night from Sunday evening to Monday morning. At the time of the accident, a large opening had been made in the first floor of the building preparatory to installing a pasteurizing machine. Surrounding this opening and at

its edge there had been placed beer boxes, with planks on them, for a guard or railing. Between eight and nine o'clock Sunday night, he was found lying on the basement floor. There was an abrasion on the back of the head, one shoulder was bruised, and the finger nails of one hand were turned back. On the middle of one of the planks around the opening there was an opened bottle of beer, with the contents untouched. It was held that the facts and circumstances amply supported the conclusion that the watchman accidentally sustained a personal injury which caused his death and that it was incidental to his employment. *Heileman Brewing Co. v. Shaw*, 161 Wis. 443, 154 N. W. 631.

A night watchman was employed by a biscuit company and it was his duty to patrol the buildings every hour, passing through every department. One night, soon after midnight, his body was found at the bottom of the well under the stairway in one of the company's buildings. It was held that an award of compensation was sustained by the testimony as establishing that his death was the result of an accident arising out of and in the course of his employment. *Fogarty v. National Biscuit Co.* 221 N. Y. 20, 116 N. E. 346, *reversing order* 175 App. Div. 729, 161 N. Y. S. 937.

Unexplained Death—Body Found at Foot of Stairs.—A common laborer was employed with others in connecting the water mains with the intake pipes in a theater. It was one of his duties to look after the tools and see that they were properly put away when the day's work was ended. The tools were kept, as were the men's coats, vests and dinner pails, on the stage. At about five minutes past five o'clock his body was found lying on the cement floor at the foot of the stairs leading from the basement, across which had been placed a large beam so that it was necessary for one going from the basement to the stage to stoop underneath the beam. He was in his shirtsleeves, his coat, vest, and dinner pail being later found on the stage. It was held that the evidence warranted the finding that the injury arose out of and in the course of the employment. *De Mann v. Hydraulic Engineering Co.* 192 Mich. 594, 159 N. W. 380.

Unexplained Death—Workman in Oil Refinery.—A workman, while in the employ of an oil company at its refinery, during working hours and while dressed in his working clothes, met his death by a fire communicated in some way to the inflammable flannel shirt he wore. In the course of the work the flannel shirts of all the workmen became saturated with oil and were very inflammable. Adjoining the room in which he was employed was a locker room, where each employee had a locker in which to keep his street clothes when at work, and his work

clothes at other times. For some unknown purpose he left his work room and entered the locker room, closed the door after him and was there five or six minutes, then he rushed out of the room with the side of his shirt ablaze. There was a Bunsen burner in the locker room, which had formerly been used as a test room, which burner was used occasionally for heating samples of oil in the wash tanks and for heating glue for repairs, and was lighted at the time of the accident. His locker was about two feet from the end of the hood over the burner and about four and a half feet from the burner itself. A burnt match was found on the floor. There was no rule prohibiting the men from going to the locker room during working hours, or prohibiting smoking. It was held that there was evidence to sustain the finding that the death resulted from accidental injuries which arose out of and in the course of the employment. *Chludzinski v. Standard Oil Co.* 176 App. Div. 87, 167 N. Y. S. 225.

IV. Risk of Accident.

1. IN GENERAL.

When the accident is the result of a risk reasonably incident to the employment, it is an accident arising out of the employment. But the statute does not provide an insurance against every accident happening to the workman while he is engaged in the employment. The words "arising out of and in the course of employment" are conjunctive, and relief can be had under the act only when the accident arises both "out of" and "in the course of" employment. The injury must be received: (1) while the workman is doing the duty he is employed to perform; and also (2) as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence and chiefly connected with the work. *Heitz v. Ruppert*, 218 N. Y. 148, 112 N. E. 750, L.R.A. 1917A 344, *affirming* order 171 App. Div. 961, 155 N. Y. S. 1112, *reargument denied* 218 N. Y. 702, 113 N. E. 1057.

A test for determining whether the risk is incidental to the employment, was given in *Union Sanitary Mfg. Co. v. Davis* (Ind.) 115 N. E. 676, wherein the court said: "It has been held that an injury arises 'out of' the employment 'when it is something the risk of which might have been contemplated by a reasonable person, when entering the employment, as incidental to it. . . . A risk may be incidental to the employment when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected with the employment owing to the special nature of the employment'—and that an injury arises 'in the course of the em-

ployment' if it 'occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time.' . . . In other cases it is held that an injury arises 'out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person, familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

So in the case of *In re Loper* (Ind.) 116 N. E. 324, the court said: "The existence of a duty on the part of the employer and its breach resulting in injury to a workman, however, are not the tests by which the right to an award under compensation acts is determined. A duty and its breach is negligence, but negligence on the part of the employer is not essential in order that there may be compensation under such acts. The test of the right to compensation under such acts, in so far as concerns the element now under consideration, is whether the injury resulted from some peril incident to the employment; whether the cause of the injury, although not foreseen, may reasonably be deduced from the circumstances and surroundings peculiar to the place, and under which the workman was required to perform his labors, regardless of whether such perils or surroundings involve negligence on the part of the employer."

In discussing the question of proximate cause, the court in *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 Pac. 212, L.R.A. 1916F 1164, said: "The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasona-

My incident to the employment. . . . It arises out of the occupation when there is a causal connection between the conditions under which the servant works and the resulting injury. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

In *Simpson v. Sinclair* [1917] A. C. (Eng.) 127, 116 L. T. N. S. 609, [1917] W. C. & Ins. Rep. 164, 86 L. J. P. C. 102, [1917] W. N. 97, 33 Times L. Rep. 247, 61 Sol. J. 350, *reversing* [1915] W. C. & Ins. Rep. 543, [1916] Sc. Ct. Sess. 85, [1915] Scott. L. T. 291, Viscount Haldane said: "What, then, is the special point of view which the Workmen's Compensation Act, 1906, directs us to take in the practical selection of the circumstances which are to determine whether an event has arisen out of the employment which has amounted to injury by accident within the meaning of the act? I think that the court is directed to look at what has happened proximately, and not to search for causes or conditions lying behind, as would be the case if negligence on the part of the employer had to be established. For the reasons which I assigned in this House in *Trim Joint Dist. School v. Kelly* [1914] W. C. & Ins. Rep. 359, 83 L. J. P. C. 220, [1914] A. C. 667, reasons which I abstain from repeating, I am of opinion that the governing purpose of the statute makes it as irrelevant to look beyond the immediate cause of the accident for explanations, or for remoter causes, as it would be in a case arising on a policy of marine insurance, provided that the circumstances bring the immediate cause within the definition. Where the question is one of the construction of an obligation to insure against accident, the law looks to the *proxima causa* of the accident as decisive, and does not look behind it."

2. RISK INCIDENTAL TO EMPLOYMENT.

In each of the following cases, on the facts as set forth, it was held that the risk of the accident was incidental to the employment and therefore that the accident arose out of the employment:

Assault by Fellow Workman.—A workman employed as a helper was asked by the boiler maker he was working with why he did not come to work the night before. He replied that he had been sick. The boiler maker became angry and hit him with a piece of iron across the left arm, breaking it. It was held that the accident arose "in the course of employment" within the meaning of the Federal Act of 1908. In *re Flemmings*, Op. Sol. Dept. of Labor 225.

The claimant while employed in a factory became involved in a verbal exchange of in-

sulting language with a fellow employee, as a result of which the latter violently assaulted the claimant three-quarters of an hour later. In defending himself from the assault, the claimant sustained injuries. An award of the state industrial commission was affirmed. *Carbone v. Loft*, 219 N. Y. 579, 114 N. E. 1062, *affirming* 174 App. Div. 901, 159 N. Y. S. 1104.

The claimant was employed as a driver. He brought his horses into the stable, where a fellow workman and he unharnessed them and proceeded to wash them off with the hose. The claimant told his coworkman that he was using too much water on the horses, and the latter then intentionally sprinkled some water on the claimant. Shortly after the claimant touched the other workman on the shoulder as he passed him and told him not to do that again. The workman slapped the claimant on the shoulder, and as the latter turned around, the workman's finger stuck in his eye causing injuries necessitating its removal. It was held that the accident arose out of and in the course of the employment. *Heitz v. Ruppert*, 218 N. Y. 148, 112 N. E. 750, L.R.A.1917A 344, *affirming* order 171 App. Div. 961, 155 N. Y. S. 1112, *reargument denied* 218 N. Y. 702, 113 N. E. 1057.

Assault by Stranger.—The work of the petitioner was the filling of a barrel with water, and the carrying of the water in pails to other servants of the same employer to be used in mixing cement. While temporarily away from it, two strangers upset the barrel and carried it a short distance away. At this point the petitioner's superior directed him to get the barrel and bring it back. This he undertook to do, and when he approached the men they threw down the barrel and assaulted him, inflicting injuries. It was held that the accident arose out of the employment as well as in the course of it. *Nevich v. Delaware, etc. R. Co.* 90 N. J. L. 228, 100 Atl. 234, L.R.A.1917E 847.

The claimant was employed as a night man at a plant engaged in the manufacture of sandpaper, which was a hazardous employment. His duties were to watch the premises against the danger of fire, to protect them against the commission of depredations, to keep the furnaces under the boilers supplied with coal, and to pour glue into the vats. One evening he was assaulted and robbed by strangers, and injured in the course of the struggle. It was held that he was entitled to compensation for accidental injuries arising out of and in the course of his employment. *Hellman v. Manning Sand Paper Co.* 176 App. Div. 127, 162 N. Y. S. 335.

A night watchman was assaulted and killed while engaged at the time in the duties of his employment, which included the protection of the employer's property against burglary. It was held that he received an

injury arising out of and in the course of his employment. *Ohio Bldg. Safety Vault Co. v. Industrial Board*, 277 Ill. 96, 115 N. E. 149.

Anthrax.—A workman while employed with other workmen in sorting wool in a factory, was infected with anthrax and died thereof. It was held that his death was attributable to personal injury by accident arising out of and in the course of his employment. *Brintons v. Turvey* [1905] A. C. (Eng.) 230, 2 Ann. Cas. 137, 92 L. T. N. S. 578, 74 L. J. K. B. 474, 21 Times L. Rep. 444, 53 W. R. 641, *affirming* [1904] 1 K. B. 328, on the authority of *Fenton v. Thorley* [1903] A. C. 443.

The occupation of the claimant was weighing hides, a hazardous employment. Wet salt from the hides caused a swelling on the back of his hand, from which an abrasion of the skin or fissure resulted. Later, in handling dirty and diseased hides, anthrax germs contained therein were communicated to him through this abrasion or fissure. It was held that this might properly be deemed an accidental injury arising out of and in the course of his employment. *Hiers v. Hull*, 178 App. Div. 350, 164 N. Y. S. 767.

Rupture of Blood Vessel.—A workman, as the result of the overexertion and strain of lifting a can of paint weighing a hundred or more pounds and carrying it twenty or thirty feet, ruptured a blood vessel in his lungs, and died of traumatic pneumonia resulting from that rupture. It was held that the injury was "an accidental injury suffered in the course of his employment." *Southwestern Surety Ins. Co. v. Owens (Tex.)* 198 S. W. 662.

The claimant was employed as a bottler, and while working at his employer's plant and assisting another employee in lifting a barrel weighing about two hundred pounds, for the purpose of tiering for storage in the cooler, was seized with a stroke of apoplexy by reason of the strain occasioned by the lifting of the heavy barrel. It was held that having been an employee in a hazardous employment, and having suffered a cerebral hemorrhage as the result of unusual strain or exertion while prosecuting that employment, the claimant suffered an accidental injury arising out of and in the course of his employment. *Fowler v. Risedorff Bottling Co.* 175 App. Div. 224, 161 N. Y. S. 535.

A workman, while engaged in the course of his employment in moving a weight, had an attack of cerebral hemorrhage as the result of the exertion he was using. The work was being performed in the usual manner. Four days later a second attack supervened, which caused permanent paralysis. At the time of the first attack his arteries were in a degenerate condition, rendering the recurrence of an attack likely. It was held that

the workman's final disablement was caused by accident arising out of and in the course of his employment. *M'Innes v. Dunsmuir* [1908] Sc. Ct. Sess. 1021, 45 Scott. L. Rep. 804.

Burn—Falling into Fire While in Epileptic Fit.—A night watchman in the reclamation service, while standing or leaning over a camp fire to get warm, lost consciousness from epilepsy and fell into the fire, sustaining a severe burn. It was held that he received an accidental injury in the course of his employment, within the meaning of the Federal Act of 1908, notwithstanding it arose in consequence of disease. *In re Clement*, Op. Sol. Dept. of Labor 228.

Heat-stroke—Stoker.—A trimmer on board a steamship who was in a weak and emaciated condition, received a heat-stroke while he was working in a stokehole opposite the boiler, became exhausted, and died in a few hours. It was held that this was an accident arising out of and in the course of his employment. *Ismay v. Williamson* [1908] A. C. (Eng.) 437, 99 L. T. N. S. 595, 77 L. J. P. C. 107, 24 Times L. Rep. 881, 52 Sol. J. 713, *following* *Fenton v. Thorley* [1903] A. C. 443; *Brintons v. Turvey* [1905] A. C. 230, 2 Ann. Cas. 137.

Lead Poisoning.—The physical incapacity of a workman for labor found to have been caused by the gradual absorption of lead poisoning into his system resulting in personal injury has been held to be an injury arising out of and in the course of his employment. *Johnson's Case*, 217 Mass. 388, 104 N. E. 735.

Nephritis—Hot Workroom—Chill.—There were about two big wagonloads of steaming pulp in the basement room where a workman was required to work, which had run out of a broken iron pipe. His foreman directed him to remove it by flushing it out into the sewer with water, to do which he was required to use a hose through which hot water from the exhaust of the engine was forced. His working place became very hot in consequence of the pulp and water, and he perspired profusely. On his way home for dinner he became chilled, and acute nephritis developed. It was held that he received a personal injury by reason of an accident arising out of and in the course of his employment. *United Paperboard Co. v. Lewis (Ind.)* 117 N. E. 276.

Streptococcus Infection—Undertaker's Assistant.—An undertaker's assistant, while cleaning instruments which had been used on the body of one who had died of streptococcus infection, was himself infected through a small cut in his finger, which infection caused his death. It was held that the evidence was sufficient to justify the finding that the injury arose out of and in the course of the workman's employment. *Blaess v. Dolph (Mich.)* 161 N. W. 885.

Tetanus—Nail Piercing Foot of Gardener.—A gardener, while digging in his employer's garden, was injured by a nail piercing his foot through his boot. He subsequently contracted and died of tetanus through the germ which caused that disease passing into the wound in his foot. It was found that persons working in stables and gardens were peculiarly subject to contract this disease, if suffering from any wound, and that the tetanus germ entered the wound whilst the gardener was doing his gardening work. It was held, supporting the award of the recorder, that the workman met his death by "accident arising out of and in the course of his employment." *Walker v. Mullins*, 42 Ir. L. T. 168, 1 B. W. C. 211.

Typhoid Fever—Drinking Polluted Water Furnished by Employer.—A workman became afflicted with typhoid fever which caused his death, from the drinking of polluted water furnished him by his employer. It was held that his death was proximately caused by accident while he was "performing services growing out of and incidental to his employment." *Vennen v. New Dells Lumber Co.* Ann. Cas. 1918B 293.

Larking—Turning Air Compressor on Workman.—While a drill press operator was engaged in performing his work and was not participating in the sport or horseplay, the assistant superintendent of the employer turned the air from the air compressor on him, causing severe internal injuries resulting in death. The employees in the factory had established the custom of using the air compressor to clean their clothes, and also of using the air therefrom on one another in acts of sport in which the assistant superintendent participated. It was held that as the employer, with knowledge of the facts, permitted these practices to continue when he might have prohibited them, they became an element of the conditions under which the employee was required to labor. Hence it was held that the injury and death arose out of the employment. *In re Loper (Ind.)* 116 N. E. 324.

Larking—Pushing Workman—Standing in Line for Pay.—A workman quit work about five o'clock and formed in line with the other employees to receive his weekly pay at the office window as he passed out of the building. There were about seventy-five men in line, and he occupied a position about the middle of the line. Some of the men behind him began pushing forward, and those in front of him began pushing backward at the same time, with the result that he was squeezed out of the line and slipped and fell on the cement floor and was injured. It was held that it could not be seriously contended that the injury did not arise out of the employment. *Pekin Cooperage Co. v. Industrial Board*, 277 Ill. 53, 115 N. E. 128.

Frost Bite.—An employee was engaged in soliciting insurance and collecting insurance premiums. He was of good health and of rugged physique. On an unusually cold day he left home and drove fifteen or twenty miles, in the regular course of his employment, and during this time his nose was frozen, and the tissues adjacent thereto, producing a lesion of the skin and surface tissues. As a direct result of these injuries he contracted erysipelas, from which he died. It was held that he died of a personal injury "arising in the course of and out of his employment." *Lark v. John Hancock Mut. L. Ins. Co.* 90 Conn. 303, 97 Atl. 320, L.R.A. 1916E 584.

A workman employed in filling wagons with stone in a pit eighteen feet deep at a very low temperature for ten consecutive hours froze his left foot, and in consequence it had to be amputated. It was held that the accident occurred in the course of his employment, as the workman was exposed to a particular risk. *Canada Cement Co. v. Pazuk*, 22 Quebec K. B. 432.

Street Risk—Riding Bicycle.—A boy in the employment of builders was, by their orders, riding a bicycle through the public streets, having been directed to go on the bicycle to get some plaster. He came into collision with a motor car and was injured. It was held that the accident arose out of, as well as in the course of, his employment. *Dennis v. White* [1917] A. C. (Eng.) 479, 116 L. T. N. S. 774, 86 L. J. K. B. 1074, [1917] W. N. 203, 33 Times L. Rep. 434, 61 Sol. J. 558, reversing [1916] 2 K. B. 1, 114 L. T. N. S. 579, [1916] W. C. & Ins. Rep. 106, 85 L. J. K. B. 862, 60 Sol. J. 385, 9 B. W. C. 250, and following *M'Neice v. Singer Sewing Mach. Co.* [1911] Sc. Ct. Sess. 12, 4 B. W. C. C. 351; *Hughes v. Bett* [1915] Sc. Ct. Sess. 150, and *White v. Avery* [1916] Sc. Ct. Sess. 209, in preference to *Pierce v. Provident Clothing, etc. Co.* [1911] 1 K. B. 997, 4 B. W. C. C. 242; *Sheldon v. Needham* [1914] W. C. & Ins. Rep. 274, 7 B. W. C. C. 471; *Slade v. Taylor* [1915] W. C. & Ins. Rep. 53, 8 B. W. C. C. 65.

Street Risk—Slipping on Ice.—It was the duty of the applicant, a machine fitter, to go around to various places in order to be present as representing his employers when the county inspector of weights and measures inspected certain weighing machines. After finishing his inspection at one village, the inspector had to go to another village about half an hour's walk distant. He went there by bicycle, and as there was no convenient railroad communication, the applicant, who had a railway pass, in order to keep in touch with the inspector, decided to walk the distance. The road was slippery owing to frost after a recent rain, and the applicant, whilst stepping aside to avoid a van, slipped on the ice and fell and broke his wrist. It was held

that the circumstances presented a typical case of an accident which was directly attributable to, and arose out of, his employment. *White v. Avery* [1915] W. C. & Ins. Rep. 594, [1916] Sc. Ct. Sess. 209, [1915] 2 Scott. L. T. 374.

Street Risk—Steel Beams Falling from Building on Teamster.—A teamster was doing his usual work in a customary manner, driving along a street where he would properly be expected to travel, when a heavy load of steel beams weighing over thirteen tons broke the hoisting apparatus and fell from the eighteenth story of a building, instantly killing him. It was held that the teamster's death was caused by an accident arising out of and in the course of his employment. *Mahowald v. Thompson-Starrett Co.* 134 Minn. 113, 158 N. W. 913, rehearing denied 134 Minn. 117, 159 N. W. 565.

Street Risk—Struck by Automobile.—A tree trimmer and planter was employed by the week to go around trimming trees, doing tree surgical work, taking down trees, etc., with other men of whom he had charge. While going from the inspection of one job to inspect another, which was necessary in the discharge of his duties, he was knocked down by an automobile and fatally injured. It was held that his death was due to an accident "arising out of and in the course of his employment." *Kunze v. Detroit Shade Tree Co.* 192 Mich. 435, 158 N. W. 851, L.R.A. 1917A 252.

Street Risk—Thrown Out of Cart.—The applicant, who was employed as a builder's assistant and mason, fell from a cart while taking a window frame to a customer's house, and was injured. The window frame was of considerable size and weighed about three stones. As the employer had no cart at the time in which to send the frame, he told the workman to manage it the best way he could. The man started with it on his shoulders, when, meeting a pony and cart accompanying a traction engine, he arranged with the lad in charge for a lift. He then put the frame into the cart and was getting in himself, when the pony dashed off, after the traction engine had started. It was held that the accident arose out of and in the course of the employment, and was due to a special risk incident thereto. *Mullinger v. Bidewell* [1917] W. C. & Ins. Rep. (Eng.) 51, 10 B. W. C. C. 104.

Teamster—Cat Bite.—A teamster took his horses to the stable for their midday meal, and then proceeded to eat his own dinner in the stable. While he was eating his dinner, a stable cat sprang at him and bit him. He was not teasing the cat in any way, nor was he feeding it on that occasion, although he had thrown bits to the cat on other occasions. The cat was not known to be vicious. The bite set up blood poisoning, and two joints

of the applicant's finger had to be amputated. It was held that the decision of the county judge that the accident arose out of and in the course of the employment, was correct. *Rowland v. Wright* [1909] 1 K. B. (Eng.) 963, 99 L. T. N. S. 758, 77 L. J. K. B. 1071, 24 Times L. Rep. 852, 1 B. W. C. C. 192.

Employee Bitten by Dog Kept in Cellar.—An employee of a piano manufacturer was directed by his superior to carry some materials into the cellar of the factory. While doing so, he was bitten by a dog which had been kept there for a year or more by the engineer, who was stationed in the cellar. It was held that the injury sustained by the employee was one "arising out of and in the course of his employment." *Barone v. Brambach Piano Co.* 167 N. Y. S. 933.

Bite of Mad Dog.—While the claimant was in the canal cut attending to the duties of his position as powder foreman, a mad dog came running through the cut and bit him on the calf of his left leg. It was held that the injury was received in the course of the employment. *In re Bailey*, Op. Sol. Dept. of Labor 297.

Baker—Explosion of Natural Gas—Negligence of Foreman.—A workman's injuries occurred as a result of an explosion of natural gas used for heating the ovens of his employer, caused by the negligence of the employer's foreman, while the workman was engaged in his capacity of baker at a table about twelve feet directly in front of the oven, and consisted of severe burns. It was held that the workman's injuries were accidental injuries arising out of and in the course of his employment. *Adams v. Item Biscuit Co.* (Okla.) 162 Pac. 938.

Bartender—Struck by Glass Thrown by Drunken Man.—While in the course of his employment, and actually engaged in his duties as bartender in the saloon where he was employed, the applicant was struck in the right eye by a heavy drinking glass thrown by a patron of the saloon who was so drunk that he did not know what he was doing. It was held that the applicant's employment caused a special degree of exposure to risk, and that the accident "arose out of" his employment. *State v. District Ct.* 134 Minn. 16, 158 N. W. 713, L.R.A. 1916F 957.

Hotel Employee—Fall on Platform of Railway Station.—The applicant was employed as a "boots" at a hotel. Among his duties was that of attending both arriving and departing trains and waiting for trains to carry luggage, at the railway station. On the day of the accident, he was informed that the train for which he was waiting would not come, owing to the heavy snowstorm. In walking along the platform to get to the hotel bus outside the station, he slipped in the snow and fell on the rails, three and half

feet lower than the platform, breaking his leg. It was held that the accident arose out of and in the course of the employment. *Blake v. Ramsay* [1917] W. C. & Ins. Rep. 84, 51 Ir. L. T. Rep. 6.

Bricklayer—Fall of Scaffold.—The claimant, by occupation a bricklayer, was employed by a lithographing and printing company to point up one of the walls of its plant and repair cracks therein. For such labor he and his helper were to be paid the regular wages for bricklayers and bricklayers' helpers, and the company furnished all materials, ladders, and supplies. While working without a helper, one of the ropes supporting a scaffold on which he was at work broke and he was precipitated a distance of some thirty feet to the ground and was injured. It was held that the injury to the claimant arose out of and in the course of an employment "carried on by the employer for pecuniary gain," and that the claimant's work was incidental and requisite to the hazardous business carried on by the company, namely, lithographing and printing. *Dose v. Mochle Lithographic Co.* 221 N. Y. 401, 117 N. E. 616.

Carpenter Repairing Car—Door Blown Shut.—A carpenter employed by a railroad company was repairing a camp car on a repair track. There was a coal car on the next repair track, the space between the two cars being about six feet. While passing between these cars from taking certain measurements, which was the most direct, convenient, and only available route, the door of the camp car, which opened outwards, instead of sliding as car doors generally do, blew shut in a gust of wind, throwing him against the coal car and injuring him. It was held that his injury arose out of as well as in the course of his employment. *Myers v. Louisiana R. etc. Co.* 140 La. 937, 74 So. 256.

Delivery Boy—Catching Hold of Rear End of Truck.—A delivery boy was furnished a bicycle with which to do his work. He was given permission to get his luncheon at home and was then to make a call for a package and to return to the store. After lunch he caught on the rear end of a motor truck, proceeding in his direction. The truck overtook and passed a second truck, proceeding in the same direction and then made a sudden turn. The boy was thrown to the pavement as a result and run over by the rear truck before it could be stopped. It was held that he received a personal injury arising out of and in the course of his employment. *Beaudry v. Watkins*, 191 Mich. 445, 158 N. W. 16, L.R.A.1916F 576.

Delivery Helper—Finger Pierced by Nail in Bottom of Barrel.—The claimant was employed as a delivery helper. Among his duties were loading goods on a truck and drawing the truck by hand to the place in the

basement where it was to be unloaded. While lifting a barrel for the purpose of putting it on a truck and moving it to another part of the store, a nail in the bottom of the barrel pierced one of his fingers, which wound later became infected. It was held that his injuries arose out of and in the course of his employment. *Holtz v. Greenhut*, 175 App. Div. 878, 162 N. Y. S. 359.

Dishwasher in Restaurant—Floor Giving Way.—While working as a dishwasher in the restaurant in which he was employed, the floor immediately above the place where the workman was at work suddenly gave way, due to the fact that it had been overloaded by the storing of a large quantity of bottled grape juice thereon, and he was struck by some falling object or objects, and injured. It was held that he was injured by an accident "arising out of the employment." *Kimbol v. Industrial Acc. Commission*, 173 Cal. 351, Ann. Cas. 1917E 312, 160 Pac. 160, L.R.A. 1917B 595.

Driver—Fall from Wagon.—A driver was employed in delivering gasoline, and while returning home fell in front of the wagon in attempting to raise the canopy top attached to the seat, was run over, and died. It was held that the accident from which he came to his death did not result from the nature of the product which he carried, but from an accident which occurred in the course of and arose out of his employment. *Gibson v. Industrial Board*, 276 Ill. 73, 114 N. E. 515.

Driver—Stepping on Rusty Nail.—A driver while working for his employer in collecting dirt from the city streets, stepped on a board containing a rusty nail as he was getting into his wagon. The nail pierced his shoe and went into his foot, the wound became infected, and he died of tetanus. It was held that the injuries were accidental, and arose out of and in the course of his employment. The court held that he was engaged in the operation of a wagon drawn by horses, concededly a hazardous occupation under the statute, and that one of the necessary incidents of his delivery about the streets was getting off and on his wagon and hence his dependent was entitled to compensation, though the danger of stepping on the nail might be said to have been common to all persons using the street. *Putnam v. Murray*, 174 App. Div. 720, 160 N. Y. S. 811.

Traction Engine Driver—Falling from Engine.—A traction engine driver, who was intoxicated, fell off the footplate on to the roadway while driving his traction engine, and died of the injuries received. It was held that the accident not only occurred while he was "in the course of" his employment, but arose "out of" his employment. *Fraser v. Riddel* [1914] Sc. Ct. Sess. 125, [1914] W. C. & Ins. Rep. 125.

Fish Kipperer—Fall of Adjacent Wall.—The applicant, who was employed as a kipperer in the fish-curing business, was at work along with a number of other women in a shed constructed of brick walls with a corrugated iron roof. While they were so occupied, a brick wall in the course of erection on the ground of an adjacent proprietor suddenly fell on the shed causing it to collapse, and burying the inmates beneath the wreckage, the applicant being seriously injured. It was held that the injuries sustained by the applicant were caused by an accident arising "out of" her employment. *Simpson v. Sinclair* [1917] A. C. (Eng.) 127, 116 L. T. N. S. 609, [1917] W. C. & Ins. Rep. 164, 86 L. J. C. P. 102, [1917] W. N. 97, 33 Times L. Rep. 247, 61 Sol. J. 350, *reversing* [1915] W. C. & Ins. Rep. 543, [1916] Sc. Ct. Sess. 85, [1915] 2 Scott. L. T. 291.

Gamekeeper—Shot While Hunting with Employer's Tenant.—A game warden and keeper employed to patrol a ranch in quest of poachers and to eject trespassers, was accidentally shot while, under express orders of the superintendent, he was assisting one of his employer's authorized tenants in finding and killing a deer. It was held that the fact that the accident arose out of the employment, appeared from the fact that it followed as a natural incident of the employment, engagement in which exposed the employee to the danger of being accidentally shot. *O. L. Shafter Estate Co. v. Industrial Acc. Commission* (Cal.) 166 Pac. 24.

Laborer—Going to Work Along Railroad Track.—There were three ways of getting to the works where the applicant was employed as a fitter's laborer, the way along the railway being dangerous, but used by the workmen to a far greater extent and in much greater numbers than the other two. The employers knew that this way was so used and did not forbid its use. In using this way the applicant was struck by a locomotive and injured. It was held that the accident arose out of and in the course of the employment, and that the applicant, in taking the dangerous way, was not adding a peril to his employment, disentitling him to compensation. *Fox v. Rees* [1916] W. C. & Ins. Rep. (Eng.) 339, 115 L. T. N. S. 358, 86 L. J. K. B. 43, 9 B. W. C. C. 459.

Laborer—Recovering Dropped Pipe.—A workman was employed as a laborer to load and unload wagons, and to accompany them while being hauled by a traction engine from one quarry to another. While sitting on a wagon, which was being so hauled, he dropped his pipe, and in attempting to recover it lost his balance and fell in front of the wheels of the wagon, receiving fatal injuries. It was held that the accident arose out of and in the course of his employment. *M'Lauchlan v. Anderson* [1911] Sc. Ct. Sess. 529, 48 Scott. L. Rep. 349, 4 B. W. C. C. 376.

Livery Stable Employee—Fall Down Stairs.—An employee of a firm conducting a boarding and livery stable in a building owned by them, lived on the top floor of the building. While going down stairs from his apartment, he fell and cut his forehead. Thereafter erysipelas developed which, with other complications, caused his death. It was held that the accident arose out of and in the course of his employment. *Lealie v. O'Connor*, 220 N. Y. 672, 116 N. E. 1057, *affirming* order 173 App. Div. 988, 158 N. Y. S. 1120.

Machinist Overhauling Pump—Infection from Coral.—A machinist, while assembling the fire and wrecking pump of a tug which had been used in Oriental waters, was infected by pieces of coral which had been forced into his thumb and finger. It was held that he met with an injury of an accidental nature in the course of his employment. *In re Green*, Op. Sol. Dept. of Labor 237.

Porter—Building Shelf.—A workman was employed in the capacity of "porter, elevator and handy man" by a corporation engaged in the hazardous business of manufacturing drugs and chemicals. While he was engaged in building a shelf near the elevator well in his employer's place of business, and while reaching into the elevator well to obtain a board which he had placed at some point on the side of the well, he lost his balance and fell down the elevator shaft, and was instantly killed. It was held that his act in building a shelf, while not an act in the immediate process of manufacturing drugs and chemicals, was fairly incidental to the prosecution of that business and hence, that his death was the result of an accident arising out of and in the course of his employment. *Larsen v. Paine Drug Co.* 218 N. Y. 252, 112 N. E. 725, *affirming* order 169 App. Div. 838, 155 N. Y. S. 759.

Traveling Salesman—Steamship Sunk by Submarine.—A traveling salesman engaged passage on the steamship *Lusitania*, it being necessary for him to visit his employer's London office. While the vessel was within the area which had theretofore been declared a war zone by the German government, she was attacked and torpedoed by a German submarine, the salesman being drowned. It was held that his death was due to an accident while in the course of his employment, and that the accident arose out of his employment. *Foley v. Home Rubber Co.* 80 N. J. L. 474, 99 Atl. 624.

Family Servant—Lighting Fire with Wood Alcohol.—A family servant was required as a part of her duty to light the fires. She was forbidden to use kerosene "or anything like that" to assist her in lighting a fire. She used wood alcohol, and by reason thereof was burned to death. It was held that the accident arose out of and in the course of her employment, notwithstanding the disobedience of her orders, as she was doing what she

was expected to do at the very place where it was meant to be done. *Kolaszynski v. Klie* (N. J.) 102 Atl. 5.

Stenographer—Burning of Building.—A stenographer was employed in the conduct of a business—the preparation of animal hair and its byproducts for commercial purposes—which occupied the fourth floor of a building. A fire originating in one of the lower floors sent up such great volumes of smoke and flame that it shut off practically any escape to the employees of the business. The stenographer failed in her effort to make her escape and was so burned that death resulted. It was held that her death was the result of an accident arising out of and in the course of her employment. *Newark Hair, etc. Co. v. Feldman*, 89 N. J. L. 504, 99 Atl. 602.

Night Watchman—Substance Blown into Eye.—The claimant was employed as a night watchman by an employer engaged in the business of the manufacture of desks and furniture, declared by the statute to be a hazardous employment. While working in that capacity, about eleven o'clock in the evening, a severe storm arose. In closing a window because of the storm, a gust of wind blew some substance from the outside of the building into the claimants' eye, causing an injury necessitating its removal. It was held that the injury arose out of and in the course of his employment, there being no evidence that the factory was not in operation. *Ko-byra v. Adams*, 176 App. Div. 43, 162 N. Y. S. 269.

Utility Man—Crossing Street from One Factory to Other.—The workman was employed as a general utility man by a corporation engaged in manufacturing commercial trunks, one of his duties being the lettering of trunks. Diagonally across the street was a second corporation, engaged in the manufacture of personal trunks, both corporations being owned by the same stockholders and carried on by a single executive organization. The workman performed services for both corporations. In returning from the factory of the second corporation to that of the first, after having lettered a trunk in the former factory, he slipped on the snow and ice in the street, and received injuries of which he died. It was held that the accident was one "arising out of" the employment, and not merely a street accident to which every one using the highway was equally liable. *Redner v. Faber*, 167 N. Y. S. 242.

Shifting Belt by Hand Instead of Foot Lever.—The claimant was drilling a piece held in a jig, when the drill caught, causing the jig to revolve. Instead of shifting the belt by means of the belt shifter with his foot to stop the machine, he tried to throw it off with his hand, and was injured. It was held that this was such an accident as

might happen to any ordinarily careful machinist in the usual course of his employment. *In re Hadlock*, Op. Sol. Dept. of Labor 495.

Taking Tools to Designated Place.—The assistant fire ranger directed the claimant to proceed on a subsequent day to a place eight miles distant. At the same time he directed the claimant to take along with him certain tools, among which was a small axe used for trimming trees. The claimant accordingly started on his journey on the designated morning, laden with the necessary tools, it being necessary for him to walk the distance, and the ground being covered with about six inches of snow. While en route, he stumbled and fell, dropping the axe on his foot and causing an injury to it. It was held that the injury was received in the course of his employment which began when the claimant started on the journey. *In re Connor*, Op. Sol. Dept. of Labor 330.

Negligence of Employees of Other Company.—A workman was employed by a brick company to transfer coal from railroad cars to cars by which the coal was distributed about the plant of the brick company. The railroad cars were placed on the side track of the brick company by the railroad company. In making a flying switch of a number of cars, these cars were thrown against the car which the workman was engaged in unloading while he was under the car, thus fatally injuring him through the negligent act of the employees of the railroad company. It was held that the injury was received "in the course of and resulted from the employment." *Mercer v. Ott*, 78 W. Va. 629, 89 S. E. 952.

Digging Cellar—Falling of Pier.—A workman was engaged as a laborer in digging out a cellar, in which there were some masonry piers. During the course of his work one of the piers fell over on him, with fatal results. On review, it was not denied that the accident arose out of and in the course of the employment. *Taylor v. Seabrook*, 87 N. J. L. 407, 94 Atl. 399.

Injury on Employer's Premises on Way to Work.—A screen boy employed at a colliery slipped on a rail while crossing the road on his way to work and on the colliery premises, but before he had received his check. It was held that as a matter of law the accident arose "out of the employment," as it was caused by a peril attached to the particular location in which by the obligation of service the workman was placed, although the accident was not contributed to in any way by the nature of the employment. *Marsh v. Pope* [1917] W. N. (Eng.) 262, 33 Times L. Rep. 523.

Drowned While Going for Others Living on Boat.—A laborer was employed on river and harbor improvement work, and during such

employment lived on a quarter boat, which was used for purposes of living quarters by the employees engaged in that particular work. He was on the boat one night when he heard a call from the shore from some fellow laborers who desired that a small boat should be sent them in order to return to the boat, where they also had their living quarters. While in the act of getting a small boat and going for the men on shore, he fell overboard from the quarter boat and was drowned. It was held that his death occurred in the course of his employment. *In re House*, Op. Sol. Dept. of Labor 325.

Crossing Yard to Convenience—Tripping on Small Piece of Wood.—The employers of the applicant, a woman, having no separate convenience for women as required by law, arranged that she should have the use of the women's convenience on the adjacent premises of another employer. The applicant was returning from the convenience and had almost crossed the yard common to both premises, when, on the flagged portion and close to the door leading into her employer's premises, she tripped or slipped on a small piece of wood, two inches long by one and a half inches broad, lying on the flags, with the result that she fell and was injured. It was held that the accident arose not only in the course of but out of her employment. *Fearnley v. Bates* [1917] W. C. & Ins. Rep. (Eng.) 207, 86 L. J. K. B. 1000, [1917] W. N. 170, 61 Sol. J. 506.

Pulling Timber Out of Pile—Wrenched Back.—An employee of a lumber company was assisting another man in loading 4 x 6 redwood timber on trucks. While pulling a piece of timber out from a pile, he either slipped or in some manner wrenched his back and fell down. He arose, put that stick of timber on the truck, and then could not move. It was held that, giving the words their ordinary meaning, the expression, "accident arising out of and in the course of the employment," was broad enough to include the injury received by the workman. *Southwestern Surety Ins. Co. v. Pillsbury*, 172 Cal. 768, 158 Pac. 762.

Steadying Trolley Pole—Slipping of Pike.—The claimant at the time of the injury was one of four men who, each with a pike, were steadying a trolley pole, which was being placed in position. The pole appeared to be falling over toward him and, being compelled to quickly change the position of his pike to steady the pole, he put the handle of his pike against the ground. This was new made and soft, and gave way, throwing the claimant off his balance so that he tumbled off the embankment on which he was working and fell a distance of seven or eight feet, and was injured. It was held that the injury arose in the course of employment and was not due to the negligence or misconduct

of the claimant. *In re Burns*, Op. Sol. Dept. of Labor 451.

Unexplained Death—Body Found under Train of Cars.—A workman who had gone to his foreman in search of material, was found lying dead under a train of cars, with a hole about six inches in diameter in his abdomen. It was held that a *prima facie* case of accident was shown and that the injury arose out of and in the course of his employment. *De Fazio v. Goldschmidt Detinning Co.* (N. J.) 88 Atl. 705.

3. RISK NOT INCIDENTAL TO EMPLOYMENT.

In each of the following cases, on the facts as set forth, it was held that the risk of the accident was not incidental to the risk of the employment and therefore that the accident did not arise out of the employment:

Assault—Brewery Collector.—A brewery route foreman was required to look after the various beer delivery routes and on Saturdays to deliver beer and collect the moneys therefor. One Saturday evening he made a delivery of beer at a dwelling house and while returning to his wagon which he had left in the street a little distance away, was assaulted and shot. He mounted the wagon and returned to the brewery and accounted for the moneys intrusted to and collected by him, and then went to the hospital where he died ten days later from the effects of the shot. It was held that owing to the absence of evidence showing any motive for the attack, his death was not the result of an accident arising out of his employment. *Schmoll v. Wiesbrod, etc. Brewing Co.* 89 N. J. L. 150, 97 Atl. 723.

Assault—Altercation with Fellow Employee.—A workman employed as a lead molder should have gone with the complaint that his ladle had not been relined with fire clay to the foreman. But he met a fellow workman who had nothing to do with the relining of ladles and got into a controversy with the latter, which he started, over his ladle not being relined. It was held that the injuries received by the workman as a result of the quarrel did not arise "out of" the employment, as that phrase was used in the act. *Union Sanitary Mfg. Co. v. Davis* (Ind.) 115 N. E. 676.

Assault and Robbery—Night Watchman.—A night watchman in a mill was at 9 P.M. making a tour through the mill, recording his passage by registering on his watchman's clock, and while going from one station to another stopped to close a door opening from the mill to a loading platform, adjacent to a railroad switch. As he leaned against the handle of the door to roll it shut, he was struck on the head with a club by an employee of the company who had entered the mill and hidden himself near the door, in-

tending to rob the watchman. The latter died immediately and his assailant took his pay envelope, but did not attempt any robbery from the office of the mill. It was held that the death of the watchman did not arise out of his employment. *Walther v. American Paper Co.* 89 N. J. L. 732, 99 Atl. 263, reversing judgment 98 Atl. 264.

Larking—Butcher's Boys.—The applicant, a boy in the employ of a butcher, got his right hand badly cut with a knife. He alleged that while he was cleaning knives in the shop, another boy, who was sweeping up the shop, struck a knife and so drove it into the applicant's hand while the two were larking together. It was held that the finding of the county court judge that the boys were larking meant that he found that the accident did not arise out of and in the course of the employment. *Harrison v. Featherstone* [1917] W. C. & Ins. Rep. (Eng.) 74, 10 B. W. C. C. 54.

Larking in Elevator.—An employee operating an elevator left the elevator rope to "fool" with another employee who was riding in it, and in the scuffle his heel was caught and injured. It was held that his injury "did not arise out of his employment." *Moore's Case*, 225 Mass. 258, 114 N. E. 204.

Larking—Shears Entering Eye.—Two boys employed in a candy factory were larking with a pair of shears, and in the course of the play one end of the shears went into the eye of one boy, destroying the sight of the eye. It was held that the accident was not one arising "out of and in the course of the employment." *Doyle v. Moirs*, 48 Nova Scotia 473, 22 Dominion L. Rep. 767, following *Armitage v. Lancashire, etc. R. Co.* [1902] 2 K. B. (Eng.) 178.

Larking—Tickling Fellow Employee.—As an employee known to his associates to be peculiarly susceptible of being tickled was going down a flight of stairs with a filled bucket in his hand, one of his associates, in passing him by, punched him in the back with a newspaper, which caused him to make a sudden movement and to fall, whereby he was injured. It was held that the accident did not arise out of the employment. *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 Pac. 212, L.R.A.1916F 1164.

Larking—"Trick" Camera.—One day a fellow employee took a "trick" camera into the applicant's office, pointed it at him, told him to "look pleasant," and before he could protect himself touched a button which caused a spring to be ejected from the false camera. The missile struck the applicant so that as a result of the injury inflicted he lost the sight of one eye. It was held that the accident did not arise out of the employment. *Fishing v. Pillsbury*, 172 Cal. 690, 158 Pac. 215, following *Coronado Beach Co. v. Pillsbury*, supra.

Street Risk—Death by Collapse of Parapet of House.—A workman was employed as a grocer's porter and messenger, a portion of his duties being to deliver groceries. While so engaged, and as he was walking along the pavement of a main thoroughfare in the city, the parapet of a house which he was about to pass collapsed, and he was killed by the falling stones and mortar. It was held that the accident was not one arising out of the employment, the risk of which might have been contemplated by a reasonable man when entering the employment as incidental to it. *Cooper v. Healy* [1916] 2 Ir. R. 33, applying *Collins v. Collins* [1907] 2 Ir. R. 104.

Street Risk—Riding Bicycle in Public Street.—The applicant was employed as a visiting nurse, and at the time of her engagement she was told that she would have to go around on a bicycle to see all the children in a certain area. The number of cases averaged 120 per month, and she had to travel on a bicycle from six to ten miles a day. One morning, when she was making a round of calls, and was going along a muddy road, she attempted to go around a horse and cart standing across the road, when, before she could get to the side of the road again, a small cart passed quickly, followed by two larger carts. When nearing the second cart, her bicycle skidded in a rut, and she was thrown underneath the last cart with the result that she was severely injured. The county court judge made an award in her favor saying: "I was of opinion that the evidence quite clearly established that the applicant was exposed to abnormal risk, out of which the accident arose, inasmuch as she was compelled to be traveling many hours a day on her bicycle over a large area through which the main London and Brighton Road runs, and that the risk was enhanced by her having to be constantly mounting and dismounting after each visit she made." On appeal it was held that there was no evidence from which he could properly come to the conclusion that there was an abnormal risk sufficient to lead to the inference that the accident arose out of the employment, but that, as the accident was due to an ordinary street risk and not to any special risk incidental to the employment, it did not arise out of the employment. *Ince v. Reigate Education Committee* [1916] 2 K. B. (Eng.) 671, 115 L. T. N. S. 402, [1916] W. C. & Ins. Rep. 278, 85 L. J. K. B. 1283, 32 Times L. Rep. 721, 60 Sol. J. 666, [1916] W. N. 313, 9 B. W. C. C. 595.

A solicitor's clerk had to attend a justice's court once a week at a place ten miles distant from his employer's office, on his employer's business, and then to return to the office. He generally went by train, his train fares being office expenses and paid as such by his employer. Sometimes he went on his bicycle with the

knowledge of his master and without his disapproval. One day, on his way back to the office, a motor car collided with his bicycle, and he was killed. It was held that the accident did not arise "out of the employment." *Read v. Baker* [1916] 1 K. B. (Eng.) 927, 114 L. T. N. S. 828, [1916] W. C. & Ins. Rep. 133, 32 Times L. Rep. 382, 60 Sol. 402, [1916] W. N. 145, 9 B. W. C. C. 361.

Street Risk—Slipping on Ice.—While a traveling salesman was walking from a house where he had completed his business back to the electric car line to go to another place to sell some goods, he slipped on the ice and was injured. It was held that as the risk of slipping on the icy pavement was common to the public, it was not a causative danger peculiar to the claimant's employment, and hence that the injury received could not properly have been found to have arisen out of the employment. *Donahue's Case*, 226 Mass. 595, 116 N. E. 226.

Street Risk—Slipping on Orange Peel.—The master of a ship met with an accident while walking down the road, on the way to his ship, by slipping on a piece of orange peel. He fell, breaking his left thigh. The county court judge held that the applicant was ashore on the ship's business, and found that "owing to the fruit and other stalls in the street in question, its crowded condition, and the character of the local population, a passenger along the street on the day of the accident incurred a greater risk of slipping on orange peel than other persons in the greater portion of the metropolis generally." He therefore held that the accident arose out of, as well as in the course of, the employment. It was held, however, on appeal, that the accident was not due to a risk peculiarly incidental to the employment, and that the judge erred in finding that the accident arose out of the employment. *Chapman v. Pearn* [1916] W. C. & Ins. Rep. (Eng.) 47, 32 Times L. Rep. 368, 9 B. W. C. C. 224, following *Leaske v. Wigan* [1909] 2 K. B. 635, and *Hadwin v. Shepherd* [1915] W. C. & Ins. Rep. 503.

Carman—Fall from Ordinary Staircase.—A carman in the employ of certain contractors took a cart daily to Olympia, a depot of the Royal Army Clothing Department, and therefore closed to the public, and after loading up there went to obtain instructions from the transport officer in charge as to where he was to take the goods. The transport office was situated in a gallery, which was reached by a stone staircase with ordinary steps, wide, in good repair, well-lighted and with an easy gradient. Shortly afterwards he was found lying on a landing of the staircase with his skull fractured, of which injury he died. It was held that the accident did not arise out of the employment; that he was exposed

only to an ordinary risk, and not to a special risk incident to his particular employment though the general public was excluded from the use of the staircase. *Harder v. Gains* [1916] W. C. & Ins. Rep. (Eng.) 99, 114 L. T. N. S. 817, 85 L. J. K. B. 866, 9 B. W. C. C. 328.

Cotton Spinner—Replacing Belt.—Two workmen were engaged at a carding machine, which was worked by a belt passing over a pulley on an overhead revolving shaft. The belt having shifted, it became the duty of one of them to replace it on the pulley, while the other fixed the lower end of the belt on the machine. Instead of fetching a ladder provided for this purpose, the workman replacing the belt got up on the embrasure of a window and pulled himself up, resting one foot on a very narrow and steeply sloping edge. While in this position and attempting to replace the belt, he was caught in the shaft and sustained the injuries of which he died. The county court judge held that the accident was not due to a risk incidental to the employment, and therefore that it did not arise out of the employment. On appeal the master of the rolls affirmed the decision. *Russell v. Murray* [1915] W. C. & Ins. Rep. (Eng.) 532, 9 B. W. C. C. 81.

Driver—Delivering Meat on Foot.—A workman was employed by the proprietor of a meat market, his principal duty being that of driving a delivery wagon, acting both as driver and delivery man. Occasionally, he also assisted in the abattoir; and occasionally, when not engaged in his principal duties, he assisted in cutting and preparing meat for retail sale. As he was proceeding from the market on foot, the horse and wagon having been put up for the day, to deliver some meat, he fell on a pail containing broken glass and severed a varicose vein, causing a hemorrhage which resulted in his death the next day. It was held that, inasmuch as his injury was not sustained in connection with or as incidental to any hazardous employment of his employer as defined by the act, the accident, while it occurred in the course of the employment, did not arise out of any hazardous employment. *Newman v. Newman*, 218 N. Y. 325, 113 N. E. 332, affirming order 169 App. Div. 745, 155 N. Y. S. 665.

Driver for Florist—Fixing Window Box of Customer.—A workman was employed by a florist to drive a delivery wagon, a hazardous employment under the statute, and, if necessary, to assist in delivering the goods another man who went on the wagon for the purpose of making deliveries. At one place they delivered some flowers, and then proceeded to adjust a window box in the house. For this purpose the workman got up on a ladder in front of the house, and while working there, lost his balance and fell into the areaway,

and the window box fell on top of him, causing injuries. It was held that there was no connection between the driving of the delivery wagon and his fall from the ladder, which resulted in his death, and hence that the injury received by him did not arise out of nor in the course of the employment. *Glatzl v. Stumpp*, 220 N. Y. 71, 114 N. E. 1053, reversing order 174 App. Div. 901, 159 N. Y. S. 1115.

Employee Fainting—Ammonia Thrown in Face by Mistake for Water.—An employee in a millinery department had some difference with her boss with regard to her work. As a result, she became nervous and hysterical and fainted. Two of her coemployees rushed to get water and ammonia. They returned, one with a glass of water and one with a glass of ammonia. In some way these glasses became mixed, and the ammonia was thrown into the face of the employee causing injuries. It was held that where the injuries so received by her were clearly accidental and arose in the course of her employment, they did not arise out of it. *Saenger v. Locke*, 220 N. Y. 556, 116 N. E. 367, reversing order 175 App. Div. 963, 161 N. Y. S. 1144.

Employee Sent to Dig Post Holes—Discharge of Gun Taken Along.—One of two workmen going in a wagon loaded with tools and implements with which to dig post holes, took a shotgun along for his own pleasure, thinking he would be able to hunt after quitting work. The employer knew the workman was taking the gun and his fellow employee knew that he had placed it on the seat between them and did not object. In a rough place in the road, the gun slipped from its insecure position and was discharged, injuring the fellow servant of the one who was taking it along. It was held that the accident did not arise out of the employment. *Ward v. Industrial Acc. Commission (Cal.)* 164 Pac. 1123.

Fireman—Heat Stroke.—The workman, a man of ordinary physique, was a fireman and trimmer employed on board a steamship and began to complain that he was ill with the heat several days before his death. On the morning of the day before his death he complained of being sick on account of the heat and was given some medicine by the captain, and again at 1 P.M. On the day of his death he again complained at 1 P.M. and was given medicine. He then worked, with intervals for refreshment, until 4:30 P.M. when he collapsed, and was taken up on deck, but died soon after. It was held that while his death occurred in the course of and arose out of his employment, it did not result from accident. *Pyper v. Manchester Liners* [1916] 2 K. B. (Eng.) 691, 115 L. T. N. S. 406, [1916] W. C. & Ins. Rep. 301, 85 L. J. K. B. 1459, 60 Sol. J. 706, 32 Times L. Rep. 723.

Insurance Agent—Riding with Customer at Latter's Invitation.—An insurance agent was invited by a prospective customer to accompany him on an automobile trip to further discuss the policy. In returning the machine "turned turtle" and threw the men out. It was held that the accident was not one arising out of and in the course of the employment of the agent, as the injury was not "occasioned by the nature of the employment" nor was the danger incident to the use of an automobile a "causative danger" "peculiar to the work," but it was a risk common to all parties using one. *Hewitt's Case*, 225 Mass. 1, 113 N. E. 572, L.R.A.1917B 249.

Joiner Using Wood-working Machine.—The applicant, a joiner employed in making gun-carriage wheels, while planing a piece of wood in a planing machine in order to fit it as a block for supporting the fellow of a wheel while the spokes were being riveted in, got his left hand caught in the machine and lost three fingers. The employers had in the works machine men specially provided for working the wood-working machines, a fact well known to the workman, and although there was no express prohibition of user of the machines, no other workmen were permitted to or did in fact work them. It was held that the applicant, in using the machine, was incurring a risk not incidental to his employment and that his accident could not be said to have arisen "out of" his employment. *Anderson v. Armstrong* [1917] W. C. & Ins. Rep. (Eng.) 71, 10 B. W. C. C. 67.

Fall from Scaffold—Epileptic Fit.—A laborer employed in the erection of a building, was working on a scaffold five feet in width and thirty-nine feet above the ground, and the scaffold was guarded, in compliance with the law, by a rope three feet high along its outer edge. While so engaged, he fell to the surface of the scaffold, rolled off the edge, and fell to the ground, death resulting from the injuries caused by the fall. It was practically conceded that the sole cause of his fall was a fit of epilepsy. It was held that the proximate cause of the fall was the epileptic fit, with which his employment had no causal connection, and hence that the accident and resulting injury arose from the fact that he was an epileptic and had the fit, and not out of his employment. It was also held that the question whether such an injury arose "out of" the employment would not and did not depend on the height from which the employee fell or the extent of the injury he received as the result of the fit. *Brooker v. Industrial Acc. Commission (Cal.)* 168 Pac. 126.

Where a plumber and steamfitter was standing on a scaffold six feet in height, and

fell in an epileptic fit, fracturing his skull, the fit being the only cause of his injury, it was held that the accident did not arise "out of" the employment. *Van Gorder v. Packard Motorcar Co.* (Mich.) 162 N. W. 107, L.R.A. 1917E 522.

Railway Laborer—Passing between Cars.—

A railway laborer with his foreman and other workmen had to wait in a station for a time. The men had food with them, but in order to get hot water to prepare their breakfasts, they crossed from the station over the tracks to a mess room maintained by the railway company. At the mess room the man in charge was in the habit of supplying hot water to any servant of the company who applied for it. On one of the lines, the men found a goods train which they supposed to be "dead," as, owing to the convexity of the line, the engine was not visible to them. They proceeded to pass under the couplings of the cars, and while one of them was in the act of doing so the train moved on, and he was caught between the tracks and killed on the spot. The men could have gone round to the mess room from the platform on which they were, by a bridge over the line or by making use of a subway under the line, but these routes were slightly longer. It was held that the workman, while going to make preparations for his breakfast, was engaged on his own business and not his master's, and secondly that by going between the cars as he did he ran an additional and quite unnecessary risk, and that for this reason the accident did not arise out of his employment. *Lancashire, etc. R. Co. v. Highley* [1917] A. C. (Eng.) 352, 116 L. T. N. S. 767, [1917] W. C. & Ins. Rep. 179, 86 L. J. K. B. 715, [1917] W. N. 119, 33 Times L. Rep. 286, 61 Sol. J. 397, *affirming* [1916] W. C. & Ins. Rep. 244, 115 L. T. N. S. 494, 85 L. J. K. B. 1513, 9 B. W. C. C. 496.

*Maid—Darning Skirt.—*A parlor maid was darning a rent in her skirt, and while so engaged the parlor bell rang. She sprang up to attend to it, leaving the needle sticking in her dress, with the result that the needle was driven into her knee, where a portion broke off and remained. It was held that she was not injured by an accident arising out of her employment. *Griffiths v. Robins* [1917] W. C. & Ins. Rep. (Eng.) 44, 10 B. W. C. C. 90.

*Manageress of Café—Crossing Railway Line on Level.—*The applicant was manageress of a café. Her duties were to go every weekday morning to her employer's shop and there get the key of the café, change for the day, and provisions for the café, to stay all day in the café, and return every evening to the shop with the key and the receipts. Between the shop and the café ran a railway line, and the shortest route between them

was by a level crossing over the railway line. There was a somewhat longer route over a bridge, but the applicant habitually used the level crossing. One morning while she was crossing the level crossing with the key, the change for the day, and a paper bag containing provisions, she was struck by a train and severely injured. It was held that although the accident arose "in the course of" the employment, it did not arise "out of" it. *Hadwin v. Shepherd* [1915] W. C. & Ins. Rep. (Eng.) 503, 9 B. W. C. C. 60, *following* *Sheldon v. Needham* [1914] W. C. & Ins. Rep. 274.

*Packer—Injury by Parcel Lift.—*A workman employed as a packer, was required as part of his duty to go from the second floor down to the ground floor and to return to the second floor. In going down, he made use of a temporary parcel lift, intended for goods only. In returning, he had evidently gotten in and started the lift by putting his arm outside, and in so doing his head had been crushed so that he died. It was held that the accident did not arise out of and in the course of the employment, as the risk from which it arose was not reasonably incidental to the employment, but was an added peril due to the workman's conduct. *Palmer v. Harrods* [1916] W. C. & Ins. Rep. (Eng.) 213, 114 L. T. N. S. 869, 85 L. J. K. B. 1659, 32 Times L. Rep. 382, 9 B. W. C. C. 291.

*Special Policeman—Extrahazardous Occupation.—*A special policeman for a city was accidentally killed, as he stooped over his desk, by the discharge of his own revolver, which was fired by falling out of his pocket and striking the edge of a cuspidor. The city maintained a free wagon bridge within its limits, which was an extrahazardous employment. It was held that while the city was engaged in an extrahazardous occupation, the policeman was not engaged in any work in connection with the bridge, and as his occupation was not hazardous, he did not die of an injury arising out of and in the course of such an employment. *Marshall v. Pekin*, 276 Ill. 187, 114 N. E. 497.

*Real Estate Salesman—Burned by Hotel Fire.—*A salesman employed for the purpose of selling real estate on commission, was directed by his employer to go to a town for the purpose of selling real estate there and to remain there indefinitely. The night of his arrival a fire broke out in the hotel at which he was staying and he was burned in escaping from the fire. It was held that the injuries which he had suffered could not be held to have been sustained by an accident arising out of and in the course of his employment, nor to have occurred at a time when he was performing services growing out of and incidental to his employment and acting within the course of his employment as such. For-

man v. Industrial Acc. Commission, 31 Cal. App. 441, 160 Pac. 857.

Seaman—Fall from Gangway.—A sailor, returning to his ship after leave at night in an intoxicated condition, was seen to proceed up the gangway, holding on to the ropes on either side until he reached a point about two-thirds the way up. He then stopped suddenly, let go with his left hand on the side of the gangway towards the ship, and instantly swung round, overbalanced and fell over on the quay, sustaining injuries of which he died the next day. The gangway was a solid step gangway, with stanchions, and two ropes passed on each side through the stanchions. It was well fixed, steady and well lighted. The county court judge held that the accident arose out of and in the course of the employment and was due to two concurrent causes—first, that the seaman was subjected to a special risk by reason of his employment; and secondly, that he was so much under the influence of drink that the peril was to him greatly increased and beyond his power to cope with. On appeal it was held that while the accident occurred in the ambit of the man's employment, as he was returning to the ship and his duty, it did not arise out of the employment, but out of his intoxicated condition and an award was denied. *Nash v. Rangatira* [1914] 3 K. B. (Eng.) 978, 111 L. T. N. S. 704, [1914] W. C. & Ins. Rep. 490, 83 L. J. K. B. 1496, 58 Sol. J. 705, following *Frith v. Louisianian* [1912] 2 K. B. 155, [1912] W. C. Rep. 285.

Sitting in Tent—Struck by Lightning.—A workman was employed by bridge builders and while sitting in the boarding tent provided by his employers awaiting his bed time, came to his death from a stroke of lightning. It was held that while the injury arose in the course of, it did not arise out of, his employment. *Griffith v. Cole* (Ia.) 165 N. W. 577.

Going on Forbidden Structure.—The applicant was employed by lead smelters to fill skips with ore. When a skip was full it was his duty to call for the crane to lift it, and if for any reason the call was not obeyed, he was to endeavor to find the crane man. The crane traveled over a structure spoken of as a "bridge," which connected the two buildings of the employers and crossed the street, although it did not serve any of the purposes of a passenger bridge. One night the applicant, having filled a skip, called for the crane man, but got no reply. In order to find him, the applicant went up onto the "bridge" and walked in the dark nearly the whole length of it, when he fell through a trapdoor to the street below and was injured. There was a notice on the "bridge" near the end of the gangway prohibiting workmen under pain of dismissal from going onto the

"bridge," of which the applicant was ignorant, and he honestly believed that he ought to go on the "bridge" when the crane man did not answer the call. It was obviously dangerous to go on the "bridge" and the crane man should have been hailed from a safe place near the "bridge." It was held that the accident did not arise out of the employment and that the evidence that the man believed that he was entitled to go on the "bridge" could not in any way enlarge the scope of the employment. *Wardle v. Enthoven* [1917] W. C. & Ins. Rep. (Eng.) 18, 116 L. T. N. S. 103, 86 L. J. K. B. 309, 33 Times L. Rep. 123, 61 Sol. J. 170, 10 B. W. C. C. 79.

Taking Poison by Mistake for Medicine.—At the time of a workman's death, the company employing him was installing tanning machinery for another company, and he was engaged in the performance of this work. On the day of his death, he suffered from some form of illness and was told by an employee of the company for whom the machinery was being installed to take some Epsom salts, and was informed where a large quantity of these were stored in the factory. He went to the place indicated, but by mistake took some chloride of barium, which almost immediately caused his death. It was held that, assuming that this occurrence constituted an accident under the act and that it arose in the course of the decedent's employment, it could not be said that it "arose out of his employment." *O'Neil v. Carley Heater Co.* 218 N. Y. 414, 113 N. E. 406, L.R.A.1917A 349, reversing order 173 App. Div. 922, 157 N. Y. S. 1138.

Injury Due to Intervening Act.—While the claimant was engaged in the regular work of his employment, three fingers of his right hand were frozen. On returning to his house, he put turpentine on his hand, bandaged it, and then soaked it thoroughly in turpentine. With the hand in this condition, the claimant then attempted to put coal on the fire at his house, when the bandage caught fire and the hand was badly burned. It was held that the injury causing the burn was a *novus actus interveniens*, and that the claimant's subsequent incapacity was not due to an injury which was received in the course of his employment. *In re Rockwell*, Op. Sol. Dept. of Labor 307.

Injury to Eye.—A workman alleged that his eye had been injured by an accident in his employment. About a month after he had left the employment the eye suddenly became inflamed. He went into a hospital and the eye had to be removed. On a claim for compensation by the workman, the county court judge held that the injury was not caused by accident arising out of and in the course of the employment. *Silk v. Isle of Thanet Ru-*

ral Council [1913] W. C. & Ins. Rep. (Eng.) 647, 6 B. W. C. C. 539.

Unexplained Accident—Cotton Waste Feeder.—The applicant who was employed as a waste feeder with a helper at a machine which had to be fed with cotton waste, met with an accident and had her hand drawn into the machine and severely injured. The evidence left in doubt how precisely the accident had happened, but apparently the helper had gone to fetch a fresh supply of cotton waste, the machine having been stopped meanwhile, and in her absence, the applicant moved round from the back of the machine and started it, the accident then taking place. The county court judge said that he thought that she was doing something dangerous at the time of the accident and was fully aware of this, and held that the accident had not arisen out of the employment. *Rogers v. Garside* [1915] W. C. & Ins. Rep. (Eng.) 535, 9 B. W. C. C. 91 (the case was sent back for a new trial with respect to the question whether the accident was due to the applicant's misconduct within the sphere of her employment or to some act by her outside the sphere of her employment).

V. Scope of Employment.

1. IN GENERAL.

In the reported case it is said to be the rule that an employee is engaged in the course of his employment when the injury occurs within the period of his employment, at a place where he may reasonably be, and while he is fulfilling the duties of his employment or is engaged in doing something incidental to it.

Where, however, a workman meets with an accident while doing something actually outside the sphere of his employment, the accident does not arise out of his employment, and this is so whether he performs that act from a desire for amusement, from feelings of fatigue, or to forward the object of his employer. *Herbert v. Fox* [1916] 1 A. C. (Eng.) 405, Ann. Cas. 1916D 578, 114 L. T. N. S. 426, [1916] W. C. & Ins. Rep. 1, 85 L. J. K. B. 441, 60 Sol. J. 237, 32 Times L. Rep. 261, [1916] W. N. 34, 9 B. W. C. C. 164, *affirming* [1915] 2 K. B. 81, [1915] W. C. & Ins. Rep. 154, 112 L. T. N. S. 833, 8 B. W. C. C. 94.

"If a workman is injured while voluntarily doing something quite outside the scope of the work he is employed to do, it cannot well be said that such injury 'arises out of and in the course of his employment.' . . . In other words, the work which one is employed to do, when construed in a reasonably broad and comprehensive way, does limit and mark out 'his employment,' within the meaning of the statute. Of course, the scope of such particular employment may be enlarged for the

time being by the directions of some superior who has authority; and in the case of an actual emergency it may be held that any reasonable attempt to preserve the employer's property is within the general lines of an employee's duty. But ordinarily the scope of a workman's employment is defined by the things he is employed to do, and the things reasonably and fairly incident thereto. Notice must be taken that a factory of to-day usually includes within the field of its operations many fairly distinct lines of work, from that of the roustabout engaged in the ordinary labor that almost anyone may perform, to that of the expert mechanic, which can be done safely by those only with skill and experience. The difference between these various kinds of work was always recognized by the common law, and it was held to be negligence for the master to require of the servant, without warning and instructing him, the performance of work outside of and more dangerous than that which the latter had contracted to perform. Such classification of work exists in the very nature of things, and as much under the statute as at common law. Its recognition is required by any proper organization of a factory, not only for efficiency, but as well for the purpose of guarding against accident and injury. And if a workman, when there is no emergency, should, of his own volition, see fit to intermeddle with something entirely outside the work for which he is employed, he ought not to be allowed compensation upon the mere plea that he thought his act would be for the benefit of his employer. That plea may be of value under some circumstances, but it cannot authorize an employee to voluntarily take upon himself the performance of work for which he was not employed." *Bischoff v. American Car, etc. Co.* 190 Mich. 229, 157 N. W. 34.

In passing on the right of a workman to recover an award under a workmen's compensation act for injuries received in an endeavor to save the life of another, the court in *Waters v. William J. Taylor Co.* 218 N. Y. 248, 112 N. E. 727, L.R.A.1917A 347, *affirming* order 170 App. Div. 942, 154 N. Y. S. 1149, said: "Independent of any legal obligation which might require the master to attempt to rescue a servant from the dangers of an emergency, there is a moral duty resting on principles of humanity and those principles ought to apply to a contract of employment and broaden its scope so as to permit a servant . . . to rescue a fellow-workman although technically working for a different employer. Even the rather rigid rules of an action at law for negligence bend before such a situation of peril and without penalty to his rights permit a casual bystander to take risks in the attempt to save life which would be prohibited under any other circumstances. . . . And cer-

tainly it would be a narrow and disappointing view if in judging the conduct of a workman under the remedial provisions of the workmen's compensation act we should hold that the legislature intended to deprive him of the benefits of that act because in going to the rescue of another workman under such circumstances as arose here he has stepped somewhat beyond the limits which would fix the scope of his employment under ordinary circumstances. That act is framed on broad principles for the protection of the workman. Relief under it, generally speaking, is not based on the negligence of the employer or limited to the absence of negligence on the part of the employee. It rests on the economic and humanitarian principles that compensation should be given at the expense of the business to the employee or his representatives for earning capacity destroyed by an accident in the course of or connected with his work, and this not only for his own benefit but for the benefit of the state which otherwise might be charged with his support. This purpose ought not to be defeated by placing too narrow a limit upon the nature of the acts which will be regarded as pertaining to his employment."

2. ACT NOT WITHIN SCOPE OF EMPLOYMENT.

In each of the following cases, on the facts as set forth, it was held that the workman was not acting within the scope of his employment at the time of the injury and was therefore not entitled to relief:

Riding on Trucks Contrary to Rules.—A workman was employed on a private railway line as a shunter. At the time of the accident, the shunting engine was being driven tender first, pushing trucks back to the shed and it was his duty to keep a lookout on the journey, walking in front of the first truck for that purpose. Instead, he climbed on a buffer of the truck, holding his shunting pole with both hands. The pole slipped and he fell and was run over by the truck. In riding on the buffer, the workman was violating a printed notice, of which he had knowledge, providing that lookout men should be in front of the wagons, and he admitted that the manager would have dismissed any man whom he had seen riding on the buffers. It was held that the accident did not arise out of the course of employment, but that it was outside the scope of the service altogether, and hence that he was not entitled to compensation. *Herbert v. Fox* [1916] 1 A. C. (Eng.) 405, *Ann. Cas.* 1916D 578, 114 L. T. N. S. 426, [1916] W. C. & Ins. Rep. 1, 85 L. J. K. B. 441, 60 Sol. J. 237, 32 Times L. Rep. 261, [1916] W. N. 34, 9 B. W. C. C. 164, *affirming* [1915] 2 K. B. 81, [1915] W. C. & Ins. Rep. 154, 112 L. T. N. S. 833, 8 B. *Ann. Cas.* 1918B.—61.

W. C. C. 94, *following Barnes v. Nunnery Colliery Co.* [1912] A. C. 44, [1912] W. C. Rep. 90, and *Plumb v. Cobden Flour Mills Co.* [1914] A. C. 62, *Ann. Cas.* 1914B 495, [1914] W. C. & Ins. Rep. 48, and *distinguishing Blair v. Chilton* [1915] W. C. & Ins. Rep. 283.

A workman was taking two truck loads drawn by a horse along a mine level. He mounted on the leading truck load. He had no reins, and the horse could not be controlled except by voice. He could not get off the truck load as the trucks were then going too fast, being on a downward incline, and he did not shout to stop the horse as he feared the impetus of the trucks would drive them on to it. In consequence his back was caught by the roof of the level, he was thrown off the truck load, and his spine was fractured. Riding on trucks was prohibited by the colliery rules and also by a statutory regulation applicable to that mine. The county court judge held that the applicant had not satisfied the onus resting on him of showing that the accident arose "out of" the employment. On appeal, it was held that the accident happened because the workman was doing something outside the sphere of his employment, and hence did not arise out of his employment. *Maydew v. Chatterley-Whitfield Collieries* [1917] W. C. & Ins. Rep. (Eng.) 277.

Riding Motorcycle after Express Prohibition.—A workman was employed by a cycle maker and repairer to look after his shop and do small repairs to cars and bicycles on the premises. He was not engaged as a driver and was forbidden to use machines out of the shop in any way, or to leave the shop. He was insured by his employer as a cycle repairer and not as a driver, of which fact he was aware. He had some physical weakness in the legs. A customer brought a motorcycle to the shop to be repaired. When the machine had been repaired, the workman took it out of the shop by a back way and was riding it back to the customer when he was run into by a motor omnibus and killed. It was held that there was no emergency and that the act was beyond the scope of the employment and that therefore the accident was not one which arose out of and in the course of his employment. *Leggett v. Gibbons* [1916] W. C. & Ins. Rep. (Eng.) 154, 114 L. T. N. S. 830, 85 L. J. K. B. 980, 9 B. W. C. C. 354.

Going on Forbidden Structure.—The applicant was employed by lead smelters to fill ships with ore. When a skip was full it was his duty to call for the crane to lift it, and if for any reason the call was not obeyed, he was to endeavor to find the crane man. The crane traveled over a structure spoken of as a "bridge," which connected the two buildings of the employers and crossed the street, al-

though it did not serve any of the purposes of a passenger bridge. One night the applicant, having filled a skip, called for the crane man but got no reply. In order to find him, the applicant went up onto the "bridge" and walked in the dark nearly the whole length of it, when he fell through a trapdoor to the street below and was injured. There was a notice on the "bridge" near the end of the gangway prohibiting workmen under pain of dismissal from going onto the "bridge," of which the applicant was ignorant, and he honestly believed that he ought to go on the "bridge" when the crane man did not answer the call. It was obviously dangerous to go on the "bridge," and the crane man should have been hailed from a safe place near the "bridge." It was held that the accident did not arise out of the employment, and that the honest belief by the workman that he was entitled to go on the "bridge" could not in any way enlarge the scope of the employment or make it permissible for him to say, when an accident had arisen from his going to a place where he had no duty to go, that in that case the accident arose out of the employment. *Wardle v. Enthoven* [1917] W. C. & Ins. Rep. (Eng.) 18, 116 L. T. N. S. 103, 86 L. J. K. B. 309, 33 Times L. Rep. 123, 61 Sol. J. 170, 10 B. W. C. C. 79.

Buffer—Putting Hand in Exhaust System.—In the reported case it appears that a workman was employed on a buffing machine, his sole duty being to polish small metal handles. Near the machine, but not attached to it, was a small box into which the dust fell and from this receptacle a pipe curved to connect with a larger exhaust pipe, which in turn, connected with a large sheet metal case inclosing a fan. The pipe connecting the boxlike receptacle could be detached from the exhaust system if by chance any piece of metal that was being polished should be accidentally dropped into it. On top of the larger pipe there was located an opening, covered by a tight cover leading to the case in which the fan was located. The exhaust system was entirely separate from the buffing machine and was in charge of a special, responsible man for the purpose of cleaning and oiling it. The workman was instructed that his sole duty was to take the metal pieces and hold them against the buffing wheel, but that he should not lift the cover and reach into the exhaust pipe. On the day he was injured, he testified that he accidentally dropped one of the metal pieces he was polishing into the receptacle immediately below the buffer wheel; that he did not notify anyone, but went to the opening in the pipe, took off the cover, and reached his hand down into the exhaust pipe and around inside, and was injured by the fan. It is held that the workman was not acting within the scope of his employment at the time he was injured.

Joiner—Using Wood-working Machine.—The applicant, a joiner employed in making gun-carriage wheels, while planing a piece of wood in a planing machine in order to fit it as a block for supporting the felloe of a wheel while the spokes were being riveted in, got his left hand caught in the machine and lost three fingers. The employers had in the works machine men specially provided for working the wood-working machines, a fact well known to the workmen, and, although there was no express prohibition of user of the machines, no other workmen were permitted to or did in fact work them. It was held that the applicant, in using the machine, was not in the scope of his employment and hence that the accident did not arise "out of" it. *Anderson v. Armstrong* [1917] W. C. & Ins. Rep. (Eng.) 71, 10 B. W. C. C. 67.

Molder—Going on Electrical Crane.—A workman employed as a molder used an electrical crane in his work, but was instructed never to go on the crane. He understood from the foreman that he was to report to the machinist or to the electrician any defect in the operation of the crane and, if they could not be found, that he was to sit down or go home. On the day of the injury, the claimant reported to the machinist the fact that the crane did not work properly, and the latter got a ladder and climbed up on the crane to repair it. He was followed by the claimant, not apparently for the purpose of reporting the condition of the crane, but to suggest to the machinist what the latter should do, well knowing the danger to which he was subjecting himself. The machinery was set in motion, and in going down the ladder the claimant's hand was caught in certain gear wheels and badly injured. It was held that the injury did not arise out of and in the course of the claimant's employment, but that he had gone outside the limits of his employment. *Bischoff v. American Car, etc. Co.* 190 Mich. 229, 157 N. W. 34.

Leaving Work to Cash Pay Check.—A foreman carpenter was at work in a roundhouse surrounded with tracks, which were used as a shunting yard in making up trains. He was paid there about eight o'clock in the morning. At half-past eleven that morning, he left his work to cross the tracks for the purpose of getting his pay check cashed at a bank some distance away and returning to his work. There was a space between two cars in a train being made up of from two to four feet, and the workman started to pass between these two cars, when an engine at one end of the line of cars brought the two together. He was caught between the couplers and killed. There was a special prohibition against the crossing of these tracks by the men, and particularly that the men should not leave their work to cash their pay checks. It was held that the accident did

not happen by reason of or in the course of the employment. *Lavery v. Grand Trunk R. Co.* 48 Quebec Super. Ct. 278, 24 Dominion L. Rep. 522.

Boy Employed on Punching Machine—Operating Other Machine.—A shop boy was employed to turn a lever on a punching machine and for other minor services. A few feet from the punching machine stood a large rolling machine with which he had nothing whatever to do. On the day of the accident, while the punching machine was not running, the boy stepped up on the rolling machine to turn a handle or lever, and in attempting to do so his left foot slipped between the rollers and he was injured. It was held that his injury was due to an act without the scope of his employment. In re Morales, Op. Sol. Dept. of Labor 295.

Assisting Fellow Servant in Work for Master.—The applicant was employed by a mathematical instrument maker to work a hand press for cutting squares of metal. Being short of material on which to work, she went down to the ground floor of the factory to find the foreman in order to get instructions from him. While waiting for him, she went to assist another girl who was sitting there working on piece work a power press drawing pins. While so doing, her left hand was caught in the press and parts of four fingers were taken off. There was no special prohibition against workers assisting one another. It was held that the girl took an added peril clearly not within the scope of her employment and that the accident therefore did not arise out of her employment. *Brinckman v. Harris* [1916] W. C. & Ins. Rep. (Eng.) 45, 9 B. W. C. C. 200.

Answering Supposed Call of Fellow Servant.—A girl who was employed at a machine for making lozenges thought she heard another girl who worked on a second machine on the same bench call her. She left the machine at which she was working and walked towards the other machine, and in so doing got her hand caught in the cogs of that machine. It was held that the accident did not arise out of the employment. *Chinnick v. Potter* [1916] W. C. & Ins. Rep. (Eng.) 55, 9 B. W. C. C. 320.

Seaman Going Ashore to Bring Comrade Back.—A seaman on a ship hauled up on a slip for the purpose of being overhauled went ashore in performance of a private arrangement with another seaman to bring the latter back, his time being his own outside of his regular hours. While returning with his fellow employee in a boat borrowed for that purpose, the boat was swamped and the seaman was drowned, the place of his death being about five-eighths of a mile from his ship. It was held that his dependent was

not entitled to recover, because the accident occurred while the seaman was outside, and before he had returned to the scope, of his employment, and therefore did not arise out of his employment. *M'Lean v. Macbrayne* [1916] W. C. & Ins. Rep. (Eng.) 49, [1916] Sc. Ct. Sess. 338, [1916] 1 Scott. L. T. 76

Going to Assistance of Fellow Workman.—A shovel engineer and a negro brakeman became involved in an altercation and the negro attacked the former with an iron bar and finally struck him on the head. The claimant, seeing the engineer's life in danger, got down from the shovel to defend him, and when he struck the negro in the teeth with his fist, the back of his hand was badly bruised and lacerated and shortly afterward became infected. It was held that the claimant went outside the scope of his employment in taking part in the fight, and compensation was denied. In re Armistead, Op. Sol. Dept. of Labor 305.

Forestry Service—Cleaning Pistol of Fellow Employee.—The claimant was employed as a laborer or fire patrolman in the forest service. While he was engaged in cleaning the pistol of a fellow employee, it was unexpectedly discharged, the bullet inflicting a serious injury to his leg. It was held that the injury did not arise in the course of the claimant's employment. In re Brown, Op. Sol. Dept. of Labor 328.

Workman Off Duty Assisting Another.—A workman, who was off duty at that hour, went up on the bin to talk with the man working there about going home the following Sunday. As he was in the act of leaving, a box of gravel was raised for the purpose of being emptied by the man to whom he had been talking. Instead of passing on and allowing the man on duty to empty the box, the workman took hold of it for that purpose, and in so doing fell overboard and was drowned. It was held that at the time of his death he was not engaged in the course of his employment. In re Simpson, Op. Sol. Dept. of Labor 316, 319.

Watchman on Engine—Taking Charge of Steam Shovel.—A night watchman of a locomotive operated by contractors, whose duty it was to stay on the engine nights, was killed while on a steam shovel of which he had taken temporary charge at the request of the watchman employed to stay on it. It was held that his death was not due to an injury arising out of or in the course of his employment. *Sherer v. Industrial Acc. Commission* (Cal.) 166 Pac. 318.

Laborer Employed to Shovel Gravel—Driving Team.—The applicant was employed as a laborer to shovel gravel, but while driving a team hauling a gravel wagon, the team became frightened and the applicant was thrown from the wagon and injured. His

testimony was that he was not assigned specifically to any particular kind of work, but that he understood that he was to shovel gravel. He also stated that it was customary for teamsters and shovelers to exchange places, but it did not appear that the employer had any knowledge or notice of any such custom. It was held that in driving a team, the applicant was acting outside the scope of his employment, and that the accident did not arise "out of and in the course of his employment." *Modoc County v. Industrial Acc. Commission*, 32 Cal. App. 548, 163 Pac. 685.

Assault by Fellow Workman.—While a workman was carrying some stock to the racks where it was required to be placed, he passed a fellow employee, who was putting some blind rails on a box, one of which accidentally struck the workman as he passed. He became angry over this accident, and kicked the fellow employee, who in turn shoved him and he fell over against a box, sustaining injuries and aggravating a latent disease which caused his death. It was held that the injury did not arise "out of" the employment, but was outside the scope and sphere of it. *Griffin v. Roberson*, 176 App. Div. 6, 162 N. Y. S. 313.

Assisting Fire Warden to Put Out Fire.—While the claimant, with a gang of men, was engaged in constructing a railroad, he, with several of his collaborators, was ordered by the fire warden to go with him and assist in extinguishing a fire. He complied with the order and while engaged in that work, was struck by a falling tree and the sight of his left eye was destroyed. He was directed at his work by the fire warden and his regular wages were paid him by his employer, who was reimbursed by payments from the county and state. It was held that his injury did not arise out of his employment or in the course of it. *Kennelly v. Stearns Salt, etc.* Co. 190 Mich. 628, 157 N. W. 378.

Boarding Moving Train.—The chief clerk of the freight auditing department of a railroad company was ordered to proceed to a station for the purpose of checking up the accounts of the local agent at that station. Just as the train on which he was riding left an intermediate station, it ran over and injured a man, and when it stopped, on account of that accident, the clerk alighted from the train. On signal being given by the conductor for the train to proceed, the clerk, after it had started, attempted to board it, when in some manner his hold slipped and he fell under the wheels and was almost instantly killed. It was held that his act in alighting from the train was a departure from the course of his employment, and that therefore he was not performing services growing out of and in the course of his employment, so as to en-

title his dependents to compensation for his death. *Northwestern Pac. R. Co. v. Industrial Acc. Commission*, 174 Cal. 297, 163 Pac. 1000.

Explosion—Miner Using Detonator.—The rules of a pit provided that explosives capable of being fired only by detonators should be used; that the detonators should be securely kept and issued only to shot-firers; and that every charge should be fired by a competent person appointed in writing to perform that duty. After the shot-firer had left the pit, a miner who had a detonator in his possession, which, however, he had not received from the shot-firer, started to fire a shot. In the course of the operation an explosion occurred whereby he was killed. It was held that the accident happened while the miner was taking on himself a duty which he was neither engaged nor entitled to perform, and that it did not arise out of and in the course of the employment. *Kerr v. Baird* [1911] Sc. Ct. Sess. 701, 48 Scott. L. Rep. 646, 4 B. W. C. C. 397.

Conductor on Train Run by Employees for Their Own Pleasure.—The claimant volunteered his services as conductor for the purpose of running a train known as the "opera special," which was run by and for the employees who wished to attend a theatrical performance. The use of the equipment was granted to the employees by the officials of the commission and of the railroad company. The conductor and engineer volunteered their services and the train crew was paid by a collection taken up among the party. On the trip the claimant was injured. It was held that the injury was not received in the course of employment. *In re Fitzpatrick*, Op. Sol. Dept. of Labor 306.

Craneman Living on Dredge—Falling Overboard from Dock while Intoxicated.—A crane man employed and living on a dredge went ashore one evening on his own business. He became intoxicated and fell from the dock, where a boat from the dredge was on its way to meet him, into the water and was drowned. It was held that the injury did not arise out of and in the course of the employment. *Berg v. Great Lakes Dredge, etc. Co.* 173 App. Div. 82, 158 N. Y. S. 718.

Diver's Assistant—Going Ashore During Hours of Duty.—It was a workman's duty to attend one of the divers on a derrick, his hours of duty being from four o'clock in the afternoon until midnight. One evening he went ashore about eight o'clock for supper and returned in an intoxicated condition. His diver refused to allow him to assist, and the captain of the derrick locked him up in the forecandle. Shortly after eleven o'clock he came out of the forecandle and after insisting on attending the diver, but not being allowed to do so, went at

11:30 with one of the other employees who was going ashore in the customary boat for some purpose in connection with the work, and who conveyed him to the trestle and placed him thereon. The next morning his body was found in the trench under the trestle, he evidently having fallen therefrom and been drowned. It was held that in no just or reasonable sense could it be said that this accident arose out of and in the course of the employment. *Matter of Pope*, 177 App. Div. 60, 183 N. Y. S. 655.

Leaving Employment for Relief.—A workman employed by a gas company, when repairing a gas pipe in a private house, asked leave of his chargeman to go to a place of convenience. Leave having been given, the workman went to the house of his father-in-law, three streets (about 214 yards) away from the house in which he was working. On entering the house, he fell into a hole in the floor and was injured. It was held that the accident did not arise out of and in the course of his employment. *Cogdon v. Sunderland Gas Co.* 1 B. W. C. C. (Eng.) 156.

Mate Taken Out of Employment by Captain's Order.—A mate of a ship was ordered by his captain to go to his room for being drunk, but instead of going to his room, he went in another direction to speak to some one on a personal matter, and fell down a hatchway, dying from the effects of the fall. It was held that he had been taken out of his employment by the order of the captain and that the accident did not arise "out of" the employment. *Horsfall v. Steamship Jura* [1913] W. C. & Ins. Rep. (Eng.) 183, 6 B. W. C. C. 213.

Messenger Boy—Taking Ride on Passing Truck.—A messenger boy, on an unusually busy day, in his haste to return to the office to continue his duties from an errand on which he had been sent, climbed on an automobile truck which was proceeding in that direction. While so riding, he slipped on a roller on the floor of the truck, became entangled in the gears thereof, and was severely injured. It was held that, while the accident happened in the course of his employment, in obtaining a ride on the truck, he had departed from the scope or ambit of his employment, and hence that the accident did not arise out of his employment. *State v. District Ct.* (Minn.) 164 N. W. 1012.

Packer—Injury by Parcel Lift.—A workman, employed as a packer, was required, as part of his duty, to go from the second floor down to the ground floor and to return to the second floor. In going down, he made use of a temporary parcel lift, intended for goods only. In returning, he apparently got in and started the lift by putting his arm outside, and in so doing his head was crushed so that he died. It was held that the accident did not arise out of or in the course of his em-

ployment, as the use of the lift was an added risk or peril without the scope of his employment. *Palmer v. Harrods* [1916] W. C. & Ins. Rep. (Eng.) 213, 114 L. T. N. S. 869, 85 L. J. K. B. 1659, 32 Times L. Rep. 382, 9 B. W. C. C. 291.

Railway Laborer—Passing between Cars.—A railway laborer, with his foreman and other workmen, had to wait in a station for a time. The men had food with them, but in order to get hot water to prepare their breakfast, they crossed from the station over the tracks to a mess room maintained by the railway company. At the mess room the man in charge was in the habit of supplying hot water to any servant of the company who applied for it. On one of the lines, the men found a goods train which they supposed to be "dead," as, owing to the convexity of the line, the engine was not visible to them. They proceeded to pass under the couplings of the cars, and one of them was in the act of doing so when the train moved on, and he was caught between the trucks and killed on the spot. The men could have gone around to the mess room from the platform on which they were, by a bridge over the line or by making use of a subway under the line, but these routes were a little longer. It was held first, that the workman, while going to make preparations for his breakfast, was engaged in his own business and not his master's and secondly, that by going between the cars as he did, he ran an additional and quite unnecessary risk, and that for this reason the accident did not arise out of his employment. *Lancashire, etc. R. Co. v. Highley* [1917] A. C. (Eng.) 352, 116 L. T. N. S. 767, [1917] W. C. & Ins. Rep. 179, 86 L. J. K. B. 715, [1917] W. N. 119, 33 Times L. Rep. 286, 61 Sol. J. 397, *reversing* [1916] W. C. & Ins. Rep. 244, 115 L. T. N. S. 494.

Real Estate Salesman—Burned by Hotel Fire.—A salesman employed for the purpose of selling real estate on commission, was directed by his employer to go to a town for the purpose of selling real estate there and to remain there indefinitely. The night of his arrival a fire broke out in the hotel at which he was staying and he was burned in escaping from the fire. It was held that the injuries which he had suffered could not be held to have been sustained by an accident arising out of and in the course of his employment, nor to have occurred at a time when the employee was performing services growing out of and incidental to his employment, and acting within the course of his employment as such. *Forman v. Industrial Acc. Commission*, 31 Cal. App. 441, 160 Pac. 857.

Walking on Railroad Track.—It was found that a workman was not in the usual passageway of eight feet in width between the railroad tracks and his employer's trestle, but was on the railroad track when killed.

On certiorari, the court held that while it was not prepared to say that there was no proof of an accident, in the absence of evidence that he was forced on the track, if an accident occurred, it did not arise out of the employment. *Siemientkowski v. Berwind White Coal Min. Co.* (N. J.) 92 Atl. 909.

Watchman—Falling While Asleep in Chair.—A night watchman was employed "to watch the premises and to go around the building for that purpose." The findings showed that he abandoned his duty, and after obtaining a chair sat therein on the second floor of the building at an open doorway, and that while sitting there he "dozed off" and fell down a chute and received the injuries from which he died. It was held that the injury did not arise out of and in the course of his employment. *Gifford v. Patterson*, 222 N. Y. 4, 117 N. E. 946, reversing order 179 App. Div. 420, 165 N. Y. S. 1043.

Workman Off Duty Purchasing Money Order—Injured on Employer's Premises.—A workman was employed to tend the generators in an electric power plant. While off duty he went to a hotel on a portion of the employer's premises, run by the defendant through another employee. While the workman was purchasing a money order from the hotel employee, a gasoline tank the latter was soldering exploded and the workman was injured. It was held that the workman was attending to his own private affairs and therefore that his act was not service growing out of and incidental to his employment, though at the time it was performed he was subject to a call for duty, and though done on the employer's premises under the sanction of a custom. *Brienen v. Wisconsin Public Service Co.* (Wis.) 163 N. W. 182.

Deviating from Usual Route in Returning to Quarters.—A workman was employed as a foreman in the reclamation service, performing excavating work, and as was usual he had his living quarters furnished by the government in the immediate vicinity of the work. While off duty he had left his quarters to go to a store near by to make some necessary purchases. On his return to his quarters, his attention was attracted to an electric wood saw which was in operation just off the main road of travel, and he, with several other men, stopped to watch the operations. While so doing, a stick of wood was thrown by the saw, striking him in the face and inflicting injuries resulting in his death. It was held that his death did not arise in the course of the employment. *In re Gilson*, Op. Sol. Dept. of Labor 326.

3. ACT WITHIN SCOPE OF EMPLOYMENT.

In each of the following cases, on the facts as set forth, it was held that the workman

was acting within the scope of his employment at the time of the injury and was therefore entitled to relief:

Foreman—Going to Stop Fight between Men.—The claimant was in charge of a gang of men, and it was his duty to enforce discipline and preserve order in and around the work. Two of the men engaged in a fight, and as he started toward them to stop the fight, he ran into a pole in the hands of other laborers engaged in unloading a boat and was thereby injured. It was held that the injury was received in the course of his employment. *In re Wharton*, Op. Sol. Dept. of Labor, 315.

Mill Hand—Bursting of Beer Bottle.—The applicant, who worked at a mill in a room with an average temperature of about ninety degrees, was in the act of getting hold of a bottle of herb beer to quench his thirst, when the bottle burst, injuring him. It was shown that it was a recognized custom throughout Lancashire to allow mill employees to bring to their work liquid refreshment, which they took from time to time to quench their thirst while following their employment. It was held that the accident arose out of the man's employment. *Heywood v. Broadstone Spinning Mill*, 128 L. T. J. (Eng.) 134.

Carpenter's Laborer—Fall through Open Hatch.—A carpenter's laborer went on board a ship with some other men to do some work in No. 5 hold. They removed a portion of No. 5 hatch on the upper deck to enable them to get down to the shelter deck, where they removed part of the lower hatch going down to the 'tween decks. After a time the laborer was found to be missing and it was subsequently discovered that he had fallen into the hold through No. 6 hatchway in the shelter deck. No. 6 hatchway was some forty or fifty feet further aft than No. 5, and there was no work to be done at it. The only suggestion with regard to his presence at No. 6 hatchway was that he had gone there to relieve himself, and that, it being pitch dark on the shelter deck except just under No. 5 hatchway, he had fallen down No. 6 hatchway which happened to be open. The w. c.'s on the ship were all closed at the time. The county court judge drew the inference that the laborer had gone towards No. 6 hatch to relieve himself and held that the man had not gone so far that he had traveled outside the scope of his employment, and hence that the accident arose out of and in the course of the employment. The finding was affirmed on appeal. *Armstrong v. Gregson* [1916] W. C. & Ins. Rep. (Eng.) 226, 9 B. W. C. C. 468.

Express Truck Driver—Delivering Package.—The driver of an express company's motor truck was struck by an automobile while crossing a street on his way from his truck to deliver an express package, and received injuries which caused his death. It was held

that the injury arose out of his employment. *Miller v. Taylor*, 173 App. Div. 865, 159 N. Y. S. 999.

Fireman—Extinguishing Fire in Foreign Territory.—The claimant was employed as a fireman in the fire department of the civil administration under the Isthmian canal commission. While assisting as pipeman in an effort to extinguish a fire which had broken out in a building situated in Colon, he was injured. The city of Colon was foreign territory. It was held that the accident arose out of and in the course of his employment. In *re Nellis*, Op. Sol. Dept. of Labor 286.

Hernia—Lifting Barrel.—A shipping clerk suffering from hernia, in pursuing his regular duties, sustained a personal injury consisting of a strain occasioned by lifting or attempting to lift a barrel. His duties were confined to clerical and inspecting work, and his only duty in regard to the barrel was to weigh it. What he was engaged in doing was for his master's benefit and to push on his own work. It was held that though he departed temporarily from his usual avocation to perform some act necessary to be done by some one for his master, he did not cease to be acting in the course of his employment; and so it was held that he suffered a personal injury arising in the course of and out of the employment. *Hartz v. Hartford Faience Co.* 90 Conn. 539, 97 Atl. 1020.

Steam Fitter—Moving Steel Beams.—A steam fitter's helper, while attending to a boiler, attempted to move two steel "I" beams resting about three feet from the floor by pushing against the beams with his body. The ends of these beams projected over and obstructed the passageway on which he was required to walk to reach the steam pressure gauges of the boiler, and he might have called other steam fitters near to move the beams far enough to allow him to pass. He did this once or twice when he felt sick and faint. He was assisted home and was sick, nauseated and weak, with increasing soreness and pain across the stomach. The third night he was nauseated and vomited blood and soon afterwards had a slight paralytic stroke. It was held that he was injured by an accident while he was acting within the scope of his employment. *Manning v. Pomerene* (Neb.) 162 N. W. 492.

Power Press Operator—Putting Hand in Press While in Operation.—The claimant was employed by a manufacturer of metal oiling cups as the operator of one of its power presses, into which automatically a sheet of steel was fed and the cup shells punched therefrom released. It was a rule of the company, as to which the claimant had been explicitly instructed both by his foreman and superintendent, never

to put his hand within the press while it was in operation. Noticing that one or more small pieces of steel had caught in the die of the press, the claimant attempted to remove them with his left hand, with the result that it was caught by the punch and badly injured. It was held that the prohibition was not one which limited the sphere of the claimant's employment, but simply dealt with his conduct within the sphere of his employment in operating the press, and hence that the accident was one arising out of the claimant's employment. *Macechko v. Bowen Mfg. Co.* 166 N. Y. S. 822.

Subway Engineer—Taking Shower Bath.—The claimant was supervising the construction of a part of a subway, and was directed to survey all the floors under the railroad tracks, underneath the decking, and while so engaged he became very dirty. It was his duty after leaving the subway to make up estimates at the engineer's field office. In most such offices a shower bath was provided for the men similarly engaged; no such regular bath was provided at this one, and two or three days before the accident the claimant and his assistant engineer had improvised a shower bath at the office. While standing on a marble slab, his foot slipped and he was injured. It was held that his injuries arose out of and in the course of his employment. *Sexton v. Public Service Commission*, 167 N. Y. S. 493.

Street Risk—Thrown out of Cart.—The applicant, who was employed as a builder's assistant and mason, fell from a cart while taking a window frame to a customer's house and was injured. The window frame was of considerable size and weighed about three stones. As the employer had no cart at the time in which to send his frame, he told the workman to manage it the best way he could. The man started with it on his shoulders, when, meeting a pony and cart accompanying a traction engine, he arranged with the lad in charge for a lift. He then put the frame into the cart and was getting in himself, when the pony dashed off, after the traction engine had started. It was held that the accident was not due to an act of the workman so far outside the scope of his employment that it could be said that the accident did not arise out of the employment. *Mullinger v. Bidewell* [1917] W. C. & Ins. Rep. (Eng.) 51, 10 B. W. C. C. 104.

Fall When Leaving Shop.—While leaving the shipfitter's shed after quitting time, the claimant tripped, and in attempting to keep from falling took hold of a sharp plate edge, cutting the palm of his hand, according to the report of his superior officer. The claimant himself stated that while coming into the shop he stumbled and injured himself as described above. It was held that the fact that

the claimant was not actually engaged in the work for which he was employed would not take him without the scope of his employment. In *re Fahey*, Op. Sol. Dept. of Labor 283.

Seaman—Going Ashore on Ship's Business.

—The crew of a vessel were by arrangement allowed to sell old ropes, which were the property of the owners, and to keep the proceeds for themselves, save that out of the proceeds of sale they had first to make good any broken crockery. The ship came into harbor to coal, but having to wait until the tide rose, the crew had nothing to do for an hour or so. On a previous occasion, some old ropes had been sold under the foregoing arrangement, and a seaman went to get the purchase money. The only way to get ashore was by going on top of the wheelhouse, leaning or kneeling down to get on the plank extending from the wheelhouse top to the quay, and crossing by the plank. In kneeling or leaning down to get onto the plank, the seaman slipped, and fell on the boiler casing and thence onto the deck, and died of his injuries. The master of the rolls held that the evidence showed that the accident arose "out of" the employment, because it was proved that the seaman was really going ashore to perform a duty to his employers—that was to say, to get money due in respect to his employers' goods, or on which they had a lien. With respect to the claim that, even if the seaman was going ashore on his own business, the accident still arose "out of" the employment, it was held that it was sufficient to say that the accident occurred while he was on the ship and before he had crossed the plank. *Duck v. North Sea Steam Trawling Co.* [1915] W. C. & Ins. Rep. (Eng.) 529, 9 B. W. C. C. 83.

Going to Assistance of Employee of Another Company.—A workman was in the employ of a company which had a contract for performing part of the work necessary in the construction of a building. While one of the employees of another contracting company, engaged in performing other work in its construction necessitating an excavation, was at work in the excavation, the bank thereof caved in and he was caught. This occurred about 20 feet from where the workman was at work, and he went to the assistance of the endangered man. While he was endeavoring to release the latter another cave-in occurred by which the workman received injuries of which he subsequently died. It was held that his death was due to an accident "arising out of and in the course of" his employment. *Waters v. William J. Taylor Co.* 218 N. Y. 248, 112 N. E. 727, L.R.A. 1917A 347, *affirming* order 170 App. Div. 942, 154 N. Y. S. 1149.

Crossing Tracks.—A workman was employed as a stone derrickman, part of his

work consisting of assisting in unloading stone from cars on switch tracks onto wagons. On the day prior to the accident, he and the other employees left, on quitting work, in a partially unloaded car, some tools with which they were unloading the stone. On arriving at work the next morning, the workman discovered that the car had been moved north during the night and was informed that it would be moved back the next morning. He then went to work unloading another car of stone, but he and the other workmen confined their work to the smaller pieces which did not require tools in handling. After he had been working a short time the yardmaster came to where he and the other workmen were unloading the car, and said: "Here comes your car in that train now. It's running slow, and you can jump over the fence and get on the car and throw off your tools." The freight train was moving slowly south on the fourth track west of the fence. The workman immediately jumped from the car he was on, climbed over the fence and was struck and killed by an express train running north on the track next to the fence. A city ordinance declared it unlawful for any person, other than employees of railroad companies acting in the discharge of their duties, to enter on or to walk along or across any track of any railroad elevated in accordance with the city ordinances. It was held that the workman was killed by an accident arising out of his employment. *Alexander v. Industrial Board*, 281 Ill. 201, 117 N. E. 1040.

Volunteer Work.—An employee working on the door of a warehouse received an injury to his eye. The work was in the nature of an improvement or alteration which was done for the purpose of expediting some work within the scope of the employee's duties, but was not work which he had been ordered to do and was performed outside the building in which he usually worked. It was held that the accident arose "out of and in the course of employment." *Holland v. Rumely Products Co.* 35 West L. Rep. 454, 31 Dominion L. Rep. 426.

Miner Returning to Work after Hours — Shot by Guard.—The evidence showed that the established mining practice was for one of the departing shift which had drilled the blasting holes and fired the shots to investigate where any apparently failed to explode, and, if possible, remedy the dangerous situation left by the unexploded charges for the new shift. The claimant went to his tent and twenty minutes later revisited the scene of the explosions and found that all of the shots had been fired, his fellow workmen having meanwhile gone on home. In returning to his tent, while carrying his miner's light, he was shot by a mine guard. It was held that his injuries thus resulting grew

out of and occurred in the course of his employment. *Atolia Min. Co. v. Industrial Acc. Commission* (Cal.) 167 Pac. 148.

Returning to Machine to Remedy Obstruction.—The applicant for compensation was employed in a department where material was being prepared for rope-making by a series of machines. She had worked at first as a preparer, and then at an intermediate drawing frame, next to which was a finishing frame. On the morning of the accident, she was working an intermediate drawing frame along with another girl, when the water power of the factory temporarily failed, stopping the machines. When work was resumed, the applicant and the other girl were replaced by two girls, by instructions of the foreman, but received no orders what they themselves were to do. Without instructions, they went to the adjoining finishing machine, and after sorting some "ends" which were running away, the applicant left to look for the foreman for definite instructions. As she passed the end of the intermediate frame at which she had been previously working, she noticed some manilla threads twining round one of the rollers and threatening to disturb the even running of the machine; and she attempted to release them while the machine was running, with the result that her right hand was caught between the rollers and she received injuries necessitating the amputation of her arm. The same or similar obstructions in the working of the machines were not uncommon and the girls employed at the machines were in the habit of so removing them; nor was there any prohibition against the practice. It was held that the applicant was injured by an accident arising out of and in the course of her employment. *Beattie v. Tough* [1917] W. C. & Ins. Rep. 93, [1917] 1 Scott. L. T. 27.

VI. Disobedience or Negligence of Workman.

1. IN GENERAL.

In the absence of serious and wilful misconduct, the mere disobedience of orders, which limit the method of work, but do not limit the sphere of the employment, does not preclude a recovery by the injured workman. See the cases cited *infra* in this subdivision.

A rule of an employer, however, has in some cases the function of fixing the limits of the workmen's duty, or as it has been expressed, delimiting the sphere of his employment. Thus, if an employer employs a workman to do a particular kind of work in an indicated place, and prohibits him from doing a different kind of work in quite another place, the doing of the prohibited work in

the prohibited place is not merely misconduct. The prohibition places the work in the doing of which the accident occurs outside the sphere of the workman's employment altogether, and the accident cannot therefore be held to arise out of his employment, *Herbert v. Fox* [1916] A. C. (Eng.) 405, Ann. Cas. 1916D 578, 114 L. T. N. S. 426, [1916] W. C. & Ins. Rep. 1, 85 L. J. K. B. 441, 60 Sol. J. 237, 32 Times L. Rep. 261, [1916] W. N. 34, 9 B. W. C. C. 164, *affirming* [1915] 2 K. B. 81, [1915] W. C. & Ins. Rep. 154, 112 L. T. N. S. 833, 8 B. W. C. C. 94.

Where it appears that the accident occurred while the servant was doing an act which he was expressly forbidden, by his master, to do, no recovery can be had. *Smith v. Corson*, 87 N. J. L. 118, 93 Atl. 112.

The question what constitutes the "serious and wilful misconduct" which debars an injured employee from recovery under a workman's compensation act, is discussed in the note to the case of *In re Nickerson*, Ann. Cas. 1916A 791. The voluntary intoxication of an employee as precluding a recovery under a workman's compensation act for an injury of which the intoxication is the proximate cause, is treated in the notes to *Nekoosa-Edward Paper Co. v. Industrial Commission*, Ann. Cas. 1915B 995, and *Williams v. Llandudno Quaching, etc. Co.* Ann. Cas. 1918B 682.

2. DISOBEDIENCE OR NEGLIGENCE PRECLUDING RECOVERY.

In each of the following cases, on the facts as set forth, it was held that the disobedience or negligence of the workman was a bar to recovery:

Riding on Truck—Practice Forbidden by Rules and Statute.—A workman was taking two truck loads drawn by a horse along a mine level. He mounted on the leading truck load. He had no reins, and the horse could not be controlled except by voice. He could not get off the truck load, as the trucks were then going too fast, being on a downward incline, and he did not shout to stop the horse as he feared the impetus of the trucks would drive them on to it. In consequence his back was caught by the roof of the level, he was thrown off the truck load, and his spine was fractured. Riding on trucks was prohibited by the colliery rules and also by a statutory regulation applicable to that mine. The county court judge held that the applicant had not satisfied the onus resting on him of showing that the accident arose "out of" the employment. On appeal, it was held that the accident happened because the workman was doing something outside the sphere of his employment, as the effect of the rule was to exclude from the sphere of his employ-

ment the doing of that which was prohibited by the rule, and hence did not arise out of his employment. *Maydew v. Chatterley-Whitfield Collieries* [1917] W. C. & Ins. Rep. (Eng.) 277.

A workman was employed to work on a private railway line as a shunter. At the time of the accident, the shunting engine was being driven tender first, pushing trucks back to the shed, and it was his duty to keep a look-out on the journey, walking in front of the first truck for that purpose. Instead, he climbed on a buffer of the truck, holding his shunting pole with both hands. The pole slipped and he fell and was run over by the truck. In riding on the buffer, he was violating a printed notice, of which he had knowledge, providing that look-out men should be in front of the wagons, and he admitted that the manager would have dismissed any man whom he had seen riding on the buffers. It was held that the accident did not arise out of the course of employment but that it was outside the scope of the service altogether and hence that he was not entitled to compensation. *Herbert v. Fox* [1916] A. C. (Eng.) 405, Ann. Cas. 1916D 578, 114 L. T. N. S. 426, [1916] W. C. & Ins. Rep. 1, 85 L. J. K. B. 441, 60 Sol. J. 237, 32 Times L. Rep. 261, [1916] W. N. 34, 9 B. W. C. C. 164, *affirming* [1915] 2 K. B. 81, [1915] W. C. & Ins. Rep. 154, 112 L. T. N. S. 833, 9 B. W. C. C. 94, *following* *Barnes v. Nunnery Colliery Co.* [1912] A. C. 44, [1912] W. C. Rep. 90, and *Plumb v. Cobden Flour Mills Co.* [1914] A. C. 62, Ann. Cas. 1914B 495, [1914] W. C. & Ins. Rep. 48, and *distinguishing* *Blair v. Chilton* [1915] W. C. & Ins. Rep. 283.

Riding Motorcycle after Express Prohibition.—A workman was employed by a cycle maker and repairer to look after his shop and do small repairs to cars and bicycles on the premises. He was not engaged as a driver and was forbidden to use machines out of the shop in any way, or to leave the shop. He was insured by his employer as a cycle repairer and not as a driver, of which fact he was aware. He had some physical weakness in the legs. A customer brought a motorcycle to the shop to be repaired. When the machine had been repaired, the workman took it out of the shop by a back way and was riding it back to the customer when he was run into by a motor omnibus and killed. It was held that there was no emergency and that the accident was not one arising out of and in the course of the employment. *Leggett v. Gibbons* [1916] W. C. & Ins. Rep. (Eng.) 154, 114 L. T. N. S. 830, 85 L. J. K. B. 980, 9 B. W. C. C. 354.

Jumping on Moving Car.—The plaintiff was a member of a gang of fourteen or fifteen men, carried by the employer from place to

place as required in a work-train, two cars of which were box cars fitted as sleeping cars, and was allotted to one of the sleeping cars. The train stopped at a point during a trip and the plaintiff got off for a purpose contemplated by his employment. He was then invited to join some of his fellow workmen in a car ahead. He got into that car and remained there until the train started, when he jumped out of that car and waited on the ground until his car came along. He then grabbed a rung of the ladder which was the means of ingress and egress, nailed to the side of the car, but the motion of the train jerked him off his feet and he fell under the train and was injured. It was held that the plaintiff was guilty of misconduct of such a character as to make it impossible for him to say that the risk of accident arising therefrom was reasonably incidental to his employment. *Bechtel v. Canadian Pac. R. Co.* 9 Sask. L. Rep. 3, 33 West. L. Rep. 426, 26 Dominion L. Rep. 339.

Brakeman Jumping from Train.—It was the custom and duty of a brakeman to get on the first car and there receive and transmit to the engineer the requisite orders and signals. While reducing speed to stop at a station, the brakeman instead of staying on the first car, descended to the first step of the tender. The engineer, realizing that he was going to jump and also the danger, warned him not to do so. However, a few seconds after the warning, the brakeman jumped and was killed. It was held that he was not the victim of an accident happening by reason of or in the course of his employment. *Jette v. Grand Trunk R. Co.* 40 Quebec Super. Ct. 204.

Reaching under Moving Car for Coat.—The claimant was one of a gang of laborers engaged at work on the tracks in a train yard. A rain shower, sufficiently copious to justify the suspension of work, occurred, and the claimant, with a number of other laborers, went under one of the cars of a train which was standing on a nearby track, for shelter. The nearest shelter available other than the cars was an engine shed about three hundred yards away. At the time the claimant went under the car no engine was attached to the train, but while he was still there an engine was coupled on and the train was moved. The claimant safely escaped from under the car, but reached under the moving car to get his coat, which had been left on one of the trucks, and his arm was caught and badly injured. It was held that the accident did not arise out of and in the course of employment, but was due to the negligence of the claimant. *In re Torres*, Op. Sol. Dept. of Labor 412.

Explosion—Minor Using Detonator.—The rules of a pit provided that explosives capable

of being fired only by detonators should be used; that the detonators should be securely kept and issued only to shot-firers; and that every charge should be fired by a competent person appointed in writing to perform that duty. After the shot-firer had left the pit, a miner who had a detonator in his possession, which, however, he had not received from the shot-firer, started to fire a shot. In the course of the operation an explosion occurred whereby he was killed. It was held that the accident happened while the miner was taking on himself a duty which he was neither engaged nor entitled to perform, and that it did not arise out of and in the course of his employment. *Kerr v. Baird* [1911] Sc. Ct. Sess. 701, 48 Scot. L. Rep. 646, 4 B. W. C. C. 397.

Joiner—Using Wood-working Machine.—The applicant, a joiner employed in making gun-carriage wheels, while planing a piece of wood in a planing machine in order to fit it as a block for supporting the fellow of a wheel while the spokes were being riveted in, got his left hand caught in the machine and lost three fingers. The employers had in the works machine men specially provided for working the wood-working machines, a fact well known to the workmen, and, although there was no express prohibition of user of the machines, no other workmen were permitted to or did in fact work them. It was held that the applicant, in using the machine, was incurring a risk not incidental to his employment and that his accident could not be said to have arisen "out of" his employment. *Anderson v. Armstrong* [1917] W. C. & Ins. Rep. (Eng.) 71, 10 B. W. C. C. 67.

Fireman—Entering Transformer Room.—A company operating a power plant took every precaution to exclude from the transformer room the public and all of its employees except those whose duties required them to enter or pass through the room, by means of a fence, signs, and rules. In disobedience of these rules, the head fireman, who, the evidence showed, had sometimes been called on to perform the duties of the engineer and enter this room, but who had no business therein at the time of the accident, entered the room and was killed by an electric shock by coming in contact with a wire. It was held that the accident which resulted in the injury did not arise out of and in the course of his employment. *Northern Illinois Light, etc. Co. v. Industrial Board*, 279 Ill. 565, 117 N. E. 95.

Leaving Work to Cash Pay Check.—A foreman carpenter was at work in a round-house surrounded with tracks, which were used as a shunting yard in making up trains. He was paid there about eight o'clock in the morning. At half-past eleven that morning,

he left his work to cross the tracks for the purpose of getting his pay check cashed at a bank some distance and returning to his work. There was a space between two cars in a train being made up of from two to four feet, and he started to pass between these two cars, when an engine at one end of the line of cars brought the two together. There was a special prohibition against the men crossing these tracks, and particularly that the men should not leave their work to cash their pay checks. It was held that the accident did not happen by reason of or in the course of the employment. *Lavery v. Grand Trunk R. Co.* 48 Quebec Super. Ct. 278, 24 Dominion L. Rep. 522.

Carpenter—Ordered to Keep Off Scaffolds.—A carpenter was employed on a building in the course of erection. He fell from the end of a plank lying diagonally across a scaffold fourteen feet high, sustaining injuries of which he died later. His presence on the scaffolding was in direct disobedience of his employer's orders that he was "to keep off scaffolds and not to do any climbing." It was held that the injuries which caused his death did not arise out of his employment. *Smith v. Corson*, 87 N. J. L. 118, 93 Atl. 112.

Going on Forbidden Structure.—The applicant was employed by lead smelters to fill skips with ore. When a skip was full it was his duty to call for the crane to lift it, and if for any reason the call was not obeyed, he was to endeavor to find the crane man. The crane traveled over a structure spoken of as a "bridge," which connected the two buildings of the employers and crossed the street, although it did not serve any of the purposes of a passenger bridge. One night the applicant, having filled a skip, called for the crane man but got no reply. In order to find him, the applicant went up onto the "bridge" and walked in the dark nearly the whole length of it, when he fell through a trapdoor to the street below and was injured. There was a notice on the "bridge" near the end of the gangway prohibiting workmen under pain of dismissal from going onto the "bridge," of which the applicant was ignorant, and he honestly believed that he ought to go on the "bridge" when the crane man did not answer the call. It was obviously dangerous to go on the "bridge" and the crane man should have been hailed from a safe place near the "bridge." It was held that the accident did not arise out of the employment, and that the honest belief of the workman that he was entitled to go on the "bridge" could not in any way enlarge the scope of the employment or make it permissible for him to say, when an accident had arisen from his going to a place where he had no duty to go, that in that case

the accident arose out of the employment. *Wardle v. Enthoven* [1917] W. C. & Ins. Rep. (Eng.) 18, 116 L. T. N. S. 103, 86 L. J. K. B. 309, 33 Times L. Rep. 123, 61 Sol. J. 170, 10 B. W. C. C. 79.

Molder—Going on Electrical Crane.—A workman employed as a molder used an electrical crane in his work, but was instructed never to go on the crane. He understood from the foreman that he was to report to the machinist or to the electrician any defect in the operation of the crane, and, if they could not be found, that he was to sit down or go home. On the day of the injury, the claimant reported to the machinist the fact that the crane did not work properly, and the latter got a ladder and climbed up on the crane to repair it. He was followed by the claimant, not apparently for the purpose of reporting the condition of the crane, but to suggest to the machinist what the latter should do, well knowing the danger to which he was subjecting himself. The machinery was set in motion, and in going down the ladder the claimant's hand was caught in certain gear wheels and badly injured. It was held that the injury did not arise out of and in the course of his employment. *Bischoff v. American Car, etc. Co.* 190 Mich. 229, 157 N. W. 34.

3. DISOBEDIENCE OR NEGLIGENCE NOT PRECLUDING RECOVERY.

In each of the following cases, on the facts as set forth, it was held that the disobedience or negligence of the workman was no bar to recovery:

Bottler in Soda Water Factory—Not Wearing Gauntlets.—The applicant for compensation was a girl of fourteen, who was engaged as a bottler in a soda water factory. While she was at work, a bottle exploded in the machine, and a piece of glass struck and injured her right wrist. At the time of the accident she was wearing a glove on her left hand, but had no protection on the right, as required by the special rules under the factory and workshop acts for the bottling of soda water, which were posted. The employer claimed that the accident was due to the applicant's serious and wilful misconduct in not wearing protective gauntlets on both arms as required by the rules, and as she had been told to do by himself and the forewoman. The county court judge found that the gauntlets were provided, that the applicant knew that she had to wear them, but that the forewoman, whose duty it was to see that the applicant wore them, had allowed her to do the work without a gauntlet on her right hand and to disregard the rules, and only verbally told the applicant to obey the rules to protect her-

self with the employer. He therefore held that the defense of serious and wilful misconduct was not established, which decision was affirmed on appeal. *Casey v. Humphries* [1913] W. C. & Ins. Rep. (Eng.) 485, 57 Sol. J. 716, 29 Times L. Rep. 647, 6 B. W. C. C. 520.

Family Servant—Lighting Fire with Wood Alcohol.—A domestic servant, part of whose duty was to light the fires, was forbidden to use kerosene "or anything like that" to assist her in lighting a fire. She used wood alcohol, and by reason thereof was burned to death. It was held that the accident arose out of and in the course of her employment, notwithstanding the disobedience of her orders, as she was doing what she was expected to do at the very place where it was meant to be done. *Kolaszynski v. Klie* (N. J.) 102 Atl. 5.

Going Home from Work—Forced Off Engine by Conductor.—The claimant was engaged in his usual employment on the day of the injury about half a mile distant from the shop and about a mile distant from the place where he lived. On the blowing of the whistle at 5 P.M., as the signal for stopping work, he and two other men boarded the step on the front of a light engine, which was going to the shop. Such riding on "light engines" was a matter of frequent occurrence, some conductors permitting it and some not. In the present case, the conductor threw coal at the men on the front of the engine; the claimant's hat fell off; the conductor went forward over the engine, and while it was in rapid motion kicked or forced the claimant off. It was held that the accident arose out of and in the course of the employment, and was not due to the claimant's negligence, though he was undoubtedly guilty of misconduct in boarding the engine contrary to orders. *In re Clarke*, Op. Sol. Dept. of Labor 468.

Larking—Mine Explosive.—In the course of blasting operations in a mine, a brushing squad, had drilled a hole and filled it with a charge of an explosive known as saxonite, placing at the bottom of the charge a detonator which was to be electrically exploded by means of two wires passing downwards through the charge and attached to the detonator. The foreman brusher thereafter, contrary to fact and apparently for fun, informed the fireman whose duty it was to explode the charge that it was not ready, and the fireman went away. Subsequently the fireman was sent for, but could not be found, and the foreman brusher then proceeded alone to the charge, which exploded and killed him. It was found in fact, as the only way in which the arbitrator could account for the accident, that it was caused by friction set up by the foreman attempting to pull out the wires communicating with

the detonator. It was proved that the statutory rule providing that "no explosive shall be forcibly pressed into a hole of insufficient size, and when a hole has been charged, the explosive shall not be unrammed," was well known to the foreman and was carefully enforced, but it was not proved that he knew the mechanism of the detonator, or the danger of pulling the wires. It was held that the accident was not caused by an attempt to unram the charge in the sense of the statutory rule, and did not result from the "serious and wilful misconduct" of the foreman; but that it arose "out of and in the course of" his employment. *Lynch v. Baird*, Sc. Ct. Sess. 6 F. 271, 41 Scott. L. Rep. 214.

Machinist—Filing Piece of Steel in Vise.—A machinist was engaged in filing a heavy piece of steel which he had fixed in the grip of a vise. While changing the position of the piece of steel, it accidentally slipped, struck against his wrist, and inflicted a severe cut. The superintendent of the factory stated that it was "due to his negligence in not properly securing the work to prevent slipping between vise jaws." It was held that the claimant incurred the injury in question through an accident such as might happen to any ordinarily careful machinist in the usual course of his employment. In *re Robinson*, Op. Sol. Dept. of Labor 389.

Motorman—Adjusting Trolley.—While a motorman was on the ground in front of his car, attempting to adjust the trolley so as to furnish current to drive his car into the barn, the car suddenly started forward and caught his body between it and the next car, injuring him so that he died the same day. It was held that the injury which caused his death was an accidental one arising out of and in the course of his employment; and that the fact that he had not observed the rules of the company, with which he was familiar, or that he acted negligently, did not take him out of the employment, nor the act which resulted in the injury out of the course of his employment. *Chicago Rys. Co. v. Industrial Board*, 276 Ill. 112, 114 N. E. 534.

Power Press Operator—Putting Hand in Press While in Operation.—The claimant was employed by a manufacturer of metal oiling cups as the operator of one of its power presses, into which automatically a sheet of steel was fed and the cup shells punched therefrom released. It was a rule of the company, as to which the claimant had been explicitly instructed both by his foreman and superintendent, never to put his hand within the press while it was in operation. Noticing that one or more small pieces of steel had caught in the die of the press, the claimant attempted to remove them with his left hand, with the result that it was caught by the punch and badly injured. It was held that the prohibition was not one

which limited the sphere of the claimant's employment, but simply dealt with his conduct within the sphere of his employment in operating the press, and hence that the accident was one arising out of the claimant's employment. *Macechko v. Bowen Mfg. Co.* 166 N. Y. S. 822.

Operating Elevator—Putting Head Out of Door.—A workman was engaged in moving patterns from one floor to another by means of an elevator which he operated himself. The evidence furnished some ground for the inference that he carelessly put his head out of the elevator door while it was moving. It was held that this was merely a want of due care and that the accident occurred in the course of the employment. *Erickson v. American Well Works*, 196 Ill. App. 346.

VII. Beginning of Employment.

1. IN GENERAL.

An accident to a workman may arise out of and in the course of his employment, within the meaning of a workmen's compensation act, though he is not actually working at the time of the accident. *Holland-St. Louis Sugar Co. v. Shraluka (Ind.)* 116 N. E. 330; *Von Ette's Case*, 223 Mass. 56, 111 N. E. 696, L.R.A.1916D 641; *Stacy's Case*, 225 Mass. 174, 114 N. E. 206. So it has been held that the employment is not limited to the exact moment of the workman's arrival at the place of the actual work, but exists after the actual work begins and continues after the actual work has ceased, for a reasonable length of time. *Carter v. Rowe*, 92 Conn. 82, 101 Atl. 491. In *De Constantin v. Public Service Commission*, 75 W. Va. 32, 83 S. E. 88, L.R.A.1916A 329, the court said: "Since injury after termination of actual work, while on the premises of the employer and in pursuit of the usual way of leaving the same, is held to be within the course of employment and to have arisen out of the same, it seems clear that an injury to a workman while coming to his place of work on the premises of the employer and by the only way of access, or the one contemplated by the contract of employment, must also be regarded as having been incurred in the course of employment and to have arisen out of the same. If, in such case, injury does not occur on the premises but in close proximity to the place of work and on a road or other way intended and contemplated by the contract as being the exclusive means of access to the place of work, the same principle would apply and govern. If the place at which the injury occurred is brought within the contract of employment, by the requirement of its use by the employee, so that he has no discretion or choice as to his mode or manner of coming to work, such place and its use seem logically to become

elements or factors in the employment and the injury thus arises out of the employment and is incurred in the course thereof. But, on the contrary, if the employee, at the time of the injury, has gone beyond the premises of the employer, or has not reached them, and chosen his own place or mode of travel, the injury does not arise out of his employment nor is it within the scope thereof."

"We think the governing principles of all the decisions are not difficult of discernment. The first of these is that there are excluded from the benefits of the act all those accidental injuries which occur while the employee is going to or returning from his work, and it matters not in this respect whether his journey takes him over public roads or private ways. Second, in the case of vessels, a seaman or other employee is entitled to the benefits of the act if injured while using the instrumentality provided in either reaching or departing from his ship, and in case no instrumentality at all is provided, the injured employee will not be excluded from the benefits of the act if he adopts some perilous means of boarding his ship, as by endeavoring to leap to her deck from her pier. But in the case of an employee seeking to board his vessel, until he has come into such proximity to her as to be using or immediately about to use the gang-plank, ladder, or other instrumentality 'specifically connected with the ship,' his accident does not arise out of his employment. In the very broadest sense, of course, it is true that an injury which happens to a man who is on his way to his place of employment is an injury 'growing out of and incidental to his employment,' since a necessary part of the employment is that the employee shall go to and return from his place of labor. But it is to be noted that the right to an award is not founded upon the fact that the injury grows out of and is incidental to his employment. It is founded upon the fact that the service he is rendering at the time of the injury grows out of and is incidental to the employment. Therefore, an employee going to and from his place of employment is not rendering any service, and begins to render such service only when, as has been said, arriving at the place of his employment, he proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his tasks. Such beyond question is the reasoning of the cases and the meaning of their adjudications." *Ocean Acc. etc. Co. v. Industrial Acc. Commission*, 173 Cal. 313, 159 Pac. 1041, L.R.A.1917B 336.

2. EMPLOYMENT BEGUN.

In each of the following cases, on the facts as set forth, it was held that the employment

had begun and that the applicant was therefore entitled to recover:

Boat Hand—Ashore with Leave.—A boat hand was instructed to report for duty on the boat which was to sail at 5 o'clock. He reported shortly before that hour and was then informed that the boat would sail at 11 o'clock. He went ashore with permission to use the intervening time as he pleased. About 10 o'clock in the evening he returned to the premises and while going through the yard by a not unreasonable route to board the boat, fell in the darkness and suffered injuries. It was held that he was injured in the course of his employment. *Carter v. Rowe*, 92 Conn. 82, 101 Atl. 491.

Laborer—Going to Work Along Railroad Track.—There were three ways of getting to the works where the applicant was employed as a fitter's laborer, the way along the railway line being dangerous, but used by the workmen to a far greater extent and in much greater numbers than the other two. The employers knew that this way was so used and did not forbid its use. In using this way, the applicant was struck by a locomotive and injured. It was held that the accident arose out of and in the course of the employment, and that the applicant, in taking the dangerous way, was not adding a peril to his employment, disentitling him to compensation. *Fox v. Rees* [1916] W. C. & Ins. Rep. (Eng.) 339, 115 L. T. N. S. 358, 86 L. J. K. B. 43, 9 B. W. C. C. 459.

Waiting to Start Work—Struck by Stone from Blast.—While the claimant was on the premises of his employer waiting for time to start work, he was warned by the blowing of a whistle that a blast was to go off. He got under a car for protection, but was struck on the elbow by a stone hurled by the blast. It was held that the accident arose out of and in the course of his employment. *In re Giovanni*, Op. Sol. Dept. of Labor 287.

Going to Work in Time to Change Clothes.—The claimant was a plasterer employed by subcontractors for the plastering of a building in the course of construction, and in the course of the work it became necessary to shift the temporary stairs which had been erected. The claimant arrived before working time in order to change into his working clothes which he had left on the third floor the night before, and be ready for work on time. In ascending to the third floor he fell through the stairs and was injured. It was held that the accident "arose out of" the claimant's employment. *Klukas v. Thompson*, 7 West. W. Rep. (Alberta) 1102, 21 Dominion L. Rep. 312, reversed on other grounds 31 West. L. Rep. 438, 8 West. W. Rep. 778, 24 Dominion L. Rep. 67.

Going to Work—Pursuing Ordinary and Necessary Course.—The claimant, a watchman on a steam shovel, was injured by jump-

ing to the ground in getting over a train of cars. It appeared that there were practically no roads or sidewalks at the place and that the claimant was pursuing the ordinary and necessary course pursued by employees engaged in connection with the shovel. In re Chambers, Op. Sol. Dept. of Labor 291.

Going to Work—Injury at Main Gate to Premises.—While a workman was going to work through the main gate at the place where he was employed, he received a fall, caused by a hose being pulled against him by another employee who was using it. It was held that he was injured while in the course of his employment. In re Guerin, Op. Sol. Dept. of Labor 324.

Going to Work—Injury on Employer's Premises.—A screen boy employed at a colliery, slipped on a rail crossing the road while on his way to work and on the colliery premises, but before he had got his check. It was held that as a matter of law the accident "arose out of the employment," as it was caused by a peril attached to the particular location in which by the obligation of service the workman was placed, although the accident was not contributed to in any way by the nature of the employment. Marsh v. Pope [1917] W. N. (Eng.) 262, 33 Times L. Rep. 523.

Going to Work—Hernia from Fall.—A policeman employed by the Isthmian canal commission in the canal zone was walking along the railroad track near midnight on his way to report for duty. It was raining and the night was very dark. When he had almost reached his destination, he slipped on a crosstie and stepped into a drain about twelve inches deep and was injured. It was held that, the claimant having taken the only route available on his way to work, the accident had occurred in the course of employment. In re Koontz, Op. Sol. Dept. of Labor 294.

Going to Work Along Employer's Track—Struck by Train.—As a workman was following the railroad track of his employer on his way from his quarters to his place of employment, he was killed by being run over by a train of cars belonging to his employer, without negligence or misconduct on his part. It was held that he met his death in the course of his employment. In re Gonzales, Op. Sol. Dept. of Labor 333.

3. EMPLOYMENT NOT BEGUN.

In each of the following cases, on the facts as set forth, it was held that the employment had not begun and that the applicant was therefore not entitled to recover:

Crossing River in Fellow Employee's Launch.—A cook on a dredge, while crossing the river on his way to work one morning

along with three other employees in a launch owned by one of them, was drowned with the others by the sinking of the launch. It was held that the accident did not arise in the course of the employment, since the employee had not entered on the duties of his occupation. In re Ware, Op. Sol. Dept. of Labor 335.

Crossing Street—Struck by Train.—A night fireman, en route to the place of his employment, was struck at a street crossing by the train. It was held that the injury had not been received in the course of his employment. In re Flaherty, Op. Sol. Dept. of Labor 290.

Going to Work—Walking Along Railroad Track.—A workman employed by contractors engaged in construction work on a railroad line, was killed on the main line of the railroad, but not on the construction work, while on his way to work, when he supposedly stepped in front of one train in an effort to escape from another. There was no evidence that the place of the injury had been brought within the contract of employment by the requirement of its use by the employee in coming to work. Hence it was held that the evidence did not show that the injury, by which the workman's death was occasioned, arose out of his employment, or that it was incurred in the course thereof. DeConstantin v. Public Service Commission, 75 W. Va. 32, 83 S. E. 88, L.R.A.1916A 329.

Going to Work—On Public Highway.—While a storeman was on his way from his hotel to a labor train, he passed by a mule team on the highway, belonging to the quartermaster's department, and one of the mules kicked him, breaking his left wrist. It was held that the injury was not sustained in the course of the claimant's employment. In re Gilkey, Op. Sol. Dept. of Labor 288.

The claimant was injured while on a public road or path leading to the place of his employment. He stepped on a rock which turned under his foot, throwing him to the ground whereby he was injured. It was held that the accident did not occur in the course of the claimant's employment. In re Cassidy, Op. Sol. Dept. of Labor 289.

VIII. Interruption of Employment.

1. IN GENERAL.

"From an examination of cases in which it has been held that an employee injured on the premises of his employer during the noon hour or other temporary suspension of work was not under the act, we think it manifest that the controlling reason for denying an award in those cases rests upon the proven facts that the employee broke the so called

nexus between work and employer by some manifestly reckless and unreasonable hazard, amounting to intentional and wilful misconduct, or by disregarding, or disobeying, some warning or danger at the place of injury, or prohibition relating to the thing being done, either addressed to the workman or promulgated as a general rule of conduct while on the premises." *Haller v. Lansing* (Mich.) 102 N. W. 335, L.R.A.1917E 324.

2. SEAMAN RETURNING TO SHIP.

In each of the following cases, on the facts as set forth, it was held that the accident to a seaman returning to his ship, while arising in the course of, did not arise out of, the employment:

Fall from Gangway—Intoxication.—A sailor, returning to his ship at night after leave in an intoxicated condition, was seen to proceed up the gangway, holding on to the ropes on either side until he reached a point about two-thirds the way up. He then stopped suddenly, let go with his left hand on the side of the gangway towards the ship, and instantly swung around, overbalanced and fell over on the quay, sustaining injuries of which he died the next day. The gangway was a solid step gangway, with stanchions, and two ropes passed on each side through the stanchions. It was well fixed, steady and well lighted. The county court judge held that the accident arose out of and in the course of the employment and was due to two concurrent causes—first, that the seaman was subjected to a special risk by reason of his employment; and secondly, that he was so much under the influence of drink that the peril was to him greatly increased and beyond his power to cope with. On appeal, it was held that while the accident occurred in the ambit of the man's employment, as he was returning to the ship and to his duty, it did not arise out of the employment, but out of his intoxicated condition, and an award was denied. *Nash v. Steamship Rangatira* [1914] 3 K. B. (Eng.) 978, 111 L. T. N. S. 704, [1914] W. C. & Ins. Rep. 490, 83 L. J. K. B. 1496, 58 Sol. J. 705, following *Frith v. Louisianian* [1912] 2 K. B. 155, [1912] W. C. Rep. 285.

Engineer Returning to Tug Moored in Unusual Berth.—After a tug had been moored in a temporary location, chosen for protection against stormy weather and not its customary berth, the engineer went ashore for purposes of his own, unconnected with his employment and spent the night ashore. On going ashore it was necessary to cross two steamers before reaching the wharf. During the night the tug was shifted back to its usual berth. The next morning the engineer returning to the tug crossed the steamers

safely and discovered that his vessel was not there. In seeking to return to the wharf and thence to his vessel, he fell into the bay between the two steamers and was drowned. It was held that the engineer in his progress toward his vessel had not reached a point where it could be said that his death was due to an accident in "performing service growing out of and incidental to his employment." *Ocean Acc. etc. Co. v. Industrial Acc. Commission*, 173 Cal. 313, 159 Pac. 1041, L.R.A.1917B 336.

3. OTHER CASES.

In each of the following cases, on the facts as set forth, it was held that the accident arose out of the employment, and that therefore a recovery could be had:

Cat Bite—Teamster.—A teamster took his horses to the stable for their midday meal, and then proceeded to eat his own dinner in the stable. While he was eating his dinner a cat sprang at him and bit him. He was not teasing the cat in any way, nor was he feeding it on that occasion, although he had thrown bits to the cat on other occasions. The cat was not known to be vicious. The bite set up blood poisoning and two joints of the applicant's finger had to be amputated. It was held that the decision of the county court judge that the accident arose out of and in the course of the employment was correct. *Rowland v. Wright* [1909] 1 K. B. (Eng.) 963, 99 L. T. N. S. 758, 77 L. J. K. B. 1071, 24 Times L. Rep. 852, 1 B. W. C. C. 102.

Employee Eating Lunch in Factory.—An employee of a manufacturing concern was seated on a large piece of rubber in a room of the factory at the noon hour eating his lunch, in accordance with a custom known by and tacitly consented to by his employer, when a large pile of crude rubber near him unexpectedly fell on him, breaking his leg. It was held that at the time of the accident he was performing service "growing out of and incidental to his employment." *Racine Rubber Co. v. Industrial Commission*, 165 Wis. 600, 162 N. W. 664.

Going for Meal.—A common laborer left his work of piling and loading wood at about noon, and started for dinner at his boarding place, about half a mile distant and a few hundred feet westerly of his employer's lands. His path lay along the private roadway of the company and then along a switch track of the company; and while crossing over an intervening switch he was struck by a switching engine and killed. During the time of his employment, he had continuously followed this route in going between his work and his boarding house. There was no rule of the company forbidding the men to

walk along the railroad tracks. It was held that the injuries were accidental and that they arose out of and in the course of the employment. *Bylow v. St. Regis Paper Co.* 179 App. Div. 555, 166 N. Y. S. 874.

While the claimant was walking hurriedly down the path to dinner, he stumbled and fell on a crosstie. The fall aggravated a previous rupture and produced a double hernia. It was held that the evidence was sufficient to justify the conclusion that the claimant was on his way from his work to his dinner and that he was pursuing the course usually and necessarily followed by him in connection with his employment. Hence it was held that the injury was received in the course of the employment. *In re Joseph*, Op. Sol. Dept. of Labor 294.

Riding from Work to Dinner—Jumping from Car.—A workman was on a labor train riding from his place of employment to his dinner when one car of the train was derailed and he jumped, falling under the cars and being killed. It was held that the accident arose out of and in the course of his employment. *In re Lyte*, Op. Sol. Dept. of Labor 397.

Returning from Dinner—Going over Pile of Stone in Usual Path.—A cableway engineer, on going to his work after the noon meal, found that the usual path had been blocked by a tower. In going around this tower he had to go over a pile of crushed stone. While on this stone, he began to slide and slid into a moving engine which was passing by, and was injured. In view of the fact that the claimant was injured while following the usual pathway on his return to work from dinner, and was on the premises of his employer at the time of the accident, it was held that he was injured in the course of his employment. *In re Atkins*, Op. Sol. Dept. of Labor 295.

Eating Lunch in Toolhouse—Explosion of Gasoline Vapor.—A workman was employed as a common laborer by the day at outside work. It was customary for the men employed at grading and shoveling to eat their dinners wherever they were, at such spot as they found most convenient and comfortable. The day of the accident was cloudy, raw and windy, and the men were working on an elevation. A short distance away was a toolhouse belonging to the employer, to which they repaired that day to eat their lunch, violating no rules and disobeying no orders in doing so. There was a banked up fire in a stove in the toolhouse, and a small amount of gasoline in a can under a bench. The workman struck a match to light his pipe and an explosion ensued causing a fire which destroyed the building and he received burns which caused his death a few days later. It was held that the accident arose out of and in the course of the employment. *Haller v.*

Ann. Cas. 1918B.—52.

Lansing (Mich.) 162 N. W. 335, L.R.A.1917E 324.

Alighting to Get Drink.—The claimant belonged to the crew engaged on a dirt unloader. As the unloader was passing through the yard office on the way to a water truck about a hundred yards beyond, to take water for the engine, he attempted to alight for the purpose of getting a drink of water at the yard office. The unloader was moving at the rate of about four or five miles an hour at the time; and as he stepped down his foot caught in some way, causing him to fall against a switch stand and injure himself. It was held that the accident occurred while the claimant was still in the course of his employment and that he was not guilty of misconduct or negligence. *In re Guiseppe*, Op. Sol. Dept. of Labor 467.

Captain of Vessel Being Towed—Falling Overboard.—The captain of a schooner which was being towed and was not using its sails, was drowned by falling from the ship at a time when his service was not required. He slept on board the vessel according to the terms of his employment. It was held that he was the victim of an accident in the course of his work. *Dallaire v. Quebec Salvage Co.* 49 Quebec Super. Ct. 501.

Deck Hand on Barge—No Duties on Trip.—A deck hand whose duties consisted in helping to load and unload a barge, but who had no duties to perform during the voyage, fell from it while it was being towed and was drowned. It was held that the accident occurred in the course of and arose out of his employment. *W. R. Rideout Co. v. Pillsbury*, 173 Cal. 132, 159 Pac. 435.

Survey Man Returning to Boat Wherein He Lived.—A workman was employed as a survey man in a party engaged in survey work along the Mississippi river. In the performance of the work it was necessary for the entire party to occupy boats furnished by the government for living quarters, taking their meals and sleeping therein. After supper one evening the workman left the boat and proceeded to a nearby town for the purpose of cashing his pay check and making some purchases. In returning to the boat, he passed across the bow of an intermediate barge, and in attempting to pass around a person on the gangplank who had stopped, he lost his balance, fell overboard, and was drowned. It was held that the accident occurred in the course of his employment. *In re Hott*, Op. Sol. Dept. of Labor 302.

One of Several Bunk House Men Getting Water for Others.—The claimant, a laborer in the reclamation service, was furnished as an incident of his employment, a bunk house for lodging purposes which was located at the site of the employment. Each of the several men living at the bunk house took a turn at

supplying the wash water for all. At about six o'clock one morning the claimant was in the act of taking his turn at supplying the water, and while so doing he slipped on the ice and was injured. It was held that he was injured in the course of his employment. In re Joos, Op. Sol. Dept. of Labor 303.

Walking Backward from Looking Out of Window.—During the noon hour the claimant was looking out of the window. She walked backward from the window and tripped over an electric wire attachment to a sewing machine and fell to the floor. It was held that the accident arose in the course of her employment. In re Hawes, Op. Sol. Dept. of Labor 285.

Leaving Work to Answer Supposed Telephone Call.—A workman's daily period of service was from six o'clock in the morning until six o'clock in the evening continuously, without the allowance of time for his noon lunch, for seven days in each week. His regular task was operating a centrifugal machine, but on the day of the accident he was ordered by the foreman to go to the third floor and wipe the belt on the beet slicer. While working there, the employer's chemist called to him from the second floor and informed him that he was wanted on the telephone. It appeared later that the call was for another employee. In response to the call the workman started to walk down the stairway, and after taking the first step slipped on some pieces of beet and fell to the floor below. It was held that the accident which resulted in his injuries was an "accident arising out of and in the course of his employment." Holland-St. Louis Sugar Co. v. Shraluka (Ind.) 116 N. E. 330.

Employee on Way to Office.—The claimant was on his way from the cut where he was at work to the field office for the purpose of securing a commissary book, which was part of the consideration for his services, and his route lay between two railroad tracks. On reaching a point where it became necessary for him to cross one of the tracks, which lay between him and the office, cinders were blown into his eyes from a train which was standing on the other track, momentarily blinding him. At this moment, a train going in the opposite direction at about ten miles an hour came along. The engineer blew the whistle, which was heard by the claimant, but before he could recover his composure he was struck by the engine and injured. It was held that the accident occurred in the course of the employment. In re Papius, Op. Sol. Dept. of Labor 314.

In each of the following cases, on the facts as set forth, it was held that the accident did not arise out of the employment, and that therefore a recovery could not be had:

Eating Dinner in Cellar—Explosion of Boiler.—A workman was employed by a gen-

eral contractor who had a contract for some construction work to be done on the main and second floors of a garage. He and three other men at the noon hour went down to the boiler room in the cellar to eat their dinner. Just before the men were ready to go upstairs to continue their work for the afternoon, the boiler exploded and the workman thereby received burns from which he died the same day. It was held that this accident was not one "arising out of and in the course of his employment." Manor v. Pennington, 167 N. Y. S. 424.

Railway Laborer—Passing between Cars.—A railway laborer after reporting for work, with the foreman and other workmen, had to wait in a station for a time. The men had food with them, but in order to get hot water to prepare their breakfast, they crossed from the station over the tracks to a mess room maintained by the railway company. At the mess room the man in charge was in the habit of supplying hot water to any servant of the company who applied for it. On one of the lines, the men found a goods train which they supposed to be "dead," as, owing to the convexity of the line, the engine was not visible to them. They proceeded to pass under the couplings of the cars, and one of them was in the act of so doing when the train moved on, and he was caught between the tracks and was killed on the spot. The men could have gone around to the mess room from the platform on which they were, by a bridge over the line or by making use of a subway under the line, but these routes were slightly longer. It was held first, that the workman, while going to make preparations for his breakfast, was engaged in his own business and not his master's, and secondly, that by going between the cars as he did, he ran an additional and quite unnecessary risk, and that for this reason the accident did not arise out of the employment. Lancashire, etc. R. Co. v. Highley [1917] A. C. (Eng.) 352, 116 L. T. N. S. 767, [1917] W. N. 119, 33 Times L. Rep. 286, 61 Sol. J. 397, affirming [1916] W. C. & Ins. Rep. 244, 115 L. T. N. S. 494, 85 L. J. K. B. 1513, 9 B. W. C. C. 496.

Deviating from Usual Route in Returning to Quarters.—A foreman in the reclamation service performing excavating work, had his living quarters furnished by the government in the immediate vicinity of the work. While off duty he had left his quarters to go to a store near by to make some necessary purchases. On his return to his quarters, his attention was attracted to an electric wood saw which was in operation just off the main road of travel, and he, with several other men, stopped to watch the operations. While so doing, a stick of wood was thrown by the saw, striking him in the face and inflicting injuries resulting in his death. It was held that his death did not arise in the course of

the employment. In re Gilson, Op. Sol. Dept. of Labor 326.

Returning to Work.—Bitten by Mad Dog.—The claimant was bitten on the right leg below the knee by a mad dog while returning to work from dinner. It was held that he was not injured in the course of his employment. In re Green, Op. Sol. Dept. of Labor 288.

Conductor—Reporting for Duty after Temporary Relief.—A conductor employed by a street surface railroad, a corporation engaged in a hazardous employment, was relieved and had no further duties to perform for about two hours. In returning to his duties and his employer's station, and while crossing the public highway twelve minutes before it was time for him to report for duty, he was struck by another car of the employer and killed. It was held that he was performing no service in the operation of his employer's railroad, and hence that the injury did not arise out of and in the course of the employment. McCabe v. Brooklyn Heights R. Co. 177 App. Div. 107, 162 N. Y. S. 741.

On Way to Work at Noon—Returning Baseball.—As the claimant was on his way to work at the noon hour, on his employer's premises, following the path, and as he crossed a street, a baseball rolled in front of him from an adjoining baseball field. As he picked it up to return it to the game, he was struck by an automobile. It was held that the claimant was not injured in the course of his employment. In re Schlechter, Op. Sol. Dept. of Labor 331.

Running to Ring Time Clock at Noon.—The claimant had been playing ball during the noon hour, and while running to check up at the time clock, fell and struck his knee on the ground. It was held that the injury had not been received in the course of his employment. In re Kramer, Op. Sol. Dept. of Labor 322.

Returning to Boat.—A dredge hand on river and harbor work was furnished with living quarters, but not with meals, on the boat. He left the boat one evening to go to a neighboring town as a matter of personal recreation after the completion of the day's work, and in returning to the boat fell into the water and was drowned. It was held that he did not meet his death in the course of his employment. In re Jackson, Op. Sol. Dept. of Labor 320.

Watchman on Engine—Taking Charge of Steam Shovel.—A night watchman having charge of a locomotive used by contractors, and whose duty it was to stay on the engine nights, was killed while on a steam shovel which he had taken temporary charge of at the request of the watchman employed to stay on it. It was held that the injury did not arise out of and in the course of his employment. The court said that the case presented was precisely as though he had, at the close

of his night's labor, repaired to his home, and, while awaiting a return of the time to assume his duties, he had been murdered. Sherer v. Industrial Acc. Commission (Cal.) 166 Pac. 318

IX. End of Employment.

1. IN GENERAL.

An accident to a workman may arise out of and in the course of his employment, within the meaning of the act, though he is not actually working at the time of the accident, as when his work for the day is finished, and he is on his way home at the time of the accident. Stacy's Case, 225 Mass. 174, 114 N. E. 206.

An employee, in quitting work for the day, is entitled to a reasonable opportunity to leave the employer's plant and place himself on a public highway, and if he is injured before reaching the public highway, provided he uses reasonable speed in leaving the plant, he is within the purview of the compensation law. In re Pope, 177 App. Div. 69, 163 N. Y. S. 655; Bylow v. St. Regis Paper Co. 166 N. Y. S. 874; De Constantin v. Public Service Commission, 75 W. Va. 32, 83 S. E. 88, L.R.A. 1916A 329

2. EMPLOYMENT NOT TERMINATED.

In each of the following cases, on the facts as set forth, it was held that the employment had not ceased, and that the applicant was therefore entitled to recover:

Workman Going for Pay.—An employee was engaged by an agent in Chicago and was sent to work in a logging camp near Phelps, Wis. When he arrived at Phelps, the book-keeper sent him to the camp by its logging train and told him to come to Phelps to get his pay. Later the employee told the foreman of the camp that he was going to take a vacation, and the foreman told him to go to Phelps for his money and gave him a slip for that purpose. While riding on the logging train on his way to Phelps he was injured. Employees usually went from the camp at which they were working, transportation free, to Phelps on the logging train and railway owned by the employer, and operated by it in the prosecution of its business. It was held that at the time of his injury, the employee was in the employment of his employer and was performing service incidental to and growing out of the employment, and that the employment had not terminated on the receipt of the time slip. Hackley-Phelps-Bonnell Co. v. Industrial Commission, 165 Wis. 586, 162 N. W. 921.

Going Home—Injured on Employer's Premises.—The applicant was employed as a rolleyway man at a colliery. His shift finished

work at 5.30 A.M., at which time it was quite dark and the ground was covered with ice, owing to frost. In going home, he slipped and fell on the first of two railway sidings which he had to cross in order to reach the street on which his house was, and was injured. The place where he fell was part of the colliery premises. It was held that the accident arose out of and in the course of the employment. *Wales v. Lambton, etc. Collieries* [1917] W. N. (Eng.) 250, 33 Times L. Rep. 504, 61 Sol. J. 611.

Miner—Injured while Still in Mine.—At the end of the day's work, the plaintiff changed his mining clothes for street clothes in one of the rooms in the coal mine and then started to walk along the entry in the mine leading towards the shaft for the purpose of ascending to the top of the mine. He wore his miner's lamp in order to find his way to the bottom of the shaft. While he was walking along one of the straits of the mine leading to the shaft, he struck his face against a piece of slate which was hanging from the roof of the mine, and was injured. It was held that his injury arose out of and in the course of his employment. *Sedlock v. Carr Coal Min. etc. Co.* 98 Kan. 680, 159 Pac. 9, L.R.A.1917B 372.

Fall on Employer's Premises after Day's Work.—A workman, while on his way home after completing his day's work, and while still on the employer's premises, slipped on the sidewalk and fractured his hip. It was held that the injury was received in the course of his employment. *In re Bernard, Op. Sol. Dept. of Labor* 323, *following In re Fahey, Op. Sol. Dept. of Labor* 283.

Leaving Work by Outside Stairway—Fall over Railing.—While an employee was going down a stairway on the outside of the building on his way home, he momentarily took his hand off the railing. Other employees were rushing down the stairs. When he reached for the railing again near the bottom, he lost his balance and fell over the railing to the ground. It was held that he "received a personal injury which arose out of and in the course of his employment." *O'Brien's Case.* 228 Mass. 380, 117 N. E. 619.

Subicay Workman—Struck by Train.—A foreman employed by a contracting company on work being done in a subway was struck by a train and killed a few minutes after the close of his day's work. The question was whether the accident arose out of and in the course of his employment. An award of the state industrial commission was affirmed. *Di Paolo v. Thomas Crimmins Contracting Co.* 219 N. Y. 580, 114 N. E. 1065, *affirming* 173 App. Div. 988, 158 N. Y. S. 1113.

Leaving Work for Unknown Reason.—A laborer on river work for some unknown reason left the barge on which he was working, got into a skiff used around the work for vari-

ous purposes, and started across the river to the opposite shore. The skiff was caught by the wind and current and carried over a nearby dam, and the employee was drowned. It was held that it might be assumed that he was engaged in some duty, either directly or indirectly connected with his employment, in the absence of anything in the record to support an opposite hypothesis, and hence that the accident occurred in the course of his employment. *In re Webb, Op. Sol. Dept. of Labor* 336.

"Ringing Out" at Close of Day's Work.—In the carpenter shop where the claimant was employed, a time clock was used for recording the time of the employees. While the claimant was in the act of "ringing out" just at the close of the day's work, he was pushed by some person behind him, and in trying to keep from falling, he slipped and tore the ligaments of his left leg. It was held that the accident arose out of and in the course of his employment. *In re Rugan, Op. Sol. Dept. of Labor* 285.

Detained Beyond Quitting Hour—Injured by Blast.—The claimant had ceased his work for the day, had left the premises proper of the employer and was on the public highway on his way home when he was struck by a rock thrown by a blast which had just been set off. This highway was the only available route from the place where he was at work to his home and was used only for business connected with the work. On account of the known danger to the employees from the blasting, the same was not done until after the usual hour of quitting work, but the claimant had been detained by his work beyond the quitting hour. It was held that the accident arose in the course of his employment. *In re Leonard, Op. Sol. Dept. of Labor* 312.

Living on Boat—Unexplained Death.—A workman was employed on river and harbor improvement work, and by reason of the exigencies of the employment, it was necessary that he have his living quarters in one of the boats attached to the project. About 5:30 o'clock one morning, he came out of his quarters in the boat and in some unknown way fell overboard, and was drowned. It was held that he met his death in the course of his employment. *In re Jenkins, Op. Sol. Dept. of Labor* 334.

Carpenter Leaving Quay—Place of Accident Property of Another.—A carpenter was employed by certain engineers and ship repairers to do work on a barge which they had contracted to repair. The dock at which the barge lay was private property under the control of the Port of London authorities, but the employers and their workmen had permission to pass through the docks on the way to and from the barge on which they were at work. The deceased left the barge one night,

missed his way in the darkness while passing along the quay, fell into the lock and was drowned. It was held that his employment continued until he had passed out of the dock gates and reached the public road and that therefore the accident arose out of and in the course of his employment. *Stewart v. Longhurst* [1917] A. C. (Eng.) 249, 116 L. T. N. S. 763, 86 L. J. K. B. 729, 33 Times L. Rep. 285, [1917] W. N. 120, 61 Sol. J. 414, *affirming* [1916] 2 K. B. 803, 115 L. T. N. S. 399, [1916] W. C. & Ins. Rep. 292, 85 L. J. K. B. 1328, 32 Times L. Rep. 722, 61 Sol. J. 9, 9 B. W. C. C. 605.

Janitor—Putting Out Fire after Employment Had Ended.—A janitor was employed to operate the elevator, fire the boilers and keep the hall and stairways in a building swept clean. One evening an hour after his hours of employment for the day had ended, a fire occurred in the basement of the building. He had not left the premises and in attempting to extinguish the fire was overcome by the fumes and smoke. Early the next morning he died from the effects of having inhaled poisonous gases in the boiler room. It appeared that he was in the habit of removing bags of film scraps set outside the door of a film company's rooms, for which service he was paid 50 cents per week by the film company. It did not appear from the recital of facts that his presence an hour after his day had ended under the terms of his employment was caused by his employment by the film company to remove its scraps. Hence it was held that the mere fact that at the time of the accident his day's service according to the terms of his employment had ended, was not sufficient to authorize the reversal of a finding that the accident arose out of and was received in the course of his employment. *Munn v. Industrial Board*, 274 Ill. 70, 113 N. E. 110.

Returning on Last Trip of Day.—A workman was employed to load from the platform of a warehouse onto an automobile truck, goods that were stored in the warehouse, and to go with the truck and unload the furniture, etc., at the homes of customers. His work for the day had terminated and while returning from having made his last delivery of goods, the truck, which had become stalled on the street car tracks, was struck by a car, and the applicant badly injured as a result. It was held that the injury occurred within the line of his employment. *Friebel v. Chicago City R. Co.* 280 Ill. 76, 117 N. E. 467.

Raftman Returning to Camp.—A raftsmen returning to camp after his day's work, on a dark and rainy night, came to a river thirty-five feet wide, where the bridge had been carried away during the day by the water. At the same time, searchers sent out from the camp to find him, having seen him, threw across the river a tree to form a bridge.

The raftsmen tried to cross thereon, but the tree broke and he was carried away by the current and drowned. It was held that there was no inexcusable fault on the part of the raftsmen, and that, though the accident happened after the day's work, yet it was at his place of work, during the course of and by reason of his employment, since he was returning to the camp from necessity, there to take his meals and rest under the supervision of his employer. *Baie St. Paul Lumber Co. v. Tremblay*, 25 Quebec K. B. 1, *affirming* 46 Quebec Super. Ct. 203.

Laborer on Bridge—Train Running Wild.—In going from his work to the place where he took his dinner, the claimant crossed a bridge to board a train which generally stopped at the other side and did not usually cross the bridge at all to take its passengers. This time apparently the train was running wild since it was coming towards him at a speed of about forty miles an hour, and the claimant, not having time to get off the bridge before the train would pass, lay down on the bridge between the rails, the train, in passing, crushing the big toe of his left foot. It was held that the injury arose out of and in the course of his employment, and was not due to negligence on his part. *In re Crooks*, Op. Sol. Dept. of Labor 449.

Going Home—Riding on Engine.—While the claimant, who was employed in the canal zone, was going home from work riding on an engine, the engine struck a depression in the track and left the rails, the claimant being injured in the accident. There was no rule forbidding riding on the engine by an employee going home from work. It was held that the injury arose out of and in the course of the employment and was not due to negligence or misconduct of the claimant. *In re Gerow*, Op. Sol. Dept. of Labor 282.

Going Home—Passing from One Car to Another.—A workman was on a labor train going to his work when he attempted to pass from one car to another. The train was in motion and a jar or lurch caused him to fall between the cars. The trucks passed over his body, killing him instantly. It was held that the accident occurred in the course of the employment. *In re Lopez*, Op. Sol. Dept. of Labor 282.

Going Home Across Ice Pond.—A workman employed in cutting ice from a pond on his employer's premises, went home from work across the pond, which was shown to be the "reasonable and customary way," instead of going by a circuitous path around the pond. He broke through the ice and was drowned. It was held that the injury arose out of and in the course of his employment. *Stacy's Case*, 225 Mass. 174, 114 N. E. 206.

Going Home in Automobile Hired by Employer.—Certain building contractors agreed with a carpenter and five other employees, to

pay them, in addition to their regular wages, their transportation charges to their place of employment, fixed at 90 cents each day. They arranged with one of the workmen to carry the employees to and from the place of employment in his own automobile, operated and maintained by him, and the 90 cents for each man was paid by the contractors to him. While returning from their work to their homes one afternoon, the automobile collided with a train, and the owner and the other five men in it were killed. It was held that the injury arose out of the employment. *Swanson v. Latham*, 92 Conn. 87, 101 Atl. 492; *Osterhout v. Latham*, 92 Conn. 91, 101 Atl. 494.

Going Home—Railroad Track Only Route.

—The claimant, who was employed as a night watchman by the Isthmian canal commission, was struck by an ice train on the main line of the railroad while going home from work. The evidence showed that the claimant was walking on the railroad track as being the only available route for him to travel in order to reach the public highway at the place where he could get on it by crossing the ditch between the railroad and the highway. It was held that he had received the injury in the course of his employment, and had not been guilty of negligence or misconduct within the meaning of the act. In *re Forde*, Op. Sol. Dept. of Labor 309.

Going Home—Forced Off Engine by Conductor.—The claimant was engaged in his usual employment on the day of the injury about a half mile distant from the shop and about a mile distant from the place where he lived. On the blowing of the whistle at 5 P.M. as the signal for stopping work, he and two other men boarded the step on the front end of a light engine, which was going to the shop. Such riding on "light engines" was a matter of frequent occurrence, some conductors permitting it and some not. In the present case, the conductor threw coal at the men on the front of the engine; the claimant's hat fell off; the conductor went forward over the engine, and while it was in rapid motion kicked or forced the claimant off. It was held that the accident arose in the course of the employment, and was not due to the claimant's negligence, though he was undoubtedly guilty of misconduct in boarding the engine contrary to orders. In *re Clarke*, Op. Sol. Dept. of Labor 468.

3. EMPLOYMENT TERMINATED.

In each of the following cases, on the facts as set forth, it was held that the employment had ceased, and that the applicant was therefore not entitled to recover:

Mate Taken Out of Employment by Captain's Order.—A mate of a ship was ordered

by his captain to go to his room for being drunk, but instead of going to his room, he went in another direction to speak to some one on a personal matter, and fell down a hatchway, dying from the effects of the fall. It was held that the deceased had been taken out of his employment by the order of the captain and that the accident did not arise "out of" the employment. *Horsfall v. Steamship Jura* [1913] W. C. & Ins. Rep. (Eng.) 183, 6 B. W. C. C. 213.

Going Home by Boat of Another.—A workman, at the end of his day's work, got into a boat belonging to another than his employer, to cross the canal, and was drowned. It was held that the accident did not arise out of the employment. *Menard v. Quinlan*, 47 Quebec Super. Ct. 115.

Engineman Going to Collect Pay.—A yard engineman, having completed his work, turned in his engine and also his slip showing that his run had been completed. There were a number of streets by which he could have left the yard for the purpose of going home, but instead, he walked along the tracks for a distance and crossed over another street and onto the tracks on the other side and was there struck and killed by a passing freight train. His purpose in going on this second track was supposed to be in order to catch a passing freight train to ride to a certain place to collect his pay. It was held that the injuries which resulted in his death did not arise out of and in the course of his employment. *Ames v. New York Cent. R. Co.* 178 App. Div. 324, 165 N. Y. S. 84.

Walking Along Track to Bunk Car.—The claimant was one of a force of laborers engaged under a foreman in repairing and raising the railroad track. He was employed by the day, and when work stopped at quitting time in the evening, about 5:30, his wages stopped, he was through for the day, his employer had no demand nor duty on him, he owed it no duty, and was then master of his own time and movements until the following morning when he returned to work. He did not receive pay for time used in going to or returning from his place of employment, nor for transportation. He lived in a bunk car, which it was customary for his employer to furnish on a siding near the work for the laborers to use if they desired, free of charge. It was not compulsory for them to do so and some did not. On quitting one evening, the claimant "hung around" for about half an hour and then started toward the town, returning with a companion to his car for the night. They went along the railroad track instead of using the slightly longer highway nearly paralleling the track, and he was struck by a train going in the opposite direction and was injured. It was held that the accident did not arise out of and in the course of his employment. *Guastecio*

v. Michigan Cent. R. Co. (Mich.) 160 N. W. 484, L.R.A.1917D 69.

Running to Car to Proceed to Place for Watch Test.—After a motorman had finished his work for the day, and as he was hurrying to catch a car which was just coming to a stop before the car barn, he was struck by an automobile, receiving injuries from which he died later. It was understood when employees were hired that they should have free transportation on the cars of the company. It was a rule of the company (employer) that the men should have their watches tested once in every two weeks, under penalty of loss of one day, and it was for the purpose of taking a car to proceed to a place to have his watch tested that the motorman was hurrying. The employees were not paid for the time they consumed in the period of testing their watches, or of going to or from the place where the test was made. The person who made the test was designated and paid by the employer. It was held that the death did not result from "an accidental personal injury sustained by the employee arising out of and in the course of his employment." *De Voe v. New York State Rys.* 218 N. Y. 318, 113 N. E. 256, L.R.A.1917A 250, affirming order 169 App. Div. 472, 155 N. Y. S. 12.

Railway Section Hand Fighting Fire on Ranch—Leaving to Go Home.—The manager of a ranch applied for help to fight a fire on the ranch to the foreman of a railroad section gang, and the latter sent a number of the section hands, among them the applicant. He worked under the manager's direction from 6 P.M. until midnight, when the fire had been brought under control and the work ended. The men collected in a group preparing to walk to their homes and stopped for a brief period to partake of drinks furnished by the manager, he being at the time still on the ranch premises. During this stop the applicant walked backward a short distance and in so doing fell, breaking his leg. His fall was due to his stepping in a squirrel hole. It was held that the accident occurred after the applicant's work had ended, when he had left the precise place of his labors and was ready to go home, and though he was still on the premises did not arise out of and in the course of his employment. *London, etc. Guarantee, etc. Acc. Co. v. Industrial Acc. Commission*, 173 Cal. 642, 161 Pac. 2.

Miner Going Home.—A workman employed at a coal mine had finished his day's work, and was proceeding home along a private line of railway occupied by the colliery, when he was run over and killed at a point 230 yards distant from the place where he worked. It was held that the accident did not arise out of and in the course of his employment. *Catón v. Summerlee, etc. Iron,*

etc. Co. So. Ct. Sess. 4 F. 989, 39 Scott. L. Rep. 762.

Going Home for Dinner.—A "trouble man" employed by an electric company was told to report after supper to take the place of the man whose turn it was to take care of the "troubles" but who was ill. At the regular quitting time, the workman took the automobile furnished him by the company for use in his work, to drive to his home for supper. On the way, the automobile was struck by a street car and he was injured. It was held that he was not in the course of his employment at the time of the accident. The court said: "We think it clearly appears that he had completed his regular work, and had not entered upon the extra work which he was to perform that night. The burden was upon defendant to prove that plaintiff was performing work for his master at the time the accident happened. There was no evidence that he was to receive pay for the time occupied in going to and returning from his supper. The statute leaves little room for doubt or argument on the question before us, for it provides that the phrase 'personal injuries arising out of and in the course of the employment' shall be held 'not to cover workmen except while engaged in, on or about the premises where their services are being performed or where their services require their presence as a part of such service at the time of the injury, and during the hours of service as such workmen' (*Gen. St. Minn.* 1913 sec. 8230, subd. '1')." *Otto v. Duluth St. R. Co. (Minn.)* 164 N. W. 1020.

Workman Leaving Colliery.—A boiler-maker's assistant employed in a colliery, left at the end of his day's work and proceeded to the station, seven hundred yards away in a direct line, to catch a train there. There were three ways of getting from the colliery to the station—first, along the railway line, which passed by the colliery; secondly, by a road running nearly parallel with the line, a slightly longer route; and thirdly, by the road from the colliery for about half the distance, and thence, getting on the railway line by some steps, along it to the station. The workman went by the third route, and was caught by a train on the line and was killed. The colliery employees generally used the railway line, special facilities having been given them by the railway company and they were given permission to use the line which was denied to the general public, but this permission was not given at the instance of the employers. It was held that the accident did not arise out of or in the course of the employment. *Whittall v. Staveley Iron, etc. Co. [1917]* W. C. & Ins. Rep. (Eng.) 202, 117 L. T. N. S. 130, [1917] W. N. 179, 61 Sol. J. 523.

CAIN

v.

GARNER ET AL.

Kentucky Court of Appeals—April 25, 1918.

169 Ky. 633; 185 S. W. 122.

Master and Servant — Contract of Employment — Enforcement of Negative Covenant.

Contracts for the services of artists of special merit are personal and peculiar, and, when they contain negative covenants which are essential parts of the agreement that the artist will not perform elsewhere, and the damages in case of violation are incapable of definite measurement, they are such contracts as ought to be specifically enforced, and a violation of the covenants will be restrained by injunction.

[See Ann. Cas. 1914B 2; Ann. Cas. 1917C 391.]

Divorce — Effect of Remarriage — Custody of Child.

Where the parents of an infant were divorced in 1905, and the mother was awarded the custody, the remarriage of the parents in 1906 annulled the judgment of divorce and restored the parents to their rights over the child as if they had never been divorced.

Parent and Child — Respective Rights of Parents.

Under the law of Iowa the rights of parents in relation to their children are equal.

Contract by Parent for Services of Child.

A contract whereby the father of an infant undertook to bind him to work for plaintiff as a stable boy and race rider for three years for a fixed compensation, to be paid to the father, signed by the father, the son, and the plaintiff, all the covenants of which purported to be the covenants of the infant, whether regarded as executed directly by him or by his father, is the contract of the infant.

[See note at end of this case.]

Same.

An infant is not bound by a contract made for him or in his name by another person purporting to act for him, unless such person has been duly appointed his guardian or next friend and authorized by the court to act and bind him; but the person so contracting is himself bound.

[See note at end of this case.]

Same.

A contract whereby a father undertook to bind his infant son to work for plaintiff as a stable boy and race rider for a term of three years for a fixed compensation to be paid to the father, which purported to be the act of the infant by his parents, and was signed by him and by his father and the plaintiff, covenanting that the infant would not leave the service of plaintiff and would faithfully

serve him, but under which the plaintiff was under no obligation to teach the infant or to develop him as a jockey, is a contract for his personal services, and not an indenture of apprenticeship, under the laws of Iowa, where the contract was made.

[See note at end of this case.]

Infants — Right to Avoid Contract — Contract for Personal Services.

Except for necessities, an infant may, at his election, avoid any executory contract made by him during infancy, including his contract for the performance of labor or personal services.

Enforcement of Infant's Contract for Services.

Where an infant's executory contract with plaintiff for personal services as a jockey was unenforceable against him, an injunction restraining him from a breach of its covenants by working for or serving any person except the plaintiff is improperly granted.

Appeal from Circuit Court, Fayette county.

Action by W. M. Cain, plaintiff, against Mack Garner et al., defendants. From judgment rendered, defendants appeal. The facts are stated in the opinion. **REVERSED.**

Allen & Duncan for appellants.

J. P. Johnston and *George C. Webb* for appellee.

[634] MILLER, C. J.—This action was brought by the plaintiff, W. M. Cain, to compel the defendant, Mack Garner, an infant sixteen years of age, to specifically perform a contract to render personal services as a jockey for the plaintiff, and for an injunction prohibiting him from working for any other person.

Mack Garner and his parents, T. F. and Sarah M. Garner, are and were at the time the contract was made, residents of Centerville, Appanoose county, Iowa. On November 8th, 1905, T. F. and Sarah M. Garner were divorced from the bonds of matrimony by a judgment of the district court of Appanoose county, Iowa, and the custody of their infant children, including the defendant, Mack Garner, was awarded to the mother.

T. F. and Sarah M. Garner, however, lived separate and apart for only about eight months, and were then remarried to each other. They have since continuously lived together as husband and wife.

While at Butte, Montana, on July 14th, 1914, T. F. Garner made a contract with the plaintiff, Cain, whereby T. F. Garner undertook to bind his infant son Mack Garner to work for Cain as a stable boy and race rider, for a term of three years, for a compensation of \$25.00 per month for the first year, \$35.00 per month for the second year, and \$50.00 per month for the third year, to be paid to

the father. The contract, which purported to be the act of Mack Garner, by his parents, was signed by Mack Garner, T. F. Garner his father, and W. M. Cain, and contained this clause:

[635] "The said minor agrees not to leave the said services of his employer during term of service, and to faithfully, honestly and industriously serve said employer; to keep all his secrets, and to readily obey all the lawful directions and instructions of the said employer, or the said employer's duly authorized representative or trainer."

The infant Mack Garner consented to this contract, signed it as a party thereto, and immediately entered plaintiff's service. He had had no experience, however, in riding horses; but he was a bright boy and learned to ride rapidly, under the instruction of Cain. The value of a race rider in addition to his ability to ride at light weight, consists largely in his skill and judgment, as evidenced by his ability to get his mount away from the post in the most advantageous position, to properly rate his horse throughout the entire race, to save all the ground possible, and to take advantage of every opportunity during the race of getting the position most favorable to winning it.

Cain instructed Mack upon all these points, and gave him every opportunity to profit therein by having him ride in races so as to become an experienced jockey. By reason of his small stature, Mack was able to ride at 85 pounds; had good judgment; and used his head; and, under the tuition of Cain, he rapidly developed into a jockey or extraordinary skill and success. The contract permitted Mack to ride horses for outside parties, and in this way he earned several hundred dollars per month, in addition to his salary. Cain and one other witness testified that the contract by which Cain was entitled to the services of Mack for the remaining two and a half years covered thereby, was worth from \$15,000.00 to \$20,000.00 to Cain.

Mack remained with Cain during the race meetings in Helena, Mont., Oklahoma, Dallas and Juarez, Mexico, the last named place having been reached about October 1st, 1914. They remained at El Paso, Texas participating in the races at Juarez, immediately across the river, until April 1st, 1915. During that meeting Mack improved rapidly, and at the close of the Juarez meeting on April 1st, he was considered by the racing profession as the best light weight Jockey in America.

Mr. and Mrs. Garner visited their son, Mack at El Paso; attended the races at Juarez; and witnessed many successes of their son as a rider. He frequently won from [636] two to four races in a day. Before leaving El Paso, Mrs. Garner expressed her

approval of her son's business connection with Cain, saying that she hoped he and Mack would have a successful year, make lots of money, and that she would see them at the Lexington races in April.

While the parties were at El Paso, Cain learned that Mack had made, or was contemplating the making of, a contract to ride for the defendant Holland, and upon Cain's asking Mack and his father about it, Mack denied that he had made such a contract, or even contemplated doing so, saying that he intended to remain with Cain, who had befriended him by making him what he was as as a race rider.

At the close of the race meeting at Juarez, Mack left El Paso for Lexington, Ky., going, however by the way of Centerville, Iowa, to visit his parents who had preceded him. He was to join Cain in Lexington in time for the April races.

But, on March 1st, 1915, and while in Iowa, Mack Garner and Sarah M. Garner, his mother, entered into a contract with the defendant, James L. Holland, through his agents, Williams and Cassidy, by which Mack, who was then sixteen years of age, agreed to work for Holland as a stable boy and race rider for a term of three years, for a compensation of \$200.00 per month, to be paid to the mother.

By a judgment of the district court of Appanoose county, Iowa, entered on April 19th, 1915, Sarah M. Garner was appointed guardian of Mack Garner's property, and the contract of March 1st, 1915, with Holland, was approved and ratified.

Shortly thereafter, Mack Garner appeared in Lexington, where he entered the service of Holland under the contract of March 1st, 1915, above referred to, and refused to carry out or even to recognize the contract with Cain.

On May 15th, 1915, Cain brought this action against Garner, alone, seeking to enforce his contract, and to enjoin Garner from riding for Holland. By an amended petition, Holland, and Williams and Cassidy, his agents, were made defendants; and, upon her petition, Sarah M. Garner, as guardian, was made a defendant, whereupon she filed her answer, counter-claim and cross-petition showing her appointment as guardian of her son Mack; the judgment of the Iowa court approving the contract [637] with Holland; and asked that the petition be dismissed.

Upon the trial the circuit court sustained plaintiff's motion for an injunction against the defendant Mack Garner, in part, by enjoining him from working for or serving any person except Cain. The defendants have applied to me as a judge of the Court of Appeals to dissolve the injunction.

Many interesting questions were presented upon the argument, all centering, however, around the validity and effect of plaintiff's contract of July 14th, 1914. If that contract is valid and binding upon the infant Mack Garner, the injunction was properly granted, since it is well settled that contracts for the services of artists of special merit are personal and peculiar; and when they contain negative covenants which are essential parts of the agreement, as in this case, that the artist will not perform elsewhere, and the damages, in case of violation, are incapable of definite measurement, they are such contracts as ought to be observed in good faith and specifically enforced in equity. That a violation of such covenants will be restrained by injunction, is thoroughly settled law, both in England and in America. *Lumley v. Wagner*, 1 De G. M. & G. (Eng.) 604; *Montague v. Flockton*, L. R. 16 Eq. Eng. 190; *McCaull v. Braham*, 16 Fed. 37, and *Abbott's Note* thereto; *Philadelphia Ball Club v. Lajoie*, 202 Pa. St. 210, 51 Atl. 973, 90 Am. St. Rep. 627 with Note, 58 L.R.A. 227; *Pom. Eq. Jur. sec. 1343*.

But the enforcement of plaintiff's contract depends upon its validity and binding force upon the infant Mack Garner. The validity of plaintiff's contract must be established before he can obtain any relief whatever. Recognizing that fact, the plaintiff contends that as T. F. Garner, the father, was liable for the support of his infant son, he is entitled to his services, and had the right to make the contract; that the divorce in 1905, followed by the re-marriage in 1906, did not affect his rights or liability with respect to his son; that Mrs. Garner ratified her husband's contract by her acts of approval at El Paso and Juarez, above referred to, and that she should not be permitted to defeat his contract by the subsequent contract made by her with Holland. On the other hand, it is insisted that when the Garner parents were divorced in 1905, and the custody of Mack was awarded to his mother, the father was thereby deprived of all his rights [638] to the control of Mack, and that the mother retained those rights, although she and her husband were subsequently re-married.

Furthermore, Sarah M. Garner relies upon her appointment as statutory guardian of the property of Mack Garner, and the subsequent approval of the Iowa district court, of that contract.

Plaintiff's counsel has displayed great industry in bringing to our attention the cases which support the proposition that the judgment of divorce granted to Mrs. Garner in 1905, with the custody of her son, Mack Garner, did not relieve his father from his liability to support his infant son, or deprive him of the correlative right to his son's serv-

ices. But, in view of the re-marriage of the parents in 1906, it is wholly beside the question to discuss the divorce proceedings of 1905. The re-marriage annulled the judgment of divorce and restored the parents to all their rights over their children as if they had never been divorced.

Usually, it is provided by statute that a judgment of divorce may be annulled upon the joint application of the divorced parties. The same result, however, is obtained by a formal re-marriage of the parties. But, in either case, the result upon the status of the parties with respect to each other, or their relation to their children is the same; and, under the law of Iowa their rights are equal. *Rowe v. Rugg*, 117 Ia. 606, 91 N. W. 903, 94 Am. St. Rep. 318.

It has often been held that upon the death of a mother to whom a child has been awarded by a decree of divorce, the father becomes entitled to the custody of his child. *Schammel v. Schammel*, 105 Cal. 261, 38 Pac. 729; *Bell v. Krauss*, 169 Cal. 387, 146 Pac. 874; *In re Neff*, 20 Wash. 652, 58 Pac. 383; *Clarke v. Lyon*, 82 Neb. 625, 118 N. W. 474, 20 L.R.A. (N.S.) 171.

So, whenever the judgment of divorce is annulled the parents' rights with respect to their children are reinstated as if no divorce had been granted. That being true, whatever rights T. F. Garner had over his infant son in 1914, were not affected by the divorce of 1905, because it had been annulled by the re-marriage of 1906.

Moreover, since Cain can win only upon the strength of his contract, it is unnecessary to consider the effect of the Holland contract. The case is to be determined upon the major proposition as to what was the effect of the Cain contract upon the infant Mack Garner. If it was not [639] binding upon him, the injunction was erroneously granted, and should be dissolved.

Counsel for the plaintiff concede the general doctrine that the contract of an infant for the performance of labor or personal services, is voidable at his election, and that Cain's contract with Mack Garner is not enforceable against him if it should be treated as the contract of Mack Garner only, and not the contract of his father. The contract with Cain purports to be the covenant of Mack Garner, acting through his father. All the covenants are between Mack Garner and Cain; T. J. Garner undertakes nothing. He cannot breach his contract because he made none. He is not even made a defendant to this action. The injunction went against Mack Garner, not against his father. The contract must, therefore, be treated as the covenant of the infant Mack Garner, whether it be treated as executed directly by him, or by his father for him.

But in 22 Cyc. 584, it is said:

"An infant is not bound by a contract made for him or in his name by another person purporting to act for him unless such person has been duly appointed his guardian or next friend and authorized by the court to act and bind him; but the person so contracting is himself bound."

See also *Slusher v. Weller*, 151 Ky. 203, 151 S. W. 684.

It may be conceded that a parent is entitled to his child's services, and that the child owes obedience to the parent; but it will hardly be contended that a parent could come into a court of equity and successfully ask for an injunction to prevent his son from working for some one else. And, if a court would not grant such relief to a parent, it certainly would not grant it to a third person to whom the parent had attempted to transfer the right to the son's service.

The contract in question cannot be treated as an indenture of apprenticeship under the laws of Iowa. By its terms, Cain is under no obligation whatever to teach the boy, or to develop him as a jockey. It is a simple contract for the personal services of an infant, for a stipulated compensation to the father.

The case, therefore is reduced to the simple proposition of enforcing the executory contract of an infant. It is elementary law that, except for necessities, an infant may avoid any contract made by him during infancy. [640] 1 Bl. Com. 465; 22 Cyc. 580; *Breckenridge v. Ormsby*, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; *Watson v. Cross*, 2 Duv. (Ky.) 147; *Forsee v. Forsee*, 144 Ky. 171, 137 S. W. 836.

And, as to his contract for personal services, 22 Cyc. 599, says:

"An infant may enter into a contract for the performance of labor or personal service, and although such contract is not binding upon him, but voidable at his election, it is not void, and cannot be avoided by the other party, but the infant may recover the wages due him under the contract."

See also *Ray v. Haines*, 52 Ill. 485, and *Danville v. Amoskeag Mfg. Co.* 62 N. H. 133; the first case holding that an infant may quit service before the expiration of his contract term, and the second, that a contract not to quit work without a specified notice is not binding upon an infant.

Cain's contract being unenforceable against the infant defendant, it follows that the injunction was improperly granted, and it is now dissolved.

Carroll, Thomas and Clarke, JJ., heard the argument, and concur in this opinion.

NOTE.

Contract by Parent for Services of Minor Child as Binding Latter.

Exclusive of decisions relating to contracts of apprenticeship, there seems to be but one case other than the reported case which deals with the question whether a parent may bind his minor child by a contract for the services of the latter. In the reported case it is held that while a parent is entitled to his child's services, the father of a minor son who contracts for the latter's services is not entitled to an injunction to prevent the son from working for some one else; and that a contract for an infant's services entered into between the minor and his father on one side and the employer on the other, is binding on the father, but is voidable as against the infant. In *Barnes v. Barnes*, 50 Conn. 572, it appeared that the father of an infant, when the latter was four months old, agreed with the plaintiff that the infant should serve the plaintiff faithfully during his minority, the plaintiff agreeing to provide for the infant during that time suitable food, clothing and schooling. When the infant reached the age of nineteen years he agreed with the plaintiff that the contract should not be binding, and that thereafter the infant was to be entitled to his earnings and the plaintiff was to receive three dollars per week for the infant's board. In an action by the plaintiff for the board, the infant contended that the agreement between the plaintiff and the father was a valid and subsisting contract. It was held that the subsequent agreement was a repudiation by the infant of the contract made between the father and the plaintiff and that the plaintiff could recover from the defendant for reasonable necessities. Touching the right of the infant to repudiate the contract made by his father the court said: "That a father has a right to dispose of the services of his minor son during minority is not disputed; but this right is not absolute. As his right to the services of his son is limited and qualified, it necessarily follows that he conveys only a qualified right. The more important qualification, and the only one we need now to refer to, is, that the father's right to the services of his son dies with the father. That event emancipates the son, and his obligation to perform the contract made for him by the father is at an end. In this case, the father being dead, the son was at liberty to repudiate the contract, certainly after arriving at years of discretion. The question is not whether the minor was legally capable of making a valid contract with the plaintiff, but it is rather whether that agreement amounted to a repudiation of the contract made with the father. We are clearly of the opinion that it did."

MISSISSIPPI RAILROAD COMMISSION

v.

MOBILE AND OHIO RAILROAD COMPANY ET AL.

Mississippi Supreme Court—June 18, 1917.

115 Miss. 101; 75 So. 778.

Public Service Commissions — Remedy for Review — Injunction.

Injunction by railroad company objecting to reasonableness of railroad commission's orders, requiring erection of a new depot, is a proper remedy, since the commission in making such order was acting in its legislative or administrative capacity, and not in a judicial or quasi judicial capacity.

Presumption in Favor of Order.

In view of Code 1906, § 4836, providing that the railroad commission's findings shall be prima facie evidence that their determination was right and proper, one who attacks such order has the burden of proving its unreasonableness "by clear and satisfactory evidence."

Decree Disapproving Order — Review by Appellate Court.

A chancellor's decree, disapproving railroad commission's orders, requiring erection of railroad depot, will be conclusive on appeal, where there is evidence to support it, such decree being considered of the same force and effect as other chancery decrees, and the appellate court in such cases will not retry the case.

Railroads — Requiring Station at Particular Place — Reasonableness of Order.

In proceedings for injunction against enforcement of railroad commission's orders requiring erection of station, it is held that there was evidence to sustain chancellor's decree disapproving orders of the commission.

[See note at end of this case.]

Appeal from Chancery Court, Hinds county: **TAYLOR**, Chancellor.

Action by Mobile and Ohio Railroad Company et al., plaintiffs, against Mississippi Railroad Commission, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Ross A. Collins for appellant.

Carl Fox for appellee

[111] **SYKES, J.**—The Mississippi Railroad Commission was petitioned by the Business Men's League of Corinth to require the Mobile & Ohio and Southern Railroad Companies to construct a new union passenger depot in the city of Corinth. These two rail-

roads cross each other at almost right angles. The present union passenger station is now situated in the southeast angle, south of the Southern Railroad, and east of the Mobile & Ohio Railroad. The petitioners asked that the union passenger station be located in the northeast angle. The principal reason alleged for this change in location was in order to prevent passengers and other parties having business at the union station from crossing the tracks of the Southern Railway Company at Filmore street crossing, which is one of the principal streets of Corinth, and which is a dangerous crossing. The Southern Railroad at that time maintained nine tracks over this crossing. It was also alleged that the depot accommodations were insufficient. Already located at that time in the northeast angle—which, by the way, is an obtuse angle, as the two railroads do not exactly cross at right angles—was situated the freight depot of these two railroad companies, and also, as a necessary adjunct to the freight depot, a great many tracks for switching were therein situated. The business portion of the town of Corinth, and a great many residences therein, are also situated in this northeast angle. If the passenger depot were located in that angle, then it would obviate the necessity of crossing over the tracks of the Southern Railway Company at Filmore street crossing over the tracks of the Southern Railway Company at Filmore street crossing.

The members of the Railroad Commission personally examined the present union passenger station and the [112] freight depot and railroad tracks and all the four angles. They also took oral testimony on the question and passed an order requiring the railroad companies to construct a new union passenger depot in the northeast angle. The present passenger depot was built about ten years ago, and was the result of a citation originally issued by the Railroad Commission to these two companies, to know why it was not necessary for them to build a union passenger depot. After many continuances of that investigation, the Railroad Commission and the railroad companies, without any orders, tacitly agreed on the location of the present passenger depot. Some months after the railroad companies were ordered to build a new passenger station in the northeast angle, the one here in controversy, on subsequent petitions and an examination, these companies were further ordered to erect a new freight depot and alter certain switch tracks, also, in the northeast angle, and some across Filmore street. In other words, the orders of the Commission here involved are: First, an order requiring a new passenger depot in the northeast angle; and the subsequent orders requiring a new freight depot in the same angle, and switch-track alterations. These

orders require the railroad companies to build a freight depot and switch tracks in this angle and also a passenger depot which would be in the switchyards of the company. A bill was filed by the railroad companies, enjoining the Commission from executing the order requiring the erection of the passenger depot. Subsequently to the filing of this bill, the subsequent orders requiring the erection of the freight depot and alteration of tracks were entered, and a bill of injunction was filed to enjoin the Commission from putting these orders into effect. Both these bills were filed in the chancery court of Hinds county, and by agreement the two suits were consolidated. In the trial in the chancery court, [113] the defendant companies admitted the reasonableness of the order as to the freight depot and track facilities, but contended that the order as to the passenger depot was unreasonable. The case was tried before the chancellor, and a vast amount of testimony was introduced before him. The question for determination was whether or not the order of the Commission requiring the erection of this passenger depot in the northeast angle was reasonable or unreasonable.

The question is raised, but not seriously argued, that injunction was not the proper procedure by these companies. However, the Commission was not acting in a judicial or quasi-judicial capacity in ordering the building of these depots. It was acting in its legislative or administrative capacity in doing so, and its procedure was proper, as is borne out by the authorities, which we deem it unnecessary to cite.

The principal contention of the Railroad Commission in this court is that under section 4836, Code of 1906, which reads as follows:

"Findings in Writing; Proof of; Effect of. —All findings of the Commission and the determination of every matter by it shall be made in writing and placed upon its minutes, and proof thereof shall be made by a copy of the same duly certified by the secretary under the seal of the Commission; and whenever any matter has been determined by the Commission, in the course of any proceeding before it the fact of such determination, duly certified, shall be received in all courts and by every officer in civil cases as *prima facie* evidence that such determination was right and proper; and the record of the proceedings of the Commission shall be deemed a public record, and shall at all seasonable times be subject to the inspection of the public," the order of the Railroad Commission in this case was *prima facie* evidence that it was right and proper, and that the lower court should have sustained this finding [114] unless the testimony showed

"by clear and satisfactory evidence that the order of the Commission complained of is unlawful and unreasonable;" that if in this trial there were two reasonable theories, one that the order of the Commission was reasonable, the other that it was unreasonable, then it was the duty of the chancellor to uphold the order of the Commission. *Minneapolis, etc. R. Co. v. Wisconsin R. Commission*, 136 Wis. 146, 116 N. W. 905, 17 L.R.A. (N.S.) 821. The above statute makes the findings of the Railroad Commission *prima facie* evidence that they are right and proper. One who attacks an order of the Railroad Commission has the burden of proof resting upon him of establishing to the satisfaction of the lower court that the order of the Commission is not reasonable. This statute is perfectly plain and unambiguous. It was the duty of the lower court to give to findings of the Railroad Commission the benefit of this statute. Without reviewing all of the testimony introduced before the chancellor, it is sufficient to say that, from this testimony, he could have found, as in fact he did, that the greatest part of the danger at Filmore street crossing would be obviated by the removal of certain switch tracks ordered to be removed by the Railroad Commission.

It was contended, and testimony was introduced by the railroad companies, that there was not sufficient ground in the northeast angle at its disposal to maintain the union passenger and freight depots and all the necessary switch tracks in that angle; that it would be highly dangerous, inconvenient and improper to maintain a passenger depot in such close proximity to the freight yards; that the passenger depot was practically a new one, was adequate and sufficient and convenient to the public and to the railroad companies, and that it would be unreasonable and confiscatory to require these companies to build another passenger depot just across the track from the site of the present one; that [115] if the present one was inadequate it could be sufficiently enlarged to meet the views of the Commission and of the complaining parties. This testimony fully sustained the contention of the railroad companies. Practical railroad men, familiar with these matters, testified to this effect. Railroad civil engineers, some in the employ, and some not connected with the companies, testified that it would be impracticable to obey the orders of the Commission. On behalf of the Commission, the commissioners testified, giving their judgment that their orders were just and proper and reasonable, and that they believed these two depots and certain switch tracks could be maintained within this angle; that, in their judgment, it was not necessary to put all the tracks the railroads wanted in this angle; that certain

tracks could be placed in other places by the railroad, where they would be just as useful and convenient to the railroad and to the public. A number of business men of the highest standing in the city of Corinth testified to facts sustaining the orders of the Commission. Only one expert engineer testified for the Commission. He had never been to Corinth, and only testified from certain maps and blueprints submitted to him on behalf of the Commission.

The chancellor, after hearing and considering the testimony, decided that the order to remove the passenger depot was unreasonable, and the injunction was made perpetual in that particular. He also decided that the present union station was inadequate, and ordered certain changes made in it and certain work done at the Filmore street crossing. The railroad company has not prosecuted on appeal from the latter part of this order; the Commission being the sole appellant. We are not therefore called upon to city the latter party of this decree.

It is earnestly insisted by the appellant in this case that this court, in reviewing the decision of the chancellor, [116] should not give it the same weight and consideration on its findings of fact that it does in ordinary cases, but that we should view this case just as if we were the lower court trying the case and give to the order of the Commission the weight it is entitled to under section 4836 of the Code. Numerous decisions are cited by counsel for the appellant as to what effect should be given the finding of the Commission. These decisions, however, relate only to the effect to be given to this finding by the lower court, or by the appellate court when the lower court has sustained these findings of the Commission. In the case at bar, however, the chancellor decided that the order of the Commission was unreasonable. To this decree we give the same force and effect that we do to all other decrees of the lower court. In other words, if the chancellor could have so found under the testimony, then we will not disturb his findings here. The case now under review comes to us with the finding of fact of the chancellor that the order of the Commission relating to the passenger depot is unreasonable. The decree specifically so states. There was testimony under which the chancellor could have so found. We cannot try the case in this court, as it was tried in the lower court. We give to this decree the same force and effect that we give to the decrees of all the chancery courts. The chancellor also held the orders of the Commission relative to the building of a new freight depot and the alteration of the switch tracks to be reasonable, and dissolved the temporary injunction and dismissed the bill in that case. No appeal was prosecuted from this decree of dismissal.

We, therefore, decline to disturb the findings of fact of the chancellor, and the decree is affirmed.

Affirmed.

NOTE.

The reported case sustains a decree setting aside as unreasonable an order of a railroad commission requiring the erection of a passenger depot and prescribing its precise location, the purpose being so to locate it as to permit of approach by the greater part of the persons using the station without crossing the tracks. The validity of an order by a railroad commission requiring a railroad to erect a depot at a specified place is discussed in the note to Vicksburg, etc. R. Co. v. Louisiana R. Commission, Ann. Cas. 1914C 1168.

IN RE HAHN.

New Jersey Court of Errors and Appeals—
January 28, 1916.

85 N. J. Eq. 510; 96 Atl. 589.

Attorneys — Disbarment — Right of Appeal.

One deprived by order of the court of chancery of his office of solicitor and of the right of exercising to the full extent, the office of counselor is aggrieved thereby within 1 Comp. St. 1910, p. 450, § 111, authorizing persons aggrieved by any order of the court of chancery to appeal from the same.

[See note at end of this case.]

Jurisdiction to Disbar — Court of Chancery.

Under 2 Comp. St. 1910, p. 2278, fixing a fee for the governor for a license to an attorney and solicitor, to appear and practice in all courts, and page 2281, providing for fees for the judges of the supreme court for license to an attorney and solicitor, and page 4054, § 5, providing that any counselor, solicitor, or attorney who shall be guilty of malpractice in any of the courts shall be put out of the roll and not thereafter permitted to practice, unless he shall obtain a new license and be again enrolled in due form of law, which is section 5 of the Practice Act of 1903 regulating "the practice of courts of law," and the constitution, protecting the jurisdiction of the court of chancery as existing at the time of the adoption of the constitution, the court of chancery has no jurisdiction to make an order adjudging a solicitor guilty of malpractice and debarring him from practice as solicitor and counselor in the court of chancery.

Same.

An order of the court of chancery debar-ring a solicitor in chancery from practicing as solicitor and counselor in the court of chancery cannot be sustained under the practice act, requiring the solicitor to act under the direction of the court, which refers only to causes in which the solicitor is acting, and not to his own disqualification for practicing.

Same.

An order of the court of chancery disbar-ring a solicitor in chancery from practicing as solicitor and counselor in the court of chancery, entered in proceedings not purporting to be proceedings to punish for contempt, is not sustainable as a punishment for contempt.

Appeal and Error — Motion to Dismiss — Merits Not Considered.

Whether an order of the court of chancery, disbarring a solicitor in chancery from practicing as solicitor and counselor in the court of chancery, is sustainable as an order suspending him from practicing in the court of chancery until the supreme court has acted under the statute, will not be considered on a motion to dismiss an appeal from the order, but the question can be dealt with only on the appeal itself in determining whether the order shall be affirmed, reversed, or modified.

Appeal from Chancery Court.

Disbarment proceedings against Simon Hahn, solicitor of Court of Chancery. Decree of disbarment ordered. Defendant appeals. Motion to dismiss appeal. The facts are stated in the opinion. **MOTION DENIED.**

Nelson B. Gaskill for motion.

Robert H. McCarter and *George W. O. McCarter* opposed.

[512] SWAYZE, J.—The proceedings are not in the nature of proceedings for contempt of court nor mere disciplinary proceedings. The distinction between proceedings to punish for contempt and proceedings to disbar is sufficiently shown by the decision of the United States supreme court in *Ex p. Bradley*, 7 Wall. 364, 19 U. S. (L. ed.) 214, and *Ex p. Robinson*, 19 Wall. 505, 22 U. S. (L. ed.) 205. We have no doubt that the chancellor has the same power to proceed against an attorney for contempt as against any other person, and that he has the additional power to suspend a solicitor or counselor from appearing in the court of chancery provided he does not as far as to infringe upon the powers possessed by the supreme court at the time of the adoption of the constitution of 1844. This would include power to suspend until the facts could be presented to the supreme court for more severe action. Whether an appeal will lie

from an order punishing for contempt or even suspending a solicitor for a limited time as an act of mere discipline is not the question now before us. This order “debars” Mr. Hahn from appearing hereafter in the court of chancery as a solicitor or counselor, and prohibits him from exercising any of the functions, rights or privileges of a solicitor or counselor of that court. We do not know whether the selection of the unusual word “debar” was merely accidental or whether it was chosen advisedly in an effort to distinguish the order from the well known, and long-continued procedure of the supreme court not hitherto departed from in the whole history of New Jersey’s jurisprudence, except perhaps in a single sporadic case to be mentioned hereafter. That procedure was commonly known as a procedure to disbar. As neither “disbar” nor “debar” accurately expresses the result in technical terms, the mere question of words is not important. Nor do we attribute any significance to the fact that the proceeding was by its title directed against Mr. Hahn as a solicitor only, and was for malpractice as a solicitor while the order affects him as a counselor also. The fact that he is prohibited from exercising his rights as a “counselor [513] of this court” is, as will be shown, of more importance. We deal with the substance rather than the form of the order. In substance it has the same effect, if valid, as far as the court of chancery is concerned, as striking the appellant’s name off the roll would have, and the real question now before us is whether an appeal will lie from an order of the court of chancery having that effect.

There is some divergence in the cases as to whether an appeal will lie in such a case where the lower court has jurisdiction. It turns sometimes upon a mere question of procedure, and sometimes upon the statutes of the state. Our statute, dating from 1799 (Pat. L. p. 434 § 59), enacts that all persons aggrieved by any order or decree of the court of chancery may appeal from the same or any part thereof to the court of errors and appeals. Comp. Stat. p. 450 § 111. On the face of it, we think that a man is aggrieved by an order that deprives him of one office, that of solicitor, and prevents him from exercising to the full extent, another office, that of counselor. We need not go so far as the supreme court of Connecticut and hold that the office of solicitor or counselor can fairly be regarded as property. In *re O’Brien*, 79 Conn. 46, 63 Atl. 777, 780. It is enough to say that one holding such an office is as much aggrieved and entitled to appeal to the courts for protection in its enjoyment, as a public officer or the officer of a private corporation is by means of *quo warranto*, *mandamus* or *certiorari* with an

tracks could be placed in other places by the railroad, where they would be just as useful and convenient to the railroad and to the public. A number of business men of the highest standing in the city of Corinth testified to facts sustaining the orders of the Commission. Only one expert engineer testified for the Commission. He had never been to Corinth, and only testified from certain maps and blueprints submitted to him on behalf of the Commission.

The chancellor, after hearing and considering the testimony, decided that the order to remove the passenger depot was unreasonable, and the injunction was made perpetual in that particular. He also decided that the present union station was inadequate, and ordered certain changes made in it and certain work done at the Filmore street crossing. The railroad company has not prosecuted on appeal from the latter part of this order; the Commission being the sole appellant. We are not therefore called upon to city the latter party of this decree.

It is earnestly insisted by the appellant in this case that this court, in reviewing the decision of the chancellor, [116] should not give it the same weight and consideration on its findings of fact that it does in ordinary cases, but that we should view this case just as if we were the lower court trying the case and give to the order of the Commission the weight it is entitled to under section 4836 of the Code. Numerous decisions are cited by counsel for the appellant as to what effect should be given the finding of the Commission. These decisions, however, relate only to the effect to be given to this finding by the lower court, or by the appellate court when the lower court has sustained these findings of the Commission. In the case at bar, however, the chancellor decided that the order of the Commission was unreasonable. To this decree we give the same force and effect that we do to all other decrees of the lower court. In other words, if the chancellor could have so found under the testimony, then we will not disturb his findings here. The case now under review comes to us with the finding of fact of the chancellor that the order of the Commission relating to the passenger depot is unreasonable. The decree specifically so states. There was testimony under which the chancellor could have so found. We cannot try the case in this court, as it was tried in the lower court. We give to this decree the same force and effect that we give to the decrees of all the chancery courts. The chancellor also held the orders of the Commission relative to the building of a new freight depot and the alteration of the switch tracks to be reasonable, and dissolved the temporary injunction and dismissed the bill in that case. No appeal was prosecuted from this decree of dismissal.

We, therefore, decline to disturb the findings of fact of the chancellor, and the decree is affirmed.

Affirmed.

NOTE.

The reported case sustains a decree setting aside as unreasonable an order of a railroad commission requiring the erection of a passenger depot and prescribing its precise location, the purpose being so to locate it as to permit of approach by the greater part of the persons using the station without crossing the tracks. The validity of an order by a railroad commission requiring a railroad to erect a depot at a specified place is discussed in the note to *Vicksburg, etc. R. Co. v. Louisiana R. Commission*, Ann. Cas. 1914C 1168.

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Jurisdiction to Disbar — Court of Chancery.

Under 2 Comp. St. 1910, p. 2278, fixing a fee for the governor for a license to an attorney and solicitor, to appear and practice in all courts, and page 2281, providing for fees for the judges of the supreme court for license to an attorney and solicitor, and page 4054, § 5, providing that any counselor, solicitor, or attorney who shall be guilty of malpractice in any of the courts shall be put out of the roll and not thereafter permitted to practice, unless he shall obtain a new license and be again enrolled in due form of law, which is section 5 of the Practice Act of 1903 regulating "the practice of courts of law," and the constitution, protecting the jurisdiction of the court of chancery as existing at the time of the adoption of the constitution, the court of chancery has no jurisdiction to make an order adjudging a solicitor guilty of malpractice and debarring him from practice as solicitor and counselor in the court of chancery.

Same.

An order of the court of chancery debar-ring a solicitor in chancery from practicing as solicitor and counselor in the court of chancery cannot be sustained under the practice act, requiring the solicitor to act under the direction of the court, which refers only to causes in which the solicitor is acting, and not to his own disqualification for practicing.

Same.

An order of the court of chancery disbar-ring a solicitor in chancery from practicing as solicitor and counselor in the court of chancery, entered in proceedings not purporting to be proceedings to punish for contempt, is not sustainable as a punishment for contempt.

Appeal and Error — Motion to Dismiss — Merits Not Considered.

Whether an order of the court of chancery, disbarring a solicitor in chancery from practicing as solicitor and counselor in the court of chancery, is sustainable as an order suspending him from practicing in the court of chancery until the supreme court has acted under the statute, will not be considered on a motion to dismiss an appeal from the order, but the question can be dealt with only on the appeal itself in determining whether the order shall be affirmed, reversed, or modified.

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[512] SWAYZE, J.—The proceedings are not in the nature of proceedings for contempt of court nor mere disciplinary proceedings. The distinction between proceedings to punish for contempt and proceedings to disbar is sufficiently shown by the decision of the United States supreme court in *Ex p. Bradley*, 7 Wall. 364, 19 U. S. (L. ed.) 214, and *Ex p. Robinson*, 19 Wall. 505, 22 U. S. (L. ed.) 205. We have no doubt that the chancellor has the same power to proceed against an attorney for contempt as against any other person, and that he has the additional power to suspend a solicitor or counselor from appearing in the court of chancery provided he does not as far as to infringe upon the powers possessed by the supreme court at the time of the adoption of the constitution of 1844. This would include power to suspend until the facts could be presented to the supreme court for more severe action. Whether an appeal will lie

from an order punishing for contempt or even suspending a solicitor for a limited time as an act of mere discipline is not the question now before us. This order "debars" Mr. Hahn from appearing hereafter in the court of chancery as a solicitor or counselor, and prohibits him from exercising any of the functions, rights or privileges of a solicitor or counselor of that court. We do not know whether the selection of the unusual word "debar" was merely accidental or whether it was chosen advisedly in an effort to distinguish the order from the well known, and long-continued procedure of the supreme court not hitherto departed from in the whole history of New Jersey's jurisprudence, except perhaps in a single sporadic case to be mentioned hereafter. That procedure was commonly known as a procedure to disbar. As neither "disbar" nor "debar" accurately expresses the result in technical terms, the mere question of words is not important. Nor do we attribute any significance to the fact that the proceeding was by its title directed against Mr. Hahn as a solicitor only, and was for malpractice as a solicitor while the order affects him as a counselor also. The fact that he is prohibited from exercising his rights as a "counselor [513] of this court" is, as will be shown, of more importance. We deal with the substance rather than the form of the order. In substance it has the same effect, if valid, as far as the court of chancery is concerned, as striking the appellant's name off the roll would have, and the real question now before us is whether an appeal will lie from an order of the court of chancery having that effect.

There is some divergence in the cases as to whether an appeal will lie in such a case where the lower court has jurisdiction. It turns sometimes upon a mere question of procedure, and sometimes upon the statutes of the state. Our statute, dating from 1799 (Pat. L. p. 434 § 59), enacts that all persons aggrieved by any order or decree of the court of chancery may appeal from the same or any part thereof to the court of errors and appeals. Comp. Stat. p. 450 § 111. On the face of it, we think that a man is aggrieved by an order that deprives him of one office, that of solicitor, and prevents him from exercising to the full extent, another office, that of counselor. We need not go so far as the supreme court of Connecticut and hold that the office of solicitor or counselor can fairly be regarded as property. In *re O'Brien*, 79 Conn. 46, 63 Atl. 777, 780. It is enough to say that one holding such an office is as much aggrieved and entitled to appeal to the courts for protection in its enjoyment, as a public officer or the officer of a private corporation is by means of *quo warranto*, *mandamus* or *certiorari* with an

ultimate appeal to this court. The right of appeal by attorneys from orders of disbarment is well settled by the decision of tribunals of the first authority. In *Ex p. Bradley*, 7 Wall. 364, 19 U. S. (L. ed.) 214, a *mandamus* was issued to restore an attorney and counselor to his office from which he had been removed by an inferior tribunal. Mr. Justice Miller dissented from this judgment of the court but did not question that a state appellate tribunal might entertain an appeal; his argument was that the supreme court of the United States possessed no such general supervisory power over inferior federal courts as belongs to the king's bench and the appellate tribunals of the states. The jurisdiction of the last named tribunals to [514] review has been exercised in repeated instances. It is enough to cite *In re Durant*, 80 Conn. 140, 67 Atl. 497; *In re Eldridge*, 82 N. Y. 161, 37 Am. Rep. 558. The report of the former case in 10 Ann. Cas. 539, is accompanied by a note citing cases in which the appellate jurisdiction has been exercised; in some the facts have been reviewed, and in others the legal errors only. *Boston Bar Assoc. v. Greenhood*, 168 Mass. 169, 46 N. E. 568. In the last cited case, the language of the statute was similar to that of our Chancery act above quoted. In England, also, an appeal is allowed from an order striking a solicitor off the roll. *In re Hardwick*, 12 Q. B. D. (Eng.) 148; 53 L. J. Q. B. 64.

Whatever doubt there may be as to the right of appeal from a mere disciplinary order, there can be no doubt as to the appealability of such an order as this if the court of chancery was without jurisdiction to make it, since if this court cannot restrain the excess of jurisdiction, no court can, and the usurpation of power, if there is any, would go uncorrected. The supreme court could not act by *mandamus* as the United States supreme court acted in the *Bradley* case, because the court of chancery is one of co-ordinate jurisdiction. Only this court can act, and that by way of appeal. The stress of the argument at bar was upon the question whether the court of chancery had jurisdiction. This question we proceed to consider.

Our method of licensing counselors, attorneys and solicitors is peculiar. From the very beginning of the Province of New Jersey in the time of Lord Cornbury and probably in East Jersey at least from the time of Governor Basse in 1698 (Leam. & Spen. 223 § 11), attorneys and counselors have been licensed by the governor under the great seal of the state. The supreme court never has licensed them nor admitted them to practice. *In re Branch*, 70 N. J. L. 568, 570, 571, 57 Atl. 431. There has never been a sug-

gestion that the court of chancery has licensed solicitors to practice in that court. A careful distinction has been preserved in that court between masters and solicitors. Beginning with 1817 at least, the rules of the court of chancery have provided for the oaths of masters but not for the oaths of solicitors, no doubt because solicitors who were licensed by the governor, were [515] sworn in the supreme court, and there were no solicitors licensed by the chancellor as chancellor. After the new constitution of 1844, there seems to have been some doubt of the power of the chancellor to appoint masters, and in 1845, the legislature enacted that the power should continue in the chancellor. P. L. 1845 p. 161. This was confirmed in 1846. P. L. 1846 p. 188. The act now appears in the compiled statutes. Comp. Stat. 3785 pl. 8. There is no such legislation as to solicitors. A claim by the chancellor to appoint or remove solicitors is inconsistent with the language of the governor's commission. See 70 N. J. L. 570, 57 Atl. 431. The mandate of the governor under the great seal, attested by the secretary of state, is addressed to the court of chancery as well as to the supreme court and all the courts of record within the state. In 1748 the colonial legislature enacted a fee bill (1 Nevill 338; Allinson 160) which gave the governor a fee of twenty shillings for licensing an attorney, and the supreme court a fee of eighteen shillings for "admitting" every attorney, and those provisions, in substance, have remained on the statute books. No mention was made of any license to a solicitor until the act of 1799 (Pag. L. p. 418) which gives the governor a fee of three dollars for a "license to an attorney and solicitor," and the judges of the supreme court a like fee in the same language. The language is repeated in the revision of 1877 and is to be found in the compiled statutes of 1910. Comp. Stat. pp. 2278, 2281. The fact that attorney and solicitor were coupled, that a fee was allowed the governor, and a like fee for the same service to the justices of the supreme court, is significant enough; its importance is emphasized by the fact that although the chancellor was then paid by fees and his fee bill was for the first time, as far as appears, provided for by the very same act of 1899, no mention is made of any fee to him for licensing a solicitor. Governor Paterson had himself been governor and chancellor, and was not likely to overlook any of the chancellor's rights when he was for the first time drawing a fee bill to be provided for that officer by the legislature. It is probable, as suggested in the case of *In re Raich*, 83 N. J. Eq. 82, 90 Atl. 12, that in New Jersey as [516] in England in early times, no distinction was made be-

tween the practice of an attorney in a court of law and his practice in the court of chancery. The instances cited by the learned vice-chancellor on pages 114 and 115 point to that. But when Judge Paterson was drawing the fee bill and the Practice act, he wrote with accuracy, and for the first time a fee was provided the governor for a license to an attorney and solicitor. The license was as it has ever since been a single license to one individual in a double capacity for one fee. See *Lynde v. Lynde*, 64 N. J. Eq. 736, 747, 52 Atl. 694, 97 Am. St. Rep. 692, 5 L.R.A. 471. That the governor in granting the license was acting as governor and not as a chancellor also is apparent from the fact that the fee was given him as governor, and not as chancellor; while the fee for such judicial service as was rendered even in the licensing of a solicitor was given to the justices of the supreme court.

Enough has been said to demonstrate the difference between our practice and the English practice. Practitioners in the superior courts in England were admitted by each several court to practice in that court, and each court had its own roll. 3 Bl. Com. 26. By the act of 2 Geo. II. c. 23 § 20, a sworn attorney in any of the courts of king's bench, common pleas, &c., might be sworn and enrolled as a solicitor without further fee after an examination of his qualifications to be a solicitor. That act did not give a similar privilege to solicitors to act in the law courts, and the omission was corrected by 23 Geo. II. c. 26, § 15, which permitted solicitors to be enrolled as attorneys of the king's bench or common pleas without fee upon an examination by the judges of the solicitor touching his fitness and capacity to act as attorney. Under such a system, each court controlled its own roll and its own officers, and although an attorney who had been struck off the roll of one court might also be stricken off the roll of another court, this was not always done. 1 Tidd 89; 1 Arch. 30; *In re Smith*, 1 B. & B. 522, 5 C. C. L. 172. The power of the English courts was a power to discipline officers of their own appointment by striking names off a roll kept by that very court, not by some other. In New Jersey the appointment comes not from the court but from the governor; counselors, attorneys and solicitors are more than [517] mere court officers; their commissions run in substantially the same terms and are issued by the same authority and with the same solemnity as our own. They do not in terms require enrollment by the court. That requirement comes from immemorial usage descended from the English practice and implied rather than required by the Practice act. But for the provisions of

Ann. Cas. 1918B.—53.

that act it might be doubtful whether even the supreme court could nullify the governor's commission, or whether any action of that character could be of consequence if the governor should choose to issue a new commission. Could the chancellor, even if he knew an attorney and solicitor to be unfit to practice, refuse to obey the mandate of the governor? Whatever the inherent power of a court may be to punish its officers, it has no inherent power to deprive the governor's commission of its efficacy to authorize an attorney and solicitor to "appear and practice in all courts of record and to receive fees therefor, and to require all judges, justices and others concerned to admit him accordingly." The power of the supreme court to deprive the governor's commission of its efficacy rests on the Practice act of 1799. Section 3 of that act which appears substantially unchanged in the Revised Practice act of 1903 (Comp. Stat. p. 4054), enacted that if any counselor, solicitor or attorney-at-law shall be guilty of malpractice in any of the said courts, he shall be put out of the roll and never after be permitted to act or practice as a counselor, solicitor or attorney-at-law, unless he shall obtain a new license and be again enrolled in due form of law. The section is directed against malpractice in "any of the said courts." The reference is to section 1 of the act, which authorizes every person of full age and sound memory to prosecute or defend any action in any of the courts of judicature of this state in person or by his solicitor in chancery or attorney-at-law. The reference to "solicitor in chancery" makes it clear that the court of chancery was included among the courts, for malpractice in which an attorney and solicitor could be put out of the roll. The collocation of sections remained the same until the revision of March 27th, 1874; section 3 became section 5, and the language was changed so as to read, "If any counselor, solicitor or attorney-at-law [518] shall be guilty of malpractice in any of the courts, he shall be put out of the roll." The words "any of the courts" are as broad as they can well be and the use of the word "solicitor" again shows that the court of chancery was included. So also does the language of section 5 of the revision of 1903, "any court." Although the title of the Practice act points only to the courts of law, it must be remembered that our constitutional provision as to the title of an act is not found in the constitution of 1776, and the act of 1799 was therefore not objectionable on that score. In 1844, when our present constitution was adopted, the power of the supreme court under the act of 1799 was settled beyond the power of legislative interference; and the legislature

in the revisions of 1846, 1877 and 1903, merely followed the ancient lines.

Judge Paterson prepared also an act respecting the court of chancery which was passed in 1799, a few months after the Practice act. Pat. L. p. 428. He made no provision therein for the punishment of solicitors who had been guilty of malpractice. It is almost inconceivable that he would have omitted such a provision in the Chancery act and inserted it in the Practice act if it had been meant that the court of chancery should possess that power. Moreover the language of the Practice act demonstrates that the power was meant to be limited to the supreme court. The only penalty prescribed for misconduct, including as we have said, misconduct in any court, was that the delinquent solicitor should be put out of the roll, and never after permitted to practice. Obviously before he could be put out of the roll, he must be on it. The only roll ever known in New Jersey is a roll kept by the clerk of the supreme court, going back to colonial days, and for many years the oath to which an attorney and solicitor subscribed on that roll, has covered his office both as solicitor and as attorney. In *re Raisch*, 83 N. J. Eq. 97, 90 Atl. 12. The oath has always been taken before the supreme court. The suggestion in the *Raisch Case* that Judge Paterson, when he drew the Practice act of 1799, either erroneously supposed that the court of chancery maintained a separate roll of its solicitors and that they took their official oath as solicitors before the chancellor in open court, or assumed [519] that this practice (the English practice) would be established forthwith in New Jersey, can hardly be taken seriously. That Judge Paterson, who was a solicitor himself and had already served as chancellor, could have made the mistake of supposing that he had signed such a roll as solicitor, or that he had had such a roll in his custody as chancellor, when in fact he had not, and that he had taken an oath as solicitor before the then chancellor or that others had taken such an official oath before him when chancellor, in open court, when the fact was otherwise, is to us incredible. The alternative supposition that the English practice would be forthwith established in New Jersey is an impossible supposition since Judge Paterson himself omitted from the Chancery act all provision as to striking solicitors from the roll and carefully inserted such a provision in the Practice act. The language is struck out of the roll, not the rolls.

Judge Paterson moreover had a good reason for putting the provision in question in the Practice act. Although the commissions of counselors, attorneys and solicitors were from the governor under the great seal of the

state, the practice was to issue the commission on the recommendation of the supreme court, and only on that recommendation. Even the commission to one as solicitor was issued on the recommendation of the supreme court, as soon at least as the commission began to run to the licensee as both attorney and solicitor. It was because the justices of the supreme court did the work that the legislature gave them the fee, making no distinction between attorney and solicitor and giving one fee for the two combined. There was another and a more cogent reason. The evil of the English practice was that a man might be able to practice in one court who had been stricken off the roll of another court. That evil was the natural, almost inevitable result, of each court having a separate roll. That evil Judge Paterson guarded against by providing that for malpractice in any court, the practitioner should be put out of the roll and never after permitted to practice as counselor, solicitor or attorney, unless he obtained a new license and was again enrolled in due form. The evil of having solicitors and attorneys under the control of two distinct courts is well illustrated in the present case. Mr. Hahn's offence is said [520] to have been committed by him as a solicitor in his practice in the court of chancery. The supreme court would have no means of knowing the facts unless communicated to it by the chancellor, as in the *Cahill case*, hereinafter referred to, or by some outside agency. The chancellor, by proceeding to "debar" the solicitor, prevents him from practicing in the court of chancery before the supreme court can even direct proceedings to be begun in the supreme court. Under our constitutional provisions, the attorney cannot be put out of the roll without notice and a hearing, and pending the hearing, if the present order is valid, the lawyer, as he is commonly called, may practice in one tribunal and not in another, the very scandal that Judge Paterson's act would have avoided. One who is put out of the roll of the supreme court is disqualified to practice in all courts; one who is "debarred" as solicitor may still practice in all other courts unless a new proceeding is had against him. Judge Paterson could not have meant that. Again, the provision as to putting counselors out of the roll is contained in the same section as the provision relating to attorneys and solicitors. Whether the attorney and solicitor holds two offices, as the vice-chancellor argues in the *Raisch case*, or is one officer with two distinct functions as a justice of the supreme court is also a judge of the oyer and terminer, is unimportant; a counselor certainly holds but one office, that of counselor-at-law. There is no such officer as "a counselor of this court," to use the words of the chancellor's order. The office of counselor-at-

law cannot be divided by the action of the court of chancery; the governor's commission requiring all courts to admit him as such cannot be deprived of its efficacy in one end of the state house while it remains efficacious in the other. So far as the present order affects Mr. Hahn as counselor, it is a clear excess of jurisdiction. It is notable that in the case of Cosey, argued at the same time, there was no attempt to "debar" him from practice as counselor; so, that if the order in his case is valid, although he may not issue a subpoena, he may, nevertheless, appear and argue before the chancellor as a counselor.

To return to the language of the Practice Act of 1799. The provision as to re-enrollment of itself is conclusive against the [521] jurisdiction of the court of chancery. A new license could be obtained only as the old license had been obtained, by a recommendation of the supreme court and a commission from the governor; and that commission would require the chancellor as well as other judges to admit the practitioner to practice. The control of this new license and re-enrollment would thus be in the supreme court, and the man who had been "debarred" on one day by the chancellor might walk into court with the governor's new commission the next week. To avoid that scandal the control was put in a single tribunal, the supreme court. No doubt our whole system of admission to the bar and of disbarment is *sui generis*, but it has worked well, and, so far as we know, without difficulty for over a century, recognized by the court of chancery as well as by the supreme court, and no question has ever been brought to this court until the present time. We are far from suggesting that any inherent power of the court of chancery is lost by disuse; but when the question is whether the power existed in that court, the fact that it has not been exercised, is a cogent argument against its existence. The argument becomes irresistible when we find that a distinguished chancellor communicated to the supreme court a case of malpractice by a solicitor in the court of chancery "with the suggestion that it was a case for discipline." In re Cahill, 66 N. J. L. 527, 50 Atl. 119. It is true we are referred in the opinion of the vice-chancellor, in the Raisch Case, 83 N. J. Eq. 111, 90 Atl. 12, to an unreported case, In re Edmunds, where Chancellor Runyon, it is said, expelled from office a solicitor who had forged a decree of divorce. The fact that no opinion is reported, and that the chancellor "stayed the infliction of the penalty," weakens the value of the case as a precedent even in the court of chancery. We cannot avoid the thought that perhaps he came to entertain doubts of his jurisdiction. The explanation that he was led by considerations of mercy seems hardly ade-

quate in view of the serious nature of the offence—one in which mercy would be misplaced. Such weight as the case might have had in the court of chancery is lost in the face of the subsequent action of Chancellor Magie in the Cahill case, and it was never followed until two years ago in the Raisch case. Even the [522] opinion in that case is of no more value as a precedent than the weight, great, to be sure, to be given to the view of the very learned and able judge who gave expression to it. Confessedly, what he said was merely *obiter*, since the question of jurisdiction was not raised in the case (see pages 85, 86), and the discussion of that subject, it seems probable, was intended as a foundation for a claim of jurisdiction in the court of chancery that had never been exercised before, with the possible exception of the Edmunds case. This court is not bound by the Raisch case, nor by the cases in the court of chancery that have followed it during the last two years without any further consideration of the question of jurisdiction.

We have thus far dealt with the question as one of statutory construction. The Raisch case seeks, however, to vindicate the jurisdiction, on the theory that the power was inherent in the court of chancery when the constitution of 1844 was adopted. This is deduced from the fact that the English chancellor exercised the power over the solicitors in his court. The deduction lacks support in fact. What the English chancellor did was to strike off the roll of the court of chancery a solicitor who was enrolled thereon. Precedents antedating the Judicature acts of 1873 and 1875 are given in Seton Dec. 651, 652. There is nothing that we have found or that counsel has cited to show that the English chancellor ever undertook to strike a name off the roll of the king's bench. The very reason that the order now brought here for review rejects the precedents of the English chancery and "debars" Mr. Hahn is that the established form of order would be absurd since Mr. Hahn has never signed a roll of the court of chancery. A novel term had to be invented for this novel proceeding and he is "debarred." No power to "debar" was ever asserted by the English chancery.

But the case is of too much importance to rest the argument upon the novelty of the word used, significant as that novelty is. The jurisdiction of the court of chancery that is protected by the constitution of 1844, is the jurisdiction that existed at that time. This jurisdiction was not necessarily the same as the jurisdiction of English chancery. So far as the latter depended on English [523] statutes antedating the Revolution, our inquiry must be whether the statute was in force in New Jersey. The regulation of the enrollment, which meant the admission to practice,

of solicitors was regulated at the time of our Revolution by statutes. The name "solicitors" seems to have arisen in the seventeenth century. Chris. His. Sol. 74. In 1729, the act of 2 Geo. II. c. 23, for the better regulation of attorneys and solicitors was passed. That act required only an oath that the affiant would truly and honestly demean himself in the practice of an attorney. Chris. 111. We have already referred to the act at length. It was extended (23 Geo. II. c. 26) so as to give solicitors the privilege to practice in the king's bench without further fee. The important point is that the practice of solicitors was regulated by statute. By the constitution of 1776 it was provided that so much of the statute law as had theretofore been practiced in the colony, should still remain in force, until altered by the legislature. To make definite exactly what was meant, the legislature, on November 24th, 1792, authorized Judge Paterson, who was then governor, to collect and reduce into proper form all the statutes of England or Great Britain, which before the Revolution were practiced and which by the constitution extended to this state, as also all the public acts passed by the legislature before or since the Revolution which remained in force; and, on March 19th, 1795, authorized him to collect, alter and modify the statutes he had not reported on and to propose to the legislature such bills as to him should appear conducive to the general interests of the state and to the completion of the revision and system of the laws of this state. Judge Paterson's work, in pursuance of these legislative mandates, has ever since been treated as a complete system of the statute law of New Jersey, in 1799. Schomp v. Schenck, 40 N. J. L. 195, 29 Am. Rep. 219. The omission of the acts of 2 Geo. II. c. 23, and of 23 Geo. II. c. 26, together with the enactment of the Practice act of 1799, make it clear that the English law as to the admission of solicitors was not applicable in this state, and account for the uniform practice with reference to the matter. We find no jurisdiction of such proceedings as this existing in the court of chancery when the constitution of 1844 was adopted.

[524] The order cannot be sustained under the section of the Practice act requiring the solicitor to act under the direction of the court. That, obviously, refers to causes in which he is acting, not to his own disqualification for practicing at all, which is the subject of another clause of the statute. It is, however, suggested that the order made by the chancellor may be sustainable as a punishment for contempt. This amounts to saying that what the court of chancery cannot do directly, it can do indirectly. The distinction between the power to punish for contempt, and the power to disbar, is pointed

out in *Ex p. Robinson*, 19 Wall. 505, 22 U. S. (L. ed.) 205, and the care our own courts take to avoid excessive punishment for contempt, is apparent from our opinion in *O'Rourke v. Cleveland*, 49 N. J. Eq. 577, 25 Atl. 367, 31 Am. St. Rep. 719. As far as we know, the power to punish for contempt is limited to fine and imprisonment and does not extend to stripping a man of his means of gaining a living. We need not pursue the subject, since the proceedings do not purport to be proceedings to punish for contempt and there is no adjudication of a contempt.

As the court of chancery was without jurisdiction to make the order, the motion to dismiss the appeal must be denied.

The question whether or not the order disbarring the appellant may be held to be an order suspending him from practicing in the court of chancery until the supreme court has acted under the statute is not presented by a motion to dismiss the appeal which is all that is now before us; such a question can be properly dealt with only upon the appeal itself, when the question will be whether the order brought up by the appeal shall be affirmed, reversed or modified.

TRENCHARD, J. (*dissenting*).—I am unable to concur in the conclusion of the majority of the court. I think the court of chancery had jurisdiction to make the order under review. I think it had power to make it substantially, for the reasons given by Vice-Chancellor Stevenson in his opinion in *re Raisch*, 83 N. J. Eq. 111, 90 Atl. 12, in which case an order quite like the one here was made. If, as I think, the court of chancery had power to make such order, it follows, upon well-settled principles, that it is not appealable. I vote to dismiss the appeal.

[525] I am requested by Mr. Justices Garison and Black, and Judges White, Terhune and Heppenheimer, to say that they concur in this view.

NOTE.

Right of Attorney to Review of Disbarment Proceedings.

Introductory, 836.

Appeal, 837.

Writ of Error, 837.

Mandamus, 837.

Certiorari, 838.

Introductory.

The earlier cases touching on an attorney's right to a review of proceedings resulting in his disbarment are discussed in the notes to

In re Durant, 10 Ann. Cas. 539, and *Burns v. Allen*, 2 Am. St. Rep. 844. This note collates the more recent decisions.

Appeal.

In several recent cases the right of an attorney to review by appeal proceedings resulting in his disbarment has been recognized. *Peters v. State*, 193 Ala. 598, 69 So. 576; *State v. Kimball (Ia.)* 158 N. W. 579; *In Matter of Goodman*, 199 N. Y. 143, 92 N. E. 211, *affirming* 135 App. Div. 594, 120 N. Y. S. 801; *In re Robinson*, 209 N. Y. 354, 103 N. E. 160, *affirming* order 151 App. Div. 589, 136 N. Y. S. 548; *In re Flannery*, 212 N. Y. 610, 106 N. E. 630, *affirming* 150 App. Div. 369, 135 N. Y. S. 612. And see the reported case.

In the case of *In Matter of Goodman*, supra, an order was entered suspending an attorney from practice for a period of two years. From this order an appeal was taken, the contention being that the charges of unprofessional conduct against him were not sustained by the evidence. The court said: "In a proceeding of this character the power of review ends in this court when it appears that the proceeding has been instituted and conducted in accordance with the statutes and rules authorizing it; that no substantial legal right of the accused has been violated; that no prejudicial error has been committed in the reception or exclusion of testimony; and that there is some evidence to sustain the findings upon which the order is based. Further we cannot go, for the power and discretion of the appellate division in the infliction of punishment when guilt is established are not subject to review in this court."

In *Peters v. State*, 193 Ala. 598, 69 So. 576, an attorney, who had been disbarred, sought to review the proceedings by an appeal under the statute, which was allowed, but it was held that the appeal did not permit a trial de novo but only a review on exceptions taken at the trial, the court saying: "It is plain that appeals in such cases are not trials de novo in this court. The statute (Code, § 3002) vests in the trial court the power, and imposes thereon the duty to decide whether the attorney charged shall be disbarred or merely suspended. In order to present for review a trial court's decision to disbar, rather than suspend, an attorney, it is necessary to save the question in the trial court. It cannot be presented here for the first time. Hence there cannot be on this record any review of the trial court's conclusion to disbar, rather than suspend, the attorney."

In *State v. Kimball (Ia.)* 158 N. W. 579, the court held, in reviewing disbarment proceedings on appeal, that a disbarred attorney has the right to submit questions of fact on

the evidence in the record, if he included the evidence in his abstract, but that where no evidence was presented, only points of law could be reviewed.

In each of the following cases an appeal taken by a disbarred attorney was entertained, though the question of the attorney's right to appeal was not raised: *Wernimont v. State*, 101 Ark. 210, Ann. Cas. 1913D 1156, 142 S. W. 184; *In re Soale*, 31 Cal. App. 144, 159 Pac. 1065; *In re Kone*, 90 Conn. 440, 97 Atl. 307; *U. S. v. Ballinger*, 35 App. Cas. (D. C.) 520; *Jones v. McCullough*, 138 Ga. 16, 74 S. E. 694; *In re Darrow*, 176 Ind. 44, 92 N. E. 369; *In re Wilson*, 79 Kan. 450, 453, 100 Pac. 75; *In re Wilson*, 79 Kan. 674, 17 Ann. Cas. 690, 100 Pac. 635, 21 L.R.A. (N.S.) 517; *Lenihan v. Com.* 165 Ky. 93, 176 S. W. 948, L.R.A.1917B 1132; *Heck v. Battistee*, 172 Ky. 234, 189 S. W. 25; *Denny v. Com.* 175 Ky. 357, 194 S. W. 330; *Boston Bar Assoc. v. Casey*, 204 Mass. 331, 90 N. E. 584, *affirming* 196 Mass. 100, 81 N. E. 892; *In re Allin*, 224 Mass. 9, 112 N. E. 494; *In re Spenser*, 203 N. Y. 613, 96 N. E. 1131; *In re Hopkins*, 54 Wash. 569, 103 Pac. 805.

Writ of Error.

Disbarment proceedings may in the federal courts be reviewed by a writ of error. *Cobb v. U. S.* 172 Fed. 641, 96 C. C. A. 477; *Thatcher v. U. S.* 212 Fed. 801, 129 C. C. A. 255, *affirming* order *In re Thatcher*, 190 Fed. 969, *rehearing denied* *Thatcher v. U. S.* 219 Fed. 173, 135 C. C. A. 71.

Mandamus.

In order to obtain a writ of mandamus to review disbarment proceedings, an attorney must clearly show his right thereto. Where the trial court has jurisdiction of the subject-matter, and there is some evidence to support the charges on which the disbarment proceedings are founded, the writ will not issue. *Garfield v. U. S.* 32 App. Cas. (D. C.) 109; *U. S. v. Ballinger*, 35 App. Cas. (D. C.) 520; *State v. Brough*, 33 Ohio Cir. Ct. Rep. 257.

In *U. S. v. Ballinger*, supra, it appeared that an order disbaring an attorney from practicing before the secretary of the interior was entered. Later the order was revoked and canceled. The attorney subsequently petitioned for a writ of mandamus to compel the secretary of the interior to make the revoking order show on its face that it related back and vacated the original order as of its date. The court held that it had no jurisdiction to review the judgment of the secretary of the interior, entered in the exercise of his discretion, saying: "Nor can it, in this proceeding, undertake to interpret the meaning and operation of the order entered, and re-

store relator to any rights of property that may have been denied him by virtue of the order of disbarment, while it was in apparent force. That could only be done in a case involving such a right between the parties interested. If the order of February 5, 1900, was entered without due process of law, it would be a nullity, and impeachable in any proceeding in which it might be pleaded or offered in evidence. But the duty of ascertaining the effect of that order, and of its subsequent cancellation is that of the tribunal in which the action is depending."

In *State v. Brough*, 33 Ohio Cir. Ct. Rep. 257, an attorney, who had been disbarred, applied for a writ of mandamus to compel a lower court to permit him to practice therein. The grounds claimed for the issuance of the writ were stated to be that the court which disbarred him had no jurisdiction, that if it had jurisdiction it did not extend beyond its own court, and that the legislature had passed an act admitting him to practice. The court held that to entitle the relator to the remedy of mandamus, he must show a clear right thereto, and the claims set forth by him being decided against him, the writ was refused.

In *Garfield v. U. S.* 32 App. Cas. (D. C.) 109, a petition for a writ of mandamus by a firm of attorneys who had been disbarred from practicing in the department of the secretary of the interior was allowed, the secretary of the interior being ordered to restore them to practice. From that order an appeal was taken by the secretary. It was held that the secretary of the interior having jurisdiction of the subject-matter, and having found that there was sufficient evidence to show conduct violative of the rules and regulations, his judgment was not subject to review, and the order issuing the writ was reversed.

Certiorari.

It has been held that a writ of certiorari may be granted to review disbarment proceedings when the record shows on its face that the inferior court acted without jurisdiction. *Baird v. Justice's Court*, 11 Cal. App. 539, 105 Pac. 259; *In re Radford*, 159 Mich. 91, 123 N. W. 546, 16 Detroit Leg. N. 757.

In the case first cited it appeared that a police court judge who was trying a case before a justice of the peace, was disbarred from that court. His client applied for a writ of certiorari on which the order of disbarment was vacated, an appeal was taken, and it was held that while the petitioner was not a party in interest entitling him to bring the petition, nevertheless, inasmuch as a justice of the peace had no authority to disbar attorneys, the record itself showed that the attorney was improperly disbarred, and al-

though the court below should not have entered a judgment vacating the order on the client's petition, since no injustice by so doing resulted, the judgment was affirmed.

In the case of *In re Radford*, 159 Mich. 91, 123 N. W. 546, 16 Detroit Leg. N. 757, proceedings were brought to disbar an attorney, who filed a demurrer to the charges. The court entered an order overruling the demurrer, to review which order the attorney applied for a writ of certiorari. It was held that the proceedings must be finally disposed of in the trial court before the petition for the writ of certiorari would be considered.

VIRGINIA RAILWAY AND POWER COMPANY

v.

GORSUCH.

Virginia Supreme Court of Appeals—March 15, 1917.

120 Va. 655; 91 S. E. 632.

Trial — Reopening for Additional Testimony — Discretion of Court.

Reopening the case to take additional testimony inadvertently omitted being within the trial court's discretion and not reviewable unless arbitrarily exercised, it is proper, in an action against a street railway for injuries to an automobile passenger, to permit the reopening of the passenger's case to show the ownership of the street car which struck the automobile.

Automobiles — Occupant — Imputation of Driver's Negligence.

That the wife owned an automobile which she sent to another city for her husband to use, and on her casual visit to the city, while riding with him in the automobile, it was struck by a street car, at a crossing, while she was engaged in conversation with another passenger and exercising no control over its operation, does not render negligence of the husband, if any, imputable to her, since the husband was in effect her bailee.

[See note at end of this case.]

Error to Circuit Court, City of Richmond.

Action by Mrs. Sophia Gorsuch, plaintiff, against Virginia Railway and Power Company, defendant. Judgment for plaintiff. Defendant brings error. The facts are stated in the opinion. **AFFIRMED.**

H. W. Anderson, A. B. Guigon and Thos. P. Bryan for plaintiff in error.

J. Kent Raicley and M. J. Fulton for defendant in error.

[657] PRENTIS, J.—A collision occurred at the intersection of Eighth and Grace streets, in the city of Richmond, on the night of September 19, 1914, between 11:30 and 12 o'clock, between a west-bound automobile and a north-bound street car of the Virginia Railway and Power Company. The occupants of the automobile were Mr. Thomas H. Gorsuch, his wife Sophia, and their friend, Mr. John F. Stephenson. The front part of the automobile was seriously damaged and Mrs. Gorsuch was injured.

Mr. Gorsuch was employed by the Virginia Railway and Power Company to do some work in the city of Richmond in connection with dismantling certain plants on Brown's Island and re-erecting them on Belle Isle. His wife lived in the city of Baltimore. She owned the automobile referred to, but Mr. Gorsuch, shortly before the accident, had told her that he had so far to walk to his work, it would be a convenience to him to have the use of the automobile in Richmond, and she had sent it to him, and it had been in Richmond and in his possession for about a week before the date of the accident. On the afternoon of the day of the accident, Mrs. Gorsuch came from Baltimore to Richmond for a visit, was met at the train by her husband with the automobile, and after a pleasure ride Mr. Stephenson was invited to go with them to a local hotel, where the party had something to eat with some beer (though there is no suggestion of intoxication), and after watching the dancing they started home about 11:30 p.m. Within one square after the automobile started, the collision occurred. At that time the surface of Grace street was torn up because the company was relaying or repairing its tracks at that point. The excavations made it necessary to provide a temporary crossing over the tracks at the place of the accident, which consisted of railroad ties laid alongside of each other, making a crossing twelve feet wide.

[658] 1. One of the errors assigned is, that after the evidence had been concluded, the defendant company had demurred to the evidence because it had not been proved that the street car was the property of the Virginia Railway and Power Company, although the plaintiff, Mrs. Gorsuch, had rested and concluded her case, after the statement of the grounds of demurrer, the court allowed her to reopen the evidence and prove the ownership of the street car.

There is no merit in this assignment. At that stage of the proceedings they were within the control of the trial court, and it was the duty of the judge to permit the plaintiff to prove a fact which had been inadvertently omitted, but about which there was no doubt whatever. Had the court refused to do so, it would have been reversible error. Matters of

this sort are within the discretion of the trial court and will not be reviewed unless such discretion is exercised in an arbitrary or obviously improper manner. *Norfolk, etc. R. Co. v. Coffey*, 104 Va. 670, 51 S. E. 729, 52 S. E. 367; *Daniels v. Thacker Fuel Co. (W. Va.)* 90 S. E. 841; *Burns v. Morrison*, 36 W. Va. 423, 15 S. E. 62; *Cook v. Raleigh Lumber Co.* 74 W. Va. 503, 82 S. E. 327.

2. Another error assigned is the failure of the court below to instruct the jury that the contributory negligence of the husband, Mr. Gorsuch, should be imputed to Mrs. Gorsuch in bar of her recovery.

The doctrine of imputable negligence has been discussed, and the books are full of cases dealing with the question. There are some conflicts in the decisions, but it may be regarded as settled by the overwhelming weight of authority, that the negligence of the driver of an automobile will not be imputed to a mere passenger, unless the passenger has or exercises control over the driver. The negligence of the servant is imputed to the master, because the master employs and can discharge the servant and direct his actions. It seems to be well settled that the negligence of a husband [659] driving an automobile is not, as a general proposition, imputable to his wife merely because of the marital relation; nor is the negligence of the driver of an automobile imputable to his guest merely because he is riding with him by invitation. *Anthony v. Kiefner*, 96 Kan. 194, 150 Pac. 524, L.R.A. 1915F 876, Ann. Cas. 1916E 268; Ann. Cas. 1912A 649; *Reading Tp. v. Telfer*, 57 Kan. 798, 48 Pac. 134, 57 Am. St. Rep. 355, 110 Am. St. Rep. 289; *Shultz v. Old Colony St. R. Co.* 193 Mass. 309, 79 N. E. 873, 8 L.R.A. (N.S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402; *Wachsmith v. Baltimore, etc. R. Co.* 233 Pa. St. 465, 82 Atl. 755, Ann. Cas. 1913B 679; *St. Louis, etc. R. Co. v. Bell (Okla.)* 159 Pac. 336, L.R.A. 1917A 543.

It is earnestly claimed, however, that because of the fact that Mrs. Gorsuch owned the automobile involved in this collision, none of the rules above stated are applicable to this case, and that Mrs. Gorsuch, as the owner of the machine, had such control, or right of control, over it as to make her responsible for the negligence of her husband.

We cannot agree with this suggestion. Mr. Gorsuch was the gratuitous bailee of her automobile and had been for a week before the accident. His control of it while his wife remained in Baltimore, was as absolute as if he had owned the machine, and the casual visit of Mrs. Gorsuch to Richmond did not change this control.

The case of *Hartfield v. Roper*, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273, decided in 1839, is instructive. Newell had demised his team for a term of two years, which had

not expired at the time of the injury, to his son-in-law and co-defendant, Roper. The accident, however, occurred when Newell, the owner of the team, was riding in the vehicle, and the court acquitted him of responsibility for the accident upon the ground that at the time thereof he had no control over the team and could not be made liable [660] without proof of positive and active concurrence in the injury, quaintly adding, "a thing for which there is no pretense in the proof, and which implies a barbarous temper, which the law cannot presume in any one."

This appears from the case of *New Jersey Electric R. Co. v. New York, etc. R. Co.* 61 N. J. L. 287, 41 Atl. 1116, 43 L.R.A. 849. The New York, Lake Erie and Western Railroad Company was the owner of a certain locomotive and cars which had been injured in a collision between such locomotive and an electric car of the New Jersey Electric Railway Company. At the time of the accident the locomotive and cars of the plaintiff had been hired by the day and from day to day for the use of another company, the New York and Greenwood Lake Ry. Co. which latter company was, with its own engineer, fireman and employees, operating the same upon its own roadbed and rails at the time and place of the collision. The effort was made to impute the negligence of the operating company, the lessee, to the New York, Lake Erie and Western Railroad Company, the owner of the cars, but the court refused to take that view, saying, among other things: "In a contract of bailment of things for hire, the bailor is not responsible to a third party for injuries occurring to such third party by reason of the negligent use of the thing hired by the bailee, nor for the negligence of the servants of the bailee in respect thereto. The bailee does not stand in the place of the bailor, nor represent him in such relation as to render the bailor liable for such injuries; nor are the servants of the bailee the servants of the bailor, or in any sense acting for him; and the contract of bailment is in so far entirely an independent one, and the liabilities of the bailor and the bailee to third parties are essentially independent of each other."

The modern and better doctrine is that the negligence of a bailee of property, over whom the bailor is exercising no [661] control at the time of the injury, is not imputable to the bailor. Hence, a livery stable keeper is not prevented from holding a railroad company liable for negligently killing a horse because the negligence of the hirer, in whose sole control the animal was, contributed to the injury. *Gibson v. Bessemer, etc. R. Co.* 226 Pa. St. 198, 75 Atl. 194, 27 L.R.A.(N.S.) 690, 18 Ann. Cas. 535.

The proposition is also strengthened by *Sea Ins. Co. v. Vicksburg, etc. R. Co.* 159 Fed. 676,

86 C. C. A. 544, 17 L.R.A.(N.S.) 925; *Currie v. Consolidated R. Co.* 81 Conn. 383, 71 Atl. 356; *Alabama Great Southern R. Co. v. Clarke*, 145 Ala. 459, 39 So. 816; *Van Zile on Bailments and Carriers* (2d ed. 1903) sec. 119; 3 R. C. L. 147.

We know of no reason for applying a different rule when the bailment is gratuitous.

The relation of Mrs. Gorsuch to Mr. Gorsuch, under the circumstances above referred to, was that of bailor to bailee, and until she resumed control of the property, the operation of the car was as completely within his control as if he had been the fee simple owner thereof.

Mrs. Gorsuch, at the time of the accident, was no more responsible for the negligence of her husband than the other guest who was riding in the machine was responsible therefor. In order to defeat her recovery in this case, it would be necessary to prove that she was herself guilty of some negligence. This the record fails to show. She was on the front seat, on the side of the automobile from which the street car was approaching, half-turned, so that she could not see the approaching street car, talking from time to time to their guest, Stephenson. This conduct was perfectly natural and such as is demanded by the ordinary rules of courtesy. She had no reason to distrust her husband's skill or carefulness, and notwithstanding the advances made by modern women towards political and [662] economic independence of man, it still remains true that the normal woman married to the normal man recognizes the obligation of obedience contained in the marriage vow, and observes the Pauline injunction to remain subject to her husband, as is suggested in *Reading Tp. v. Telfer, supra*; Ann. Cas. 1912A 649.

There is nothing then in this record to indicate any negligence on the part of the plaintiff in the action, Mrs. Gorsuch.

Where a passenger is in a private vehicle by invitation and is exercising no control over the driver, the negligence of such driver cannot be imputed to the passenger. If precluded from recovery it must be because of his own negligence. This case is controlled by the well-established doctrine announced in the case of *Atlantic, etc. R. Co. v. Ironmonger*, 95 Va. 632, 29 S. E. 319.

It follows from this that it is unnecessary to pass upon the question as to whether the evidence indicates that the negligence of her husband contributed to the accident. Whether it did or not, under the circumstances of this case, it cannot be imputed to her.

Mrs. Gorsuch made no claim in her testimony for damages for injury to the automobile, and her husband stated that the automobile had been repaired at his own expense. The court apparently eliminated this element

of damage from the consideration of the jury, for the instruction as to damages limits the jury to the consideration of her physical and bodily injuries, mental suffering caused by the accident, and actual damages to wearing apparel and jewelry; and the jury unquestionably heeded this instruction, because they rendered a verdict of \$800, and the repairs to the automobile alone, according to the testimony, amounted to \$590.

[663] The question as to responsibility for the accident was fairly submitted to the jury, and they were justified, upon the evidence introduced by the plaintiff, in inferring the negligence of the company from the failure of the motorman to keep a proper lookout for travelers upon Grace street, and in failing to moderate the speed of the street car in accordance with the city ordinance limiting that speed to four miles an hour when crossing Grace street.

The judgment will, therefore, be affirmed. Affirmed.

NOTE.

The reported case holds that the negligence of a husband in driving an automobile is not to be imputed to his wife who is riding as a passenger and exercising no control over the driving, though the car is the property of the wife. The negligence of the driver as imputable to an occupant of an automobile is discussed in the notes to the following cases: *Dale v. Denver City Tramway Co.* 19 Ann. Cas. 1223; *Wachsmith v. Baltimore, etc. R. Co.* Ann. Cas. 1913B 679; *Corley v. Atchison, etc. R. Co.* Ann. Cas. 1915B 764; *Anthony v. Kiefner*, Ann. Cas. 1916E 264, and *Hampel v. Detroit, etc. R. Co.* 110 Am. St. Rep. 275.

WESTERN UNION TELEGRAPH COMPANY

v.

BURLINGTON TRACTION COMPANY.

Vermont Supreme Court—October 10, 1916.

90 Vt. 506; 99 Atl. 4.

Judicial Notice — Charter of Public Service Corporation.

The court will not take judicial notice of the provisions of the charter of a public service corporation.

[See 124 Am. St. Rep. 57.]

Public Service Commissions — Review of Findings.

In proceedings before the public service commission by a telegraph company to compel a traction company to remove its high-tension power line from dangerous proximity to the telegraph company's wires, the findings of the commission, that both parties were corporations subject to its supervision, under Acts 1908, No. 116, and that their lines were used in service to the public in and about their business carried on in the state, are determinations of mixed questions of law and fact, and conclusive on appeal as showing that the traction company fell within the provisions of section 3 of the act.

Power of Commission — Requiring Separation of Electric Wires.

Acts 1908, No. 116, § 9, giving the public service commission jurisdiction to enter judgment and make orders or decrees in all matters respecting the manner of operating and conducting any business, subject to its supervision under the act, so as to be reasonable and expedient and to promote the safety, convenience, and accommodation of the public, and respecting the sufficiency and maintenance of proper systems, plants, conduits, appliances, wires, and exchanges, and, when the public safety and welfare require, respecting the location of such wires or any portion thereof underground, confers jurisdiction on the commission to hear and determine proceedings by a telegraph company against a traction company to compel removal of power wires from dangerous proximity to telegraph wires.

[See note at end of this case.]

Same.

In proceedings before the public service commission by a telegraph company to compel a traction company to remove its power wires from dangerous proximity to telegraph wires, where the traction company sought to base any claim upon the intention of the legislature to take away by its charter the private rights of individuals or the telegraph company, another public service corporation, the burden is with the traction company to show that such an intention appeared by express words or necessary implication in its charter.

[See note at end of this case.]

Same.

An order of the public service commission, made on petition of a telegraph company, requiring a traction company, owning its right of way, to remove its high-tension power wires from dangerous proximity to telegraph wires, does not exceed the constitutional powers of the commission as being confiscatory of the traction company's property and a taking without "due process of law," in violation of Federal Const. Amendments 5 and 14; private ownership of its right of way not giving the traction company the right to erect its high-tension line thereon without regard to the rule restricting every man against using his property to the prejudice of others.

[See note at end of this case.]

Review of Findings.

The findings of the public service commission, having the force and effect of reports of special masters in courts of equity, are conclusive in the supreme court on appeal.

Requiring Separation of Electric Wires.

Where a traction company constructed its high-tension power line on its right of way in dangerous proximity to the wires of a telegraph company, though the telegraph company's lines needed some repair by way of new poles, the order of the public service commission, made on petition of the telegraph company, requiring that the traction company remove its high-tension power line to a minimum distance of 30 feet, is not an unreasonable exercise of the commission's authority.

[See note at end of this case.]

Same.

Where the public service commission determined the necessity of an elimination of the danger in the close proximity of a traction company's high-tension power wires and a telegraph company's wires, it is within the province of the commission to determine the manner in which the elimination could best be accomplished, with a view to the operation of both lines and to the public safety.

[See note at end of this case.]

Appeal from order of Public Service Commission, Chittenden county.

Action by Western Union Telegraph Company, plaintiff, against Burlington Traction Company, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

[507] This case comes before the Supreme Court by appeal from the order of the Public Service Commission. The petition was brought by the Western Union [508] Telegraph Company against the Vergennes Power Company; but the report of the commission states that at the outset of the first hearing, it was stated that the Burlington Traction Company was practically the party in interest instead of the Vergennes Power Company, the Burlington Traction Company being the real owner of whatever there was to the Vergennes Power Company; that it was thereupon agreed by all the parties that the Burlington Traction Company should be substituted as petitionee for the Vergennes Power Company, whereupon the Burlington Traction Company entered as petitionee in the matter and appeared by counsel; and that the latter company is thereafter in the report designated as the petitionee. It is so designated in the opinion of the court.

The commission reports the following facts: It was conceded by both parties that the petitioner's lines were erected before the high tension line of the petitionee was erected, and that there has been no change in the petitioner's lines since the high tension line

of the petitionee was erected. Both parties to this proceeding are corporations subject to the supervision of the commission under No. 116 of the Acts of 1908, and the lines of said parties which are described and designated in the report and order are used by them in service to the public and about the business carried on by them in this state.

In presenting its case, the petitioner arbitrarily divided that part of petitionee's high tension line against which it petitioned into twenty-one sections. Sections 19-21 were not urged at the hearing, and are not in question. The first section begins at a point about 2,000 feet north of Ferrisburgh station; thence the first eighteen sections which are consecutive, extend northerly along the west side of the right of way of the Rutland Railroad Company and parallel thereto, ending at a point about one and one-half miles south of Shelburne station at which the high tension line and the right of way diverge.

The petitioner, on February 23, 1910, and before the petitionee had taken any steps looking to the construction of its high tension line or the acquisition of any real estate or rights incident thereto, entered into a written contract with the Rutland Railroad Company, by the terms of which it acquired the right to maintain its poles and wires at the places within the railroad right of way and in the manner set forth in the report for a period of twenty-five years from January 1, 1910. This [509] contract also gave the railroad company the right to use certain of the petitioner's wires. The petitioner's poles and wires had been located at these places specified in the contract for a considerable period prior to the execution thereof. The petitionee erected its high tension line sometime subsequent to the month of April in the year 1912, and upon a private right of way which it purchased. This high tension line, consisting of three solid copper wires, one of which is located on top of the poles, and the others on the ends of the cross-arms, constantly carries a voltage of 22,000. The poles are placed one hundred thirty feet apart. There was no evidence tending to show that the petitionee had any other right of way than the one which its high tension line now occupies.

The petitioner has two lines of poles and wires, located wholly within the limits of the railroad right of way, which extend from a point opposite to the beginning of section 1 of the high tension line to the point opposite the end of section 18 thereof, a distance of a little less than eleven miles. One of these lines is on the east and the other on the west side of the single railroad track. The line west of the track is parallel with the high tension line for the whole of this distance and is constructed with twenty-five foot class B and C cedar poles, each carrying two cross-

arms. The lower arms carry three wires on the west of the poles and two on the east side of the poles. The two outside wires on the west of the poles are a telephone circuit used by the railroad company in its general business. The wire on the west which is nearest the poles is a railroad telegraph wire for general messages. The wire on the east of and nearer the poles is a telegraph wire used jointly by the petitioner for commercial business, and by the railroad for general messages. The outside wire on the east of the poles is a commercial wire of the petitioner. The upper cross-arms carry two wires on each side of the poles. The two wires on the west of the poles are commercial telegraph wires. The wire nearer the poles on the east is a lease wire of the petitioner, and the outside wire is used by the railroad company in telegraphic train dispatching between Bellows Falls and Burlington.

The petitioner's line has been in place for a number of years and the majority of the poles need renewal, but in many instances the poles could be cut off and reset, and then have a considerable period of usefulness. But if the line of the petitioner [510] were in proper condition, the hazards set forth in the report would not be materially reduced. The report shows the location of the eighteen sections (in question) of the high tension line, the average distance at each of these sections between the centers of the petitionee's high tension pole-line and the petitioner's pole-line adjacent thereto, and the average clearance at each of the sections between the wires of the two proximate lines.

The high tension line when considered without reference to proximity or parallelism with any other line, might be regarded as fairly well constructed for the purpose for which it is used. But the proximity which exists between sections 1 and 18 inclusive of said line, and the petitioner's line west of the railroad track which is parallel, creates danger which is in no wise justifiable from the standpoint of public safety. The wooden poles of the high tension line, under abnormal stress of weather and particularly in the spring when the ground is thawing, are likely to blow over, which would almost inevitably bring about a contact between the wires of the two lines. Porcelain insulators, the type used in the high tension line, will puncture occasionally under stress of electrical service and a breakage of insulators often results therefrom. This is sometimes followed by a break and recoil of the wire which, being under considerable tension may be whipped laterally to a considerable distance, probably resulting, the present conditions existing, in a contact between the high tension and the telegraph wires. The pins holding the insulators of the high tension line are of wood,

and a punctured insulator would probably result in the destruction of the pin and a liberation of the wire, with a resultant contact between the lines. At points where the two lines are closest, the line clearance in some instances is not over twenty-five inches, and if a wire in either line becomes there disconnected, an ordinary swing of the disconnected wire would result in contact between the two lines. At these last mentioned points, it is extremely hazardous for linemen to work on the ends of petitioner's cross-arms nearest the high tension line. All the hazards mentioned are intensified by the use of wooden pins in the high tension line. Such pins tend gradually to disintegrate when used in connection with voltage of an intensity as high as 22,000. The lack of storm and head guying and of [511] sufficient side guying, and the use of solid instead of stranded wire in the electric line, also go to intensify the danger created by the proximity of the two lines. Contact between wires of the two lines would produce an instantaneous electrification by a current of at least 16,000 volts of the petitioner's wire and every instrument and piece of apparatus connected therewith at every point on the wire, with the attendant probability of injury or death to persons using said instrument or apparatus.

The findings in conclusion are, that the maintenance and operation of the aforesaid eighteen sections of the petitionee's high tension line with a voltage of 22,000 at the proximity which exists between the same and the petitioner's telegraph line adjacent thereto, constitutes an ever present public danger which should be eliminated; and that a separation of the line of poles carrying the first eighteen sections of the high tension line and the petitioner's line of poles parallel thereto and west of the railroad track to a minimum distance of thirty feet would eliminate the danger above described in the most reasonable and feasible manner, if both lines are to be continued in operation.

The order of the commission, dated February 17, 1916, is as follows: "Upon the facts found as above set forth, it is ordered that the Burlington Traction Company shall, before the first day of July, 1916, separate the line of poles of the eighteen sections of its high tension line above described to a minimum distance of thirty feet from the line of poles of the Western Union Telegraph Company parallel thereto on the west side of the railroad track or, as an alternative, cease from transmitting high tension current over said eighteen sections after said date until such separation is made."

On March 27, 1916, by order of a Justice of the Supreme Court upon the application of the petitionee, the foregoing order of the com-

mission was stayed, and the time therein limited was extended to October 1, 1916, with leave to make further application for extension, if circumstances warrant.

An appeal was taken by the petitionee from the order made by the commission, and from the order overruling the petitionee's exceptions to the report.

George W. Stone, A. G. Whittemore and Sherman R. Moulton for appellant.

W. B. C. Stickney for appellee.

[513] *WATSON, J. (after stating the facts).*—It is contended by the petitionee that the order of the public service commission should be set aside for three reasons: (1) Because it is beyond the scope of the statutory authority delegated to the commission; (2) because it is beyond the constitutional powers of the commission; (3) because it is so unreasonable, that it comes "within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power." No other question is within the appellant's brief.

I. By statute the findings of fact by the commission have the force and effect of the reports of special masters in courts of equity, whenever the cause is taken by appeal to this court. And any party who feels himself aggrieved by the final order, judgment or decree of the commission is given the right of appeal for the correction of any errors excepted to in its proceedings, or in the form or substance of its orders, judgments and decrees, on the facts found and reported by the commission. P. S. 4598, 4599, as amended by Sec. 1, No. 116, Laws of 1908.

The report states that both parties to this proceeding are corporations subject to the supervision of the commission under No. 116 of the Acts of 1908, and the lines of said parties, which [514] are described and designated in the report and order, are used by them in service to the public in and about the business carried on by them in this State. No exception was taken to either of these findings. Each of these corporations, though private in character, is upon the findings a public service corporation carrying on business in this State. Neither the charter of the petitionee, nor any part of it, is before us, and notice of the provisions thereof will not be judicially taken. *Briggs v. Whipple*, 7 Vt. 15; *Winooski v. Gokey*, 49 Vt. 282. In these circumstances we think the above findings are the determinations of mixed questions of law and fact, and are conclusive as showing that the petitionee falls within the provisions of section three of the Act mentioned.

By section nine of that Act, the public service commission is given jurisdiction to ren-

der judgment and make orders and decrees in all matters provided for in the charter of any corporation owning or operating any plant, line or property subject to supervision under the Act, and is given like jurisdiction in all matters respecting: "III. The manner of operating and conducting any business subject to supervision under this act, so as to be reasonable and expedient, and to promote the safety, convenience and accommodation of the public." And "V. The sufficiency and maintenance of proper systems, plants, conduits, appliances, wires and exchanges, and when the public safety and welfare require the location of such wires or any portion thereof underground." The provisions of these two clauses are sufficiently broad to confer jurisdiction upon the commission to hear and determine the matters here involved as shown by the record, and to render judgment, make orders and decrees therein.

II. It is urged that the order made is in excess of the constitutional powers of the commission, in that it is confiscatory of the property of the petitionee, and is a taking of it without due process of law, in violation of the 5th and the 14th Amendments of the Constitution of the United States.

The report shows that, by written contract entered into with the Rutland Railroad Company on February 23, 1910, and before the petitionee had taken any steps looking to the construction of its high tension line or the acquisition of any real estate or rights incident thereto, the petitioner acquired the right to maintain its telegraph poles and wires at the places within the [515] railroad right of way, and in the manner, stated in the report, for the period of twenty-five years from January 1, 1910; that the petitioner's poles and wires had been there located and erected for a considerable period prior to the execution of the contract; that the petitionee erected its high tension line sometime subsequent to the month of April in the year 1912, and upon its private right of way by purchase; and that since the last named line was erected, there has been no change in the petitioner's lines.

The report further shows that the high tension line, consisting of three solid copper wires, constantly carries a voltage of 22,000; that this line, when considered without reference to proximity or parallelism with any other line, might be regarded as fairly well constructed for the purpose for which it is used; that the proximity which exists between sections 1 to 18 inclusive of this line and the petitioner's parallel line west of the railroad track, creates danger which is in no wise justifiable from the standpoint of public safety; that at points where the two lines are closest, the line clearance is, in some instances, not over twenty-five inches, and if a

wire in either line become there disconnected, an ordinary swing of the disconnected wire would result in contact between the two lines; that at these last mentioned points, it is extremely hazardous for linemen to work on the ends of the petitioner's cross-arms nearest the high tension line; that contact between wires of the two lines would produce an instantaneous electrification, by a current of at least 16,000 volts, of the petitioner's wire and every instrument and piece of apparatus connected therewith at every point on the wire, with the attendant probability of injury or death to persons using said instruments or apparatus; that the maintenance and operation of the aforementioned eighteen sections of the petitionee's line with a voltage of 22,000, at the proximity existing between the same and the petitioner's telegraph line adjacent thereto, constitutes an ever present public danger that should be eliminated; and that the separation of the line of poles carrying these eighteen sections of the high tension line, and the petitioner's line of poles parallel thereto and on the west side of the railroad track, to a minimum distance of thirty feet, would eliminate the danger in the most reasonable and feasible manner, if both lines are to be continued in operation.

[516] No claim is made that by the provisions of the petitionee's charter the locating of its high tension line where it is in the sections in question, was mandatory or imperative; and the contrary must be assumed, for if the petitionee sought to base any claim upon the intention of the Legislature to take away the private rights of individuals or of another public service corporation, the burden was with the petitionee to show that by express words, or by necessary implication, such an intention appears. Per Lord Blackburn in Metropolitan Asylum Dist. v. Hill, 6 App. Cas. 193, 18 Eng. Rul. Cas. 556. See also Rutland-Canadian R. Co. v. Central Vermont R. Co. 72 Vt. 128, 47 Atl. 399. Fixing the location of its line, acquiring the right of way therefor in that particular place, and erecting the line there, were discretionary acts of the company. Private ownership of the right of way did not give the company the right to erect its high tension line thereon without regarding the rule of law restricting every man against using his property to the prejudice of others. In Clarendon v. Rutland R. Co. 75 Vt. 6, 52 Atl. 1057, this Court said: "It was not within the scope of legislative authority to grant to the company a right to construct and operate its road without regard to the rights of other persons and corporations. It is a settled principle that every holder of property, however absolute his title, holds it under the implied liability that his use of it shall not be injurious to the enjoyment of others having an equal right to the

enjoyment of their property, nor injurious to the rights of the community. All property is held subject to general regulations made by the Legislature, under its police power, for the common good and general welfare." In *Carty v. Winooski*, 78 Vt. 104, 62 Atl. 45, 2 L.R.A.(N.S.) 95, 6 Ann. Cas. 436, it is said that, "One of the powers of government inherent in every sovereignty is the governing and regulating of its internal police." And that, "It is a governmental function founded upon the duty of the state to protect the public safety, the public health, and the public morals." In *Nelson v. Vermont, etc. R. Co.* 26 Vt. 717, 62 Am. Dec. 614, it was held that by general laws, the Legislature may require public service corporations to conform to such regulations of a police character, as they may deem for the security of the rights of citizens generally, and most conducive to quiet and good order, and the security of property, and even of animals. "And if the running of railroads, under [517] present restrictions, was found cruelly and recklessly destructive, even of the lives of domestic animals, it would be strange if the Legislature could not interfere, upon the general maxim, that every one shall be bound and required, *sic utere tuo ut alienum non laedas*." In *Thorpe v. Rutland, etc. R. Co.* 27 Vt. 140, 62 Am. Dec. 625, it is said that the police power extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State; and that according to the maxim given above, it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. In *State Board of Health v. St. Johnsbury*, 82 Vt. 276, 73 Atl. 581, 23 L.R.A.(N.S.) 766, 18 Ann. Cas. 496, the principle of this maxim is said to be "a universal and prevailing obligation, and a condition on which all property is held, the application of which in the particular conditions must necessarily be within the reasonable discretion of the Legislature; and that when such discretion is exercised in a given case by means appropriate and reasonable, not oppressive nor discriminatory, it is not subject to constitutional objection." See also *State v. Morse*, 84 Vt. 387, 80 Atl. 189, 34 L.R.A.(N.S.) 190, Ann. Cas. 1913B 218.

In *Chicago, etc. R. Co. v. Chicago*, 166 U. S. 226, 41 U. S. (L. ed.) 979, 17 S. Ct. 581, the court, through Mr. Justice Harlan, said: "The plaintiff in error took its charter subject to the power of the state to provide for the safety of the public, in so far as the safety of the lives and persons of the people were involved in the operation of the railroad. The company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to

insure the public safety. And as all property, whether owned by private persons or by corporations, is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition of the exercise of that authority that the state shall indemnify the owners of property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law. The requirement that compensation be made for private property taken for public use imposes no restriction [518] upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people. In the recent case of *New York, etc. R. Co. v. Bristol*, 151 U. S. 556, 38 U. S. (L. ed.) 269, 14 S. Ct. 437, this Court declared it to be thoroughly established that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. 'The governmental power of self-protection' the court said 'cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.' The recent case of *Bacon v. Boston, etc. R. Co.* 83 Vt. 421, 76 Atl. 128, contains a lengthy discussion of the police power and its applicability in regulating public service corporations in the interest of the public. There the report of the public service commission showed that at the railroad station in White River Junction, a condition inconsistent with the safety of the travelling public existed, and that additional platform space was necessary to relieve the situation; and it appeared that some change of tracks was a necessary incident of providing such platform space as should be reasonably safe and free from discomfort. It was held that so far as the movement of the rails adjacent to the station was such necessary incident, the commission had power to order it; that moving back from the station, the railroad tracks, as safety required, was a legitimate exercise of the police power, was not a taking of property without compensation, did not constitute expropriation of property, nor impair any obligation of contract.

The facts reported show that the part of the petitionee's high tension line, here in question, at the short distance it is now located from the petitioner's parallel telegraph line west of the railroad track, is highly dan-

gerous to the public safety, in that it constantly endangers the lives and persons of the petitioner's linemen at work in the place mentioned, and the lives and persons of all those who are anywhere using the instruments and apparatus connected with that telegraph wire, and consequently that said high tension line constitutes a public nuisance. In these circumstances, on the authorities cited, the [519] commission has the constitutional power of regulation in the interest of the public, and if this power was not exercised by it in such a manner as to cause it to be within the rule that the substance and not the shadow, determines the validity of the exercise of the power, the order made is not confiscatory and does not deprive the petitionee of its property without due process of law. *Interstate Commerce Commission v. Illinois Cent. R. Co.* 215 U. S. 452, 54 U. S. (L. ed.) 280, 30 S. Ct. 155; *Interstate Commerce Commission v. Union Pac. R. Co.* 222 U. S. 541, 56 U. S. (L. ed.) 308, 32 S. Ct. 108.

III. It is contended that the order, even though in form within the power delegated to the commission, is an unreasonable exercise of authority. This question must be determined upon the facts reported; for the findings of the commission, having the force and effect of reports of special masters in courts of equity, when the cause is in this Court on appeal, are conclusive.

When the petitionee constructed its high tension line, it had knowledge of the location of the petitioner's lines; and it will be taken to have had knowledge of the natural tendencies of electric energy in its transmission under high voltage, and of the inherent dangers attending it. In such circumstances it would be most inequitable and unjust to say that the petitionee could locate this line in disregard of the legal rights of the petitioner, thereby create a public nuisance of the nature hereinbefore described, and then, because of some repairs (by way of more or fewer new poles), needed in the latter's parallel line, that the nuisance should be abated and the dangers eliminated by the removal of the line of the innocent party, instead of by the removal of the line of the wrong-doer, as was ordered in this case. By the order made, the petitionee is required to separate its line of poles of the eighteen sections in question, to the minimum distance of thirty feet from the line of the poles of the petitioner on the west side of the railroad track, within the time limited, or thereafter to cease using its line for the transmission of high tension current until separation is made. Such separation is expressly found to be the most reasonable and feasible manner of eliminating the danger, if both lines are to be continued in operation. The commission having determined the necessity for such elimination, it was within the

province of the commission to determine the manner in which this could best be accomplished with a view to the operation of the lines [520] and the public safety (Sayers v. Montpelier & W. R. R. 90 Vt. 201, 97 Atl. 660); and the record affords no basis for the contention that the order is an unreasonable exercise of authority to that end.

Order of the Public Service Commission affirmed and cause remanded that the commission may fix a new time within which the order shall be complied with.

NOTE.

Power of Public Service Commission to Prevent Maintenance of Electric Wires in Close Proximity.

By the weight of authority an electric company is not entitled to enjoin another similar company from stringing wires to transmit a high tension current in such close proximity to those of the first company as to involve danger of damage by induction. See the note to Citizens Telephone Co. v. Ft. Wayne, etc. R. Co. Ann. Cas. 1916A 132. But, as is shown by the cases discussing that point, experience has demonstrated that a real danger of damage of induction exists in such a case. Moreover the charging of the wire of one company by that of another is a fruitful source of peril to person and property. See the note to Mize v. Rocky Mountain Bell Telephone Co. 16 Ann. Cas. 1189. The prevention of a construction of that kind would seem therefore to be within the regulatory power of the state, and that view is taken in the reported case, which is apparently the only decision on the point. An order of a public service commission requiring a traction company to remove its high tension line to a distance of at least thirty feet from a telegraph line is held to be reasonable and to violate no constitutional rights of the traction company.

HILL

v.

PURDY ET AL.

District of Columbia Court of Appeals—June 2, 1917.

46 App. Cas. (D. C.) 495.

Wills — Estates Devisable — Contingent Remainder as "Interest" in Land.

A contingent remainder is, if the person who is to take is certain, such an "interest

in real estate" as to be subject to devise by the remainderman.

[See note at end of this case.]

Appeal from Supreme Court of District of Columbia.

Action by John Purdy et al., plaintiffs, against Josephine Postlewait et al., defendants. Elizabeth Pauline Hill, intervener. From judgment rendered, intervener appeals. **AFFIRMED.**

[496] This is an appeal from a decree in equity of the supreme court of the District of Columbia construing the wills of John Purdy, Rebecca Wallace, and Virginia Thompson, deceased; ordering partition by sale of certain real estate devised by said decedents, and certain accountings in respect of funds arising in the administration of said estates.

The original bill of complaint was filed by John Purdy, Annie Purdy Reager, William Wallace Purdy, Virginia Purdy Corley, and Edgar Purdy, all being children of John Purdy, Junior, deceased, and grandchildren of John Purdy, Senior, said plaintiffs claiming certain interests in the property left by said John Purdy, Senior.

The defendants to the original bill were Josephine Postlewait and Clara P. Elliot, legatees and devisees under the wills of Rebecca Wallace and Virginia Thompson, through which wills said defendants also claimed certain interests in the property left by John Purdy, Senior.

Thomas Bryan Huyck and the National Savings & Trust Company were also made defendants in the bill as custodians of certain funds involved in the controversy.

After issue joined on the original bill between the abovenamed parties, the appellant here, Elizabeth Pauline Hill, was made a party defendant in the cause and decreed to be a child of Henry Purdy, deceased, a son of John Purdy, Senior, and entitled to share whatever rights in the premises a child of said Henry Purdy might be entitled to take.

Thereafter, upon consideration of the whole case, a final decree was made disposing of all the issues presented to the court, and adjudging that all the properties involved be divided among the original beneficial parties to the cause in certain proportions fixed in the decree, to the exclusion of the said Elizabeth Pauline Hill, who took nothing.

All parties acquiesced in this decree, except Mrs. Hill, who prosecutes the present appeal alone.

Simon Wolf, Myer Cohen and Wm. G. Johnson for appellant.

J. J. Darlington and George Francis Williams for appellees.

[498] Hirtz, J.—After consideration of all questions presented by the record and by the arguments of counsel, we conclude that the decree appealed from was correct and should be affirmed, with costs; and it is so ordered.

And this court adopts as its own the learned opinion of Mr. Justice Gould filed in the supreme court of the District of Columbia in connection with the final decree of that Court:

[499] "The original bill in this case was filed to secure the construction of three wills: that of John Purdy, and those of his two daughters and devisees, Ellen Rebecca Wallace and Virginia Thompson. It also sought a distribution of funds derived from sales of certain real estate devised by said John Purdy, such funds being held by the defendant, the National Savings & Trust Company, as trustee appointed by the court in prior equity causes, and of other funds collected by the defendant Huyck, as rents of other real estate of said John Purdy.

"On August 24, 1914, an amended bill was filed making one Elizabeth Pauline Hill a party defendant on the ground that her claimed rights in the estate of said Purdy might be determined. The amended bill also seeks a partition of the real estate described in the original bill, being the undistributed portion of the estate of said John Purdy.

"John Purdy, a resident of the District, died July 22, 1881, possessed of a considerable estate, both real and personal. His will was dated December 27, 1866, and two codicils thereto were dated, respectively, September 5th, 1868 and September 18, 1872; they were duly probated September 27, 1881. The personal estate has long since been distributed. He left a widow, who received a bequest in lieu of dower in the form of an annuity charged upon his real estate, but she has since died. At the date of his will he had five children; three sons, Henry, Alexander and John, and two daughters, both married, Rebecca Wallace and Virginia Thompson. Henry died before the testator. Alexander, who was given an annuity under the will, departed this life before his brothers and sisters. The plaintiffs are the children of the son John. The defendants, Josephine Postlewait and Clara P. Elliot, are devisees of the lost survivor of the children, Virginia Thompson. Elizabeth Pauline Hill, made a defendant by the amended bill, is a daughter of Henry Purdy, who, as heretofore stated, predeceased his father.

"Testimony was taken in open court as to whether or not Elizabeth Pauline Hill was the daughter of said Henry Purdy, which resulted in a decree dated June 29, 1915, adjudging her to be the legitimated child of said Henry Purdy.

[500] "The portion of the will of John Purdy, Sr., which the court is asked to con-

strue is the residuary clause containing devises to John Purdy, Jr., Rebecca Wallace, and Virginia Thompson. The clause in question gave one third of the residuary estate to his son John Purdy, with a proviso that if the son died childless, his third part should go to the testator's daughters, Rebecca Wallace and Virginia Thompson, and their respective heirs, in equal shares; a second one third part of the residuary estate was given to the testator's daughter, Rebecca Wallace, with the proviso that if she died childless, her one third share should pass to John Purdy, Jr., and Virginia Thompson, and their respective heirs; while the remaining one-third interest was given to Virginia Thompson, with the proviso that, if she died childless, her share should pass to John Purdy, Jr., and Rebecca Wallace, and their respective heirs.

"It thus appears that John Purdy, Jr., took a fee in his one-third share, subject to be cut down to a life estate if he died childless, with an executory devise of a fee simple of a one-third interest in another third if Rebecca Wallace died childless, and an executory devise in fee simple of one-half interest in the remaining one-third share if Virginia Thompson died childless.

"Rebecca Wallace took a third part in fee simple, subject to be cut down to a life estate if she died childless, with an executory devise in fee simple of a one-half interest in another third share if John Purdy, Jr., died childless, and an executory devise in fee simple of another one-half interest in the remaining one-third share, if Virginia Thompson died childless.

"Virginia Thompson took a fee in her one-third share, subject to be cut down to a life estate if she died childless, with an executory devise in fee simple of a one half of another one-third share if John Purdy died childless, and an executory fee simple devise of a one-half interest of the remaining third share if Rebecca Wallace died childless.

"1. John Purdy, Jr., died August 7, 1887, intestate, the first of the three residuary devisees to depart this life. He left children, who are the plaintiffs, to whom, of course, passed his residuary one third in fee simple.

[501] "2. Rebecca Wallace died April 12, 1907, without children, so that her one-third share was cut down to a life estate, terminating with her death, and passed, one half to the heirs of John Purdy, Jr., and one half to Virginia Thompson. But she also had, at her death, under the will of her father, an executory devise of one half of Virginia Thompson's residuary one third, in the event that the latter died childless. Mrs Wallace left a will, the eighth paragraph of which reads as follows: 'All my right, title, and interest in the estate of my late father, John Purdy, I give, devise, and bequeath, one half

to my sister Virginia Thompson, and the other half thereof to the children of my deceased brother John Purdy.'

"At her death, therefore, the residuary estate of John Purdy, Sr., stood as follows:

"A. The children of John Purdy, Jr., were seized as follows:

"Item 1. One-third share devised to their father by the will of John Purdy, Sr.,

"Item 2. One half of the one-third share devised to Mrs. Wallace by the same will, she having died childless,

"Item 3. An expectancy in one half of the one third devised to Mrs. Thompson, should she die childless,

"Item 4. An expectancy, under the will of Mrs. Wallace, of one half of her half share in the executory devise attached to Mrs. Thompson's original one-third share of the residuary estate, if the latter died childless.

"This would make their portion, absolutely and in expectancy, as follows:
 $\frac{1}{3} + \frac{1}{3} + \frac{1}{3} + \frac{1}{3} = \frac{4}{3}$.

"3. Virginia Thompson, the remaining residuary devisee of John Purdy, Sr., died August 19, 1913, leaving a will by which she devised all her real estate to the defendants Josephine Postlewait and Clara P. Elliot.

"Upon her death, childless, as above stated, one half of her original residuary one third passed to the children of John Purdy, Jr. (Item 3, supra). The other one half of her original residuary one third passed to Rebecca Wallace, under the terms of the will of John Purdy, Sr. As before stated Rebecca Wallace devised this one half of one third as follows: one half (one [502] half of one half of one third—one twelfth) to the children of John Purdy, Jr., and the other one half (one half of one half of one third—one twelfth) to Virginia Thompson. The controversy in the case is whether this last-mentioned one twelfth passed by the will of Virginia Thompson to the defendants, Josephine Postlewait and Clara P. Elliot. There is no question but that the one half of Rebecca Wallace's original residuary one third passed to these devisees through Mrs. Thompson's will.

"On behalf of the complainants, and of Mrs. Hill, the intervener, it is contended that the one twelfth referred to which Mrs. Wallace attempted to dispose of by her will was contingent, and not capable of being devised until the contingency happened; viz., the death of Mrs. Thompson without children.

"But the authorities do not support this contention.

"Thus, in *Loring v. Arnold*, 15 R. I. 428, 8 Atl. 335, the will devised real estate to testator's son James for his natural life, to his heirs and assigns if he left children, and if none, then the lands to descend to Julia Bar-

Ann. Cas. 1918R.—54.

ney and other named persons. James died childless February 8, 1885. Julia Barney had died four years earlier, leaving a will by which she had devised her interest in all real estate in Rhode Island to Charles Barney. The question was whether she had at the time of her death, four years prior to the death of James, a devisable interest in the land disposed of by the will of the testator. The court said: 'She had a contingent remainder in this portion of the estate of Thomas Whipple. Her estate depended upon the leaving of "any lawful child or children" by her brother James. This contingency was not determined until after her death, when James died in 1885. Nevertheless she had a devisable interest. In *Brown v. Williams*, 5 R. I. 309, the court, quoting the works of Lord Mansfield, declares it to be the established doctrine "that in all contingent, springing, and executory uses, where the person who is to take is certain, so that the same are descendible, they are devisable, these being convertible terms." The court points out the distinction to be observed between cases, 'where the person who is to take is certain' and those where the contingency [503] is to determine who is to be the object of the contingent limitation. In the former, the interest is descendible; in the latter, "no one can claim, before the contingency decides the matter, that any interest is vested in him, to descend from, and hence to be transferred or devised by him."

"The court of appeals of Maryland, on a recent case, *Fisher v. Wagner*, 109 Md. 243, 21 L.R.A.(N.S.) 121, 71 Atl. 999, gave careful consideration to the question involved, and, in an exhaustive opinion by Chief Justice Boyd, reached the same conclusion. James I. Fisher's will devised the residue of his estate equally among his four children, Robert A., Richard D., Ammita E. (who afterwards married Charles Green), and Mary M. Wagner. In case Mrs. Green died without leaving a child, one-third part was devised to his son Robert. Robert died in 1881, leaving a will in which he devised and bequeathed the residue of the estate of which he might die possessed in trust, etc. Mrs. Green died in 1908 leaving no issue. The question was whether Robert's contingent interest in the estate devised to Mrs. Green passed under his will. After a careful review of the Maryland cases and a full citation of cases from other jurisdictions and quotations from text-writers, the chief justice, speaking for the whole court, concludes: 'Robert A. Fisher took a transmissible and devisable estate under the will of his father, as the person to take was certain.'

"A note to this case in 21 L.R.A.(N.S.) 121, says: 'Where the person who will take is certain, a contingent remainder may be devised subject to the contingency;' and many

authorities are cited in support of the statement.

"While, in view of the authorities, it is not necessary to seek statutory provisions to support the proposition involved, the following sections of the Code are instructive:

"Sec. 512. [31 Stat. at L. 1269, chap. 854 as amended 32 Stat. at L. 532, chap. 1329.]

Any interest in or claim to real estate, whether entitled to present or future possession and enjoyment, and whether vested or contingent, may be disposed of by deed or will, and any estate which would be good as an executory devise, may be created by deed.'

[504] "Sec. 1022. [31 Stat. at L. 1351, chap. 854.] A future estate is vested when there is a person in being who would have an immediate right to the possession of the land upon the expiration of the intermediate or precedent estate, or upon the arrival of a certain period or event when it is to commence in possession.'

"Sec. 1030. Expectant estates shall be descendible, devisable, and alienable in the same manner as estates in possession.'

"Sec. 1623. [31 Stat. at L. 1433, chap. 854.] All lands, tenements, and hereditaments, and personal estate which might pass by deed or gift, or which would, in the case of the proprietor's dying intestate, descend to or devolve on his or her heirs or other representatives, shall be subject to be disposed of, transferred, and passed by his or her last will, testament or codicil.'

"The conclusion is that the devise by Mrs. Wallace to Mrs. Thompson of one half of Mrs. Wallace's interest in the estate of John Purdy, Sr., carried with it one half of her one half interest in the executory devise attached to Mrs. Thompson's original one third of that estate, and gave Mrs. Thompson a fee simple in the one twelfth interest in question, which passed under her devise of all her real estate to the defendants Postlewait and Elliot.

"It follows that the plaintiffs are entitled to nine twelfths and the defendants to three twelfths of the estate. And a decree will be signed accordingly.

"The funds held by the defendant National Savings & Trust Company, as trustee, hereinbefore referred to, amounting to about \$6,000 exclusive of accumulative interest, represent an undistributed balance of proceeds of sales of certain parcels of real estate of which John Purdy died seized and title to which passed under the residuary clause of his will already considered. The suits in which said sales were made were based, so far as an undivided two thirds interest in the lands involved therein was concerned, upon the provisions of law contained in sec. 100 of the Code, giving this court jurisdiction to order sales of lands in which one or more persons shall be entitled to an estate for life or years,

or base or qualified fee simple, or any other limited or conditional estates, and any other person or persons shall be [505] entitled to a remainder or an interest by way of executory devise in the lands. As to the other undivided one third, it was alleged in the bills in said equity causes that the title thereto was vested, in fee simple, in the children of John Purdy, Junior, deceased (plaintiffs in the present suit), and that they were entitled to have the said lands sold for the purpose of partition, as to said third interest. The decrees passed in said causes appointed said National Savings & Trust Company trustee to sell, and directed that of the net proceeds of sale one third be distributed among the children of said John Purdy, Junior, and that the residue of said net proceeds be held by the trustee so as to inure in like manner as provided by the aforesaid will of John Purdy, deceased.

"The parties to said equity causes (which causes are known as Nos. 24505 and 25264 in equity, and have been consolidated) were the said children of John Purdy, Junior, deceased (plaintiffs in the present suit), and the two daughters of John Purdy, Senior; namely, Ellen Rebecca Wallace (called in the will Rebecca Wallace) and Virginia Thompson. It appears that after the sales, distribution to the children of John Purdy, Junior, of one third of the net proceeds thereof was made, as directed, by the decrees in said causes.

"The death of Mrs. Wallace occurred after the said partial distribution, and application to the court was subsequently made on behalf of all the surviving parties to the cause for distribution of another one third of the net proceeds of sale. Following a reference to and report by the auditor, the court directed that one half of the one third be distributed to the children of John Purdy, Junior, and the other one half thereof to the said Virginia Thompson. The remaining one third of the net proceeds of sale was invested and held by the trustees under the terms of the original and supplemental decrees in said equity causes, and pursuant to the provisions of said Code sec. 100 'so as to inure in like manner as provided by the original grant to the use of the same parties who would be entitled to the land sold.'

"The balance of said funds thus held by said trustee represented [506] that interest or share in the real estate sold, devised by the will of John Purdy, whereby he devised a one-third part of all the rest and residue of his estate to said Virginia Thompson and her heirs, with the proviso that if she died childless, her third share should pass to John Purdy, J., and Rebecca Wallace and their respective heirs. Said Virginia Thompson was therefore entitled to receive the income

from said balance of proceeds during the remainder of her life, and it appears that the same was paid to her accordingly. After her death, which occurred in August, 1913, the defendant Josephine Postlewait, executrix of the will of Virginia Thompson, claimed the entire funds so held by the National Savings & Trust Company, while the plaintiffs herein also claimed the same funds. The intervener, Elizabeth Pauline Hill, has also asserted a claim to share the said funds, on the ground that Ellen Rebecca Wallace having died childless, she, as the only child of a deceased brother, Henry Purdy, is one of the heirs of Mrs. Wallace.

"The proper disposition of these funds, however, depends upon the application of the same principles already stated. The plaintiffs are entitled, as children of John Purdy, Junior, to one half of said funds to which he would have been entitled if living, while the other one half, to which Mrs. Wallace would have been entitled if living, goes not to her heirs as such (the plaintiffs and said Elizabeth Pauline Hill), but to the devisees under her will. As hereinbefore stated, she died before Virginia Thompson, and by her will devised one half of all her right, title, and interest in the estate of her father, John Purdy, unto said Virginia Thompson and the other one half unto the children of her deceased brother, John Purdy. The plaintiffs by virtue of this devise are entitled to one half of one half of said funds, making, with the one half to which they are entitled as children of John Purdy, three fourths of the net funds, while the defendants Miss Postlewait and Mrs. Elliot, in their capacity of devisees of Virginia Thompson, are entitled to the remaining one fourth.

"A reference to the auditor should be taken to state the account of the trustee and distribution in accordance with this opinion.

[507] "It should be added that on the pleadings in the present case a question is presented as to the validity of the several executory devises above referred to, their validity being alleged in the original and amended bills and denied in the answer of the defendants, Postlewait and Elliot, the answer (to the original bill) of the said two defendants stating in this regard that they are advised and believe, and so aver, that under said will of John Purdy, the said Ellen Rebecca Wallace and Virginia Thompson took fee simple estates, clear of limitations. Under this construction of the will, if sustained, the said two defendants, as sole devisees of Virginia Thompson, would be entitled to a one-half interest in the real estate, while the entire trust fund held by the trustee above-mentioned would be payable to the executrix of Mrs. Thompson. As to this theory of construction it is sufficient to say that this court

is clearly of opinion that the executory devises referred to are valid, and the point was conceded by counsel for said two defendants in his argument at the hearing, and in his brief filed after argument."

NOTE.

The reported case, applying a statute providing that any "interest in real estate" is subject to devise, holds that a contingent remainder may be devised if the person who will take the remainder is certain. The meaning of the term "interest" as used with respect to the transfer of property is discussed in the note to *Copeland v. Eaton*, Ann. Cas. 1912B 521.

CHILTON

v.

COMMONWEALTH.

Kentucky Court of Appeals—May 31, 1916.

170 Ky. 491; 186 S. W. 191.

Homicide — Sufficiency of Evidence — Self-defense Not Shown.

In a prosecution for murder, where it appeared that accused had left his barn carrying his shotgun at a time when he was in no immediate danger, and approached the pike upon which the decedents with whom he had had trouble were walking, evidence is held to be sufficient to sustain a verdict of guilty.

Instructions — Self-defense.

In a prosecution for murder an instruction on self-defense must leave the question to be determined by the jury in the light of all the facts and circumstances in the case, rather than in the light of certain particular facts, whether relied on by the commonwealth or by the accused.

Trial — Custody and Conduct of Jury.

The members of a jury impaneled to try a homicide case should not be subjected to any outside influence, but their conclusion should be the result of an unbiased judgment, based on the evidence heard in the courtroom and the law as expounded by the court, considered in the light of proper arguments by counsel for the prosecution and defense.

Taking Jury to Revival Meeting.

In a prosecution for murder, where the jury were present at a revival meeting during the trial, a mere theoretical discussion of sin and its punishment, considered solely from the angle of divine government, is not prejudicial to the rights of the defendant.

[See note at end of this case.]

Disqualification of Juror — As Ground for New Trial.

In a prosecution for murder, the fact that a juror on the day before the trial stated that "he had heard much about the case and he thought it was a bad case" is insufficient to authorize a new trial on the ground that the juror was disqualified from acting because of any opinion he had formed as to defendant's guilt.

New Trial — Newly Discovered Evidence — Affidavit Showing Diligence — Necessity.

In a prosecution for murder, where a new trial is sought for newly discovered evidence, the defendant must file his own affidavit stating that he did not know, and by the exercise of reasonable diligence could not have known, of the existence of the newly discovered evidence until after the trial was concluded.

Appeal from Circuit Court, Anderson county.

Criminal action. Joe Chilton convicted of murder and appeals. The facts are stated in the opinion. **AFFIRMED.**

Lillard Carter for appellant.

M. M. Logan, C. H. Morris and Leslie W. Morris for appellee.

[491] CLAY, C.—Appellant, Joe Chilton, who was convicted of the murder of Dollins Hawkins and given a life sentence in the penitentiary, seeks a reversal of the judgment.

For a proper understanding of the questions raised a brief statement of the facts will be necessary. It appears that appellant, with his wife and three children, lived in Anderson county about eight miles from Lawrenceburg and near the Bond Brothers' Distillery on Gilbert's creek. A turnpike, known as the Harry Wise pike, runs through appellant's farm and by the distillery, where it joins the [492] Lawrenceburg pike. Though appellant owns land on both sides of the Harry Wise pike, that pike is a public road and after running through appellant's farm passes the home of Dollins Hawkins some distance away. Appellant's house is situated on a hill somewhere in the neighborhood of two hundred yards from the pike, and a footpath leads from his house by his barn to the pike near two water tubs. Along the pike and some distance therefrom a fence runs practically parallel with the pike, inclosing that part of the farm on which appellant's residence is located. Near the point where the footpath passes this fence there is a gate through which the path leads towards the pike. At a point near the pike the path bends to the south and runs with the pike. Just above the pike is a long bluff about four feet high, made in grading the pike on the hillside.

The path leads abruptly down the bluff into the turnpike. Near the home of appellant and just above the distillery lived Elmer Standforth. A road or path leads down the hill from his residence to the turnpike at a point near the distillery. In front of the distillery is the boiler room facing the pike, and a path leads therefrom to the pike by way of a foot bridge across an intervening branch.

Dollins Hawkins was a brother-in-law of appellant. Some three or four months before the homicide, Hawkins, according to the story of appellant, told him of a certain scandal affecting Standforth's wife. This appellant repeated to his own wife. Subsequently his wife told Standforth of the report. Thereafter Hawkins came to appellant's home, called him a liar and abused and threatened him with a hand spike. At that time appellant made no effort to defend himself and begged off from the difficulty. Some time later Hawkins, Standforth and appellant were in the distillery office. Hawkins and Standforth went out. Hawkins told Standforth to call appellant out. They began quarreling and appellant tried to beg out of the difficulty. Standforth remarked that the matter had to be settled; he was not going to have any such talk get out. Mr. Jeff Bond objected to their quarreling on the premises. Standforth then remarked that he was going to get Hawkins and appellant together again and have the matter settled. About eight o'clock on the morning of the tragedy Hawkins and Standforth met at the quart house conducted by Bryan Hawkins on the Kentucky river a mile and a half from the scene of the killing. Dollins [493] Hawkins bought a quart of whiskey. Bryan Hawkins gave Dollins a half pint bottle of whiskey for his sick uncle. Thereafter Dollins Hawkins and Standforth went to the Bond Brothers' Distillery. After being there a while Standforth started for his home. In the meantime appellant had gone to the distillery to get some wire. When he reached the bridge Standforth came towards him. According to appellant's statement, Standforth began cursing him and wanted him to go down the creek with him and Hawkins. Standforth called him a damn coward, and appellant stated that he did not want any trouble with him. Standforth then stated that he was going to get Hawkins and come up to appellant's home. Other witnesses said that Standforth stated that the matter had to be settled and damn quick, and wanted appellant to get off the distillery premises. Appellant then left and went to his house. There he procured a shot gun, loaded it with two shells and went to his barn. After appellant left the distillery, Hawkins and Standforth started up the pike. John Taylor Bond heard Standforth say: "We will meet him." He then went up

towards appellant's barn for the purpose of avoiding trouble, and appellant inquired where Hawkins and Standforth were. Bond told appellant that he saw them coming up the hill. Appellant and his boy say that Bond told them that he had seen Standforth and Hawkins coming up to appellant's house to get him. Taking his boy with him, appellant started towards the pike. Appellant says that when Hawkins and Standforth approached he pleaded with them to drop the matter and be friends. Hawkins and Standforth immediately began to threaten and abuse him and started up the path towards him. Hawkins was in the lead and threw his hands behind him as if to draw a weapon. Standforth was also approaching in a threatening manner. Appellant first shot Hawkins and then Standforth. As to what occurred at the time of the killing appellant is corroborated by his fifteen year old boy, who was present.

According to the evidence for the Commonwealth, appellant spoke to Hawkins in a friendly manner while at the distillery and there appeared to be no friction between them. Hawkins and Standforth were both shot in the side of the neck and face, and their bodies were found, that of Hawkins in the road about seven feet above the path, and that of Standforth about seventeen feet above the path, and on the side of the road near the bluff. Persons who examined [494] their bodies found no weapons of any kind on them, except a small knife in the possession of Standforth. Some two or three witnesses examined the hillside and found no footprints or blood that would indicate that the two men were on the hillside when shot. It appears, however, that Mrs. Hawkins was present before any others reached the scene of the tragedy and it is suggested that perhaps she removed the weapons which they carried. There is also evidence to the effect that Hawkins generally carried a pistol.

It is the theory of the Commonwealth that appellant, while at his own house or barn, was in no danger at the hands of Hawkins and Standforth, and he voluntarily left his barn and went down to the pike to meet them for the purpose of killing them; that as the physical facts show that their bodies were found in the road beyond the path and there was no evidence of blood or footprints on the side of the bluff, it clearly appears that they were shot while in the road and not while coming up the path in the direction of appellant. On the other hand, the evidence for appellant tends to show that although he took his shot gun and left his barn and approached the pike, he had no intention of killing the decedents, but only did so to avoid injury at their hands when they started up the path towards him and indicated by their hostile demonstrations a determination on

their part to do him personal violence. Considering the case, however, in the light of the physical circumstances, and of the fact that appellant did not await the coming of Hawkins and Standforth, but at a time when he was in no immediate danger at their hands voluntarily approached the point where he had reason to believe they would pass and carried a shot gun which he had previously loaded, we cannot say that the evidence was insufficient either to take the case to the jury or to sustain the verdict.

1. The instructions given by the trial court are in the usual form and are not complained of. It is insisted, however, that the court should have instructed the jury that if they believed from the evidence that Hawkins and Standforth, or either of them, had assaulted and threatened to kill the appellant, or to do him great bodily harm, and threatened then and there to go together to the home of appellant to carry out said purpose, the appellant had a right to arm himself, and if the jury further believed from the evidence that the appellant knew, or had reasonable [495] grounds to believe, that Hawkins and Standforth were then and there going to his home to execute their said threats, appellant had a right to meet them near his home and on his premises so armed; and if he then believed, and had reasonable grounds to believe, from their actions that they then and there were able and intended to carry out their threats, he had a right to use such means as to him seems reasonably necessary to protect himself from the threatening danger. Without entering into a discussion of the soundness of the principle of law contained in the suggested instruction, it is sufficient to say that the instruction should not have been given, because it groups together and unnecessarily emphasizes particular facts relied on by the defendant and gives them undue prominence in the estimation of the jury. We have repeatedly condemned such an instruction and held that an instruction on self defense should be in the usual form, thus leaving the question to be determined by the jury in the light of all the facts and circumstances of the case, rather than in the light of certain particular facts, whether relied on by the Commonwealth or by the accused. *Reynolds v. Com.* 114 Ky. 912. 72 S. W. 277; *Com. v. Thomas*, 31 Ky. L. Rep. 899, 104 S. W. 326; *Heck v. Com.* 163 Ky. 518, 174 S. W. 19; *Hobson, Blain & Caldwell on Instructions to Juries*, section 661.

2. Another error relied on is the misconduct of the sheriff and jury. It appears that after the jury had been empaneled and sworn the sheriff took them to the opera house, where a religious revival was being conducted. On the next day appellant made a motion to discharge the jury and filed in support thereof the following affidavit:

"The affiant Joe Chilton states that after the jury herein was accepted and sworn, it was on last night taken to the opera house where a protracted meeting was being held; that the jury were given seats just in front of the preacher who preached from the subject of sin and its punishment and his sermon referred directly to this prosecution and gave many illustrations of offenses and crimes and character of punishment therefor."

The minister who was conducting the religious meeting also filed his affidavit. He says that in introducing his subject he asked the people to hear him before they passed judgment on him. In this connection he said: "Gentlemen, your court is in session, and if a man is being tried for murder would you pass judgment before you [496] heard the evidence or after?" He also showed that David committed murder and yet went to heaven, and proved it by God's word. He further states that the above reference, if it be considered a reference, was the only one that he made in regard to the court being in session and the man on trial, and in making these statements he did not have in mind the trial which was going on in the circuit court and did not know the jury was present. J. R. Paxton also filed an affidavit, saying that he was present on the occasion referred to and heard all of the sermon; that at no time was reference made to the case on trial; that the word "murder" was used by the minister, but only in a general way and as one of the number of sins denounced by the Bible. It is well settled, of course, that the members of a jury empaneled to try a case like this should not be subjected to any outside influences, but their conclusion should be the result of an unbiased judgment, based on the evidence heard in the court room and the law as expounded by the court, considered in the light of proper arguments by counsel for the prosecution and defense. Therefore, if it appeared that on the occasion in question any improper reference was made by the minister to the facts of the case on trial, or to the duty of the jury under the circumstances, there might be some merit in the contention that the accused was prejudiced. As it is, however, the only reference to the case, even if it be considered a reference, was the suggestion that a man should not be condemned until after the evidence was heard, and this reference was in favor of the accused rather than against him. It is suggested, however, that the very subject of the sermon, that of sin and its punishment, was prejudicial, because it showed that even God himself approved of punishment and thus fortified and prepared the minds of the jurors to follow the divine example. This contention, however, does not go beyond the mere suggestion.

It is not based on any facts which actually occurred. It is not shown that the jurors were exhorted to do their duty because God did his. In the absence of facts tending to show the contrary, we are unable to perceive how a mere theoretical discussion of sin and its punishment, considered solely from the angle of divine government, can be regarded as prejudicial to the substantial rights of the appellant.

3. Another error assigned is the incompetency of one of the jurors. It appears from an affidavit that this [497] juror, on the day before the trial, stated that "he had heard much about the case and he thought it was a bad case" and that he wanted to hear it. The language attributed to the juror only shows that what he had heard had made upon him a mere impression to the effect that the case was a bad one. It does not show that he had formed any real opinion as to appellant's guilt. We, therefore, conclude that the language referred to is insufficient to authorize a new trial, on the ground that the juror was disqualified from acting by reason of any opinion which he had formed as to the real merits of the case.

4. Lastly, it is insisted that a new trial should have been granted on the ground of newly discovered evidence. In support of this ground there is filed only the affidavit of one Grover C. Springate, who states that in a conversation which took place between him and Elmer Standforth just prior to Christmas, 1914, Standforth said that he had had several quarrels with Joe Chilton, and that he had made up his mind to kill Chilton and go back to his former home in Ohio. He also says that after that time he had another conversation with Standforth, in which Standforth stated that he had to sell his farm, because if he stayed in Anderson County he would have to kill Chilton; that his wife wanted to kill him herself but that it was not a woman's affair, and that he would do it himself if he stayed there. Passing the question whether or not the evidence relied on his, under the particular facts of this case, of such a decisive character as to render a different result reasonably certain, it is sufficient to say that a new trial was properly refused, because appellant did not file his own affidavit stating that he did not know, and by the exercise of reasonable diligence could not have known, of the existence of the newly discovered evidence until after the trial was concluded. *Ellis v. Com.* 146 Ky. 715, 143 S. W. 425; *Brennon v. Com.* 169 Ky. 815, 185 S. W. 489.

Finding in the record no error prejudicial to the substantial rights of the appellant, it follows that the judgment should be affirmed, and it is so ordered.

NOTE.

Allowing Recreation to Jury during Trial as Ground for New Trial.

The rule laid down in *State v. Jeffries*, 210 Mo. 302, 14 Ann. Cas. 524, that allowing recreation to a jury during the trial of a criminal case is not a ground for a new trial when it does not appear that the accused was prejudiced thereby, and there was no misconduct on the part of the jury, is supported by several recent cases.

It has been held that a new trial will not be granted because of the mere fact that the jury were taken to a theatrical performance or moving picture show where it is shown that they were properly kept apart, communicated with no one, and were not subjected to improper influences. *Mansfield v. Com.* 163 Ky. 488, 174 S. W. 16; *State v. Oteri*, 128 La. 939, Ann. Cas. 1912C 878, 55 So. 582; *Sherman v. State*, 125 Tenn. 19, 140 S. W. 209. In the case last cited it appeared that a portion of the jurors attended a vaudeville show, sitting in a private box, apart and separate from all others. They did not come in contact with anyone. The court in denying a new trial said: "We do not mean in any way to approve the course of the officers in allowing these jurors to become separated and taking part of them to a theater. While, as matter of fact, no communication was had with them, or influence exerted upon them, in this case, and no opportunity seems to have been offered for such communication to have been effected, nevertheless the officers' conduct was reprehensible. They should have been fined by the circuit judge. They took a chance which they should not have done. While the circuit judge has found, and we can see, that there were no evil results in this case, and the defendant was not at all prejudiced, still it might have resulted differently, and it might have been necessary to set this verdict aside, and such a practice as that indulged in here cannot be permitted by a trial court, on the part of its officers or jurors. Both officers and jurors should have been punished by the court."

In *State v. Oteri*, 128 La. 939, Ann. Cas. 1912C 878, 55 So. 582, the defendant, having been convicted of murder, moved for a new trial, assigning as one of the grounds therefore that the jury had been permitted to attend a theatrical performance and sit with the audience. In discussing the question the court said: "It appears that on a Sunday, during the recess of the court, the jury, attended by two deputy sheriffs, left their room in the courthouse to attend a theatrical show nearby. After the jury were seated, one of the deputies retired, leaving the jury in charge of the other deputy, Mr. Erwin, who

was a witness for the prosecution, and had testified several times during the trial of the case. The jury were seated on benches reserved for them, and the nearest spectators were about ten feet away. The jury remained during the performance, and, according to the testimony of Mr. Erwin, had no communication with anyone outside of their body. It appears that the jury had the permission of the judge to attend church or go to the show. The majority voted in favor of the place of amusement. . . . The evidence shows that the jury did not separate for a moment and had no communication with anyone outside of their body. Therefore the accused was not prejudiced by the incident under discussion. We, however, must express our disapproval of the permission given the jury to attend the show, thereby subjecting them to the danger of outside influence. We may add that our ruling would have been different if any prejudice whatever had been shown by the evidence."

In *Mansfield v. Com.* 163 Ky. 488, 174 S. W. 16, wherein the defendant was found guilty of murder, it appeared that the jury were taken by the officer in charge to a moving picture show on several different occasions. On a motion for a new trial, this fact having been alleged as one of the grounds, the court said: "It is further complained that the sheriff, on three different nights during the trial, took the jury to a moving picture show. But the record shows, without contradiction, that the place where the moving picture show was exhibited was not crowded; that the jury sat on the front seats, while the sheriff occupied a seat nearby from which he could and did see what the jurors did, and that no one approached any of them nor was any conversation relating to the trial had in their presence. We do not find in this circumstance any misconduct on the part of the officer or jury."

Where it is shown, however, that the jury were taken to a place of recreation and were then so situated as to be accessible to outside influences, misconduct will be presumed, and the burden is on the state to show that in fact there was no misconduct. *State v. Clary*, 136 La. 589, 67 So. 376. In that case, wherein the defendant was convicted of manslaughter, it was shown that the jury were taken to moving picture shows on two occasions at night and sat in the ordinary rows of chairs with the rows in front and back of them occupied. It was held that the jury were accessible, and misconduct was presumed and a new trial ordered. Later, however, on a rehearing, it being affirmatively shown by the state that there had been no separation, and no misconduct on the part of the jury while attending the moving pictures, the verdict was affirmed.

In the reported case it appears that the jury, after having been accepted and sworn, were taken to an opera house where a religious revival meeting was being held. The jury were given seats in front of the preacher, who preached on the subject of sin and its punishment, and referred in a general way to the court being in session and a man on trial. The minister afterwards stated that he did not know the jury were present. The court, while declaring that members of a jury should not be subjected to outside influences and that their conclusion should be the result of unbiased judgment, holds that since there was no improper reference made by the minister to the facts in the case on trial or to the duty of the jury, but merely a theoretical discussion of sin and its punishment, the attendance of the jury thereat could not be regarded as prejudicial to the substantial rights of the accused.

During a trial, the jury may be taken for a walk in charge of the proper officers and it is not ground for a new trial if the jury are not subject to improper influences and are not allowed to communicate with others. *Freels v. State* (Ark.) 196 S. W. 913. In that case, a prosecution for murder, it was shown that the morning after the jury took the case under consideration they were taken for a walk, and, while walking, were permitted to go through the cemetery where the person alleged to have been murdered was buried. A relative of the deceased was seated near the grave at the time, weeping. It was contended on the part of the defendant that this tended to influence the verdict of the jury. The court said: "The special bailiff having charge of the jury testified that on Thursday morning, after the case had been turned over to the jury the night before, he started out to give the jury a little exercise. Nobody suggested that they go into the cemetery. He was walking behind the jurors. When they got to the corner on the street where Judge Driver lived, some one says, 'Let's go to the cemetery.' He did not think any of the jurors knew Mrs. Sullinger. They merely saw a lady sitting there. He did not know himself that it was Mrs. Sullinger. The lady was weeping and glanced around. The jury went straight on through the cemetery, and as they came back through the lady had gone. There was no effort upon her part to attract the attention of the jury. She did not speak a word to them, and the fact that she was in the vicinity of the grave of Edrington did not enter witness's mind. He heard no discussion among the jury about the presence of the lady there. He did not know where Edrington's grave was; neither did any of the jury. . . . This testimony shows conclusively that there was no pre-arranged plan on the part of the attorney

and Mrs. Sullinger and the officer that the jury, while they were deliberating upon their verdict, should be conducted to the cemetery for the purpose of bringing them under any sinister influence that would be calculated to arouse their sympathies for the dead and their prejudice against the appellant, and thus to procure a verdict not in accordance with the law and the evidence."

SELECTIVE DRAFT LAW CASES.

ARVER

v.

UNITED STATES.

GRAHL

v.

UNITED STATES.

WANGERIN

v.

UNITED STATES.
(Two Cases.)

KRAMER

v.

UNITED STATES.

GRAUBARD

v.

UNITED STATES.

United States Supreme Court—January 7,
1918.

245 U. S. 366; 38 S. Ct. 159.

Army and Navy — Conscription — Validity of Act.

Under Const. art. 1, § 8 (8 Fed. St. Ann. pp. 637, 645, 649), authorizing Congress to declare war, to raise and support armies, and to make rules for the government and regulation of the land and naval forces, and to make all laws necessary and proper for carrying the foregoing powers into execution, and article 6 (9 Fed. St. Ann. 218), providing that the Constitution and laws of the United States made in pursuance thereof shall be the supreme law of the land, Congress has power to raise armies by conscription, and such power is not denied by reason of the fact that under the Constitution as

originally framed state citizenship was primary, and United States citizenship but derivative and dependent thereon, or by the fact that, prior to the Constitution, the state authority over the militia embraced every citizen, and therefore Act May 18, 1917, c. 15 (Fed. St. Ann. Pamph. Supp. No. 11, p. 85), providing for raising an army by means of a selective draft, is valid.

[See note at end of this case.]

Same.

When Congress exercises its power to call a citizen into the army without his consent, the army into which he enters is not limited to services such as those for which it is claimed the militia may only be used.

[See note at end of this case.]

Same.

The powers of Congress respecting the militia under Const. art. 1, § 8 (8 Fed. St. Ann. 652), authorizing Congress to provide for calling forth the militia to execute the laws of the nation, suppress insurrections, and repel invasions, and to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of officers and the authority of training the militia according to the discipline prescribed by Congress, and the power to raise armies conferred by the same section, are separate powers, and the army power embraces complete authority, and is not diminished by the control over the militia left in the states, though the militia power may diminish the occasion for the exertion by Congress of its military power, and though the power to raise armies is susceptible of narrowing the area over which the militia clause operates.

[See note at end of this case.]

Citizens — State and Federal Citizenship.

Under Const. Amend. 14 (9 Fed. St. Ann. 384), providing that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside, citizenship in the United States is paramount and dominant, instead of being subordinate to and derivative from state citizenship.

Army and Navy — Conscription — Validity of Act.

Act May 18, 1917, c. 15 (Fed. St. Ann. Pamph. Supp. No. 11, p. 85), providing for the raising of an army by means of a selective draft, is not void as delegating federal powers to state officials because of some of its administrative features.

[See note at end of this case.]

Same.

Act May 18, 1917, c. 15 (Fed. St. Ann. Pamph. Supp. No. 11, p. 85), providing for raising an army by a selective draft, is not void, as vesting administrative officers with legislative discretion.

[See note at end of this case.]

Same.

Act May 18, 1917, c. 15 (Fed. St. Ann. Pamph. Supp. No. 11, p. 85), providing for raising an army by selective draft, is not void, as conferring judicial power on administrative officers.

[See note at end of this case.]

Same.

Act May 18, 1917, c. 15 (Fed. St. Ann. Pamph. Supp. No. 11, p. 85), providing for the raising of an army by means of a selective draft, and exempting from the draft regular or duly ordained ministers of religion and theological students under prescribed conditions, and also relieving from military service, other than service of a noncombatant character, members of religious sects whose tenets exclude the moral right to engage in war, does not violate Const. Amend. 1 (9 Fed. St. Ann. 241), providing that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

[See note at end of this case.]

Same.

Act May 18, 1917, c. 15 (Fed. St. Ann. Pamph. Supp. No. 11, p. 85), providing for raising an army by means of a selective draft, does not impose involuntary servitude, in violation of Const. Amend. 13 (9 Fed. St. Ann. 376).

[See note at end of this case.]

Error to United States District Court for District of Minnesota, and for Southern District of New York.

Criminal actions. Joseph F. Arver, Alfred F. Grahl, Otto Wangerin, Walter Wangerin, Louis Kramer, and Meyer Graubard, convicted of failing to present themselves for registration under Act of May 18, 1917, chapter 15, and bring error. The facts are stated in the opinion. **AFFIRMED.**

T. E. Latimer for plaintiffs in error Arver, Grahl, Otto Wangerin and Walter Wangerin.

Harry Weinberger for plaintiff in error Kramer.

Edwin T. Taliaferro for plaintiff in error Graubard.

Solicitor General Davis for defendant in error.

[375] WHITE, C. J.—We are here concerned with some of the provisions of the act of May 18, 1917, c. 15, 40 Stat. 76, (Fed. St. Ann. Pamph. Supp. No. 11, p. 85) entitled, "An Act to authorize the President to increase temporarily the Military Establishment of the United States." The law, as its opening sentence declares, was intended to supply temporarily the increased military force which was required by the existing emergency, the war then and now flagrant. The clauses we must pass upon and those which will

throw light on their significance are briefly summarized:

The act proposed to raise a national army, first, by increasing the regular force to its maximum strength and there maintaining it; second, by incorporating into such army the members of the National Guard and National Guard Reserve already in the service of the United States (Act of Congress of June 3, 1916, c. 134, 39 Stat. 211 (6 Fed. St. Ann. 2d ed. 444) and maintaining their organizations to their full strength; third, by giving the President power in his discretion to organize by volunteer enlistment four divisions of infantry; fourth, by subjecting all male citizens between the ages of twenty-one and thirty to duty in the national army for the period of the existing emergency after the proclamation of the President announcing the necessity for their service; and fifth, by providing for [376] selecting from the body so called, on the further proclamation of the President, 500,000 enlisted men, and a second body of the same number should the President in his discretion deem it necessary. To carry out its purposes the act made it the duty of those liable to the call to present themselves for registration on the proclamation of the President so as to subject themselves to the terms of the act and provided full federal means for carrying out the selective draft. It gave the President in his discretion power to create local boards to consider claims for exemption for physical disability or otherwise made by those called. The act exempted from subjection to the draft designated United States and state officials as well as those already in the military or naval service of the United States, regular or duly ordained ministers of religion and theological students under the conditions provided for, and, while relieving from military service in the strict sense the members of religious sects as enumerated whose tenets excluded the moral right to engage in war, nevertheless subjected such persons to the performance of service of a non-combatant character to be defined by the President.

The proclamation of the President calling the persons designated within the ages described in the statute was made, and the plaintiffs in error, who were in the class and under the statute were obliged to present themselves for registration and subject themselves to the law, failed to do so, and were prosecuted under the statute for the penalties for which it provided. They all defended by denying that there had been conferred by the Constitution upon Congress the power to compel military service by a selective draft, and asserted that even if such power had been given by the Constitution to Congress, the terms of the particular act for various reasons caused it to be beyond the power and

repugnant to the Constitution. The cases are here for review because of the constitutional [377] questions thus raised, convictions having resulted from instructions of the courts that the legal defences were without merit and that the statute was constitutional.

The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power "to declare war; . . . to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . . to make rules for the government and regulation of the land and naval forces." Article I, § 8 (8 Fed. St. Ann. 637, 645, 649). And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Article I, § 8 (8 Fed. St. Ann. 674.)

As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice. It is said, however, that since under the Constitution as originally framed state citizenship was primary and United States citizenship but derivative and dependent thereon, therefore the power conferred upon Congress to raise armies was only coterminous with United States citizenship and could not be exerted so as to cause that citizenship to lose its dependent character and dominate state citizenship. But the proposition simply denies to Congress the power to raise armies which the Constitution gives. The power by the very terms of the Constitution, being delegated, is supreme. Article VI. (9 Fed. St. Ann. 218.) In truth the contention simply assails the wisdom of the framers of the Constitution in conferring authority on Congress and in not retaining it as it was under the Confederation in the several States. Further it is said, the right to provide is not denied by calling for volunteer enlistments, but it does not and [378] cannot include the power to exact enforced military duty by the citizen. This however but challenges the existence of all power, for a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power. It is argued, however, that although this is abstractly true, it is not concretely so because as compelled military service is repugnant to a free government and in conflict with all the great guarantees of the Constitution as to individual liberty, it must be assumed that the authority to raise armies was intended to be

limited to the right to call an army into existence counting alone upon the willingness of the citizen to do his duty in time of public need, that is, in time of war. But the premise of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion. Let us see if this is not at once demonstrable. It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. Vattel, *Law of Nations*, Book III, c. 1 & 2. To do more than state the proposition is absolutely unnecessary in view of the practical illustration afforded by the almost universal legislation to that effect now in force.¹ In England it is certain that before the [379] Norman Conquest the duty of the great militant body of the citizens was recognized and enforceable. Blackstone, *Book I*, c. 13. It is unnecessary to follow the long controversy between Crown and Parliament as to the branch of the government in which the power reside, since there never was any doubt that it somewhere resided. So also it is wholly unnecessary to explore the situation for the purpose of fixing the sources whence in England it came to be understood that the citizen or the force organized from the militia as such could not without their consent be compelled to render service in a foreign country, since there is no room to contend that such principle ever rested upon any challenge of the right of Parliament to impose compulsory duty upon the citizen to perform military duty wherever the public exigency exacted, whether at home or abroad. This is exemplified by the present English Service Act.²

In the Colonies before the separation from England there cannot be the slightest doubt that the right to enforce military service was unquestioned and that practical effect was given to the power in many cases. Indeed [380] the brief of the Government contains a list of Colonial acts manifesting the power and its enforcement in more than two hundred cases. And this exact situation existed also after the separation. Under the Articles of Confederation it is true Congress had no such power, as its authority was absolutely limited to making calls upon the States for the military forces needed to create and maintain the army, each State being bound for its quota as called. But it is indisputable that the States in response to the calls made upon them met the situation when they deemed it necessary by directing enforced military service on the part of the citizens. In fact the duty of the citizen to render military service and the power to compel him against his consent to do so was expressly sanctioned by the constitutions of at least nine of the States, an illustration being afforded by the following provision of the Pennsylvania constitution of 1776. "That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto." Art. 8, (Thorpe, *American Charters, Constitutions and Organic Laws*, vol. 5, pp. 3081, 3083.)³ While it is true that the States were sometimes slow in exerting the power in order to fill their quotas—a condition shown by resolutions of Congress calling upon them to comply by exerting their compulsory power to draft and

¹ In the argument of the Government it is stated: "The Statesman's Year-book for 1917 cites the following governments as enforcing military service: Argentine Republic, p. 656; Austria-Hungary, p. 667; Belgium, p. 712; Brazil, p. 738; Bulgaria, p. 747; Bolivia, p. 728; Colombia, p. 790; Chile, p. 754; China, p. 770; Denmark, p. 811; Ecuador, p. 820; France, p. 841; Greece, p. 1001; Germany, p. 914; Guatemala, p. 1009; Honduras, p. 1018; Italy, p. 1036; Japan, p. 1064; Mexico, p. 1090; Montenegro, p. 1098; Netherlands, p. 1119; Nicaragua, p. 1142; Norway, p. 1152; Peru, p. 1191; Portugal, p. 1201; Roumania, p. 1220; Russia, p. 1240; Serbia, p. 1281; Siam, p. 1288; Spain, p. 1300; Switzerland, p. 1337; Salvador, p. 1270; Turkey, p. 1353." See also the recent Canadian conscription act, entitled, "Military Service Act" of August 27, 1917, expressly providing for service abroad (printed in the Congressional Record of September 20, 1917, 55th Cong. Rec., p. 7959); the Conscription Law of the Orange Free State, Law No. 10, 1899; Military Service and Commando Law, sections 10 and 28; Laws of Orange River Colony, 1901, p. 855; of the South African Republic, "De Locale

Wetten en Volksraadsbesluiten der-Zuid-Afr. Republiek," 1898, Law No. 20, pp. 230, 233, article 6, 28; Constitution, German Empire, April 16, 1871, Art. 57, 59; Dodd, 1 *Modern Constitutions*, p. 344; Gesetz, betreffend Aenderungen der Wehrpflicht, vom 11 Feb. 1888, No. 1767, Reichs-Gesetzblatt, p. 11, amended by law of July 22, 1913, No. 4264, RGBL, p. 593; Loi sur le recrutement de l'armee of 15 July, 1889 (Duvergier, vol. 89, p. 440), modified by act of 21 March, 1905 (Duvergier, vol. 105, p. 133).

² Military Service Act, January 27, 1916, 5 and 6 George V, c. 104, p. 367, amended by the Military Service Act of May 25, 1916, 2nd session, 6 and 7, George V, c. 15, p. 33.

³ See also Constitution of Vermont, 1777, c. 1, Art. 9 (Thorpe, vol. 6, pp. 4747, 3740); New York, 1777, Art. 40 (*id.*, vol. 5, p. 2637); Massachusetts Bill of Rights, 1780, Art. 10 (*id.*, vol. 3, p. 1891); New Hampshire, 1784, pt. 1, Bill of Rights, Art. 12 (*id.*, vol. 4, p. 2455); Delaware, 1776, Art. 9 (*id.*, Vol. 1, pp. 562, 564); Maryland, 1776, Art. 33 (*id.*, vol. 3, pp. 1686, 1696); Virginia, 1776, Militia (*id.*, vol. 7, p. 3817); Georgia, 1777, Art. 33, 35 (*id.*, vol. 2, pp. 777, 782).

by earnest requests by Washington to Congress that a demand be made upon the States to [381] resort to drafts to fill their quotas⁴—that fact serves to demonstrate instead of to challenge the existence of the authority. A default in exercising a duty may not be resorted to as a reason for denying its existence.

When the Constitution came to be formed it may not be disputed that one of the recognized necessities for its adoption was the want of power in Congress to raise an army and the dependence upon the States for their quotas. In supplying the power it was manifestly intended to give it all and leave none to the States, since besides the delegation to Congress of authority to raise armies the Constitution prohibited the States, without the consent of Congress, from keeping troops in time of peace or engaging in war. Article I, § 10 (8 Fed. St. Ann. 899).

To argue that as the state authority over the militia prior to the Constitution embraced every citizen, the right of Congress to raise an army should not be considered as granting authority to compel the citizen's service in the army, is but to express in a different form the denial of the right to call any citizen to the army. Nor is this met by saying that it does not exclude the right of Congress to organize an army by voluntary enlistments, that is, by the consent of the citizens, for if the proposition be true, the right of the citizen to give consent would be controlled by the same prohibition which would deprive Congress of the right to compel unless it can be said that although Congress had not the right to call because of state authority, the citizen had a right to obey the call and set aside state authority if he pleased to do so. And a like conclusion demonstrates the want of foundation for the contention that although it be within the power to call the citizen into the army without his consent, the army into which he enters after the call is to be limited [382] in some respects to services for which the militia it is assumed may only be used, since this admits the appropriateness of the call to military service in the army and the power to make it and yet destroys the purpose for which the call is authorized—the raising of armies to be under the control of the United States.

The fallacy of the argument results from confounding the constitutional provisions concerning the militia with that conferring upon Congress the power to raise armies. It treats them as one while they are different. This is the militia clause:

"The Congress shall have power . . . To provide for calling forth the militia to

execute the laws of the Union, suppress insurrections and repel invasions; To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." Article I, § 8 (8 Fed. St. Ann. 652, 654).

The line which separates it from the army power is not only inherently plainly marked by the text of the two clauses, but will stand out in bolder relief by considering the condition before the Constitution was adopted and the remedy which it provided for the military situation with which it dealt. The right on the one hand of Congress under the Confederation to call on the States for forces and the duty on the other of the States to furnish when called, embraced the complete power of government over the subject. When the two were combined and were delegated to Congress all governmental power on that subject was conferred, a result manifested not only by the grant made but by the limitation expressly put upon the States on the subject. The army sphere therefore embraces such complete authority. But the duty of exerting the power thus conferred in all its plentitude was not [383] made at once obligatory but was wisely left to depend upon the discretion of Congress as to the arising of the exigencies which would call it in part or in whole into play. There was left therefore under the sway of the States undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies. This did not diminish the military power or curb the full potentiality of the right to exert it but left an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared. This, therefore, is what was dealt with by the militia provision. It diminished the occasion for the exertion by Congress of its military power beyond the strict necessities for its exercise by giving the power to Congress to direct the organization and training of the militia (evidently to prepare such militia in the event of the exercise of the army power) although leaving the carrying out of such command to the States. It further conduced to the same result by delegating to Congress the right to call on occasions which were specified for the militia force, thus again obviating the necessity for exercising the army power to the extent of

⁴ Journals of Congress, Ford's ed., Library of Congress, vol. 7, pp. 262, 263; vol. 10, pp.

190, 200; vol. 13, p. 299. 7 Sparks, Writings of Washington, pp. 162, 167, 442, 444.

being ready for every conceivable contingency. This purpose is made manifest by the provision preserving the organization of the militia so far as formed when called for such special purposes although subjecting the militia when so called to the paramount authority of the United States. *Tarble's Case*, 13 Wall. 397, 408, 20 U. S. (L. ed.) 597. But because under the express regulations the power was given to call for specified purposes without exerting the army power, it cannot follow that the latter power when exerted was not complete to the extent of its exertion and dominant. Because the power of Congress to raise armies was not required to be exerted to its full limit but only as in the discretion of Congress it was deemed the public [384] interest required, furnishes no ground for supposing that the complete power was lost by its partial exertion. Because, moreover, the power granted to Congress to raise armies in its potentiality was susceptible of narrowing the area over which the militia clause operated, affords no ground for confounding the two areas which were distinct and separate to the end of confusing both the powers and thus weakening or destroying both.

And upon this understanding of the two powers the legislative and executive authority has been exerted from the beginning. From the act of the first session of Congress carrying over the army of the Government under the Confederation to the United States under the Constitution (Act of September 29, 1789, c. 25, 1 Stat. 95) down to 1812 the authority to raise armies was regularly exerted as a distinct and substantive power, the force being raised and recruited by enlistment. Except for one act formulating a plan by which the entire body of citizens (the militia) subject to military duty was to be organized in every State (Act of May 8, 1792, c. 33, 1 Stat. 271) which was never carried into effect, Congress confined itself to providing for the organization of a specified number distributed among the States according to their quota to be trained as directed by Congress and to be called by the President as need might require.⁵ When the War of 1812 came the result of these two forces composed the army to be relied upon by Congress to carry on the war. Either because it proved to be weak in numbers or because of insubordination developed among the forces called and manifested by their refusal to cross the border,⁶ [385] the Government determined that the exercise of the power to organize an army by compulsory draft was necessary and Mr. Monroe, the Secretary of War (Mr. Madison

being President) in a letter to Congress recommended several plans of legislation on that subject. It suffices to say that by each of them it was proposed that the United States deal directly with the body of citizens subject to military duty and call a designated number out of the population between the ages of 18 and 45 for service in the army. The power which it was recommended be exerted was clearly an unmixed federal power dealing with the subject from the sphere of the authority given to Congress to raise armies and not from the sphere of the right to deal with the militia as such, whether organized or unorganized. A bill was introduced giving effect to the plan. Opposition developed, but we need not stop to consider it because it substantially rested upon the incompatibility of compulsory military service with free government, a subject which from what we have said has been disposed of. Peace came before the bill was enacted.

Down to the Mexican War the legislation exactly portrayed the same condition of mind which we have previously stated. In that war, however, no draft was suggested, because the army created by the United States immediately resulting from the exercise by Congress of its power to raise armies, that organized under its direction from the militia and the volunteer commands which were furnished, proved adequate to carry the war to a successful conclusion.

So the course of legislation from that date to 1861 affords no ground for any other than the same conception of legislative power which we have already stated. In that year when the mutterings of the dread conflict which was to come began to be heard and the Proclamation of the President calling a force into existence was issued it [386] was addressed to the body organized out of the militia and trained by the States in accordance with the previous acts of Congress. (Proclamation of April 15, 1861, 12 Stat. 1258.) That force being inadequate to meet the situation, an act was passed authorizing the acceptance of 500,000 volunteers by the President to be by him organized into a national army. (Act of July 22, 1861, c. 9, 12 Stat. 268.) This was soon followed by another act increasing the force of the militia to be organized by the States for the purpose of being drawn upon when trained under the direction of Congress (Act of July 29, 1861, c. 25, 12 Stat. 281), the two acts when considered together presenting in the clearest possible form the distinction between the

⁵ Act of May 9, 1794, c. 27, 1 Stat. 367; Act of February 28, 1795, c. 36, 1 Stat. 424; Act of June 24, 1797, c. 4, 1 Stat. 522; Act of March 3, 1803, c. 32, 2 Stat. 241; Act of April 18, 1806, c. 32, 2 Stat. 383; Act of

March 30, 1808, c. 39, 2 Stat. 478; Act of April 10, 1812, c. 55, 2 Stat. 705.

⁶ Upton, *Military Policy of the United States*, pp. 99 et seq.

power of Congress to raise armies and its authority under the militia clause. But it soon became manifest that more men were required. As a result the Act of March 3, 1863, c. 75, 12 Stat. 731, was adopted entitled "An act for enrolling and calling out the National Forces and for other purposes." By that act which was clearly intended to directly exert upon all citizens of the United States the national power which it had been proposed to exert in 1814 on the recommendation of the then Secretary of War, Mr. Monroe, every male citizen of the United States between the ages of twenty and forty-five was made subject by the direct action of Congress to be called by compulsory draft to service in a national army at such time and in such numbers as the President in his discretion might find necessary. In that act, as in the one of 1814, and in this one, the means by which the act was to be enforced were directly federal and the force to be raised as a result of the draft was therefore typically national as distinct from the call into active service of the militia as such. And under the power thus exerted four separate calls for draft were made by the President and enforced, that of July, 1863, of February and March, 1864, of July and December, [387] 1864, producing a force of about a quarter of million men.⁷ It is undoubted that the men thus raised by draft were treated as subject to direct national authority and were used either in filling the gaps occasioned by the vicissitudes of war in the ranks of the existing national forces or for the purpose of organizing such new units as were deemed to be required. It would be childish to deny the value of the added strength which was thus afforded. Indeed in the official report of the Provost Marshal General, just previously referred to in the margin, reviewing the whole subject it was stated that it was the efficient aid resulting from the forces created by the draft at a very critical moment of the civil strife which obviated a disaster which seemed impending and carried that struggle to a complete and successful conclusion.

Brevity prevents doing more than to call attention to the fact that the organized body of militia within the States as trained by the States under the direction of Congress became known as the National Guard (Act of January 21, 1903, c. 196, 32 Stat. 775 [6 Fed. St. Ann. (2d ed.) 433]; National Defense Act of June 3, 1916, c. 134, 39 Stat. 211 [6 Fed. St. Ann. (2d ed.) 444]. And to make further preparation from among the great body of the citizens, an additional number to be determined by the President was directed to be organized and trained by the States as the

National Guard Reserve. (National Defense Act, *supra*.)

Thus sanctioned as is the act before us by the text of the Constitution, and by its significance as read in the light of the fundamental principles with which the subject is concerned, by the power recognized and carried into effect in many civilized countries, by the authority and practice of the colonies before the Revolution, of the States under the Confederation and of the Government [388] since the formation of the Constitution, the want of merit in the contentions that the act in the particulars which we have been previously called upon to consider was beyond the constitutional power of Congress, is manifest. Cogency, however, if possible, is added to the demonstration by pointing out that in the only case to which we have been referred where the constitutionality of the Act of 1863 was contemporaneously challenged on grounds akin to, if not absolutely identical with, those here urged, the validity of the act was maintained for reasons not different from those which control our judgment. (*Kneeder v. Lane*, 45 Pa. St. 238.) And as further evidence that the conclusion we reached is but the inevitable consequence of the provisions of the Constitution as effect follows cause, we briefly recur to events in another environment. The seceding States wrote into the constitution which was adopted to regulate the government which they sought to establish, in identical words the provisions of the Constitution of the United States which we here have under consideration. And when the right to enforce under that instrument a selective draft law which was enacted, not differing in principle from the one here in question, was challenged, its validity was upheld, evidently after great consideration, by the courts of Virginia, of Georgia, of Texas, of Alabama, of Mississippi and of North Carolina, the opinions in some of the cases copiously and critically reviewing the whole grounds which we have stated. *Burroughs v. Peyton*, 16 Grat. 470; *Jeffers v. Fair*, 33 Ga. 347; *Daly v. Harris*, 33 Ga. Supp. 38, 54; *Barber v. Irwin*, 34 Ga. 27; *Parker v. Kaughman*, 34 Ga. 136; *Ex p. Coupland*, 26 Tex. 386; *Ex p. Hill*, 38 Ala. 429; *In re Emerson*, 39 Ala. 437; *In re Pille*, 39 Ala. 459; *Simmons v. Miller*, 40 Miss. 19; *Gatlin v. Walton*, 60 N. C. 333, 408.

In reviewing the subject, we have hitherto considered [389] it as it has been argued, from the point of view of the Constitution as it stood prior to the adoption of the Fourteenth Amendment. But to avoid all misapprehension we briefly direct attention to that Amendment for the purpose of pointing out,

⁷ Historical Report, Enrollment Branch, 1866.

Provost Marshal General's Bureau, March 17,

223 Mass. 119.

as has been frequently done in the past,⁸ how completely it broadened the national scope of the Government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore, operating as it does upon all the powers conferred by the Constitution, leaves no possible support for the contentions made, if their want of merit was otherwise not so clearly made manifest.

It remains only to consider contentions which, while not disputing power, challenge the act because of the repugnancy to the Constitution supposed to result from some of its provisions. First, we are of opinion that the contention that the act is void as a delegation of federal power to state officials because of some of its administrative features, is too wanting in merit to require further notice. Second, we think that the contention that the statute is void because vesting administrative officers with legislative discretion has been so completely adversely settled as to require reference only to some of the decided cases. *Field v. Clark*, 143 U. S. 649, 12 S. Ct. 495, 36 U. S. (L. ed.) 294; *Buttfield v. Stranahan*, 192 U. S. 470, 24 S. Ct. 349, 48 U. S. (L. ed.) 525; *Intermountain Rate Cases*, 234 U. S. 476, 34 S. Ct. 986, 58 U. S. (L. ed.) 1408; *Bay City First Nat. Bank v. Fellows*, 244 U. S. 416, 37 S. Ct. 734. A like conclusion also adversely disposes of a similar claim concerning the conferring of judicial power. *Buttfield v. Stranahan*, 192 U. S. 470, 497, 24 S. Ct. 356, 48 U. S. (L. ed.) 525; *West v. Hitchcock*, 205 U. S. 80, 27 S. Ct. 423, 51 U. S. (L. ed.) 713; *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320, 338-340, 29 S. Ct. 671, 53 U. S. (L. ed.) 1013; *Zakonaite v. Wolf*, 226 U. S. 272, 275, 33 S. Ct. 31, 57 U. S. (L. ed.) 218. And we pass without anything but statement [390] the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.

Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth

Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.

Affirmed.

NOTE.

The reported case, which is the first decision of the United States Supreme Court to pass on the validity of a law imposing compulsory military service, holds to be constitutional the Selective Draft Law of May 18, 1917 (Fed. St. Ann. Pamph. Supp. No. 11, p. 85). The court also holds that, even as applied to the drafting of members of the militia, the act is an exercise of the power to raise armies and not of the power to provide for calling forth the militia, and therefore is not subject to the limitations attached to the latter power. The entire subject of compulsory military service is discussed in the note to *Rex v. Commanding Officer*, Ann. Cas. 1917C 809.

BRACKETT

v.

COMMONWEALTH.

(Two Cases.)

BUTCHERS' SLAUGHTERING AND MELTING COMPANY

v.

COMMONWEALTH.

(Two Cases.)

Massachusetts Supreme Judicial Court—
March 3, 1916.

223 Mass. 119; 111 N. E. 1036.

Eminent Domain — Procedure — Report of Commissioners — To What Court Made.

St. 1911, c. 439, providing for proceedings in the supreme judicial court for the assessment of damages from the building of a bridge, authorizes the filing of a petition in the supreme judicial court and the appointment of commissioners to assess damages. It is held that such commissioners are required by imperative inference to make their report to the supreme judicial court which appointed them, and are officers of such court subject to its orders.

⁸ *Slaughter House Cases*, 16 Wall. 36, 72-74, 94-95, 112-113, 21 U. S. (L. ed.) 394; *United States v. Cruikshank*, 92 U. S. 542, 549, 23 U. S. (L. ed.) 588; *Boyd v. Nebraska*,

143 U. S. 135, 140, 12 S. Ct. 375, 36 U. S. (L. ed.) 103; *McPherson v. Blacker*, 146 U. S. 1, 37, 13 S. Ct. 3, 36 U. S. (L. ed.) 869.

Status of Commissioners.

That Congress in giving the state permission to build a bridge over a stream required that the state should by legislative enactment provide for adequate compensation to persons suffering injuries, does not make commissioners appointed under St. 1911, c. 439, providing for assessment of such damages, federal officers, but such commissioners being appointed by the state courts are officers of the state court.

Elements of Compensation — Injury Not Actionable at Common Law.

That landowners' injuries resulting from the erection of a bridge were not of a kind for which a common-law action would lie, and no constitutional provision entitled them to compensation, does not preclude the state from awarding compensation.

Jurisdiction over Commissioners.

As St. 1911, c. 439, § 3, relating to assessment of damages for the erection of a bridge makes ample provision for meeting expenditures incurred under the act, the supreme judicial court, which was empowered to appoint commissioners to assess damages, has exclusive jurisdiction over such officials.

Proceeding to Enforce Award — Jurisdiction.

As St. 1911, c. 439, relating to compensation for damages from the construction of a bridge provided a remedy in the supreme judicial court, the superior court has no jurisdiction over a proceeding to collect the award of commissioners appointed by the supreme judicial court.

Review of Decision of Commissioners.

As St. 1911, c. 439, § 2, providing that the decision of commissioners appointed to estimate the damage resulting from the erection of a bridge should be final as to the amount of damages and as to questions of fact involved, the commissioners' decision is not final as to other matters; the statute implying that ordinary court procedure should be pursued in other respects and the commissioners not constituting a board of referees or arbitrators to whom all issues both of law and fact were submitted irrevocably.

Same.

A court appointing commissioners to estimate damages from a public work has power to examine their report and review it as to any errors of law apparent on its face.

Same.

Where commissioners appointed by a court to estimate the damage resulting from a public work intended to proceed and decide according to law, their report may be reviewed to correct errors of law as could an award of arbitrators or referees under similar circumstances.

Same.

Where court commissioners appointed to assess damages resulting from a public work, exercised the authority conferred upon them, their report will not be recommitted for errors, unless substantial justice requires that course and some appreciable change would be made.

Elements of Damage — Loss of Profits.

In assessing damages to a leasehold interest from the building of a bridge near by, the profits of a lessee from his business conducted on the demised premises are immaterial.

[See note at end of this case.]

Procedure — Irrelevant Evidence — Effect.

In such case, if incompetent evidence touching that point is injected in the case, by the petitioner, the commonwealth should move to have it stricken out and not meet it by a further inquiry into irrelevant matters.

Evidence Admissible to Show Value — Tax Returns.

Under St. 1903, c. 437, § 48, continued in St. 1909, c. 490, part 3, § 40, and St. 1914, c. 196, § 6, declaring that tax returns shall only be open to inspection of the tax commissioner and his assistant and such officers of the commonwealth as may have occasion to inspect them to collect taxes, tax returns are not admissible in a proceeding to assess the damages suffered by a landowner from the building of a bridge in the vicinity of his lands.

Certificate of Incorporation.

Certificates of condition filed by a corporation with the secretary of the commonwealth containing statements as to value of its real estate which it contended was damaged by the erection of a bridge, while not conclusive admissions as to value, are admissible in determining that question.

Admissions as to Value.

Such certificates are not admissions binding on a lessee of the corporation, as to injury to his leasehold.

Same.

Statements by one who was the director, clerk, and auditor of a corporation and by another who was its vice-president and managing director to a tax assessor as to the value of corporate real estate, are not admissible to show value in a proceeding by the corporation to recover damages to its real estate resulting from the building of a bridge; it not being shown that such officers were authorized to speak for the corporation on that matter.

Same.

That a corporation after a bridge was built near its realty paid the same taxes as before, is not an admission that the building of the bridge did not damage its property.

Estoppel to Assert Damage.

In such case, as the value was fixed by the assessors and not the corporation, neither payment of taxes nor failure to claim an abatement estopped the corporation from asserting damage.

Form of Award — Separate Statement of Items.

A lessee being entitled to occupy permanent structures on the land, as sheds, automatic railways, etc., such property constituting a part of the land and not fixtures, commissioners in assessing damages unnecessarily separated the damages to "leasehold interest" and "loss of fixtures."

Same.

That commissioners appointed to assess damage resulting from the building of a bridge improperly classified as fixtures permanent structures on the premises which were leased, and made separate awards for injuries to land and injuries to fixtures, does not require reversal.

Same.

Commissioners appointed to assess the damage to realty from the building of a bridge estimated the damage to the owner which had leased the premises separately from the damages of the lessee; the report showing the two estimates. The commissioners gave the commonwealth's nineteenth request for a ruling, providing that the report of the commissioners should show the value of the entire tract of land immediately before and immediately after the building of the bridge, and the value of the leasehold interest before and after that event. It is held that, though the report did not show separate estimates of the value of the leasehold interest and of the reversion, it was not subject to objection on the ground that all damages were included in the assessment in favor of the lessor, and that there was a duplication by assessing damages to the lessee, the separate statement of the damages showing that each party's interest and damage was separately and definitely determined.

On report from Supreme Judicial Court, Suffolk county, and from Superior Court, Suffolk county: **McLAUGHLIN**, Judge.

Petitions by Arthur L. Brackett and by Butchers' Slaughtering and Melting Association, against Commonwealth, for relief as stated in the opinion. Cases reported. The facts are stated in the opinion. Petitions in Superior Court **DISMISSED** and rulings of single justice **AFFIRMED**.

Powers & Hall for petitioners.

Roger Sherman Hoar and *Judd Dewey* for Commonwealth.

[121] *Rugg*, C. J.—The first two of these cases are petitions brought for the assessment of damages alleged to have been sustained by the petitioners as lessees and owner respectively of property abutting on the Charles River above the Stadium or Anderson Bridge, caused by the construction of that bridge, built in accordance with St. 1911, c. 439. Upon these petitions commissioners were appointed by the Supreme Judicial Court for the county of Suffolk, to hear the parties and to assess their damages, whose award was returned into that court. The Commonwealth filed numerous exceptions to the report and moved to recommit the report for the same reasons in substance set forth in its exceptions. The petitioners asked for a ruling that the court had no

Ann. Cas. 1918B.—55.

jurisdiction to receive or to act respecting the report, and that it be stricken from the files and returned to the commissioners. The single justice denied these requests for rulings, overruled the exceptions, refused to recommit the report, ordered it confirmed and then reported all questions of law involved for determination by the full court. The last two cases are petitions brought by the same petitioners in the Superior Court against the Commonwealth under R. L. c. 201, seeking collection of the amounts awarded by the commissioners. The Commonwealth demurred and answered in abatement. A judge of the Superior Court overruled the demurrers and answers in abatement and then reported the cases.

1. The first essential step open to a person damaged in his estate by the construction of the bridge was to file a petition in the Supreme Judicial Court. That of itself is implication that that court acquired and retained jurisdiction of the cause of action described in the petition. The next step in the procedure was the appointment by that court of three commissioners. The entire authority of the commissioners came from that appointment. [122] They were thereby empowered and directed to perform the duties set out in the order of appointment, and to execute the functions described in the statute. In the absence of express provision to the contrary, they were officers of the court. By imperative inference, they were required to make report of their doings to the court by which they were appointed. They stand on the same footing in this regard as auditors, masters and referees. As was said by Chief Justice Gray, with affluant citation of authorities, in *Wyman v. Eastern R. Co.* 128 Mass. 346, 347: "It is settled, by repeated decisions, that commissioners appointed by this court and deriving all their powers from their judicial appointment must, by necessary implication, without any express statute direction, return their award to the court which appoints them, to be there examined, and, if no sufficient cause to the contrary is shown, confirmed and recorded." *Kingman*, petitioner, 153 Mass. 566, 579, 27 N. E. 778, 12 L.R.A. 417.

The consent of the United States was necessary for the construction of the bridge. That consent was given by act of Congress approved February 27, 1911 (c. 165, 36 Stat. L. 933). It there was enacted that, [123] before the construction of the bridge could begin, the State of Massachusetts should, by legislative enactment, provide for adequate compensation for persons suffering injury like in kind to that claimed by the petitioners, and "Provided further, That said legislative enactment shall provide for the appointment of three commissioners to hear the parties.

in interest and assess the damages to said property: Their decision as to the amount of damages and questions of fact to be final: said commissioners to be appointed by the Supreme Judicial Court of Massachusetts." The material parts of the act of Congress were embodied in St. 1911, c. 439, § 2.

This act of Congress does not constitute the commissioners federal officers. They do not derive their authority in any degree from the United States. The Congress having the power to withhold consent for the construction of the bridge, or to grant consent upon whatever terms seemed wise, imposed as conditions to the granting of its consent, that provision should be made for awarding damages to persons suffering damages like that claimed by the petitioners, and that such damages should be ascertained by commissioners appointed by the highest court of the Commonwealth. These conditions could be performed only by the General Court of Massachusetts acting within the scope of its legislative powers and providing for the exercise of judicial functions by a State tribunal. Doubtless the injuries sustained by the petitioners were of a kind for which at common law no action would lie and no constitutional right would have been infringed if no provision for compensation to them had been made. *Blackwell v. Old Colony R. Co.* 122 Mass. 1; *Dwyer v. New York, etc. R. Co.* 209 Mass. 419, 95 N. E. 850. But the Commonwealth was not thereby precluded from awarding them damages. Statutory compensation is not imperatively confined to the boundaries of strict rights secured by the paramount law. *Earle v. Com.* 180 Mass. 579, 583, 63 N. E. 10, 91 Am. St. Rep. 326, 57 L.R.A. 292.

[124] Manifestly, compliance with the conditions imposed by the act of Congress did not establish a federal but a State commission, deriving its authority from the State court by which it was appointed and to which it must report. The act of Congress does not purport to provide affirmative action on the part of the United States. It simply allows the State to enact a comprehensive scheme of legislation for the construction of the bridge, including compensation for injury to property, which so far as it affects that part of the field over which Congress has power, must comply with certain conditions. But it is a State scheme throughout when made vital by acts of the General Court of Massachusetts. The commissioners, when appointed under this special statute, were officers of the court by which they were appointed.

2. It would be most unusual, if not unprecedented in our legislative history, to clothe a court with the duty to appoint commissioners to determine damages, and deprive

it of power to enforce its award. St. 1911, c. 439, § 3, makes ample provision for meeting the expenditures incurred under the act out of the resources of the Commonwealth. There is a necessary implication that the Supreme Judicial Court has the power and is charged with the duty of taking whatever steps may be appropriate to see that the report of the commissioners is enforced, provided it is according to the law and ought to be enforced.

3. It follows from what has been said that the Superior Court has no jurisdiction over the petitions filed in that court. Since St. 1911, c. 439, is sufficient and complete in itself as to remedy for damages, that affords the means provided by the Commonwealth for the enforcement of rights against itself. It cannot be implied in any other manner or in any other court. *McArthur Bros. Co. v. Com.* 197 Mass. 137, 83 N. E. 334, and cases there collected.

4. The court has power to examine the report of the commissioners and review it as to any errors of law apparent on its face. This power is ordinarily a part of judicial duty. In the absence of express statute or law to the contrary, it inheres in a court appointing its officers to make investigations. It is provided in § 2 of the instant statute that "the decision of said commissioners as to the amount of said damages and as to questions of fact involved shall be final." The fair implication from these [125] words is that in other respects their decision is not final, but is subject to usual court procedure, and that questions of law raised in the report may be reviewed. The statute did not constitute the commission a board of referees or arbitrators, to whom all issues between the parties, both of law and fact, were to be submitted irrevocably. It is quite distinguishable from that before the court in *Danvers v. Com.* 184 Mass. 502, 506, 69 N. E. 320. Since neither the statute, the rule of court, nor agreement of parties made the commissioners referees or arbitrators, the well settled principle that the award of arbitrators or referees will not be set aside for alleged errors of law, is not applicable. *Fairchild v. Adams*, 11 Cush. (Mass.) 549; *Electric Supply, etc. Co. v. Conway Electric Light, etc. Co.* 186 Mass. 449, 70 N. E. 983; *Darrow v. Braman*, 201 Mass. 469. Moreover, it is apparent from the report that the commissioners intended to proceed and to decide according to law. It has been said that, under such circumstances, even an award of arbitrators or referees may be reviewed to correct errors of law. *Spoor v. Tytzer*, 115 Mass. 40; *Davis v. Henry*, 121 Mass. 150. See *Gloucester Water Supply Co. v. Gloucester*, 185 Mass. 535, 70 N. E. 1015. The controlling principle in the case at bar is stated

in Boston, etc. R. Corp. v. Western R. 14 Gray (Mass.) 253, at page 258, in these words: "They [the commissioners] are constituted a board for the performance of certain services under the statutes; but as they derive all their right and power to act in the premises at all from their judicial appointment, the court by which it is made will so far supervise and control their proceedings, as to see that, in discharge of the duties thus imposed upon them, they have acted within the scope, and have neither exceeded nor failed to exercise the full measure of authority with which they are invested. In considering their return, if it be found that they have thus acted, their doings and decisions will not be interfered with."

While, therefore, the court will review the report, it will not be set aside nor the case sent back for rehearing, unless there appears to be some probability that an appreciable change would be made in the report upon a correction of the mistakes, if any there are, and unless substantial justice requires that course. Newburyport Water Co. v. Newburyport, 168 Mass. 541, 552, 47 N. E. 533; Pigeon's Case, 216 Mass. 51, 55, Ann. Cas. 1915A 737, 102 N. E. 932.

[126] 5. There was no error in the exclusion of the questions, put by the Commonwealth to the petitioner Brackett upon his cross-examination, touching the profits of his business. The question on trial was the injury to his leasehold estate. The profits of his business were too remote to have any necessary bearing upon that issue. Bailey v. Boston, etc. R. Corp. 182 Mass. 537, 539, 66 N. E. 203; Mississippi, etc. River Boom Co. v. Patterson, 98 U. S. 403, 410, 25 U. S. (L. ed.) 206. If incompetent evidence touching that point had been injected in the case by the petitioner, the proper course was to move to have it stricken out, not to meet it by further inquiry into an irrelevant subject.

6. The Attorney General offered the original tax returns of the petitioning corporation filed with the tax commissioner of the Commonwealth and taken from his custody for the purpose of the evidence before the commission. These returns are required by law to be in detail. It may be presumed that they contained statements as to value material to the issues on trial. It is matter of common knowledge that formerly such returns often have been used in evidence, when values therein stated became material in actions, by the persons making them. But in St. 1903, by § 48 of c. 437, it was enacted for the first time that such return "shall be open only to the inspection of the tax commissioner, his clerks and assistants, and such other officers of the Commonwealth as may have occasion to inspect it for the purpose of assessing or of collecting taxes."

This provision has been continued in St. 1909, c. 490, Part III, § 40, and St. 1914, c. 198, § 6. It indicates a legislative determination not only that it shall not be open to general observation, but that it shall not be used for any purpose other than that stated in the statute. Thus its evidential character is also affected. The statute manifests a purpose that such returns shall not be used as evidence in the ordinary case. Bowman v. Montcalm Circuit Judge, 129 Mich. 608, 610, 89 N. W. 334. The reason for treating tax returns as not open to use by usual methods has been recognized. Boske v. Comingore, 177 U. S. 459, 469, 20 S. Ct. 701, 44 U. S. (L. ed.) 846; In re Joseph Hargreaves [1900] 1 Ch. D. (Eng.) 347. It is not here intimated that in a criminal proceeding involving integrity of the return, it might not be produced in court. Therefore, there is nothing inconsistent with this conclusion in Commonwealth v. Ryan, 157 Mass. 403.

[127] 7. Certificates of condition filed with the Secretary of the Commonwealth by the petitioning corporation under St. 1903, c. 437, § 45, cl. 6, were received in evidence. These contained statements as to value of its real estate, which tended to contradict the value as shown by evidence introduced by the corporation at the hearing. These certificates were competent evidence as admissions by the petitioner as to the value of its real estate. Smith v. Paul Boyton Co. 176 Mass. 217, 57 N. E. 367. There appears in the record to be no other ground on which such certificates could have been received in evidence. It must be assumed that they were given the weight to which under all the circumstances they were entitled. But they were not binding admissions in the sense that the real value could not be shown by other competent evidence. The request for ruling, to the effect that the certificates constituted an admission by the corporate petitioner, taken in conjunction with the request to rule that they were binding on the other petitioner, implies that these requests went beyond the plain proposition just stated. The requests appear to seek to have attached to the certificates a conclusiveness on the question of value which they did not possess. No reversible error is shown in this respect. It is not necessary now to determine the effect of such certificates where persons have acted upon the information disclosed in them. Steel v. Webster, 188 Mass. 478, 480, 74 N. E. 686.

8. Plainly these certificates were not admissions binding the other plaintiff, who had nothing to do with making them.

9. The testimony as to statements made by one who was a director, a clerk and the auditor of the corporate petitioner, and by

another who was its vice president and managing director, to an assessor of the city of Boston, as to the value of that petitioner's real estate, rightly was excluded. It does not appear that these officers were authorized by the corporation to speak for it on that subject, or that such statements were within the scope of their official duty. *Wellington v. Boston*, etc. R. Co. 158 Mass. 185, 33 N. E. 393; *Gilmore v. Mittineague Paper Co.* 169 Mass. 471, 48 N. E. 623.

10. The payment of taxes upon the same valuation of its real estate, after as before the erection of the bridge, was not an admission that there had been no change in value. The valuation was not the act of the landowner, but of the assessors. For the same reason, the payment of taxes worked no estoppel as to valuation. [128] Nor was the failure to claim an abatement of consequence in this connection. *Raynes v. Bennett*, 114 Mass. 424.

11. The commissioners reported that the damage to Brackett, on account of "his leasehold interest," was \$18,000, and "the loss on his fixtures to be \$3,400, a total of \$21,400." It appears from another part of the report that what here was referred to as fixtures was a "coal plant," consisting of a shed, automatic railways, steam shovel, and a wharf. While the phrase of the decision in this respect is not felicitous, it appears to mean that the commissioners undertook to divide the damages between the two elements of land and of structures upon the land. That which the commissioners termed fixtures were structures annexed to the land and hence real estate. They were to become the property of the lessor at the end of the lease. These so called fixtures were as much a part of the leasehold interest as was the land itself. The right to occupy for the term of the lease the land, wharf and buildings, with their attached machinery and appliances, was the estate which constituted the leasehold interest of the petitioner Brackett. Although such a division may be necessary sometimes, *Cornell-Andrews Smelting Co. v. Boston*, etc. R. Corp. 209 Mass. 298, 314, 95 N. E. 887, there seems to have been no occasion for it here. But the form of the report in this particular does not require reversal.

12. It is contended with great earnestness in behalf of the Commonwealth, that the form of the report shows that the commissioners found the entire damages to the estate of which the corporate plaintiff owned the fee, on the basis that it as owner was in possession of the entire estate without deduction on account of the leasehold interest of Brackett, and then found the damages to Brackett's leasehold interest as a separate matter, thus including that item

twice. That contention is based on the form of the report, especially in the light of the defendant's nineteenth request for ruling, which the commissioners gave. The form of the report in this particular is as follows: "In petition No. 2110, *Butchers Slaughtering and Melting Association*, we find that the value of the property before the building of the bridge was \$290,000, and after the building of the bridge the value was \$237,000. We therefore find for the petitioner and assess damages in the sum of \$53,000, together with interest from December 11, [129] 1912 to July 29, 1915, the date of filing this report, amounting to \$8,374.00 making a total of \$61,374.00. In petition No. 21109, *Arthur L. Brackett*, we find the value of his leasehold interest to have been \$30,000 above the rental, and it was damaged to the extent of \$18,000, and we find the loss on his fixtures to be \$3,400, a total of \$21,400, with interest from December 11, 1912 to July 29, 1915, the date of filing this report, amounting to \$3,381.20 making a total of \$24,781.20." This, standing alone, while not expressed with great clearness, does not seem open to misconstruction. All that the corporate petitioner could recover under its petition was the damage it had sustained to its real estate. It did not own free from incumbrance the entire real estate, but its title was subject to the incumbrance of the leasehold interest of Brackett. The only damage which in law the corporation could recover or be entitled to was that sustained in that part of the whole estate which was left after deducting from it the value of Brackett's leasehold interest. When, therefore, the commissioners refer to the petition of the corporation by number as constituting the cause of action on which the finding of damages is made, the rational inference is that they meant only that portion of the entire parcel of real estate for which that petitioner was in law entitled to recover damages. But the commissioners granted the defendant's request No. 19, to wit: "The findings by the commission should contain these figures: (a) the value of the entire tract of land immediately prior to December 11, 1912; (b) the value of the entire tract of land immediately subsequent to December 11, 1912, (c) the value of the leasehold immediately prior to December 11, 1912; and (d) the value of the leasehold immediately subsequent to December 11, 1912." Although this introduces some confusion and has caused doubt, yet it does not quite seem to overcome the statement from the report which has been quoted. That request, strictly construed according to the interpretation contended for at the argument on behalf of the Commonwealth, in (a) and (b) did not relate to any issue upon which the commissioners were required to

pass. Their duty, as has been said, was to find the damages sustained by each of the petitioners. Separate petitions rightly were brought, and the damages were to be separately assessed. Although granting that request, the commissioners did not in express terms find the value [130] of the leasehold immediately before December 11, 1912, and immediately subsequent to that date. Those amounts can be ascertained only after some figuring. The plain duty of the commissioners was to find separately the damages suffered by each petitioner. They had performed that duty by the report as framed. Under all the circumstances, the only reasonable interpretation is to hold that the meaning of the report was not intended to be nullified by granting the request No. 19; but that the commissioners supposed they had complied with the request by the report, by finding the damages which the plaintiff corporation had suffered in its own right, and the damages which Brackett has sustained in his right.

The petitions pending in the Superior Courts are to be dismissed for want of jurisdiction. In the petitions pending in the Supreme Judicial Court, the rulings of the single justice were right and the order confirming the report is affirmed in each case.

So ordered.

NOTE.

Loss of Profits or Injury to Business as Element of Damages in Eminent Domain Proceedings.

Introductory, 869.

Condemnation for Railroad Purposes:

Majority Rule, 869.

Minority Rule, 873.

Condemnation for Other than Railroad Purposes:

Generally, 873.

Rule in Massachusetts, 875.

Rule in New York, 875.

Property Not Taken but Injured, 876.

Injury to Franchise, 877.

Injury to Good Will, 878.

Loss of Speculative or Future Profits, 879.

Introductory.

It is the purpose of this note to discuss the cases dealing with the question of loss of profits or injury to business as an element of damage in eminent domain proceedings. The element of injury to business is in the main confined to cases that are closely connected with loss of profits. For a discussion of the right to recover damages in eminent domain proceedings for an injury to personal property or the expense of remov-

ing it from the premises, see the notes to the following cases: *Blincoe v. Choctaw*, etc. R. Co. 8 Ann. Cas. 689; *Kansas City Southern R. Co. v. Anderson*, 16 Ann. Cas. 784; *St. Louis v. St. Louis*, etc. R. Co. reported post, this volume, at page 881; *Board of Trade Tel. Co. v. Darst*, 85 Am. St. Rep. 238, 298.

Condemnation for Railroad Purposes.

MAJORITY RULE.

The general rule is that loss of profits or injury to business is ordinarily not an element of damage to be considered in determining the value of property taken for railroad purposes under the power of eminent domain.

England.—*Cameron v. Charing Cross R. Co.* 19 C. B. N. S. 764, 115 E. C. L. 764, 11 Jur. N. S. 282, 12 L. T. N. S. 121, 13 W. R. 390; *Ricket v. Metropolitan R. Co.* 5 B. & S. 149, 117 E. C. L. 149, L. R. 2 H. L. 175; *Reg. v. Vaughan*, 4 L. R. Q. B. 190. *Compare* *Jubb v. Dock Co.* etc. 9 Q. B. 443, 58 E. C. L. 443; *Senior v. Metropolitan R. Co.* 2 H. & C. 258, 9 Jur. N. S. 802, 32 L. J. Exch. 225, 8 L. T. N. S. 544, 11 W. R. 836; *Ripley v. Great Northern R. Co.* L. R. 10 Ch. 435, 31 L. T. N. S. 869, 23 W. R. 685.

Canada.—*Rex v. Richards*, 14 Can. Exch. 365. *Compare* *In re Cavanagh*, 14 Ont. L. Rep. 523, 9 Ont. W. Rep. 842; *In re Davies*, 28 Ont. L. Rep. 544; *In re Schooley*, 34 Ont. L. Rep. 328, 25 Dominion L. Rep. 537, 8 Ont. W. N. 589.

Arkansas.—*Kansas City Southern R. Co. v. Anderson*, 88 Ark. 129, 16 Ann. Cas. 784, 113 S. W. 1030.

Georgia.—*Selma, etc. R. Co. v. Camp*, 45 Ga. 180.

Illinois.—*Jacksonville, etc. R. Co. v. Walsh*, 106 Ill. 253; *Chicago, etc. R. Co. v. Dresel*, 110 Ill. 89; *De Buol v. Freeport, etc. R. Co.* 111 Ill. 499; *Chicago, etc. R. Co. v. Eaton*, 136 Ill. 9, 26 N. E. 575; *Braun v. Metropolitan West Side El. R. Co.* 166 Ill. 434, 46 N. E. 974; *Chicago v. Jackson*, 196 Ill. 496, 63 N. E. 1013, 1135. See also *Dupuis v. Chicago, etc. R. Co.* 115 Ill. 97, 3 N. E. 720. *Compare* *St. Louis, etc. R. Co. v. Kirby*, 104 Ill. 345.

Louisiana.—*Opelousas, etc. R. Co. v. St. Landry Cotton Oil Co.* 121 La. 796, 46 So. 810.

Massachusetts.—*Whitman v. Boston, etc. R. Co.* 3 Allen 133; *Boston, etc. R. Corp. v. Old Colony, etc. R. Corp.* 3 Allen 142; *Massachusetts Cent. R. Co. v. Boston, etc. R. Co.* 121 Mass. 124; *Bailey v. Boston, etc. R. Corp.* 182 Mass. 537, 66 N. E. 203; *Peabody v. Boston El. R. Co.* 191 Mass. 513, 78 N. E. 392.

Missouri.—*St. Louis, etc. R. Co. v. Knapp*, etc. Co. 160 Mo. 396, 61 S. W. 300; *St.*

Louis v. St. Louis, etc. R. Co. 266 Mo. 694, 182 S. W. 750. See also *St. Louis*, etc. R. Co. v. *Continental Brick Co.* 198 Mo. 698, 96 S. W. 1011. Compare *Chicago*, etc. R. Co. v. *McGrew*, 104 Mo. 282, 15 S. W. 931.

Nevada.—*Virginia*, etc. R. Co. v. *Henry*, 8 Nev. 165.

New Hampshire.—*Ranlet v. Concord R. Corp.* 62 N. H. 561.

New York.—*Taylor v. Metropolitan El. R. Co.* 50 N. Y. Super. Ct. 311; *Troy*, etc. R. Co. v. *Northern Turnpike Co.* 16 Barb. 100. See also *In re New York*, etc. R. Co. 29 Hun 1.

Ohio.—*Toledo Consol. St. R. Co. v. Toledo Electric St. R. Co.* 3 Ohio Cir. Dec. 493, 6 Ohio Cir. Ct. 362; *Lake Shore*, etc. Co. v. *Cincinnati*, etc. R. Co. 30 Ohio St. 604.

Pennsylvania.—*Pennsylvania R. Co. v. Eby*, 107 Pa. St. 166; *Spring City Gaslight Co. v. Pennsylvania Schuylkill Valley R. Co.* 167 Pa. St. 6, 31 Atl. 368; *Becker v. Philadelphia*, etc. Terminal Co. 177 Pa. St. 252, 35 Atl. 617, 35 L.R.A. 583; *Hamilton v. Pittsburg*, etc. R. Co. 190 Pa. St. 51, 42 Atl. 369, 51 L.R.A. 319; *Kossler v. Pittsburg*, etc. R. Co. 208 Pa. St. 50, 57 Atl. 66; *Cox v. Philadelphia*, etc. R. Co. 215 Pa. St. 506, 64 Atl. 729, 114 Am. St. Rep. 979; *Schonhardt v. Pennsylvania R. Co.* 216 Pa. St. 224, 65 Atl. 543. See also *Kersey v. Schuylkill River East Side R. Co.* 133 Pa. St. 234, 19 Atl. 553, 19 Am. St. Rep. 632, 7 L.R.A. 409. Compare *Pittsburgh*, etc. R. Co. v. *Vance*, 115 Pa. St. 325, 8 Atl. 764; *Ehret v. Schuylkill River East Side R. Co.* 151 Pa. St. 158, 24 Atl. 1068.

Texas.—*Houston*, etc. Cent. R. Co. v. *Powell*, 125 S. W. 330.

Virginia.—*Richmond*, etc. R. Co. v. *Chambelin* 100 Va. 401, 41 S. E. 750; *Hunter v. Chesapeake*, etc. R. Co. 107 Va. 158, 59 S. E. 415, 17 L.R.A.(N.S.) 124. See also *Richmond v. Williams*, 114 Va. 698, 77 S. E. 492.

Washington.—*North Coast R. Co. v. A. A. Kraft Co.* 63 Wash. 250, 115 Pac. 97; *Seattle*, etc. Ry. v. *Land*, 81 Wash. 206, 142 Pac. 680. See also *Seattle*, etc. R. Co. v. *Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864.

West Virginia.—*Shenandoah Valley R. Co. v. Shepherd*, 26 W. Va. 672; *Buckhannon*, etc. R. Co. v. *Great Scott Coal*, etc. Co. 75 W. Va. 423, 83 S. E. 1031.

It was said in *Bailey v. Boston*, etc. R. Co. 182 Mass. 537, 66 N. E. 293: "The principles of law applicable to these cases have long been well established in this commonwealth, whatever difficulties may have arisen in the application of them. Under statutes like that before us, in the absence of any peculiar provision, persons damaged in their real estate are to receive compensation for all such damages as are direct and proximate, as distinguished from those that are

remote and consequential, if they are, at the same time, special and peculiar as distinguished from common and general. When real estate is used in carrying on a business, the damage to be assessed for the diminution in value of the real estate is estimated in reference to the uses to which it is adapted, and not for loss in the business. . . .

Loss to business as business is too remote and consequential a damage to be allowed in estimating damage to the real estate on which it is conducted. Nor does it furnish a correct criterion by which to determine the diminution in value of the estate for the uses to which it is adapted. The business might chance to be exceedingly profitable at the time of the taking, so that an interruption of it from an interference with the full use of the real estate might cause a loss far greater than the reasonable rentable price of the property, or it might then be going on at a loss, so that the interruption would cause no damage to the business, notwithstanding that the interference with the use of the real estate was such as would cause a great diminution of its rentable value. In these cases there was an interference with the use of the petitioner's property for about twelve months. So far as this interference diminished its rentable value, or its value for the uses to which it was adapted, and so far as the damage was special and peculiar, as distinguished from that suffered in greater or less degree by the public generally, it was an element properly to be considered by the jury. The fact that it continued only while the work of construction was going on, if it was properly incident to the construction, is immaterial. . . . In the form in which the items are stated, one being for money paid for handling goods which could not be taken by teams on account of the work of construction, and the other being for money loss to the business from diminution in its volume, it is plain that the jury were rightly instructed that they were not recoverable."

In *Jacksonville*, etc. R. Co. v. *Walsh*, 106 Ill. 253, wherein premises on which the owner maintained a saloon were sought to be condemned for railroad purposes, testimony as to the amount of business, and the profits arising therefrom, was held to be incompetent. The court said: "There can be no plainer proposition than the cash value of the property condemned was the sum appellee was entitled to recover as damages. All legitimate evidence tending to establish that sum was proper, and all evidence that tended to enhance the damages above or reduce them below that sum was illegitimate and improper. The inquiry should have been confined to the market value of the property, and all evidence of the amount of business that was or could be done in it, or the probable profits arising therefrom, was improper, and should

have been rejected. The purposes for which it was used and designed, its location and advantages as to situation, were proper matters of consideration by the jury; but the profits of the business of the past, and conjectural profits for the future, were too speculative and uncertain upon which to ascertain the market or cash value of the property. The question was not the value of the property for a short term of years, but the entire property, and its value. Here, evidence was admitted to show the sales of liquor in the saloon each day, and the profits accruing from these sales. Such sales depend so largely on varying circumstances that the damages are purely speculative. Whether there shall be licenses granted to keep saloons in the municipality is contingent, and wholly uncertain. No one can say that when appellee's license expires, he or others can procure another for years, if ever, afterwards. That all depends upon the discretion of the municipal authorities. Again, one person can do a greatly larger business in the same calling, at the same place, and under the same circumstances, than another. It may be that appellee could, in that saloon, do double the amount of business that any other person could do. Such considerations are purely contingent, and altogether speculative, and cannot form the basis for fixing the price of the property, and its market value was the question involved, and which the jury were required to find. That was the measure of the damages they were to assess. The question as to the number of guests that stopped at the house daily, was of the same character. That depended upon a great number of contingencies. As one witness answered, the house was sometimes full, and sometimes it was not. Again, the question of the cost of erecting such buildings was not an element of damages, unless it were shown they would actually increase the value of the premises to the extent of their cost. All know that the cost of improvements on real estate is not a true test of their value in market. They may, or not, owing to circumstances, enhance the value of the property to the amount of their cost. The true question was, what was the value of the property as it then was—not what it cost, but for how much would it sell. The admission of this evidence, against the objection of appellant, was also error."

So it was said in *Cox v. Philadelphia*, etc. R. Co. 215 Pa. St. 506, 64 Atl. 729, 114 Am. St. Rep. 979: "It is well settled that the measure of damages for land taken or injured by a railroad company under the right of eminent domain is the difference in the market value of the tract as a whole before the taking and afterwards, as affected by it. In adjusting this difference, the landowner is entitled to have the jury take into consideration the value of his property for any and

every purpose or use to which it may be adapted, and to have the damages assessed upon a basis of the most valuable use to which the property may be adapted. As said by the present Chief Justice in *Harris v. Schuylkill River East Side R. Co.* 141 Pa. St. 242: 'In estimating the value of the lot before the taking, its possible and probable uses are important elements, and may be shown by the opinion of experts.' On the other hand, the defendant company is entitled to any benefits or advantages which may accrue to the part of the tract of land, not taken or injured, by reason of the construction of the improvement. In ascertaining the damages, therefore, the jury must take into consideration the value of the land for the uses to which it has been or may be applied, and the special advantage the construction of the road may be to the residue of the tract through which it is constructed. While these general principles, applicable to the assessment of damages in condemnation proceedings, are well settled, there is another rule which has been recognized and enforced for more than three-quarters of a century in this state, which prohibits the landowner from having the profits of his business considered by the jury in determining the value of the property which is affected or injured by the improvement. 'We have so often said,' says Mr. Justice Green in *Becker v. Philadelphia*, etc. R. Co. 177 Pa. St. 252, 'that the profits of business could not be recovered in condemnation proceedings that it seems like a waste of time to cite the decisions. As far back as *Thoburn's Case*, 7 Serg. & R. 411, it was held that, in estimating the damages done to the landowner, the jury are to value the injury to the property at the time the injury was suffered, without reference to the person of the owner or the state of his business. The allowance of damages for an actual or supposed loss of profits in a business carried on upon the premises by reason of the taking, was most emphatically condemned in the opinion, and that decision has been followed by this court from that day to this. . . . After stating the injustice of allowing for the profits of business to be carried on, the chief justice added (in *Thoburn's case*), 'That would make the defendant an insurer of ordinary profits in a new state of the business, pushed to a morbid extent, and would put it in the power of the plaintiff to increase the damages to any extent he might think proper. I mention this to show the danger of taking into consideration circumstances posterior to the time when the privilege is fully entered on, and its consequences to the individual to be compensated are ascertained.'"

Mere consequential injuries resulting from inconvenience, loss of business and the like are not recoverable. The measure of recover-

able damage is the actual diminution in the value of the property for sale or rental. *Ope-lousas, etc. R. Co. v. St. Landry Cotton Oil Co.* 121 La. 796, 46 So. 810. No recovery for loss of profits can be had whether the interruption to business is permanent or temporary. *Cameron v. Charing Cross R. Co.* 19 C. B. N. S. 764, 115 E. C. L. 764, 11 Jur. N. S. 282, 12 L. T. N. S. 121, 13 W. R. 390. Nor may a recovery be had for any inconvenience caused to the plaintiff's business. *Birmingham R. etc. Co. v. Smyer*, 181 Ala. 121, Ann. Cas. 1915C 863, 61 So. 354, 47 L.R.A. (N.S.) 597.

In *Metropolitan West Side El. R. Co. v. Siegel*, 161 Ill. 638, 44 N. E. 276, the court while recognizing the general rule that the measure of damages for the property condemned is its fair market value, and that in arriving at such value it is competent to prove any use for which it is adapted, said that exceptional cases may arise where a proper observance of the constitutional provision that private property shall not be taken or damaged for public use without just compensation may require the payment of damages actually sustained other than those measured by the value of the property taken. Accordingly in that case wherein the plaintiff's leasehold interest was sought to be condemned for the purposes of constructing an elevated railway, damages for the interruption or suspension of business were allowed. See to the same effect *Atchinson, etc. R. Co. v. Schneider*, 127 Ill. 144, 20 N. E. 41, 2 L.R.A. 422.

In *St. Louis, etc. R. Co. v. Capps*, 72 Ill. 188, affirmed 67 Ill. 607, the power of eminent domain was exercised under an ordinance granting a right of way on the following condition: "The said railroad company are to be held bound to pay all damages that may accrue to the property owners on said Main street (the one in question) by reason of the construction of said railroad." It was held that the plaintiff was entitled to damages for whatever deterioration in value his real estate may have undergone in consequence of laying the railway track, and to damages for interruption to his business during such time as would have been necessarily employed in accommodating himself to another place equally eligible, and his removal thereto; that during that time, the damages to his business should be ascertained by proof of the probable reasonable profits which might have been made on sales had there been no interruption to the business of the plaintiff by the defendant company. See also *Peoria, etc. R. Co. v. Sawyer*, 71 Ill. 361; *Chicago, etc. R. Co. v. Hock*, 118 Ill. 587, 9 N. E. 205.

In a few jurisdictions the majority rule is maintained in a modified form, the courts

holding that while loss of profits or injury to business are not distinct elements of damage, yet in arriving at the measure of compensation, it is proper for the jury to consider the purposes for which property taken has been used, and whether it is profitable and valuable for that use, and the loss of that use may be considered in fixing the damages. *Laffin v. Chicago, etc. R. Co.* 33 Fed. 415; *King v. Minneapolis Union R. Co.* 32 Minn. 224, 20 N. W. 135; *Driver v. Western Union R. Co.* 32 Wis. 569, 14 Am. Rep. 726; *Chapman v. Oshkosh, etc. R. Co.* 33 Wis. 629; *Weyer v. Chicago, etc. R. Co.* 68 Wis. 180, 31 N. W. 710. See also *Esch v. Chicago, etc. R. Co.* 72 Wis. 229, 39 N. W. 129.

Thus in *King v. Minneapolis Union R. Co.* supra, proceedings were instituted by a railroad company to condemn a leasehold interest in certain lots together with certain buildings and fixtures thereon. The only issue was the amount of compensation to which the lessee was entitled, the entire property on which the lessee had maintained a manufacturing business for fourteen years being taken. The court said: "The evidence minutely described the situation of the premises, the size of the buildings, the nature and character of the machinery, and the uses to which it was adapted. Witnesses were also called to prove the value of the respondents' leasehold interest, including the buildings and machinery. While the exceptions to the admission of evidence as well as to the charge of the court vary somewhat in form, and present the matter in different shapes, yet the general question raised by all of them really is whether it was proper, in determining the value of this property, to take into account the fact that here was a manufacturing business established and in operation upon the premises. That this was allowed is really the alleged error here urged, and which we have to consider. We think it may be stated as elementary that a person is entitled to the fair value of his property for any use to which it is adapted and for which it is available, and for which it may be sold. He is entitled to the value of his property for any use to which it may be applied, and for which it would ordinarily sell in the market, whether that use be the one to which it is presently applied, or some other to which it is adapted. It is, we think, equally true that any evidence is competent and any fact is proper to be considered which legitimately bears upon the question of the marketable value of the property. In this case evidence was introduced tending to prove that the fact of a business having been established and carried on on the premises for so long a time materially increased the market value of this property. If this was the fact, it was competent to prove it; and, if proved, we

cannot see why it was not proper to take it into consideration in estimating the value. Who can say that this circumstance would not affect its value; that is, what a purchaser would ordinarily be willing to pay? When we speak of the market value of property as being what purchasers generally would pay for it, we do not mean what men would pay who had no particular object in view in purchasing, and no definite plan as to the use to which to put it. The owner has a right to its value for the use for which it would bring the most in the market. This property was expressly built for a plow factory, and was especially suited for such a use. And it is not unreasonable to suppose that a purchaser would give more for it than he would if the business had been suspended for a time or had never been established there. Take, for example, a hotel built expressly as a public house, and not capable of advantageous use for anything else: might it not be worth more, that is, bring more in the market, by reason of the fact that it had been for years run as a hotel? So with a stand long used for some branch of mercantile business. From that very fact it might be worth more for that kind of business than any other, and a man who wished to buy might give more for it than he otherwise would. If so, why is not that a proper element to take into account in determining its value? To do so is not, as counsel seems to argue, to pay the owner for his loss of business or loss of future profits, but simply to give him the marketable value of his property for the use for which it is best adapted, and for which it would bring the most. The court below expressly instructed the jury, in substance, that they could only allow respondents the fair market value of the property, and could not take into account their loss of profits, or damages to their business; but that in estimating this value they could take into account its desirable location for this or any other legitimate business, and the fact that a business had been established there, so far as these considerations would affect the value of the property, or what a purchaser would be willing to pay for it. Reduced down, this, it seems to us, is the plain import of the charge of the court, and the meaning which the jury would naturally attach to it. And it was only to this extent and for this purpose that witnesses were permitted to take into account the fact that this business had been established and was in operation on the premises. In this we think there was no error, and this really covers the substance of all that is here assigned as error on the trial."

MINORITY RULE.

In a few jurisdictions the view obtains that in estimating the damages in case of a

condemnation for railroad purposes injury to business and loss of profits are proper elements to be included. *Colorado M. R. Co. v. Brown*, 15 Colo. 193, 25 Pac. 87; *Missouri, etc. R. Co. v. Haines*, 10 Kan. 439; *Covington Short Route Transfer Co. v. Piel*, 87 Ky. 267, 8 S. W. 449; *Maysville, etc. R. Co. v. Conner*, 29 S. W. 344, 16 Ky. L. Rep. 635; *Grand Rapids, etc. R. Co. v. Weiden*, 70 Mich. 390, 38 N. W. 294. Thus it was said in *Missouri, etc. R. Co. v. Haines*, *supra*, "In assessing damages done to land by reason of the appropriation of a right of way through it for a railroad, the commissioners or jury may always take into consideration all incidental loss, inconvenience, and damages, present and prospective, which may be known, or may reasonably be expected, to result from the construction and operation of the road in a legal and proper manner; and in doing so they may always take into consideration the exact condition in which the road may be at the time when they make the assessment." See also *St. Louis, etc. R. Co. v. McAuliff*, 43 Kan. 185, 23 Pac. 102.

So it has been held that in ascertaining the damages, the value of the property as a home and loss resulting to the owner's business were proper elements to be considered by the jury. *Covington Short Route Transfer Co. v. Piel*, 87 Ky. 267, 8 S. W. 449, wherein the court suggested that "to say that no such facts should enter into the estimate of value would be unjust to the owner, and place him in a condition where he had sustained actual injury other than the mere market value of his property, without affording him any remedy for the wrong."

Condemnation for Other than Railroad Purposes.

GENERALLY.

The general rule recognized in case land is appropriated for railroad purposes that loss of profits and injury to business are not, as such, recoverable, is correspondingly applied to the taking of property under the power of eminent domain for other than railroad purposes. *Bigg v. Corp. of London*, L. R. 15 Eq. Cas. 376, 28 L. T. N. S. 336; *U. S. v. Inlota*, 2 Am. L. Rec. 314, 513, 26 Fed. Cas. No. 15,441; *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. 415; *U. S. v. Meyers*, 190 Fed. 688; *In re Post Office Site*, 210 Fed. 832, 127 C. C. A. 382; *West Chicago Park Com'rs v. Boal*, 232 Ill. 248, 83 N. E. 824; *Portland, etc. R. Co. v. Deering*, 78 Me. 61, 2 Atl. 670, 57 Am. Rep. 784; *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045; *In re Mt. Washington Road Co.* 35 N. H. 134; *Chosen Freeholders v. Emmerich*, 57 N. J. Eq. 535, 42 Atl. 107; *Schuylkill Nav. Co. v. Farr*, 4 Watts & S. (Pa.) 362; *Schuylkill Nav. Co. v. Thoburn*, 7 Serg. & R. (Pa.) 411; *Porter*

v. Scranton, 36 Pa. Super. Ct. 218; Fuller v. Edings, 11 Rich. L. (S. C.) 239; Eddings v. Seabrook, 12 Rich. L. (S. C.) 504; Lenzi v. Memphis Union Station Co. 3 Tenn. Civ. App. 218; Buckhannon, etc. R. Co. v. Great Scott Coal, etc. Co. 75 W. Va. 423, 83 S. E. 1031; Stadler v. Milwaukee, 34 Wis. 98. See also Kennebec Water Dist. v. Waterhill, 97 Me. 185, 54 Atl. 6, 60 L.R.A. 856; Shaw v. Philadelphia, 169 Pa. St. 506, 32 Atl. 593; In re Barbadoes St. 8 Phila. (Pa.) 498.

While it is proper to show how the property is used as an element of value, it is incompetent to go into the question of profits. Incidental loss or inconvenience in business, resulting from removal or changes made necessary by the taking of property, must be borne by the owner for the sake of the general good and are not the subject of damages in condemnation. Buckhannon, etc. R. Co. v. Great Scott Coal, etc. Co. 75 W. Va. 423, 83 S. E. 1031. "The general rule, as settled by the best authorities, is that injury to a business carried on upon the premises, either by the landlord or tenant, is not a proper element of damage." Chosen Freeholders v. Emmerich, 57 N. J. Eq. 535, 42 Atl. 107.

But in some jurisdictions the general rule is qualified by a holding that while loss of profits is not recoverable as such the fact that the property is the site of a profitable business is to be considered in estimating its value. Ranck v. Cedar Rapids, 134 Ia. 563, 111 N. W. 1027; Gillespie v. South Omaha, 79 Neb. 441, 112 N. W. 582; Harriaburg, etc. Turnpike Road Co. v. Cumberland County, 225 Pa. St. 467, 74 Atl. 340; Iron City Automobile Co. v. Pittsburgh, 253 Pa. St. 478, 98 Atl. 679, L.R.A.1917C 421; Re Meyer, 30 Ont. L. Rep. 426, 5 Ont. W. N. 733. See also Prosser v. Wapello County, 18 Ia. 327, and see *infra* the subdivision *Rule in New York*.

It is pertinent to show that the business of the occupant of the property whose land has been taken under the power of eminent domain, has been affected by the taking, and that the access thereto is less convenient, not as showing independent items of damage, but for the sole purpose of determining the difference between the market value of the property before and after the construction of the public improvement. Gillespie v. South Omaha, 79 Neb. 441, 112 N. W. 582.

Testimony by a person whose land was condemned for public use as a street, that he had a stable on the lot fitted up for a large number of horses and had been conducting a livery and feed business there for sixteen years, the long use of which tended to increase the value of the land for such business, has been held to be relevant and material on the question of its value. Ranck v. Cedar Rapids, 134 Ia. 563, 111 N. W. 1027, wherein

it was said: "It is claimed upon part of the appellant that appellee was permitted to testify to the loss of or injury to his business by reason of the condemnation, and that such evidence is inadmissible. If the record bore out this claim, it would present a very serious question, for the rule observed by the courts with respect to damages of this nature is involved in considerable doubt; but we need not pause to consider it here, because an examination of the abstracts does not sustain the alleged error. . . . The value of . . . property for any special use for which it is fitted or adapted may always be inquired into, and the fact that for a long time a particular line of business has been there carried on, thus giving an increased value to the location, may also be shown. Of the many authorities already cited supporting this view, none are more directly in point than King v. Minneapolis Union R. Co. 32 Minn. 224, 20 N. W. 135. From this opinion prepared by Mitchell, J., a jurist of distinguished ability, we quote: We think it elementary that a person is entitled to the fair value of his property for any use to which it is adapted. . . . It is, we think, equally true that any fact is proper to be considered which legitimately bears upon the market value of the property. In this case evidence was introduced tending to prove that the fact of a business having been established and carried on upon the premises for so long a time materially increased the market value of this property. If this was a fact, it was competent to prove it; and, if proved, we cannot see why it was not proper to be taken into consideration in estimating the value. . . . The owner has the right to its value for the use for which it would bring the most in the market. The property was expressly built for a plow factory, and was especially fitted for such a use, and it is not unreasonable to suppose that a purchaser would give more for it than he would if the business had been suspended for some time, or had never been established there. Take, for example, a hotel built expressly as a public house, and not capable of advantageous use for anything else. Might it not be worth more—that is, bring more in the market—by reason of the fact that it had for years been run as a hotel? . . . If so, why is it not a proper element to take into account in determining its value? To do so is not, as counsel seem to argue, to pay the owner for his loss of business or future profits, but simply to give him the marketable value of his property for the use for which it is best adapted and for which it would bring the most. This doctrine is in entire harmony with our own decisions. It is also sound in principle, and fully justifies the rulings of the trial court to which the exceptions here considered were taken."

It has been held in Michigan that profits of a business carried on on the property when reasonably certain may be allowed as an element of damage for its appropriation for public use. *Detroit Parks, etc. Com'rs v. Moesta*, 91 Mich. 149, 51 N. W. 903. And see *Detroit v. Brennan*, 93 Mich. 338, 53 N. W. 525.

RULE IN MASSACHUSETTS.

In Massachusetts the general rule that ordinarily the injury done to a person's business by the exercise of the right of eminent domain is not a matter for which he can claim compensation, is generally recognized. *Cobb v. Boston*, 109 Mass. 438; *Pegler v. Hyde Park*, 176 Mass. 101, 57 N. E. 327; *Emery v. Boston Terminal Co.* 178 Mass. 172, 59 N. E. 763, 86 Am. St. Rep. 473; *Boston Belting Co. v. Boston*, 183 Mass. 254, 87 N. E. 428; *Nashua River Paper Co. v. Com.* 184 Mass. 279, 68 N. E. 209; *Whiting v. Com.* 196 Mass. 468, 82 N. E. 670. And see the reported case. See also *Brooks v. Boston*, 19 Pick. 174.

But such damage was held to be recoverable in each of the following cases, by virtue of a special act: *Earle v. Com.* 180 Mass. 579, 63 N. E. 10, 91 Am. St. Rep. 326, 57 L.R.A. 292; *Fairbanks v. Com.* 183 Mass. 373, 67 N. E. 335; *Sawyer v. Com.* 185 Mass. 356, 70 N. E. 438; *Allen v. Com.* 188 Mass. 59, 74 N. E. 287, 69 L.R.A. 599. See also *Sawyer v. Com.* 182 Mass. 245, 65 N. E. 52, 59 L.R.A. 726.

RULE IN NEW YORK.

In New York the general rule obtains that loss of profits is not recoverable as an element of damage for the taking of property by the exercise of the power of eminent domain. *Matter of Buffalo*, 1 N. Y. St. Rep. 742; *In re New York, etc. R. Co.* 35 Hun 633; *Van Buren v. Fishkill Water-Works Co.* 50 Hun 448, 3 N. Y. S. 336, 21 N. Y. St. Rep. 438; *Matter of Public Parks*, 53 Hun 280, 6 N. Y. S. 750, 25 N. Y. St. Rep. 9, *appeal dismissed* 121 N. Y. 711, 24 N. E. 1101; *Matter of New York, etc. Bridge*, 50 Hun 606 mem. 4 N. Y. S. 222; *Matter of Newton*, 63 Hun 628 mem. 19 N. Y. S. 573; *Matter of Gilroy*, 26 App. Div. 314, 49 N. Y. S. 798; *Sauer v. New York City*, 44 App. Div. 305, 60 N. Y. S. 648; *Syracuse v. Stacey*, 45 App. Div. 249, 61 N. Y. S. 165; *New York Telephone Co. v. State*, 169 App. Div. 310, 154 N. Y. S. 1059. "Although . . . in determining the market value of property taken for public use, it is proper to consider such property with reference to any and all purposes to which it may be devoted, yet an inquiry as to the profits which have been or may be realized from some particular busi-

ness would have but little, if any, legitimate bearing upon the question of value, for the reason that the profitable or unprofitable conduct of all business is generally dependent upon a variety of causes, such as the location of the property, the enterprise, judgment, and business skill of the owner, not to mention several other elements which will readily suggest themselves." *Syracuse v. Stacey*, 45 App. Div. 249, 61 N. Y. S. 165. See also *Matter of New York Water Supply*, 159 App. Div. 279, 144 N. Y. S. 373.

But by a special enactment in New York (Laws 1905, c. 724, as amended in 1906) creating a state water supply commission, it is provided that where land is condemned for the purposes mentioned in that statute, the owners of business injured by such condemnation are entitled to compensation for the loss of profits or injuries to their business. See *Matter of Simmons*, 58 Misc. 581, 109 N. Y. S. 1036, *affirmed* 130 App. Div. 350, 114 N. Y. S. 571; *People v. New York*, 198 N. Y. 439, 92 N. E. 18; *In re New York Water Supply*, 211 N. Y. 174, 105 N. E. 213.

Evidence of the loss of profits or injury to business has been held to be admissible in New York not as showing specific items of damage, but as bearing on the question of the market value of the property appropriated. *Matter of State Reservation*, 16 Abb. N. Cas. (N. Y.) 159; *Reisert v. New York*, 174 N. Y. 196, 66 N. E. 731; *Matter of Grade Crossing Com'rs*, 17 App. Div. 54, 44 N. Y. S. 844, *affirmed* 154 N. Y. 550, 49 N. E. 127; *Brainerd v. State*, 74 Misc. 100, 131 N. Y. S. 221; *Matter of Bensel*, 148 App. Div. 553, 133 N. Y. S. 84; *Matter of Water Supply*, 81 Misc. 19, 142 N. Y. S. 83.

Thus it was said in *Brainerd v. State*, *supra*: "The cases, however, are not harmonious on the question of injury to business. . . . The profits derived from the use of the property itself may be shown, whenever such profits would be an indication of the value. . . . So the profits derived from the farming afford a criterion of the value of the farm. . . . If the particular use to which the property is devoted has continued for a long time and has imparted to the property a peculiar value for that use, as for a hotel, it is proper to show the fact and to take it into consideration in fixing the damages. . . . Whether or not profits should be considered depends upon the nature of the premises taken. Where the personal skill, experience and efforts of the owner play too prominent a part, the profits realized from the business conducted upon real property constitute but little aid in determining the value of the property; but, where the earnings depend chiefly upon the location, soil or character of the property itself, the profits derived from it may furnish reliable evidence of its value. There are,

therefore, cases which hold that profits are inadmissible in evidence (*Matter of Gilroy*, 26 App. Div. 314; *Sauer v. Mayor*, 44 App. Div. 308; *Syracuse v. Stacey*, 45 App. Div. 249) and those where evidence of profits has been held to be admissible. *Reisert v. New York*, 174 N. Y. 196. In this particular case, there is a question as to whether or not the property is so situated as to justify the introduction in evidence of the profits of the business, not as the basis of the value of the property, but as bearing upon its value. . . . The claimants should have been permitted to introduce in evidence all the facts relating to their business, including, if the information is reliable, the profits realized from their business. *Omaha Horse R. Co. v. Cable Tram-Way Co.* 32 Fed. 727; *Laffin v. Chicago*, etc. R. Co. 33 Fed. 415; *Matter of State Reservation*, 16 Abb. N. Cas. 159. It is true that the premises were favorably situated, and it is not denied that no similar location in the village of Spencerport was available. Under these circumstances it would seem that this property had a special adaptation to the uses to which it had been placed and that it was peculiarly available for the business conducted thereon by the claimants. It is well known that the income from property is one of the chief facts relied upon by prospective purchasers of real estate. The rents received from real property are supposed to bear certain relation to its value. In the case of some kinds of property, the earnings are the best measure of the value; for frequently such property is so peculiar and rare in the community that it has no market value as that term is generally understood. . . . While this is so with reference to productive real estate, it may or may not be true in the case of real property upon which a business is conducted. In the latter case the profits may be entirely the result of the personal skill, experience and labor of the individual conducting the business; and in such a case the profits would not be the measure of the value of the property and have very little bearing thereon. It is a matter that must be left to the judgment of the court, but it may be safely asserted that no element should be excluded in arriving at the market value of premises which it is customary for the business world to consider in determining such market value, and which an ordinarily prudent man would take into account before forming a judgment as to the market value of property which he is about to purchase."

Property Not Taken but Injured.

Formerly all compensation was limited to cases in which property was taken. That was the scope of the constitutional provisions, but the manifest injustice of such limitation

has led to constitutional action in many jurisdictions extending compensation to cases in which property is damaged, although none is actually taken. See 10 R. C. L. tit. *Eminent Domain*, p. 164 et seq.

In case of such an injury the measure of damages is the diminution of the value of the property which is injuriously affected by the public improvement. In arriving at that damage, neither the profits of the business conducted on the premises, nor the cost to the tenant of fixtures and improvements placed therein, nor the articles purchased for the purpose of enabling the lessee to conduct the business, nor diminution in the value of such fixtures, improvements or articles as are removed by the lessee, can be recovered as damages; but the increased value of the premises for rent in consequence of the putting in of such fixtures and improvements may properly be considered in computing the damages to the leasehold estate. In such a case the profits of the business are not recoverable by way of damages, but evidence that the business is profitable is admissible to illustrate and throw light on the value of the premises for rent. *Pause v. Atlanta*, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 290. To the same effect see the following cases: *Cook, etc. Co. v. Chicago Sanitary Dist.* 177 Ill. 599, 52 N. E. 870; *Marshall v. Chicago*, 77 Ill. App. 351; *Chicago Sanitary Dist. v. McGuirl*, 86 Ill. App. 392; *Chicago v. McShane*, 102 Ill. App. 239; *New York, etc. R. Co. v. Blacker*, 178 Mass. 386, 59 N. E. 1020; *Voigt v. Milwaukee County*, 158 Wis. 666, 149 N. W. 392. See also *St. Louis, etc. R. Co. v. Capps*, 72 Ill. 188, *affirmed* in 67 Ill. 607; *Leach v. Philadelphia, etc. Co.* 258 Pa. St. 522, 102 Atl. 175. Compare *Hohmann v. Chicago*, 140 Ill. 226, 29 N. E. 671, 41 Ill. App. 41.

Where a city closed an alley on which the plaintiff's property abutted it was held that the abutting owners could not recover damages for consequent injury to their business. *Henderson v. Lexington*, 132 Ky. 390, 111 S. W. 318, 22 L.R.A.(N.S.) 20, 33 Ky. L. Rep. 703, wherein it was said: "The measure of damages to which the property holder is entitled in cases of this character does not include loss occasioned by injury to his business. He is only entitled to compensation for loss sustained to his property, and this loss is the difference in the market value of the property. Any other criterion of damages would enter the field of speculation, and make the loss incapable of reasonable ascertainment. The market value of a thing is generally the best evidence of its worth—the fairest standard of its value. The individual whose property is taken might not be willing to surrender it for three times its market value. To him it might be as-

sociated with sentimental notions that would enlarge its value far beyond the real and substantial. Again, the owner may have established a business in a particular place or building that was more valuable to him than it would be to any one else, and as a consequence the property would have a value to him far above its market value. But these evidences or elements of value are the result of personal or individual preference and effort. They affect the individual more than they do the property, and, if allowed to enter into or control the damage, it would be virtually impossible to estimate or fix with reasonable certainty the real value of the property. It must be admitted that, when the standard by which the loss is to be measured is fixed at the market value of the property, the owner in some cases will not secure what is to him its fair value, but, on the other hand, the purchaser ought not to be required to pay more than the fair market value for any property that the law gives him the right to take upon the payment of just compensation, and when the owner has recovered this price, he will generally get what he is entitled to. There is some apparent conflict in the cases on this subject largely attributable to the different states of fact presented, but . . . the rule we have announced is fully sustained. It is also the one approved in *Lewis on Eminent Domain*, § 463; *Dillon on Municipal Corporations*, § 623; *Elliott on Streets*, § 271; 15 Cyc. 701; 10 Am. & Eng. Enc. of Law (2d ed.) 1151. In disposing of this question, we have not deemed it pertinent to the subject in hand to discuss the range the evidence may take in elucidating what is the market value of the property proposed to be taken. No fixed rule of universal application can be laid down. The relevancy and competency of evidence must be left to be controlled by the facts of each case as it comes up. But generally all the facts as to the condition of the property, its surroundings, improvements, and capabilities may be shown. . . . In the case before us the injury was to the whole property. None of it was, accurately speaking, taken. The only injury consisted in depriving the property of the full use of an adjacent alley; and, while this was in the meaning of the constitution a taking, yet the damage done was susceptible of being fairly estimated upon the basis of the injury done to the market value of the property. And what we have said upon this point must be accepted as our understanding of the law controlling cases presenting questions like the one under consideration."

So it was held in *Sauer v. New York*, 44 App. Div. 305, 60 N. Y. S. 648, that loss of profits or injury to business were not proper elements of damage where the plaintiff

claimed that he was deprived of certain easements, such as light, air and convenience of access due to the construction of a viaduct in front of his premises. The court said: "The plaintiff himself was sworn and asked the following questions: 'Q. Will you tell me what your annual profits were from these premises in the use of occupation and business as you carried it on during the years before the viaduct—state what it averaged annually?' and 'Q. After the viaduct came there what did your annual profits from the use and occupation of the business there average, if anything?' Both questions were objected to by the defendant upon the ground that they were irrelevant, incompetent and immaterial, and called for an improper measure of damages, which objections were overruled and an exception taken in each instance. The witness answered that during the four years immediately preceding the construction of the viaduct his profits averaged about \$15,000 per year, and that since its construction he had lost money each year in his business. One of plaintiff's witnesses was also permitted, against the defendant's objection, to give testimony of a similar character. We think this testimony was improperly admitted. The profits of a business are too uncertain, and depend upon too many contingencies to safely be accepted as any evidence of the usable value of the property upon which the business is carried on. Profits depend upon the times, the amount of capital invested, the social, religious and financial position in the community of the one carrying it on, and many other elements which might be suggested. What one man might do at a profit, another might only do at a loss. That the plaintiff had made profits in his business in the past was no indication that he would continue to make them in the future, even had the viaduct not been constructed. This testimony being inadmissible, the defendant's objections thereto should have been sustained."

Injury to Franchise.

The loss incident to or in depreciation of the profits of a franchise appurtenant to property is not a proper element of damage, in considering the value of the property when it is appropriated for a public purpose. *Hydes Ferry Turnpike Co. v. Davidson County*, 91 Tenn. 291, 18 S. W. 626. To the same effect see *Moses v. Sanford*, 11 Lea (Tenn.) 731. Thus, where a franchise was given to the plaintiff to operate horse cars for a period of fifty years and thereafter the defendant company received permission from the city to construct a cable tramway in which some of the tracks crossed those of the plaintiff company, it was held that no damages could

be recovered by the plaintiff for injuries to its business flowing from the mere matter of competition, but the damage caused by the loss of passengers due to the inconvenience of access to the plaintiff's cars where the defendant's cable cars ran between the horse cars and the sidewalk was a proper element of recovery. *Omaha Horse R. Co. v. Cable Tram-Way Co.* 32 Fed. 727. To the same effect see *Toledo Consol. St. R. Co. v. Toledo Electric St. R. Co.* 3 Ohio Cir. Dec. 493, 6 Ohio Cir. Ct. 362.

It was held in *Piatt v. Covington, etc. Bridge Co.* 8 Bush (Ky.) 31, that where the construction of a bridge would interpose no physical obstruction to the enjoyment of a ferry franchise across the same river, the owners of the ferry were not entitled to compensation for any incidental impairment of the profits of their ferry resulting merely from the use of the bridge instead of the ferry by the public. The court said: "Admitting the right of the appellants to the exclusive enjoyment of their ferry franchise to the fullest extent contemplated or allowed by the laws of this state, and that within certain limits they were protected by law from competition by the establishment of rival ferries, did the mere grant of the franchise under existing laws have the effect of vesting in the appellants the exclusive privilege of transporting persons and property across the river for hire between Covington and Cincinnati, by whatever mode the legislature of this state might chose to authorize, in view of the convenience of the public and the increase of travel and commercial intercourse between the cities of Covington and Cincinnati? This involves the inquiry whether the appellants could have successfully resisted the erection of the bridge as infringing or unlawfully affecting their rights; for if, notwithstanding the previous grant of the ferry franchise, the right and power still existed in the legislature of authorizing the erection of a bridge for better subserving the interests of the public, it is difficult to perceive how the owners of the bridge could be held responsible for the loss of custom to the plaintiffs, however great it might be, incidentally and consequentially resulting from the preference which the public might give to the bridge over the ferry as a means of crossing the river." See also *Richmond, etc. Turnpike Road Co. v. Rogers*, 1 Duv. (Ky.) 135. See also *Mason v. Harper's Ferry Bridge Co.* 17 W. Va. 397; *Mason v. Harper's Ferry Bridge Co.* 20 W. Va. 223.

But in *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. St. 54, 40 Atl. 407, it was held that in taking a toll bridge from the owner of the franchise for public purposes, it was proper to consider the income

from it during a series of years preceding the taking in estimating the damage.

Injury to Good Will.

No damages can be recovered for the good will of a business interfered with by the taking of property under the right of eminent domain. *Bales v. Wichita Midland Valley R. Co.* 92 Kan. 771, 141 Pac. 1009, L.R.A. 1916C 1090; *Edmands v. Boston*, 108 Mass. 535; *Cobb v. Boston*, 109 Mass. 438; *Williams v. Com.* 168 Mass. 364, 47 N. E. 115; *In re Race St.* 24 Pa. Co. Ct. 433; *Condemnation of Property*, 9 Pa. Dist. 615; *Lenzi v. Memphis Union Station Co.* 3 Tenn. Civ. App. 218. But see *Senior v. Metropolitan R. Co.* 2 H. & C. (Eng.) 258, 9 Jur. N. S. 802, 32 L. J. Exch. 225, 8 L. T. N. S. 544, 11 W. R. 836; *Re McCauley*, 18 Ont. 416.

Thus it was said in *Condemnation of Property*, supra: "The exceptions substantially charge error upon the jury in not taking into consideration the good will of the business carried on by the claimant in estimating the market value of her property, and not taking into consideration everything which gave the property intrinsic value at the time it was actually taken by the city. Upon the argument, counsel for exceptant sought to establish the proposition that the good will of a business is a valuable right of property which attaches to the freehold, and, therefore, gives it intrinsic value, which must be considered in estimating the market value of the property when taken for municipal purposes. In my opinion, there is no ground upon which this proposition can be maintained. That the good will is valuable property there is no doubt, but that in any case it can be said to attach to the freehold is without warrant of authority, and contrary to the nature of the thing itself, for, if it attached to the freehold without reference to the business, it would continue to exist after the business ceased, which is a manifestly absurd conclusion. This leads us to inquire what the nature of the good will of a business is. In *Austen v. Boys*, 2 DeG. & J. (Eng.) 626, it is held that where a trade is established in a particular place, the good will of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on, and that good will is something distinct from the profits of a business, although, in determining its value, the profits are taken into account, and it is usually estimated at so many years' purchase. Again, it has been defined as follows: Good will must mean every possible advantage that has been acquired by the old firm in carrying on its business,

whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other carrying with it the benefit of the business: *Ginesi v. Cooper*, 14 L. R. Ch. D. (Eng.) 596. Mr. Parsons defines it as that benefit or advantage which rests on the good will, or kind and friendly feeling of others, and which, of course, can be wholly lost without giving rise to any legal right or ground of complaint: *Parsons on Partnership*, *261. It is well settled that it is a partnership asset. On insolvency of a firm, it passes to the assignee. The name under which a business is conducted is part of the good will of the business. Inasmuch as the good will consists in the probability that customers will continue to come to the old place of business, it is only co-extensive with the business carried on: *Bradford v. Peckham*, 9 R. I. 250. It is perfectly clear, in reviewing these propositions, that there is nothing in the nature of realty connected with this kind of property. It is, undoubtedly, personal estate and exclusively mercantile in its character, and it is also clear that it is an incident of the business rather than of the premises upon which the business is carried on. It is true that in certain cases where the property is especially adapted to the carrying on of a particular business, as in the case of the public house, cited and relied upon by the counsel for exceptant, there is a more intimate association between the premises and the good will than in other cases, such as that presented by the present record, but, even in such cases, the nature of the property is not changed; it does not rise to the dignity of realty or become a thing appurtenant to the freehold, and its value must still be ascertained by a reference to the business of which it is a part. . . . In New York, in proceedings by a railroad company to condemn real estate, it was decided that the compensation was limited to the market value of the land condemned, and that interruption of business, loss of profits, inability to perform contracts and good will were to be excluded: *In re New York*, etc. R. Co. 35 Hun 633. And in *Mills on Eminent Domain*, § 191, in discussing the right to recover damages for the taking of property for public use, it is stated: 'No damages can be allowed for the good will of a business interfered with by condemnation of buildings.' Mr. Justice Green, delivering the opinion of the court in *Philadelphia Ball Club v. Philadelphia*, 192 Pa. St. 632, states, in reference to the rule which controls the assessment of damages in all cases of the kind under consideration, that there has never been a better statement of that rule than was given in the case in which it originated seventy-nine years ago, namely, *Schuykill Nav. Co. v. Thoburn*, 7 Serg. & R. 411, where Mr. Jus-

tice Gibson announced the rule in the following language: 'The jury are to consider the matter just as if they were called on to value the injury at the moment when compensation could first be demanded; they are to value the injury to the property without reference to the person of the owner or the actual state of his business; and, in doing that, the only safe rule is to inquire what would the property, unaffected by the obstruction, have sold for at the time the injury was committed? What would it have sold for as affected by the injury? The difference is the true measure of compensation.' In my opinion, the jury in the present case has properly applied this rule in estimating the compensation to be awarded to the owner of the premises in question."

The "good will" of the business of a lessee which was situated on land taken by a city to widen a street, has been held not to be property for which damages could be recovered; the court saying that it was to be considered only so far as it tended to enhance the market value of the estate that was injured. *Edmands v. Boston*, 108 Mass. 538.

"The fact that the premises as the petitioner had fitted them up were convenient for his business, and that he will lose the use in his business of the conveniences which he had thus provided, cannot be regarded as an element of damage, any more than the loss of good will would be." *Williams v. Com.* 168 Mass. 364, 47 N. E. 115.

Loss of Speculative or Future Profits.

It is generally held that speculative or future profits of a business are not such elements of damage as may be considered in ascertaining the value of property taken under the power of eminent domain.

United States.—*Lehigh Valley Coal Co. v. Chicago*, 26 Fed. 415; *Laffin v. Chicago*, etc. R. Co. 33 Fed. 415; *Adams v. U. S.* 101 Fed. 661, 41 C. C. A. 580; *Gage v. Judson*, 111 Fed. 350.

California.—*Central Pac. R. Co. v. Pearson*, 35 Cal. 247.

Illinois.—*Munn v. People*, 69 Ill. 80; *Booker v. Venice*, etc. R. Co. 101 Ill. 333; *Jacksonville E. R. Co. v. Walsh*, 106 Ill. 253; *Calumet River R. Co. v. Moore*, 124 Ill. 329, 15 N. E. 764; *Illinois Cent. R. Co. v. Lofant*, 167 Ill. 85, 47 N. E. 62; *Chicago*, etc. R. Co. v. *Pontiac*, 169 Ill. 155, 48 N. E. 485; *West Chicago St. R. Co. v. Chicago*, 172 Ill. 198, 50 N. E. 185; *Cook*, etc. R. Co. v. *Chicago Sanitary Dist.* 177 Ill. 599, 52 N. E. 870. See also *Mills v. St. Clair County*, 3 Scam. 53.

Kentucky.—*Richmond*, etc. Turnpike Co. v. *Rogers*, 1 Duv. 135; *Piatt v. Covington*, etc. Bridge Co. 8 Bush 31.

Massachusetts.—Boston, etc. R. Co. v. Middlesex, 1 Allen 324; Boston, etc. R. Corp. v. Old Colony R. Corp. 12 Cush. 605.

New York.—Matter of Public Service Commission, 92 Misc. 420, 155 N. Y. S. 985.

Pennsylvania.—Clements v. Philadelphia Co. 3 Pa. Super. Ct. 14; Harvey v. Lackawanna, etc. R. Co. 47 Pa. St. 428; Pennsylvania R. Co. v. Eby, 107 Pa. St. 166; Spring City Gaslight Co. v. Pennsylvania Schuylkill Valley R. Co. 167 Pa. St. 6, 31 Atl. 368; Allentown, etc. Turnpike Co. v. Lehigh Valley Traction Co. 174 Pa. St. 273, 34 Atl. 565; Hamilton v. Pittsburg, etc. R. Co. 190 Pa. St. 51, 42 Atl. 369, 51 L.R.A. 319; Philadelphia Ball Club v. Philadelphia, 192 Pa. St. 632, 44 Atl. 265, 73 Am. St. Rep. 835, 46 L.R.A. 724; Cox v. Philadelphia, etc. R. Co. 215 Pa. St. 506, 64 Atl. 729, 114 Am. St. Rep. 979. *Compare* Pittsburg, etc. R. Co. v. Vance, 115 Pa. St. 325, 8 Atl. 764.

Virginia.—Richmond, etc. Electric R. Co. v. Seaboard Air Line Ry. 103 Va. 399, 49 S. E. 512.

Washington.—Seattle, etc. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. 720; Seattle, etc. Ry. v. Land, 81 Wash. 206, 142 Pac. 680.

Canada.—Gibbon v. Reg. 6 Can. Exch. 430; Re Perram, 36 Ont. L. Rep. 582, 31 Dominion L. Rep. 142, 10 Ont. W. N. 153; In re Cavanagh, 14 Ont. L. Rep. 523, 9 Ont. W. Rep. 842.

"A mere intention on the part of the plaintiff, at some indefinite future time, to subdivide some part of the land from which the 100-foot strip was taken into lots, and to sell them if possible, from time to time, as best he could, at a profit, is not controlling, and, standing alone, is immaterial. . . . The measure of damages is its actual depreciation in value at the time of the taking. This depreciation is to be determined exclusive of all remote, fanciful, or speculative injuries." *Lafin v. Chicago, etc. Co.* 33 Fed. 415.

Evidence that the plaintiff contemplated putting additional buildings on the land cut off by a railroad and that by reason thereof he expected a future profit, has been held to be incompetent. *Hamilton v. Pittsburg, etc. Co.* 190 Pa. St. 51, 42 Atl. 369. See also *Gearhart v. Water Co.* 202 Pa. St. 292, 51 Atl. 891.

So it has been held to be error to charge the jury as follows: "In ascertaining the market value of the property in question, if the jury find that its highest available use at the time of the taking was that of gas plant, they have a right to consider the future growth of the borough of Spring City and Royersford, the increased demand for gas, as far as these considerations affect its market value; and if the jury further find that by reason of the location of the railroad through

the property its availability has been curtailed, lessened or partly destroyed, they have the right to consider these questions as far as they affect the market value of the property as a whole immediately after the taking." *Spring City Gaslight Co. v. Pennsylvania Schuylkill Valley R. Co.* 167 Pa. St. 6, 31 Atl. 368.

It has been held that anticipated profits as an element of damages should be allowed where they are reasonably certain; but when they are speculative, remote and contingent, they should be excluded. *Bales v. Wichita Midland Valley R. Co.* 92 Kan. 771, 141 Pac. 1009, L.R.A.1916C 1090. See to the same effect *Atchison, etc. R. Co. v. Lyon*, 24 Kan. 745; *Missouri, etc. R. Co. v. Haines*, 10 Kan. 439. See also *Detroit v. Brennan*, 93 Mich. 338, 53 N. W. 525.

Similarly it has been held that such items as diversion of travel and inconvenience of access to the premises thereby causing injury to business may be considered by the jury not as independent items of damage but for the sole purpose of determining the difference between the market value of the property before and after the construction of the public improvement. *Gillespie v. South Omaha*, 79 Neb. 441, 112 N. W. 582. See also *Fremont, etc. R. Co. v. Whalen*, 11 Neb. 585, 10 N. W. 491; *Fremont, etc. R. Co. v. Lamb*, 11 Neb. 592, 10 N. W. 493; *Fremont, etc. R. Co. v. Ward*, 11 Neb. 597, 10 N. W. 524.

It was held in *St. Louis, etc. R. Co. v. Continental Brick Co.* 198 Mo. 698, 96 S. W. 1011, that an instruction to the jury in substance that if they should find that the defendant's property through which the railroad company sought to condemn a right of way was specially exposed to fire from that cause, different from other property in the same neighborhood, and that thereby it was depreciated in value, they should allow for such depreciation, was not error. The court said: "The opinion of the witnesses that there is a present depreciation of value in manufacturing property because of its peculiar liability to destruction by fire notwithstanding a railroad company may be ultimately liable for the damages incurred if the fire should occur, is not unreasonable. A prudent business man would generally prefer to purchase property in which to conduct his business which is not peculiarly liable to destruction by fire even though the menacing party may be solvent and liable to respond in damages."

So it was said in *Chicago, etc. R. Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931: "When we remember the close proximity of the railroad to the engine on one side, and the shaft and superstructure on the other, and that employees of defendant would necessarily be engaged over and about the track of the

road, it will be readily seen that damage from accident may occur, for which the railroad company would not be liable. It is clear, that persons exposed to danger, as defendant's employees would necessarily be, could not perform their labors with the same degree of efficiency, and, at the same time, exercise the care to avoid danger which the law imposes on them, as they could if not so exposed. The extra risk might also cause a demand for higher wages. Neither can a railroad company be held liable for all fires that may originate from its locomotives. They may occur through no fault of the company. Defendant would also be under obligation to exercise care and watchfulness, under the circumstances, to avoid and prevent damage from fires, and this duty might impose additional expense upon him. So it will be seen that the general rule cannot, in justice, be applied to its full extent, under the facts in this case. It would not be proper to estimate the possible damage from fires or injuries to persons. Neither may ever occur, and to take them into the estimate would be mere speculation. We think they may properly be considered, however, in so far as they tend to depreciate the value of the whole property, and to affect the proposed changes, but no further."

CITY OF ST. LOUIS

v.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY ET AL.

Missouri Supreme Court—January 6, 1916.

266 Mo. 694; 182 S. W. 750.

Eminent Domain — Items of Recovery — Cost of Removing Personalty.

A lessee for years of a parcel of land condemned for a public use is not entitled to recover for loss of profits in its business during removal of its stock of goods, nor for the expense of the removal of the goods and personal property as distinguished from fixtures, from the location, condemned, to a new location, nor for the depreciation in value of such personal property and stock caused by removal and reinstallation, and is entitled to be paid the reasonable market value of its fixtures affixed to the premises condemned; but where the party condemning does not want the fixtures, and the lessee elects to take them, the damages which the party condemning must pay as such value should be reduced to the extent of the reasonable market value of the fixtures as they stood on the premises condemned diminished by the necessity of immediate removal and reinstallation elsewhere.

[See note at end of this case.]

Appeal to St. Louis Circuit Court: SHIELDS, Judge.

Action by City of St. Louis, plaintiff, against St. Louis, Iron Mountain and Southern Railway Company et al., defendants. From judgment rendered, plaintiff appeals. The facts are stated in the opinion. REVERSED.

Charles H. Danes and Truman P. Young for appellant.

Rassieur, Kammerer & Rassieur for respondent.

[697] FARIS, P. J.—The city of St. Louis brought this action to condemn a strip of land for the western approach to its Municipal Bridge. Damages were assessed in favor of the several defendants by a commission of three freeholders, to whose report the city filed exceptions. The case came on for hearing in the circuit court of the city of St. Louis, wherein the exceptions of appellant city were overruled and it appealed.

The Regal Buggy Company, respondent herein, was the lessee for years of one parcel of the real estate which was condemned in this action. The lease of respondent, at the date of the making of the commissioners' report, had a little over three years to run. Specifically touching the land occupied by respondent the commission assessed the value of said land taken, plus the damages to the remainder of the parcel, at the sum of \$41,310. They then apportioned [698] this sum by allowing to the owner thereof \$38,610, and to this respondent, as lessee, the sum of \$2700, being the appraised value of its lease over and above the monthly rent reserved. After making allowances of damages aforesaid the commission allowed the respondent the further sum of \$8450 on account of injury to its business and for its damages and expenses arising from the removal of the fixtures and personal property of respondent from the premises condemned to a new location and for installing said property therein. The commissioners' report, which was approved by the circuit court upon exceptions taken thereto, states the specific elements of damages going to make up the last mentioned sum thus:

"(1) For the cost of removal of their several stocks of goods and fixtures from their present place of business to new locations and installing said goods and fitting said fixtures therein;

"(2) For depreciation in the value of such goods and fixtures caused by the removal and reinstallation of the same;

"(3) For injury to their said businesses caused by the interruption of the same during the period of removal of their said stocks of goods and fixtures."

The allowance of damages for the three items above enumerated is the sole matter of contention here. It is conceded, even, that if these three items were proper subjects of damages, then that the amount allowed respondent therefor is fair and reasonable, but appellant contends that under the law of eminent domain of this State no such damages may be paid by the condemner to him whose land is taken for public uses.

These three propositions and the contentions of appellant and respondent *pro* and *con* respectively, form the points up for decision.

OPINION.

[699] As forecast there is no contention made by appellant that respondent as the owner of a lease for a term of years was not entitled to compensation therefor; nor that the amount of damages awarded as the market value of respondent's lease, to wit, \$2700, is unfair or unreasonable. It is only the damages awarded for the three items set out in our statement herein that are in controversy.

I. For convenience of discussion we will consider all items or elements of damages together, except that having to do with the fixtures, which we leave for subsequent separate discussion, since, under the law as we view it this may be conveniently done. In brief, these elements have to do with the allowance of damages (a) for the removal of the stock of goods of respondent from the right of way taken to a new location and placing them therein; (b) for depreciation in the value of said goods, caused by such removal and re-installation, and (c) for injury to the business of respondent on account of the interruption or cessation thereof during the period of removal of said stock of goods and fixtures.

When this case was argued, the writer was of the opinion that it ought to be affirmed upon principle if not upon authority; but upon coming to examine the authorities I have been forced to a different view. Coming to the question of authority first, we have had our attention directed to but one case squarely on all-fours in favor of the allowance of damages for the expense of removal of personal property from the right of way condemned. That is the case of *Blincoe v. Choc-taw*, etc. R. Co. 16 Okla. 286, 8 Ann. Cas. 689, 83 Pac. 903, 4 L.R.A.(N.S.) 890. In the latter case the question of the allowance of such [700] expenses was squarely before the court and he whose lease was taken was adjudged entitled to expenses of removing certain personal property, to wit, lumber, from the lands taken. In that case, however, the

learned court admitted that the rule in other jurisdictions was contrary to the conclusion reached; but it held that the law in Oklahoma warranted a different holding because of the language of the statute of that State, which in substance required the commission to *consider the injury which the owner of the land might sustain and assess the damages caused him by reason of the appropriation of his lands.*

The case of *Philadelphia, etc. R. Co. v. Getz*, 113 Pa. St. 214, 6 Atl. 356, is urged upon us as announcing a rule in favor of the contention that damages of the sort here under discussion may be allowed; but that case did not deal with ordinary personal chattels, but apparently with machinery and fixtures. Besides, the Pennsylvania court, in the later case of *Becker v. Philadelphia, etc. R. Co.* 177 Pa. St. 252, 35 Atl. 617, 35 L.R.A. 583, held to the contrary, in that they held that it was proper to refuse to allow proof as to the expense of the removal from such land of the personal property of him whose land was being taken, and said that the expense of such removal could not be considered as an element of damages for the condemnation of real estate for public uses.

The case of *Atchison, etc. R. Co. v. Schneider*, 127 Ill. 144, 20 N. E. 41, 2 L.R.A. 422, is urged as an authority for the awarding of damages of the sort here under discussion. But we need not consider whether that case is an authority or not, for the reason that it was distinguished and practically overruled by the later case of *Braun v. Metropolitan West Side El. R. Co.* 166 Ill. 434, 46 N. E. 974. So, we cannot see that respondent's contentions are at all aided by either of the above cases.

The case of *Covington Short Route Transfer Co. v. Piel*, 87 Ky. 267, 8 S. W. 449, is cited by respondent as an authority for a modicum of the position taken by it. This case seems to an extent to [701] bear out respondent's contention touching the phase of its right to damages for and during the interruption of its business caused by the taking of its property. We need not consider whether this is so or not, nor need we microscopically analyze the latter case, but pass it by, saying merely that it is opposed in its doctrine by the great weight of authority everywhere and in this State as well, and that in reaching the conclusion stated the learned court wholly overlooked and failed to consider the necessary hypothetical and speculative character of such damages. [*U. S. v. Wiener*, 210 Fed. 832, 127 C. C. A. 1. c. 385.]

The rule announced by Mr. Lewis in his excellent work on *Eminent Domain*, is as follows: "While it is proper to show how the property is used, it is incompetent to go into the profits of the business carried on

upon the property. No damages can be allowed for injury to business. The reason is that the constitution and the statutes, as ordinarily worded, require only that just compensation shall be made for the property taken. Just compensation, as we have already seen, where an entire property is taken, is the market value of the property, and where a part is taken, it is the value of the part taken and damages to the remainder by the taking and use of the part for the purpose proposed. The business conducted upon the property is not taken and the owner can remove it to a new location or continue it upon the part of the property which remains. Any incidental loss or inconvenience in business, which may result from a removal or change consequent upon the taking, must be borne by the owner for the sake of the general good in which he participates. In a few instances the statute has expressly provided that compensation should be made for injury to business." [Lewis on Eminent Domain, sec. 727; Central Pac. R. Co. v. Pearson, 35 Cal. 247; Pause v. Atlanta, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 290; Jacksonville, etc. R. Co. v. Walsh, 106 Ill. 253; Chicago, etc. [702] R. Co. v. Dressel, 110 Ill. 89; DeBuol v. Freeport, etc. R. Co. 111 Ill. 499; Braun v. Metropolitan West Side El. R. Co. 166 Ill. 434, 46 N. E. 974; Cook, etc. Co. v. Chicago Sanitary Dist. 177 Ill. 599, 52 N. E. 870; Marshall v. Chicago, 77 Ill. App. 351; Chicago Sanitary Dist. v. McGuirl, 86 Ill. App. 392; Whitman v. Boston, etc. R. Co. 3 Allen (Mass.) 133; Cobb v. Boston, 109 Mass. 438; Pegler v. Hyde Park, 176 Mass. 101, 57 N. E. 327; Sawyer v. Metropolitan Water Board, 178 Mass. 267, 59 N. E. 658; Bailey v. Boston, etc. R. Corp. 182 Mass. 537, 66 N. E. 203; Boston Belting Co. v. Boston, 183 Mass. 254, 67 N. E. 428; Nashua River Paper Co. v. Com. 184 Mass. 279, 68 N. E. 209; Keokuk, etc. R. Co. v. Knapp, etc. Co. 180 Mo. 396, 61 S. W. 300; St. Louis, etc. R. Co. v. Continental Brick Co. 198 Mo. 698, 96 S. W. 1011; In re Mt. Washington Road Co. 35 N. H. 134; Ranlet v. Concord R. Corp. 62 N. H. 561; Matter of Public Parks, 53 Hun 280, 25 N. Y. St. Rep. 9, 6 N. Y. S. 750; Van Buren v. Fishkill Water-Works Co. 50 Hun 448, 21 N. Y. St. Rep. 438, 3 N. Y. S. 336; Matter of Grade Crossing Com'rs, 17 App. Div. 54, 44 N. Y. S. 54; Matter of Gilroy, 26 App. Div. 314, 49 N. Y. S. 798; Cincinnati Iron Stove Co. v. Cincinnati So. R. Co. 9 Ohio C. C. 103 [29 Ohio Cir. Ct. Rep. 719]; Schuykill Nav. Co. v. Farr, 4 Watts & S. (Pa.) 362; Schuykill Nav. Co. v. Thoburn, 7 Serg. & R. (Pa.) 411; Pittsburgh, etc. R. Co. v. Patterson, 107 Pa. St. 461; Hamilton v. Pittsburgh, etc. R. Co. 190 Pa. St. 51, 42 Atl. 369, 51 L.R.A. 319; Schonhardt v. Pennsylvania R. Co. 216 Pa. St. 224, 65 Atl. 543; Porter v. Scranton City, 36 Pa. Super. Ct.

218; Fuller v. Edings, 11 Rich. L. (S. C.) 239; Eddings v. Seabrook, 12 Rich. L. (S. C.) 504; Richmond, etc. R. Co. v. Chamblin, 100 Va. 401, 41 S. E. 750; Hunter v. Chesapeake, etc. R. Co. 107 Va. 158, 59 S. E. 415, 17 L.R.A. (N.S.) 124; Stadler v. Milwaukee, 34 Wis. 98; Each v. Chicago, etc. R. Co. 72 Wis. 229, 39 N. W. 129; Union Steam-Boat Co. v. Chicago, 39 Fed. 723; Bigg v. London, L. R. 15 Eq. Cas. (Eng.) 376; Reg. v. Vaughn, etc. R. Co. 4 L. R. Q. B. (Eng.) 190.]

In the case of *Pause v. Atlanta*, 98 Ga. 92, 1 c. 105, 26 S. E. 489, 58 Am. St. Rep. 290, the Georgia Supreme Court said: "The measure of her damages is the injury to her property which is injuriously affected by the public improvement; in arriving at that damage, neither the profits in the business [703] conducted on the premises, nor the cost to the tenant of the fixtures and improvements placed therein nor the articles purchased for the purpose of enabling the lessee to conduct the business, nor diminution in value of fixtures, improvements or articles such as are removed by the lessee, can be recovered as damages; but the increased value of the premises for rent in consequence of the putting in of such fixtures and improvements may properly be considered in computing the damages to the leasehold estate."

The general rule as regards including as elements of damages expenses of removal of personal property, as well as that regarding the status of fixtures, below discussed, is thus stated by Mr. Lewis: "Fixtures upon the property taken must be valued and paid for as part of the real estate, and any depreciation in the value of fixtures upon the part not taken is to be taken into consideration, the same as damage to the soil itself. Where a railroad was laid through premises which had been fitted up for a water cure, so as to render it unsuitable for that purpose, it was held that the owner was entitled to the difference between what the fixtures and appurtenances were worth in connection with the property as a water cure (not exceeding their reasonable cost) and what they were worth to be removed from the premises and applied to other purposes. In a case in Pennsylvania it was held proper to show the expense of removal of machinery and fixtures as bearing upon the value of the property as it stood. But the damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid. But when both parties proceed upon the theory that the owner is entitled to the cost of removing machinery, the condemning party cannot complain. Where the statute provided that the commissioners should inspect said real property and consider the injury which such owner may sustain by reason of such railroad; [704] and they shall

assess damages which said owner will sustain by such appropriation of his land,' it was held that the words in italics required that compensation should be made for the removal of personal property." [2 Lewis, Em. Dom. sec. 728, citing *Blincoe v. Choctaw, etc. R. Co. supra.*]

But this matter has also been before our Missouri courts and if we are now to hold that respondent is entitled to damages for the three elements under discussion, we must of necessity overrule two Missouri cases wherein the point involved was squarely lodged and wherein it was held that no such compensation is allowable under our laws. [*Keokuk, etc. R. Co. v. Knapp, etc. Co.* 160 Mo. 396, 61 S. W. 300; *Springfield Southwestern R. Co. v. Schweitzer*, 173 Mo. App. 650, 158 S. W. 1058.] In the *Knapp-Stout* case, *supra*, at page 412, Judge Gantt, writing the opinion of the court, in defining the measure of damages, and touching the identical question of the allowance of damages of the sort here under discussion, said:

"It is the settled law of this court that the measure of compensation and damages in cases in which only a part of a tract is condemned, as in the case at bar, is the market value of the land taken for the right of way, and the damages to the remainder by reason of the railroad running through it, less any benefits that are peculiar to the tract of land arising from the running of the road through it. [*Mississippi River Bridge Co. v. Ring*, 58 Mo. 491; *Wyandotte, etc. R. Co. v. Waldo*, 70 Mo. 629; *Kansas City, etc. R. Co. v. Story*, 96 Mo. 611, 10 S. W. 203; *Chicago, etc. R. Co. v. Baker*, 102 Mo. 553, 15 S. W. 64.]

"Injury to business, loss of profits, inconvenience to the owner, damage to personal property or the expense of removing it, are not to be estimated as distinct elements of damages."

In the very late case ruled by the Springfield Court of Appeals practically all of the Missouri cases were examined and discussed, and such of them as seem upon casual glance to oppose the conclusion [705] reached, were successfully distinguished. Many of these cases are urged upon us as announcing a different rule, but we do not think they so far announce a different rule when carefully considered and when the precise point up for judgment is regarded, as to warrant us in overruling those on all-fours; *a fortiori*, when they but follow the overwhelming weight of the authorities upon these questions everywhere. Since all of these cases have been so lately, fully and ably discussed in *Railroad v. Schweitzer, supra*, we need not take up space to consider them again.

In the *Knapp-Stout* case, *supra*, precisely the same question was before this court that was before the Oklahoma court in the *Blincoe*

case, viz.: the question of whether he whose land was taken for public uses could recover the expenses necessarily incurred in the removal of personal property from the land, to wit, lumber, lying thereon. In both cases parts of lumber yards were taken, yet we ruled that such expenses were not proper elements of damages.

At first glance it is to be conceded that there exists a difficulty in finding a reason for not compensating the owner of personal chattels who is compelled to remove them, for his expense in so removing them to a point at least, beyond the edge of the right of way. It is equally clear, on the other hand that no logical reason can be found for compensating him for the expense of removal beyond such point. This is so, for the reason that A might desire to move his chattels only into the next adjoining house, while B might desire to have his taken several blocks, or even several miles, and C on the other hand, his business being broken up, might desire to remove his goods to some other place, or city. No reason in logic therefore can be found for the condemnor's paying more than is sufficient to move the personal property off the right of way. A rule which would require the condemnor to do more [706] would be variant and indefinite, and therefore speculative.

It is obvious that a lessee stands in no better condition touching his right to be compensated for expenses of this sort than does the owner of the fee. In fact, the reasons are more cogent for permitting the owner of the fee to recover as damages expenses of this sort than they are in favor of the lessee. For the lessee may be compelled to move at the end of his term; and since his occupancy of the premises is founded on contract, it may even be said that the presumption is that he will move. Or if there be no such presumption, or no presumption either way, the lessee is not aided by a discussion of this moving matter, for arguments in his favor in this behalf are founded upon the presumption that he will renew his lease and remain at the end of his term. But as regards the owner whose lands are taken, no requirement exists for his removal at any time, unless he sells the premises—a contingency too remote for consideration in this connection.

We apprehend that back of the rule against allowing damages of this nature also lie the considerations that loss of profits during removal is necessarily so speculative as to afford as a measure of computation no rule except a mere guess; that likewise, beyond the mere moving of goods to a point just outside the bounds of the right of way condemned, the expenses of removal being variant, damages would be arbitrary and highly speculative, and removal but to a point only just beyond the edge of the right of way

would fall into the category *de minimis*, and that moreover, the inclusion of expenses of removal of personal property and compensation for loss of profits during removal, is merged and included in the price paid for the easement to the owner, or to the lessee, as the case may be. Viewed as a forced purchase by the public for the public [707] good, as a condemnation action is in the last analysis, the latter consideration seems of great weight. For if he whose land is condemned had voluntarily sold his land to a private purchaser, ordinarily no thought would occur to either one, absent agreement to that end, that the seller should be compensated by the buyer for the removal from the sold premises of mere personal goods and chattels. That one is a voluntary sale and the other an involuntary sale does not peculiarly detract from the force of the argument.

But be all these things as may be the overwhelming weight of authority both in this State and in all other jurisdictions is as we hold, and having had other views in the beginning, by reason of the apparent, rather than real, crying inequities in the case, we have yet been compelled to follow the law as it is written both here and elsewhere. To rule otherwise would necessitate the overruling of at least two Missouri cases squarely in point and of most carefully distinguishing three or four other cases. [Chicago, etc. R. Co. v. McGrew, 104 Mo. 282, 15 S. W. 931; Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582; Missouri Pac. R. Co. v. Porter, 112 Mo. 361, 20 S. W. 568.]

We therefore hold, in consonance with the great weight of authority everywhere, that respondent was not entitled to recover for loss of profits in its business during the removal of its stock of goods; nor for the expense of the removal of its stock of goods and personal property, as contradistinguished from fixtures, from its old location which was condemned, to a new location; nor for the depreciation in value of such personal property and stock of goods, caused by such removal and reinstallation.

II. What we have said above disposes of a part of the questions involved in contention (1) *supra*, that is to that part of this contention having to do with the cost of the removing of mere personal property [708] and chattels. The other phase of the case mooted in both contentions (1) and (2) *viz*: that touching the cost of removal of trade fixtures, which we left over for subsequent separate discussion, presents a somewhat different question. We assume, of course, nothing further appearing, that the word "fixtures" is used in its legal and technical sense, and not as a mere mercantile designation applied to chairs, tables, iron safe, *et id omne genus*.

A fixture appertains to the real estate itself, which real estate to the extent, at least, of an

easement therein, is being taken by condemnor. We need not enter into any intricate discussion of fixtures (since such a discussion does not belong here), for the reason above given, which is well-settled, to wit: that a trade fixture such as is herein involved, and such as was to an extent involved in the case of Hannibal Bridge v. Schaubacher, *supra*, is a part of the realty; and since it passes ordinarily as between vendor and vendee, upon a voluntary sale, we see no reason why it should not pass to the condemnor upon an involuntary transfer, such as this is. We find nothing in the Missouri cases, nor in the cases from other jurisdictions which seriously militates against this view. Those mentioned below sustain it. It seems to be right on principle; to do full justice and afford full compensation.

In passing we may say *arguendo*, that the view that the owner should be compensated for the expense of tearing out, moving and reinstalling fixtures in another location has much of logical cogency. But it seems out of consonance with our own rulings, and subject to the objection that the expense of carriage from the old to the new location would be speculative, and so having reached a view which affords full compensation for the injury done, we hesitate to overrule our former holdings. Many of the cases from [709] other jurisdictions which have been urged upon us as sustaining all of respondent's contentions, are cases which allowed compensation for removing and reinstalling fixtures, and ruling that such compensation was permissible. This for the reason, that if the owner of the land or lease condemned take such fixtures off the hands of the condemnor, who, ordinarily, does not want them, thus minimizing the damages accruing, both the owner and the condemnor ought to be held to the rule that their reciprocal duty toward each other is to so act as not unduly to augment the damages arising from the appropriation of the land.

In a very late case, decided in the United States Circuit Court of Appeals for the Second District, it was held that an award in a condemnation proceeding for the value of certain trade fixtures, to wit, machinery of an engraving plant, was proper, the court holding that in condemnation proceedings where the land is taken in *invitum*, the rule which obtains as to such fixtures is analogous to that between vendor and vendee and not that between landlord and tenant. [U. S. v. Wiener, 210 Fed. 832, 127 C. C. A. 382.] In the latter case the court quoted with approval what was said in *In re Block Bounded by Avenue A*, 66 Misc. 488, 122 N. Y. S. 321, l. c. 339, wherein it was ruled:

"The city took the entire buildings as they stood, including the trade fixtures therein, and for the purposes of this proceeding they

must all be regarded as real property; that is, as between the tenant and the city, the trade fixtures were real property and must be paid for by the city the same as a building, and the tenant was under no more obligation to remove them than he would be to remove a building if he were the owner. As between the tenant and the owner, however, the trade fixtures were personalty, and could be removed, and therefore any award made for them would go to the tenant."

[710] In the above case of *United States v. Wiener*, the court upon the other phases of this case, discussed *supra*, says: "There seems to be no authority for an allowance for the removal of the business as distinguished from the plant and machinery. The district court allowed \$2500 as damages which may result from the change of location. This was based upon hypothesis and speculation and we are unable to find any controlling authority to support the award."

Since houses, which are but fixtures to real estate, pass to the condemner (*Kansas v. Morse*, 105 Mo. 1. c. 519, 16 S. W. 893), and since trade fixtures under the vendor and vendee rule would pass to the buyer, they pass here to the condemner and it must pay for them. Respondent, absent an election on its part and consent of the city to that end, could not take fixtures which the city had condemned, nor obtain as damages pay for moving property which by condemnation became that of the city. [*Kansas City v. Morse*, 105 Mo. 1. c. 519, 16 S. W. 893; *Springfield Southwestern R. Co. v. Schweitzer*, 173 Mo. App. 650, 158 S. W. 1058.]

It follows from all this that respondent was entitled to be paid the reasonable market value of its fixtures (contra-distinguished from mere goods and chattels) which were contained in, and affixed to the leased premises condemned. But the apparent present status of the instant case causes us to further rule, that if appellant does not want these fixtures, and respondent elects, or has elected, to take them (or, as seems probable, has already taken them), then damages which appellant will be held to pay as such value of them should be recouped to the extent of their reasonable market value, as they stood in their old location, when confronted however, as diminishing such value, by the necessity of immediately tearing them out and reinstalling them elsewhere.

Upon the other phases of the case and to the extent last discussed upon the latter one, we are of the [711] opinion that the court erred, and that for such error this case must be reversed and remanded to be retried in such wise as is not inconsistent with the views herein expressed. Let this be done. All concur.

Rehearing denied February 15, 1916.

NOTE.

Recovery of Damages in Condemnation Proceedings for Injury to Personal Property or Expense of Removing It from Premises.

Introductory, 886.

Damages Not Allowed, 886.

Damages Allowed, 887.

Introductory.

This note reviews the recent cases dealing with the right to recover damages in condemnation proceedings for injury to personal property or the expense of removing it from the premises. The earlier cases are collected in the notes to *Blincoe v. Choctaw*, etc. R. Co. 8 Ann. Cas. 689; *Kansas City Southern R. Co. v. Anderson*, 16 Ann. Cas. 784; and *Board of Trade Tel. Co. v. Darst*, 85 Am. St. Rep. 288, 298.

For a discussion of the value of fixtures as an element of damages sustained by the appropriation of property in eminent domain proceedings, see the note to *Jackson v. State*, Ann. Cas. 1916C 779.

For a discussion of the loss of profits or injury to business as an element of damage in eminent domain proceedings, see the note to *Brackett v. Commonwealth*, reported ante, this volume, at page 863.

Damages Not Allowed.

In the absence of express statutory provisions, it is generally held that damages for injury to personal property or the expense of removing it from the condemned premises, cannot be considered in estimating the compensation to be paid in condemnation proceedings. *U. S. v. Inlots*, 2 Am. L. Rec. 314, 513, 26 Fed. Cas. No. 15,441; *U. S. v. Wiener*, 210 Fed. 832, 127 C. C. A. 385; *U. S. v. Meyers*, 190 Fed. 688; *Braun v. Metropolitan West Side El. R. Co.* 166 Ill. 434, 46 N. E. 974; *Pegler v. Hyde Park*, 176 Mass. 101, 57 N. E. 327; *Emery v. Boston Terminal Co.* 178 Mass. 172, 59 N. E. 763, 86 Am. St. Rep. 473; *Springfield Southwestern R. Co. v. Schweitzer*, 173 Mo. App. 650, 158 S. W. 1058; *Mohler v. Board of Regents (Neb.)* 165 N. W. 954; *Yates, etc. Co. v. Memphis*, 137 Tenn. 642, 194 S. W. 903; *Lenzi v. Memphis Union Station Co.* 3 Tenn. Civ. App. 218. And see the reported case, and the case of *St. Louis v. St. Louis*, etc. R. Co. (Mo.) 197 S. W. 107, involving the same condemnation proceeding. See also *White v. Foxborough*, 151 Mass. 28, 23 N. E. 652; *Stone v. New York*, 25 Wend. (N. Y.) 157.

Thus in *Braun v. Metropolitan West Side El. R. Co.* *supra*, in excluding proof of damage

resulting from the removal of goods from the condemned property and by the interruption of the business while moving and re-establishing the same, the court said: "The general rule is, that just compensation to the owner of private property taken or damaged for public use is to be measured by its fair cash market value. We said in *Dupuis v. Chicago*, etc. R. Co. 115 Ill. 97 (on p. 99): 'The fair market value would always give the owner just compensation, and that is all he is entitled to receive under the law. If the lots were devoted to some particular use and in consequence of such use had an intrinsic value, the owner, in such case, in order to get just compensation, would be entitled to recover whatever the lands were worth for the use or purpose to which they might be devoted.' (See *Lewis on Eminent Domain*, sec. 478.) This rule excludes all evidence as to the amount of business done or which could be done in the property, or the probable profits arising therefrom. (*Jacksonville*, etc. R. Co. v. *Walsh*, 106 Ill. 253.) It is a general rule that damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid."

So it was held in *Emery v. Boston Terminal Co.* 178 Mass. 172, 59 N. E. 763, 86 Am. St. Rep. 473, that a lessee was not entitled to recover anything for the interruption of his business by reason of having to move from the premises which were taken under the power of eminent domain, the court saying that "the same principle applies to a claim for the expenses of removing the petitioners' property to their new place of business."

"There seems to be no authority for an allowance for the removal of the business as distinguished from the plant and machinery. The district court allowed \$2500 as damages which may result from the change of location. This was based upon hypothesis and speculation and we are unable to find any controlling authority to support the award." *U. S. v. Wiener*, 210 Fed. 832, 127 C. C. A. 385.

Unless personal property is actually taken as material to be used by the condemnor there can be no recovery for injury done thereto. *Yates*, etc. Co. v. *Memphis*, 137 Tenn. 642, 184 S. W. 903.

It was held in *North Coast R. Co. v. A. A. Kraft Co.* 63 Wash. 250, 115 Pac. 97, that evidence by a lessee tending to show the expense of moving machinery, stock and fixtures from the condemned premises to a new place of business and the damage to the property resulting from the removal, was admissible, "not as a basis for a specific claim but as showing the value of the unexpired term," the court saying: "'Damages' in law, means an adequate compensation for the loss suffered or the injury sustained. The rule itself

is well settled and simple of statement, but its application is often attended with difficulty, on account of the great diversity of circumstances surrounding different cases where the principle is sought to be applied. As was said in *Seattle*, etc. R. Co. v. *Scheike*, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503: 'It is difficult, if not impossible, to lay down a rule of universal application as to what may be considered as elements of damage, as the equities of the parties must more or less depend upon the particular facts and circumstances of each case.' This is particularly true as applied to a leasehold which may have no market value in excess of the rent reserved. The appellant is entitled to be paid the value of the unexpired term. The items under consideration are but constituent elements of the value. In principle, and according to what we consider the better authority, they are not recoverable as something apart from the leasehold interest. They form an essential part of its value."

In *Springfield Southwestern R. Co. v. Schweitzer*, 173 Mo. App. 650, 158 S. W. 1058, the court distinguished between the right to recover damages incurred in removing personal property from the condemned premises, and the right to damages sustained by the breakage and deterioration of such property while being removed, saying: "Complaint is also made of the allowance of the claim of \$86 for damage to the fire brick, but to this contention of the appellant we do not agree. It became necessary for the tenant to remove the machinery and property and if it could not be moved without being damaged the tenant should be paid for such damage as ensued because it is expressly provided by our constitution that property shall not be taken or damaged without just compensation. We therefore hold that the defendant company is entitled to any damage sustained to its property by reason of its dismantling and removal."

Damages Allowed.

In *Virginia*, compensation may be recovered for the expense of removing personal property in condemnation proceedings pursuant to a constitutional provision adopted in 1902 forbidding the legislature to enact any law "whereby property shall be taken or damaged for public uses without just compensation" and a statute in obedience to that provision of the constitution, providing that in condemnation proceedings commissioners must be appointed "to ascertain what will be a just compensation for the land or other property, or for the interest or estate therein, proposed to be condemned for its uses, and to award the damages, if any, resulting to the adjacent or other property of the owner, or to

the property of any other person," etc. *Richmond v. Williams*, 114 Va. 698, 77 S. E. 492, wherein it was said: "We are now, we believe, for the first time called upon to consider the precise question now presented in the light of the constitution and laws as they now exist. Our statute requires the commissioners to ascertain what will be a just compensation for the land or other property proposed to be condemned. In clause 10 of section 5 of the Code, it is provided that the word 'land' or 'lands,' and the words 'real estate' shall be construed to include lands, tenements, and hereditaments, and all rights thereto and interest therein, other than a chattel interest. The words 'other property,' therefore, which are added, must apply to something other than land, or they are wholly superfluous. If, therefore, it becomes necessary to take land and other property, which must of necessity embrace property other than land, we can only satisfy the language of the statute by construing the language used as embracing personal property. So construed, just compensation must be awarded for the land or other property taken, and damages must be awarded resulting to adjacent or other property of the owner, or to the property of any other person, beyond the peculiar benefits accruing to such properties, respectively; and the just compensations required to be made must, under the law as it now stands, be a full equivalent for the damages to the land or other property injured, as well as for that which is taken. Now, in this case, upon the land which was taken, there was stored a great quantity of lumber. In appropriating the land to the uses of the city it became necessary to remove the lumber, and we think it plain that in compelling its owner to remove it, a burden was imposed which diminished the value of the lumber and damaged its owner. We are of opinion, therefore, that there was no error in the instruction given to the commissioners to consider the expense of moving the stock of lumber upon the strip of land condemned."

In *Diamond Mills Emery Co. v. Philadelphia*, 22 Pa. Co. Ct. 9, wherein property consisting of a mill and machinery was taken by the city by virtue of its right of eminent domain, the court said: "There is always difficulty in estimating damages occasioned by taking or injuring mill property under the right of eminent domain. Questions of the depreciation of the value of the machinery, of the cost of its removal to another place, of the impaired value of the replaced plant, arise and lead to complications. In the case before us, the land upon which the mill stood was taken by the public for a park. As respects the land and buildings, therefore, a comparison of values before and after taking became unnecessary, the loss being total. But, as

respects the machinery, it was claimed that a great sum of money was spent in removing it from the permanent beds on which it had been fixed, in carrying it a considerable distance to the place chosen by the plaintiff for its new plant, in erecting beds at that place and in placing the machinery upon those beds. It was further claimed that the machinery was impaired in the process of taking down and putting up. Much contention arose as to the cost of removal, the city maintaining that the plaintiff could recover only for the cost of removing to the sidewalk, and the plaintiff arguing that it had a right to recover for removal to its new mill. The question is an embarrassing one. The plaintiff might, in the exercise of its discretion, have deemed it advantageous to remove its mill to a point distant from the city, and it is obvious that the city would have no right to complain of the directors of the company in choosing a new site, but the distance of the place chosen might be so great as to make the cost of removal an enormous item—greater, perhaps, than the value of the machinery removed. On the other hand, to adopt the contention of the city—that when the machinery was removed and landed on the side walk, all the damage that the plaintiff could recover had accrued—presents great difficulties. The machinery could not be used on the sidewalk; indeed, would not be tolerated there, and whoever owned it would be under a legal duty to remove it promptly. The only other alternative presented was that the jury had a right to determine to what reasonable distance the plaintiff should remove the machinery, and to give the damages for the cost of such removal. This latter method of ascertaining the damage injects into the assessment an element of personal caprice, namely, the notion of the owner as to the place to which he desires to remove. The city, however, is liable only for the real damage it does, and is not liable to pay for carrying out the fanciful views of the owners of the property. It is necessary, therefore, to seek a rule which limits itself to ascertaining facts, free from any taint of motive or personal preference. An indication of such a rule we find in the opinion of Mr. Justice Clark, in the case of *Philadelphia, etc. R. Co. v. Getz*, 113 Pa. St. 214-219. These are his words: "The damages must be measured according to the market value for any useful purpose, and the estimate, both before and after the injury, must embrace all the buildings, machinery, etc., which gave to the property its distinctive character as a marble mill. It was proper, therefore, to inquire what the property of *H. S. Getz & Co.*, not only the lease, but the machinery and fixtures used in connection therewith, was worth before and after it was affected by the injury. This was

the only way the jury could accurately ascertain the true amount of damages to which the tenants were entitled.' The proper application of this rule to the present case would require the plaintiff to prove the value of the whole plant before the taking. In estimating this value, the land, buildings and machinery must all be taken into consideration. After the taking the plaintiff had nothing unless the city expressly or tacitly permitted it to remove the machinery. If the permission to remove the machinery was given while the machinery was fastened to its beds, then the city would be entitled, by way of deduction from the plaintiff's claim, to the value of that machinery upon those beds. The cost of removal would, in that case, be merely an indirect piece of evidence as an explanation of the relatively low value of machinery which had to be removed from its fixed place. The true evidence to give would be the evidence of experts as to the value of such machinery under such conditions. This rule, firmly carried out, leaves nothing to conjecture or caprice, except in so far as these may be said to be included in the estimate of experts. As a legal rule, it is free of difficulty and may be followed in any case. The rule laid down by the trial judge assumed that the taking of the city was merely the taking of the land and buildings, leaving the machinery in the possession of the plaintiff. This, in our opinion, was a misconception. Fixtures upon the property taken must be valued and paid for as part of the real estate, and any depreciation in the value of fixtures upon the part not taken is to be taken into consideration, the same as damage to the soil itself." See also *Colorado M. R. Co. v. Brown*, 15 Colo. 193, 25 Pac. 87; *Covington Short Route Transfer Co. v. Piel*, 87 Ky. 267, 8 S. W. 499.

STATE EX REL. THOMPSON

v.

REICHMAN.

Tennessee Supreme Court—August 9, 1916.

135 Tenn. 653, 685; 188 S. W. 225, 597.

Sheriffs and Constables — Powers of Sheriff.

The office of sheriff carries all the common-law powers and duties except as modified by statute.

Duty to Prevent Crime.

Under Shannon's Code, § 6889, a sheriff who has "notice" of an offense and does not

do his duty to prevent it is guilty of a misdemeanor, and any knowledge from any source is notice within the statute.

Same.

Since cities have police officials, the sheriff may assume that they will perform their duties, but if he has knowledge of neglect on their part, or reason to think there is neglect, he must inform himself and prevent and suppress offenses in cities as well as rural districts.

Breach of the Peace — Unlawful Sale of Intoxicants.

"Breach of the peace" being a generic term including all violations of public peace or order, includes unlawful sale, actual or threatened, of intoxicating liquors, and the sheriff may arrest without warrant therefor.

Same.

While mere possession of intoxicating liquors in any quantity is not unlawful, it is a breach of the peace for one having liquors to prepare for sale thereof, that being a threat to violate the law against sales.

Duty of Sheriff to Arrest without Warrant.

The right of the sheriff to arrest without warrant for threatened unlawful sale of intoxicating liquors and to close the place of business is not unlawful as an arbitrary invasion of property rights, which are not more sacred than the person, which may be seized to prevent breach of peace.

Same.

The requirement that the sheriff, to prevent breaches of the peace, arrest one who threatens unlawful sale of intoxicating liquors and if necessary close his place of business, is not subject to the objection of requiring services without compensation.

Same.

For a misdemeanor committed without his presence, a sheriff cannot arrest without warrant; but, if breach of peace is threatened in his presence, he needs no warrant to arrest to prevent the breach under Shannon's Code, § 6892.

Notice of Violation of Law.

The duty of the sheriff, having notice of commission of an offense, being to prevent or suppress it, involves the duty to at least make some investigation, and it is not necessary in case of unlawful sales of intoxicating liquors, for the sheriff to actually see sales before swearing out warrants.

Same.

Although the sheriff is not bound to maintain a detective force, and no statute in terms makes it his duty to swear out warrants or give information to the grand jury, yet, being commanded to prevent and suppress crimes and breaches of the peace, he must use all the means provided by law to accomplish such end.

Public Officers — Removal — Failure of Sheriff to Enforce Law.

In a proceeding for his removal the evidence is held to show that a sheriff failed to perform his duties to prevent and suppress

breaches of the peace by unlawful sale and threatened unlawful sale of intoxicating liquors.

[See note at end of this case.]

Same.

It is no defense for the sheriff's failure to prevent breaches of the peace by unlawful sales of intoxicating liquors, that the state was proceeding against offenders under the Nuisance Act (Laws 1913 [2d Ex. Sess.] c. 2), or that the criminal court administration was lax and nothing would have been accomplished in case of arrest.

[See note at end of this case.]

Same.

A sheriff who has made an honest and reasonably intelligent effort to do his duty will not be removed by the courts, though his efforts may not have been wholly successful, his right to continue in office depending rather on the good faith of his efforts than on the degree of his success.

[See note at end of this case.]

Sheriffs and Constables — Duty to Enforce Law — Notice of Violation.

When a sheriff learns that a city in his county is collecting tribute from numerous liquor dealers and leaving them otherwise undisturbed, this is notice to him that the law is being violated and no effort made to enforce it.

Duty of Investigation.

While a sheriff need not make a forcible entrance into a suspected residence or place of business to discover violations of the liquor law, he or his deputies should enter open saloons and make arrests if justified by what they see therein.

Breach of Peace — What Constitutes.

The word "peace," in the phrase "breach of the peace," means the tranquility enjoyed by the citizens of a municipality or community where good order reigns among its members; that invisible sense of security which every man feels necessary to his comfort, and for which all governments are instituted.

Same.

"Breach of the peace," in view of the generally accepted definition, and of constitutional provision that all indictments shall conclude, "against the peace and dignity of the state," includes any violation of any law enacted to preserve peace and good order.

Illegal Sale of Intoxicants as Breach of Peace.

Shannon's Code, § 993, subsec. 2, requiring every applicant for a liquor license to give bond to keep a peaceable and orderly house, is a legislative declaration that the liquor law is intended to preserve the peace, so that any violation thereof is a breach of the peace.

Same.

Engaging in the sale of intoxicating liquors, declared by Acts 1913 (2d Ex. Sess.), c. 21, to be a nuisance, is among that class of nuisances always treated by the court as tending to disturb the peace and good order of the community.

Intoxicating Liquors — Illegal Sale — Exclusiveness of Abatement Proceeding.

That Acts 1913 (2d Ex. Sess.), c. 2, declaring a saloon a nuisance, provides a method for its abatement, merely furnishes a cumulative remedy, and does not abrogate any other remedy or affect a sheriff's duties.

Disorderly Houses — Illegal Sale of Intoxicants.

A saloon run in violation of law is a "disorderly house," which is defined as any place where illegal practices are habitually carried on; and hence a saloon open, equipped, and ready for business is a threat to breach the peace, if not in itself a breach of the peace.

[See 134 Am. St. Rep. 819.]

Breach of Peace — Violence Not Essential.

It is not necessary that an act have in itself any element of violence in order to constitute a breach of the peace.

[See generally, Ann. Cas. 1917C 889.]

Intoxicating Liquors — Arrest for Threatened Violation of Law — Duty of Officer.

On making an arrest for a threatened violation of the liquor law, the sheriff should take such steps as are necessary to prevent the threatened sales, as, in case of a saloon open for business, by closing it till the liquors are removed, and then release the offender and leave future sales and future threats to be dealt with as they arise.

Public Officers — Removal — Failure to Enforce Law.

In proceedings to remove a sheriff for failure to enforce the liquor law, he is precluded, by his admission that he did nothing in a city within his county but to serve process where liquor was openly sold in violation of law, from asserting that no wilful neglect of his duty has been shown.

[See note at end of this case.]

Appeal from Chancery Court, Shelby county: HEISKELL, Chancellor.

Action by State, on relation of F. M. Thompson, Attorney General, for removal from office of J. A. Reichman, sheriff of Shelby county. Judgment for defendant. Relator appeals. The facts are stated in the opinion. REVERSED.

G. T. Fitzhugh and F. M. Thompson for appellant.

Chas. M. Bryan and T. K. Biddick for appellee.

[656] FRIERSON, J.—This is a petition filed by the attorney-general of the State in the chancery court of Shelby county to remove the defendant from the office of sheriff of that county under the provisions of chapter 11, Acts 1915, entitled "An act to provide for the removal of unfaithful public officers, and providing a procedure therefor."

The petition contained many charges. Some of them, however, were considered by the chancellor insufficient, [657] even if true, to warrant a removal and were stricken out. There was then a very full hearing on the remaining charges with the result that the chancellor held that no misconduct or neglect of duty sufficient to justify a removal was shown and dismissed the petition.

The charge of the petition which has been the subject of the chief controversy, relates to the laws against the sale of intoxicating liquors. It is stated in great detail. But the substance of it is that, during his term as sheriff, defendant has not only failed and neglected to enforce these laws, but through an agreement or understanding with the officials of the city of Memphis, has permitted saloons to be run in violation of law.

Both parties introduced a great mass of evidence touching this charge. From a consideration of this evidence, we think the following facts are established with but little conflict between the witnesses. Since the passage of the Act of 1909 extending the four-mile law (Laws 1909, chapter 1), which made the sale of intoxicating liquors in Memphis unlawful, the handling of the liquor question in that city has assumed a new phase with each new act passed by the legislature to secure the enforcement of the law. From 1909 to March 1, 1914, the law seems to have been entirely ignored. The saloons seem to have been recognized, and, in a measure regulated by the city officials. During this period, for a part of the years 1910 and 1911, the defendant was police commissioner of the city of Memphis. He knew the conditions, but made no effort [658] to enforce the liquor laws. On the contrary, as he admits, he recognized the existence of saloons and assumed to regulate them by requiring that they close each night at midnight, and remain closed all day Sunday. This condition continued and the saloons seems not to have been disturbed from any source until March 1, 1914, when what is known as the "Nuisance Act" went into effect (Laws 1913 [2d Ex. Sess.] chapter 2). Then began a period during which the only effort to enforce the law was through injunction bills filed by the district attorney-general or special counsel employed by the governor. The city authorities still did nothing. But several hundred injunction bills were filed and a great many places closed and a large number of dealers were sent to the work-house for violating the injunctions. Just what the conditions were during this period is the subject of some controversy, but we think it fairly appears that intoxicating liquors continued to be sold in many places in the city in varying degrees of openness. There was undoubtedly some effort at secrecy and concealment to guard

against surprise by the special counsel in charge of the injunction suits and the officer working under him. But no danger seems to have been apprehended from any other source. Some places maintained bars; others did not. In many places liquors were served in the rear of barber shops, restaurants, and small grocery stores. In some, lunch counters were used as blinds, and, in others, sales were made behind interstate shipping house signs. The main difference, perhaps, was [659] that stocks of liquors were not kept conspicuously displayed, but were kept more or less concealed, or where they could be quickly removed.

These were the conditions in the city when in August, 1914, defendant was elected sheriff, and on September 1, 1914, when he assumed the duties of that office. They remained unchanged until about February 1, 1915. During that time he did nothing toward enforcing the liquor laws in the city of Memphis except to serve the process from the chancery courts in some three hundred injunction cases. There were, however, a number of roadhouses and other places outside of the city where liquors were being sold. These he seems to have endeavored to break up. He was advised by his counsel that he had no right to make searches or to arrest, without a warrant, for a misdemeanor, unless committed in his presence. But notwithstanding this, he had his deputies make a number of raids, arrest a good many people, and destroy a considerable quantity of liquor. He also, through his deputies, secured the indictment of a considerable number of persons for selling liquors outside of the city.

But, on January 29, 1915, the act of the removal of unfaithful officers, known as the "Ouster Law," went into effect. Immediately the defendant and the city officials held a conference. The mayor made a public announcement that the liquor laws would be enforced in Memphis. Defendant announced that, co-operating with the city officials, he would enforce the law in the county. And, for a short time, there seems to have [660] been a very fair enforcement of the liquor laws in Memphis. But, soon after the passage of the ouster bill, the policy of enforcing the law through injunction suits was abandoned and nothing further was done in that line except to wind up the suits already commenced.

Then, about May 1, 1915, the city officials adopted a new policy. Through the police, lists were made of all the places in the city in which it was known that liquor was being sold. Each dealer was arrested, but if he would turn over to the arresting officer "a forfeit" of \$50, he was left undisturbed in his place. If he did not appear at the city court, his \$50 was forfeited to the city and

this ended the matter. If he appeared he was fined \$50. In neither event was he bound over to the grand jury. Defendant admits that he knew of this practice. Some effort is made to deny that it was understood that the periodical payment of this \$50 would enable the dealer to continue his unlawful business without molestation. But it had this effect and we cannot doubt, from the record, that it was so intended and understood. Under this plan Memphis again had fairly open saloons. In places there was still some secrecy. Some places were being run in violation of injunctions, and precautions had to be taken. Others were selling on the sly and trying to avoid paying an occasional "forfeit" of \$50 to the city. But there were a great many open saloons.

These were the conditions prevailing during defendant's term of office and at the time the petition in this [661] cause was filed. For misconduct and neglect of duty in permitting them to exist, the mayor and other city officials have been removed. *State v. Crump*, 134 Tenn. 121, 183 S. W. 505, L.R.A.1916D 951. The question now is whether they also furnish ground for removing defendant from the office of sheriff. If he was responsible for them or if they were due to his neglect of any duty which the law imposed on him, he is unworthy and must be removed. But if he has neglected no duty, if the law did not require him to do the things it is insisted he did not do, and we should remove him because of the conditions we have described, we would do judicial violence to the law—the worst kind of lawlessness.

For the State, it is insisted that it was his duty to suppress these lawless saloons, arrest the offenders and report them to the grand jury. For the defendant, it is insisted that he was under no duty to do detective service to discover violations of the law; that he had no authority to arrest for misdemeanors, without a warrant, unless the offense was committed in his presence; that it was not only not his duty, but would be unlawful for him to swear out a warrant on information; that no sales of liquor were made in his presence; and that, therefore, he neglected no duty which the law imposed on him when he failed to put an end to the conditions of which complaint is made.

To determine this issue, it is necessary to understand just what the duties of a sheriff are. The office of sheriff is a most ancient one. It carries with it, in America, all of its common-law duties and powers except [662] as modified by statute. We have several statutes which bear on the question and which, taken together, set out the duties of the sheriff very much as they existed at common law.

Aside from the ordinary duties to execute and return process, to attend upon the courts,

and to take charge of the jail, the following statutes, as set out in Shannon's Code, are applicable:

Sec. 452. "The sheriff and his deputies are conservators of the peace, and, to keep the peace, prevent crime, arrest any person lawfully, or to execute process of law, may call any person or summon the body of the county to their aid."

Sec. 6892. "Public offenses may be prevented by the intervention of the officers of justice (1) by requiring security to keep the peace; and (2) by suppressing riots, unlawful assemblies, and breaches of the peace."

Sec. 6893. "Whenever the officers of justice are authorized to act in the prevention of public offenses, other persons who, by their command, act in their aid, are justified in so doing."

Sec. 6894. "The sheriff is the principal conservator of the peace in his county, and it is his duty to suppress all affrays, riots, routs, unlawful assemblies, insurrections, or other breaches of the peace, to do which, he may summon to his aid as many of the male inhabitants of the county as he thinks proper."

Sec. 6895. "The judicial and ministerial officers of justice in the State, and the mayor, aldermen, marshals, and police of cities and towns, are also conservators [663] of the peace, and required to aid in the prevention and suppression of public offenses, and for this purpose may act with all the power of the sheriff."

Sec. 6898. "If any person commanded to aid, under the provisions of this chapter, any magistrate or officer, without good cause, refuses or neglects to obey such command, he is guilty of a misdemeanor."

Sec. 6899. "If a magistrate or officer, having notice of any unlawful act provided against in this chapter, neglects or refuses to do his duty in the prevention of the public offense, he is guilty of a misdemeanor."

When an offense has been committed, a warrant for the arrest of the offender may be issued by a justice of the peace, upon information, after he has examined the informant on oath and is satisfied that the offense has been committed. Shannon's Code, section 6978.

The cases in which, to prevent a breach of the peace, the sheriff may, without a warrant, arrest a person for the purpose of requiring him to give security to keep the peace are set out in section 6900 of Shannon's Code as follows:

"It is the duty of all peace officers who know or have reason to suspect any person of being armed with the intention of committing a riot or affray, or of assaulting, wounding or killing another person, or of otherwise breaking the peace, to arrest such

person forthwith, and take him before some justice of the peace."

The succeeding section provides how the justice of the peace shall require bond of the offender and, in default thereof, commit him to jail.

[664] With respect to the arrest, without a warrant, of persons accused of felonies, an officer is given a rather wide latitude, but beyond this and the section just quoted, the only provision for such arrests is:

"An officer may without a warrant, arrest a person: (1) For a public offense committed or a breach of the peace threatened in his presence." Shannon's Code, section 6997.

To summarize, it is the duty of a sheriff to keep the peace and prevent or suppress crimes and public offenses. In order to do this, he is authorized to arrest, without a warrant, persons known to be or suspected of being armed for the purpose of committing a breach of the peace, and such persons may be required to give security to keep the peace. All other breaches of the peace he is simply commanded to suppress. And, to this end, he is authorized, for such a breach of the peace threatened in his presence, to make an arrest without a warrant. He may likewise arrest for any misdemeanor committed in his presence. In the case of all other misdemeanors, he must have a warrant.

Now what kind of an officer does this make of a sheriff? We cannot agree that he is a mere process server, or that he may, if he would discharge the duties of his office, be passive until some one swears out a warrant for him to serve. Nor can he, if he knows in any way that a public offense has been committed or is about to be committed, remain inactive. His duties are not merely to apprehend those who have committed offenses but to prevent such offenses. The sections of the [665] Code quoted make this plain. He is "to keep the peace" and "prevent crime." He is to prevent "public offenses" and suppress breaches of the peace. He is the commander in chief of the law forces of the county. All judicial and ministerial officers of justice and all city officials are required to aid him, and the male population of his county is subject to his command "in the prevention and suppression," not only of violent breaches of the peace, but of all public offenses. It is idle to say that all this does not imply initiative on the part of the sheriff in the enforcement of the law against public offenses. The duties imposed cannot be performed without some degree of activity and diligence to inform himself of conditions in his county. Certainly they preclude the idea that he may, without dereliction, shut his eyes to what is common knowledge in the community, or purposefully avoid information, easily acquired, which will make it his duty to act.

We do not mean that it is his duty to

patrol the county as the streets of the city are patrolled by the police, or to maintain a detective force to ferret out crimes. All we now decide is that it is the duty of the sheriff and his deputies to keep their eyes open for evidence of public offenses, and that it is a distinct neglect of duty for them to ignore common knowledge of law violation or to intentionally avoid being where they have reason to believe that such offenses are being committed. And to make imperative action in the discharge of his duty to prevent and suppress, it is not necessary that the sheriff shall see, with his own eyes, an offense [666] committed or about to be committed. By section 6899, Shannon's Code, it is provided that if he has notice of such offense and does not do his duty in preventing it, he is guilty of a misdemeanor. We hold that knowledge coming to him from any source is "notice" within the meaning of this statute.

Again it is clear that the duties and powers of a sheriff within the limits of an incorporated city are precisely the same that they are in the remainder of the county. The law draws no distinction. The city officials are conservators of the peace. But they do not supplant him. On the contrary, by the express terms of the statute, they are to aid him. He is the chief and they are his assistants. True, there is not ordinarily the same need for vigilance on his part in the city as in the country. One of the chief reasons for the incorporation of towns and cities is to provide in the more densely populated sections, better police protection, than, in the nature of things, the sheriff's office can afford. When, therefore a city has patrolling its streets a police force employed expressly, to detect crime and apprehend offenders, the sheriff, in the absence of information to the contrary, is justified in assuming that the city officials will do their duty, and hence will not be guilty of any serious neglect of duty if he gives little attention to police matters in such city. But if he has reason to believe that the police force is neglecting its duty, or is in league with offenders, it is his duty to inform himself. And, if he knows that the city officials are deliberately ignoring [667] or permitting a certain class of offenses, his duty to prevent and suppress such offenses is the same it would be if there was no municipality and no police force.

The unlawful sale of liquor is undoubtedly a misdemeanor and public offense in Tennessee. It is not also a breach of the peace? "The term 'breach of the peace' is generic and includes all violations of public peace or order, or acts tending to the disturbance thereof." 5 Cyc. p. 1024, citing many authorities. And this court has said:

"A breach of the peace is 'a violation of public order, the offense of disturbing the public peace. An act of public indecorum is

also a breach of the peace.'" *Galvin v. State*, 6 Cold. (Tenn.) 294.

The sale of intoxicating liquors has always been recognized as tending to provoke disturbances of good order and breaches of the peace. When such sales were lawful it was found necessary to impose upon them strict regulations to prevent breaches of the peace. Speaking of such regulation this court long ago said:

"This is a police regulation, for the good order and quiet of the city." *Smith v. Knoxville*, 3 Head. (Tenn.) 247.

See, also, *Webster v. State*, 110 Tenn. 507, 82 S. W. 179.

The original four-mile act, which exempted from its operation incorporated towns, was sustained as a reasonable police regulation for the preservation of peace and good order. And the exception of incorporated towns was justified upon the theory that such towns "would provide the necessary police force, so as to [668] keep down disturbances and breaches of the peace that arise out of the sale and use of intoxicating liquors." *State v. Frost*, 103 Tenn. 694, 54 S. W. 986.

And so when the four-mile law was extended to incorporated towns and cities, the purpose was still to preserve peace and good order. The Legislature of 1877 (Laws 1877, c. 23) considered the sale of liquor without adequate police protection a disturber of peace and good order, and prohibited it. But that Legislature thought that, with such protection as towns and cities could afford, it was possible for liquor selling and peace and good order to co-exist. However, after an experience of 32 years, the Legislature of 1909 evidently concluded that the sale of liquor, with or without police protection, was destructive of or, at least, dangerous to peace and good order. Whether we would have reached the same conclusion is immaterial. The Legislature has so declared and we hold that the liquor laws of the state were passed as a means for preserving the peace, and that their violation is a breach of the peace.

We have been cited to no case, and have found none which, in terms, decides that the unlawful sale of liquor is a breach of the peace. But the conclusion we have reached follows irresistibly from the definition of a breach of the peace generally accepted by the courts and from the logic of our cases cited above, and we are entirely satisfied with its soundness. True the unlawful sale of liquors is not a breach of the peace to prevent which the sheriff may arrest a person and require [669] him to give bond to keep the peace. That, as we have seen, can only be done when one is armed for the purpose of committing a breach of the peace. It belongs rather to that class which the sheriff is commanded to suppress, and to prevent which, when threat-

ened in his presence, it is his duty to arrest without warrant. It is of the same class and to be dealt with in the same way as the breaches of the peace enumerated in the brief of counsel for defendant, as follows:

"The term, 'breach of the peace' is generic, and includes riotous and unlawful assemblies, riots, forcible entry and detainer, the ending of challenges and provoking to fight, going around in public, without lawful occasion, in such manner as to alarm the public, the wanton discharge of firearms in the public streets, engaging in an affray or assault, using profane, indecent, and abusive language by one toward another, on a street and in the presence of others, or being intoxicated and yelling on the public streets in such manner as to disturb the good order and tranquillity of the neighborhood." 8 *Ruling Case Law*, p. 285.

The unlawful sale of liquor being a breach of the peace, it is not always necessary for an officer to actually see a sale before he is authorized to make an arrest without a warrant. If, in his presence, such a sale is threatened, he is authorized to arrest as for any other threatened breach of the peace. The threat need not be in words. If one man puts himself in a position to assault and, by his acts, manifests a purpose [670] to assault another, a breach of the peace is undoubtedly threatened. How does this principle apply to a threatened unlawful sale of intoxicating liquors? The condemnation of our statutes is confined to the selling of such liquors. It is not unlawful for a man to have liquors, in any quantity, in his home or in his place of business. The mere presence of liquors, therefore, without more, is not a public offense, and will not under all circumstances, indicate a purpose or threat to sell them unlawfully. Thus a stock of liquors in a house from which an interstate shipping business is being done may have no unlawful significance. But when liquors are found in a place of business fitted up as only saloons are usually equipped, with a bar, bartenders, bottles, glasses, and all the paraphernalia commonly used in places where drinks are served, there can be no doubt of the purpose. Men do not maintain places of that kind except for one purpose. Such a place, standing fully equipped and ready to serve the public, is a constant threat to sell liquor unlawfully and thus breach the peace. It cannot be that an officer, charged with the duty of preventing breaches of the peace, with this threat before his eyes, and with the certainty that the threat will be carried into execution the moment he is out of sight, is powerless to act because there has not already been a breach of the peace. We emphasize his duty to prevent offenses. And certainly no rights of an individual are violated when he is simply de-

prived of the privilege of doing that which is unlawful. The interposition of the law to prevent [671] a crime is more humane and less harsh than its punishment for one committed.

Our act authorizing an arrest for a threatened breach of the peace was taken from the Alabama Code of 1852. And we quote, with approval, what the Supreme Court of that State has said in sustaining the right of an officer to prevent a threatened breach of the peace as follows:

Two great and vital principles of government are to be kept steadily in view, in pronouncing on conduct, such as is brought to view in this record; the liberty of a citizen, and the peace and repose of society. Civil liberty is natural liberty, shorn of the excesses which invade and trench on the equal liberty of others. No one can claim the right to violate the law, and precautionary force is justified, to prevent a greater impending evil. Such force, however, is in its nature remedial, and can be carried no further than is reasonably necessary to prevent the threatened wrong. Prevention is less hurtful than redress, and when prudently exercised, is not only justified, but is commended of the law. No man can rightfully complain of any encroachment upon personal liberty, which he himself by his lawlessness or violence has rendered necessary for the safety and protection of others. It is liberty as defined by law, not unbridled license, our free Constitution guarantees to every man—the humblest, equally with the most exalted.” *Hayes v. Mitchell*, 69 Ala. 454.

We hold therefore, that a person found in control of such a place as we have described is subject to arrest, [672] without warrant, as for a breach of the peace threatened in the presence of an officer. It may be true that he has not committed any offense for which he may be indicted and prosecuted. But neither has the man who has threatened an assault and battery, or to send a challenge, but has been arrested before he could put his threat into execution. In such cases the arrest is made not for the purpose of inflicting punishment, but to prevent the necessity for punishment. It is not to be followed by imprisonment, unless it shall be necessary to so restrain the offender to prevent the threatened offense. The limit of the force that may lawfully be used to prevent a breach of the peace, as held by the Alabama court, is that it shall “be carried no further than is reasonably necessary to prevent the threatened wrong.”

In the Alabama case referred to it was held that the circumstances might be such as to justify the arresting officer in even putting the offender in jail, the court saying:

“The right to imprison was a question for the jury, under appropriate instructions.

There should certainly be no imprisonment, unless the circumstances rendered such imprisonment necessary. If, by reason of the unreasonableness of the hour, or the inaccessibility of the mayor or other magistrate having jurisdiction, the offender could not be then brought to trial; or, if by reason of riotous or lawless conduct, the peace-preserving powers of the marshal were, or seemed to be in request, to maintain the general peace, or to protect [673] others or their property from lawlessness, then it would not be the duty of the marshal to exhaust his entire energies, in personally detaining the prisoner, to the neglect of all other equally pressing duties. In such case, he would be authorized to imprison the offender, until he could be properly brought to trial.” *Hayes v. Mitchell*, 69 Ala. 452; *Johnson v. Americus*, 46 Ga. 80; *Boaz v. Tate*, 43 Ind. 60.

In other words, in obedience to the command to prevent and suppress breaches of the peace, the officer making the arrest is to do whatever, under the circumstances is reasonably necessary to prevent the threatened offense. In the event of an unlawful assembly, he will command that the persons assembled disperse. If the command is obeyed, his duty is done. If it is not obeyed, he will arrest those who disobey and detain them until the assembly is dispersed. *Yerkes v. Smith*, 157 Mich. 559, 122 N. W. 223. If one threatens an assault and is arrested by an officer in whose presence the threat is made, he will be detained until the danger of the assault appears to have passed, and then released. So if an officer finds a saloon, such as we have described, it is his duty to do whatever is reasonably necessary to prevent the threatened sales of liquors. Manifestly his first step will be to arrest the person in charge for a threatened breach of the peace. Having done this, he should detain such person until the danger of the threatened breach of the peace is removed. How this danger can be effectually removed will depend on the circumstances. If this can be done [674] by seizing and removing the liquors, such action is within the power of the officer. Or, if necessary, he may close the place of business and keep it closed until the purpose of conducting it as a saloon is abandoned.

It may be said that this involves an arbitrary invasion of property rights. But the law does not hold one's property more sacred than his person. And it must be conceded that his person may be seized when necessary to prevent a breach of the peace.

It is insisted that this calls on the sheriff to render services for which the law provides no compensation. It may be that he will sometimes do things not covered by the fee bill. But, if so, this is nothing more than is incident to the work of men in every walk of life. He must take his office with its

burdens as well as its emoluments. Besides when one is arrested for threatening a breach of the peace by maintaining a saloon, it will rarely be the case that sufficient evidence of past offenses will not be found to justify swearing out a warrant upon which the offender can be prosecuted and convicted.

Of course what we have said here does not apply to all places in which liquors are found. We apply it now only to places, like saloons, so fitted up as to be a constant invitation to the public to buy and drink. So applied, the things we have held that the sheriff is authorized to do are nothing more than the defendant himself did in his efforts to enforce the law in the rural districts. In fact these are the very things that all faithful officers, who have really tried to enforce the [675] law, have found it necessary to do and have done for years. There has been an impression that such officers were, in fact exceeding their lawful authority. It is time they were authoritatively advised that, in doing these things, so long as they do not abuse their power they have the full sanction and protection of the law.

We are not unmindful of the contention of counsel that an officer has no right to arrest, without a warrant, for a misdemeanor not committed in his presence. That rule is too well understood to require the citation of authorities. Nor do we mean to depart from it. But, under the statute quoted, an arrest may lawfully be made when no misdemeanor has in fact been committed if it is necessary to prevent a threatened breach of the peace. Whatever is a violation of public order or tends to the disturbance of public peace or order is a breach of the peace. In the judgment of the Legislature, the sale of intoxicating liquors is such a violation of good order and so tends to the disturbance of public peace and order that laws have been enacted prohibiting such sales. A violation of these laws undoubtedly violates good order and tends to the disturbance of public peace and order, and, by all the accepted rules of construction and of logic, is a breach of the peace.

For any misdemeanor, whether also a breach of the peace or not, actually committed, no arrest can be made without a warrant, unless the offense is committed in the presence of the arresting officer. But to prevent any offense which is a breach of the peace, threatened [676] in the presence of an officer an arrest may be made without a warrant. So, to arrest for a sale of liquor, not made in his presence, an officer must have a warrant. But to prevent such a sale, when threatened in his presence, he needs no warrant. Hence when he finds a man in possession of a saloon, with everything ready to serve customers, such a man is undoubtedly

threatening, in the presence of an officer, a breach of the peace which he will commit unless prevented. We have no hesitancy in holding that it is the duty of the officer to prevent the breach of the peace by making an arrest. It cannot be that an officer of the law must stand powerless in the presence of complete preparations for a breach of the peace which is sure to be committed as soon as he is out of sight.

Moreover, as we have seen, when the sheriff has notice that an offense is being committed, it is his duty to act in prevention and suppression. This involves the duty to, at least, make some investigation to ascertain the facts. That defendant had notice that saloons were running in Memphis, we do not doubt from the record. And it is impossible that, with saloons running as the record shows they were, the sheriff and his deputies could not, with slight effort, have put themselves in possession of sufficient knowledge to satisfy a justice of the peace that the offense of selling liquor had been committed. Nor do we understand that it was necessary for the officers to actually see sales before swearing out warrants. We are aware that *State v. Good*, 9 Lea (Tenn.) 240, holds that when the informant [677] does not know the facts, but has only been informed of them, the justice of the peace is not authorized to issue the warrant. But if any officer knows the facts which reasonably lead to the conclusion that sales of liquor have been made, he is within the rule laid down in that case and is justified in swearing out a warrant, although he may not have actually seen the sales.

We have said that the sheriff is not bound to maintain a detective force. It is also true that there is no statute which, in terms, makes it his duty to swear out warrants or give information to the grand jury. But when he is commanded to prevent and suppress crimes, public offenses, and breaches of the peace, it is incumbent on him to use all the means which the law has provided to accomplish that end. If complaint is made to him or he has notice that an offense has been committed, or is about to be committed, it is his duty to investigate. If an offense is committed or a breach of the peace threatened in his presence, it is his duty to arrest without a warrant. If, upon investigation, he learns facts which show that an offense has been committed, it is his duty to swear out a warrant and make the arrest. If he has reason to believe that an offense has been committed, but does not know facts sufficient to justify his swearing out a warrant, it is his duty to report the matter to the grand jury for investigation. Nothing short of this will be a complete performance of his

duty to prevent and suppress crime and public offenses.

[678] Has the defendant neglected to perform the duties of his office as thus fixed by the law? So far as the county outside of the limits of the city of Memphis is concerned, with a single exception, we think he has not, and, as to this part of the county, his conception of the duties of his office was just about as we have stated them to be. Some criticism is made of his conduct with respect to the sale of liquor at certain roadhouses. But it appears that he made numerous arrests, a number of raids, destroyed considerable quantities of liquors, and secured many indictments. On the whole we think he acted in good faith and with reasonable vigor in the effort to enforce the liquor laws outside of the city of Memphis with a single exception to be now referred to.

The Tri-State Fair was held in September, 1914, just outside the limits of Memphis. At some time between defendant's election, in August, 1914, and his induction into office on September 1st, in a conference at which he (Mayor Crump) and the chief of police of Memphis were present, he was asked if he would permit liquor to be sold on the fair grounds. He at first replied that he would not, as that would be a prostitution of his office. But, after some remarks by the mayor, he said that if as many as ten of the directors of the fair would ask it in writing, he would agree. This is the version as given by the chief of police. The defendant does not deny it and Mr. Crump was not called as a witness. The chancellor accepted it as true, as do we also. It does not appear that the petition suggested was ever signed or presented. But it does appear that beer and [679] whisky were sold openly on the grounds during the fair, and that defendant was present and could not have been ignorant of the sales, though he may have avoided actually seeing them. The agreement, made before he became sheriff, could not be made a ground for his removal, unless it was afterwards carried out. We do not know whether the directors ever signed a petition as suggested, nor do we know that defendant ever formally waived the petition as a condition to his agreement. But whether by his express agreement or not, intoxicating liquors were sold openly on the grounds, and he was present and took no steps to prevent it.

In the city of Memphis, defendant admits that he did nothing toward enforcing the liquor laws except to serve such process, principally in injunction cases, as was placed in his hands. He was personally and politically on the most intimate terms with the mayor of Memphis. Whether by formal agreement or tacit understanding or on his own motion, it is manifest, from his own

Ann. Cas. 1918B.—57.

testimony, that he was content to leave the enforcement or nonenforcement of the laws against selling intoxicating liquors entirely to the city authorities. At the same time he admits that he knew that, from September 1, 1914, to January 29, 1915, the city authorities were making no effort to enforce these laws, and that, from May to October, 1915, they were merely arresting liquor dealers, collecting \$50 from each, and binding none of them over to the grand jury. His failure [680] to act, under these circumstances, was a clear neglect to perform the duties of his office.

The excuse is offered that, when he was inducted into office the state was proceeding against liquor dealers by injunction suits and that this was the most effective weapon against them. But this is only an additional means of enforcing the law and relieves no officer of any of the ordinary duties of his office.

It is also urged, in excuse, that the officials of the criminal court were so derelict in the discharge of their duties that nothing would have been accomplished by having offenders bound over to the grand jury. But however this may have been, the derelictions of other officials cannot excuse him for failure to do what the law plainly required him to do for the prevention of public offenses. Besides it is conceded that, during a portion of his term, the chancery courts were very active and the counsel employed by the Governor very energetic in proceeding against dealers by injunction. In these proceedings, defendant gave no aid except to serve process. If he really desired to enforce the law and felt that his efforts were being obstructed in the criminal court, a report to the official in charge of these proceedings would have brought most effective aid. It is said, however, that the Nuisance Act does not impose any duty on him. It is true that act does not mention the sheriff, and he is not authorized to institute any proceeding under it. But neither is there any act which, in terms, says that he shall, under any circumstances, swear out a warrant or give information to the [681] grand jury and, counsel say, no statute says that he shall ever make an arrest without a warrant; the only provision being that he may do so in certain cases. But he is commanded to preserve the peace and prevent and suppress public offenses. And we hold that this makes it his duty to use all the machinery which the law provides to accomplish that result. It is his duty to co-operate with all other officials who are charged with duties looking to the same end. If, therefore, he found that the enforcement of the law was being obstructed in the criminal court, while this would not relieve him of the duty to have offenders bound over, it would impose the

additional duty of enlisting the aid of those in charge of injunction suits.

In reaching these conclusions, we have not, we think, put any harsh or strained construction on the law. We have only held that the sheriff must be a real conservator of the peace and, to that end, must, in good faith, use all the power which the law gives him to prevent and suppress public offenses.

It is not to be expected that any sheriff can so conduct his office that no liquor will be sold in his county any more than that there will be no such crimes as larceny, disturbing public worship, or assault and battery. And no sheriff who, with reasonable intelligence, makes an honest effort to prevent and suppress public offenses of all kinds has anything to fear from the courts.

The inquiry of counsel as to what defendant could have lawfully done is a pertinent one. We have no [682] right to condemn him, unless we can show what the law made it his duty to do. But what we have said furnishes, we think, a definite answer to that question. We have no doubt, from the record that, during at least a portion of his term he had notice that a number of saloons were being run openly and that the city authorities were doing nothing to suppress them. It is equally clear that no efforts were being made to conceal their operations from his force. What could he and his deputies have done? (1) They had only to step into these places, observe a sale, and make an arrest for an offense committed in their presence, or if they found the place ready for business, but saw no sales made, they could have made an arrest for a breach of the peace threatened in their presence, and could then have seized the liquor or closed the place, as under the circumstances, would have been reasonably necessary to prevent sales being made. (2) With notice of these open saloons a slight investigation would have put his deputies in position to swear out warrants. (3) If his efforts had been obstructed in the criminal court, he could have reported to the official in charge of injunction suits and secured effective aid.

We have not overlooked the authorities cited by counsel but have considered them. Most of them are not in conflict with what we have held.

Com. v. Wright, 158 Mass. 149, 33 N. E. 82, 19 L.R.A. 206, 35 Am. St. Rep. 475, simply holds that for statutory misdemeanors, not amounting to a breach of the peace, an officer has no authority to arrest [683] without a warrant, though the offense be committed in his presence, "unless it is given by statute." But our statute extends the authority to all "public offenses."

Pinkerton v. Verberg, 78 Mich. 573, 44 N. W. 579, 7 L.R.A. 507, 18 Am. St. Rep. 473,

holds that a police officer cannot, without a warrant, lawfully arrest a woman upon mere suspicion that she is on the street for the purpose of plying her vocation as a prostitute.

Jamison v. Gaernett, 10 Bush (Ky.) 221, merely denies the power of an officer to arrest, without warrant, for an assault not committed in his presence.

Robison v. Miner, 68 Mich. 549, 37 N. W. 21, and 8 Ruling Case Law, p. 258, citing a Florida case holding that carrying concealed weapons is not a breach of the peace, as well as some other cases, not cited, but which we have examined, are, in principle, more or less in conflict with our holding that the unlawful selling of liquor is a breach of the peace. But, we think, they are not supported by the weight of authority or reason.

It is not necessary to discuss other charges of the bill further than to say, in fairness to defendant, that we do not find that the charges of official oppression and demanding and receiving illegal fees are sustained by the record.

For the reasons stated, the decree of the chancellor must be reversed, and a decree entered here, removing defendant from the office of sheriff of Shelby county.

In the record of this case, no effort has been made to comply with the rule requiring bills of exceptions [684] to state the evidence in narrative and condensed form. Nor has any abstract of the evidence been filed. The bill of exceptions consists of a literal transcript of what occurred on the trial, including numerous lengthy arguments by counsel, making six large volumes. It is insisted by defendant's counsel that the court ought not to examine the testimony, but should decide the case on the facts set out in the opinion of the chancellor. In view of the summary character of this proceeding and the expressed purpose of the legislature that it should speedily be disposed of on its merits, and the short time between the trials below and here, we have not done this, but have examined the entire record. Our conclusions in the main, are based however, on the facts found by the chancellor to be true.

But we do not think the additional cost resulting from failure to comply with the rule should be borne by the defendant. Three-fourths of the cost of the transcript will be taxed against Shelby county. The remainder of the costs of this court as well as the costs of the court below will be paid by the defendant.

ON PETITION FOR REHEARING.

(October 11, 1916.)

[685] *FRIERSON, J.*—In a very earnest petition to rehear we are asked to reconsider

our opinion in which it was held that the defendant should be removed from the office of sheriff of Shelby county.

[689] When the cause was heard three members of the court were absent and their places occupied by special judges. In view of this fact, an oral argument of the petition has been permitted, and the conclusions now announced reached by the court, composed of four regular members and the writer sitting as a special judge.

As counsel seem to be under some misapprehensions, we will restate briefly what was decided.

The facts which we held justified defendant's removal were these:

(1) During the Tri-State Fair, which was held in September, 1914, in Shelby county outside the corporate limits of the city of Memphis, intoxicating liquors were sold openly on the fair grounds, and he was present and took no steps to prevent it, although he had previously said that to permit it would be to prostitute his office.

(2) During his term as sheriff, although, with the exception above stated, he made an honest effort to enforce the liquor laws in the rural districts, he did nothing toward enforcing them in the city of Memphis, except to serve such process as was placed in his hands, in spite of the fact that during at least a part of the time there were a great many open saloons running, and he knew that during a portion of his term the city authorities were doing nothing either to prevent or punish violations of the liquor laws, and during another part of his term they were merely [690] arresting liquor dealers, requiring, in each case, the payment of \$50 to the city, and binding no one over to the grand jury, but leaving offenders undisturbed in their places of business, and immune from punishment under the laws of the State.

None of these facts have been challenged by the petition to rehear or the argument in support of it except it is insisted that, though liquor was being sold in many places, there is "no definite and sufficient proof" that any of these places were open saloons, or, if so, that defendant knew of them. But this contention does not deny that he knew that the city authorities were, in effect, shielding numerous offenders from prosecution by exacting tribute to the city and leaving them free to continue their unlawful business. He, therefore, knew that, to the extent of protecting them from punishment in the State courts, the city officials were in league with the offenders. We are, however, entirely satisfied that, at least for a considerable time before this proceeding was commenced, there were many open saloons in Memphis, not a few of them in the business section of

the city, and some of them being conducted with such openness that sales over the bar could be observed from the street. The record shows that there were numerous places in Memphis where complete strangers could and did go, and, without question or difficulty, purchase intoxicating drinks, and have them served just as such drinks are ordinarily purchased and served in saloons, and that many of them had all the well-known [691] *indicia* of open saloons. And the evidence leaves no doubt that these facts were generally known in the community. We have accepted as true defendant's statement that he was not in a saloon during his term and did not actually see a sale of liquor. Indeed we have found, in the record, no reason to doubt his entire truthfulness as a witness. But his testimony, as a whole, admits a knowledge that the city authorities were permitting liquor dealers to continue their business upon the payment of an occasional \$50, and contains no denial of the circumstances shown from which he could have had no doubt that these laws were being ignored and extensively violated. And the slightest effort would have given him actual knowledge of the conditions. The saloons were as open to him as to the public. In entering them, he would no more have been a trespasser than any other citizen. The record satisfies us that the persons in charge of these places felt perfectly secure from interference by the sheriff or his deputies, and that their appearance would have caused no suspension of operations and they could easily have seen what the other witnesses saw. The conclusion must be that he did not see open saloons and liquor sales because it was not his policy to see them. That this was, in fact, his attitude is obvious from the testimony that on one occasion he learned that the city authorities had arrested, for liquor selling, the keeper of a place where some of his deputies were accustomed to eat lunch and advised them not to go there any more. [692] Under these circumstances it cannot be unfair to hold him to the duties which rest upon a sheriff who knows that saloons are being run openly in his county. We have accordingly based his removal upon his total and intentional neglect of any effort to suppress saloons or other places where liquor was sold openly.

We have not undertaken to determine what degree of failure to suppress bootlegging or other secret methods of selling liquor would justify the removal of a sheriff. It is sufficient now to say that the law is not unreasonable and does not require impossibilities of the sheriff any more than of any other person. The inquiry always must be whether he has made an honest and reasonably intelligent effort to do his duty. If he has done this, the courts will not remove him, though

his efforts may not have been wholly successful. In other words, his right to hold his office depends upon the good faith of his efforts rather than upon the degree of his success. The fact that a few or many violations of the law have occurred in his county will never, without more, justify his removal. His good faith, or lack of it, must be determined by the circumstances of each case. In the present case we are relieved of the necessity of going into these questions, because we are dealing with a defendant who expressly admits facts which show that, so far as the city of Memphis is concerned, he had every reason to believe that the law was being constantly violated and made no effort to do anything.

[693] In concluding that the facts stated above required defendant's removal, we made the following rulings as to the duties of a sheriff:

(1) He is the chief conservator of the peace in his county and expressly required to keep the peace, and to prevent and suppress public offenses and breaches of the peace.

(2) Ordinarily he may rightfully assume that the police officers of incorporated towns and cities will do their duty, and hence will be guilty of no serious neglect of duty if he gives but little attention to police matters in such places. But if he knows, or has reason to believe, that they are neglecting their duty or are in league with offenders, his duties are the same as in the rural districts.

(3) He is not a mere process server, but his duties require initiative on his part in the enforcement of laws against public offenses. It is therefore his duty to exercise the powers conferred upon him, and to use the means provided by law to accomplish the prevention and suppression of public offenses.

(4) He must use a reasonable degree of diligence to inform himself of conditions in his county, and will be derelict if he shuts his eyes to what is generally known in the community, or purposely avoids information, easily acquired, which will make it his duty to act.

(5) If he has notice of any public offense, it is his duty to act in its prevention.

[694] With respect to the means which the law affords for the performance of these duties, we held:

(1) For any public offense committed in his presence the sheriff may, without a warrant, arrest and take before a justice of the peace the offender for punishment.

(2) For a misdemeanor committed, but not in his presence, he has no authority to arrest without a warrant.

(3) To prevent any offense, which is also a breach of the peace, *threatened* in his presence, he may arrest without a warrant and

use such force as may be reasonably necessary to prevent the threat being carried into execution.

(4) If he knows or has reason to suspect that any person *is armed* for the purpose of committing certain offenses, he may arrest without a warrant and take before a justice of the peace such person, to the end that a bond to keep the peace may be required.

(5) Except as just stated, he is in no case authorized to make an arrest without a warrant, upon suspicion or information received from others that a misdemeanor, whether also a breach of the peace or not, has been committed or is about to be committed.

(6) He has no authority to swear out a warrant merely upon facts of which he has been informed by others. In such cases he may report the matter to the grand jury, with the names of his informant and such other witnesses as may be known to him.

[695] (7) But if he knows of his own knowledge such facts as reasonably make a case, he may himself swear out a warrant and then arrest the offender.

The authorities were cited in our former opinion. And the rulings as stated are not now questioned, except in so far as they impose upon the sheriff the duty of taking the initiative. It is conceded that his powers are correctly set out above. But it is denied that he is under any positive duty to exercise these powers, at least when, though having notice of offenses, he does not actually see an unlawful act. But this involves a total misconception of the nature of the office of sheriff as it has been known to the law from time immemorial.

"The powers and duties of conservator of the peace exercised by the sheriff are not strictly judicial; but he may be said to act as the chief magistrate of his county, wielding the executive power for the preservation of the public peace." *South v. Maryland*, 18 How. 396, 15 U. S. (L. ed.) 433.

He is, "in his county or bailiwick, the representative of the king or sovereign power of the State to preserve the peace." 25 Am. & Eng. Enc. of Law (2d ed.) 662. The chief magistrate clothed, in his county, with the executive power of the State, the representative of the king, or, in America, of the sovereignty of the State, cannot be said, with any show of reason, to be a mere process server who may stand passive and see the laws of the State trampled upon unless some citizen places process in his hands directing him to [696] act. For the punishment of offenses which injure a citizen in his person or property we may sometimes expect the injured person to start the machinery of the law. But for the enforcement of those laws intended for the protection of the public at large, and in which no one citizen has any

more direct interest than another, practically the sole reliance must be upon those officers who are made the guardians of the peace of the State, chief among whom is the sheriff.

Answering the suggestion that a sheriff could discharge his duty by standing ready to serve any warrants that might be issued, the Supreme Court of Michigan has said:

"We cannot shut our eyes to the fact that this has been a common excuse of sheriffs and other police officers for not enforcing this and other laws. It is the duty of the sheriff and police officers generally to enforce those laws which the people have enacted for the protection of their lives, persons, property, health, and morals." *Scougale v. Sweet*, 124 Mich. 323, 82 N. W. 1065.

That case is also authority for the statement that, when information comes to the sheriff that an offense is about to be committed, it is his duty to make an honest, and not a pretended, effort to ascertain the facts and be at the place to prevent the offense. This is all in accord with our ruling. And we are satisfied that we have not charged the defendant with any higher measure of duty than the law imposes on him. When the statute directs him to prevent and suppress [697] public offenses, and says that when he has notice of such offenses, it is his duty to act in prevention of them, it plainly intends that he must use all, or so much as may be necessary, of the means to that end which are at his command.

Applying these rules, we held that defendant was guilty of a distinct neglect of duty in making no effort to prevent the sale of liquor at the Tri-State Fair. The facts as we have stated them are not challenged by the petition to rehear. It cannot be said that this neglect was not knowing and willful, for he himself had previously said it would be a prostitution of his office. His removal could well have been rested upon this alone.

But it was not necessary to base our decision upon a single isolated failure to do his duty, occurring at the beginning of his term. In view of the facts, as we have found them, his admission that he did nothing in the city of Memphis toward enforcing these laws furnishes ample reason for his removal. *State v. Howe*, 134 Tenn. 89, Ann. Cas. 1917C 1125, 183 S. W. 510, L.R.A.1918D 1090.

When he learned, as he did, that the city was collecting tribute from numerous liquors dealers and leaving them otherwise undisturbed in their places, this was notice to him that the law was being constantly violated, and that no proper effort was being made to suppress the offenses or punish the offenders. The slightest desire to perform the duty which we have held was his would

have suggested a visit to these places. His offense was in keeping away [698] from places where he had every reason to believe that the laws were being violated. It was the offense of willful neglect of duty rather than positive wrongdoing. For an officer to purposely avoid being where he has reason to believe that an offense will be committed is as serious and willful a neglect of duty as a failure to arrest for an offense committed in his presence. The decision could well be rested upon his failure, with the notice he had to locate these saloons or at least some of them. We do not mean that it was his duty to break open any doors, or to make a forcible entrance into any suspected residence or place of business for the purpose of searching. Dealing with the case before us, we merely hold that he had the same right that the general public had to enter these places and observe what was open to observation, and that it was then his duty to take such action as would be justified by what he saw. If he had taken this course, the result cannot be doubted. At least until some arrests had been made, we are satisfied that all he or his deputies had to do was to walk into these places, observe sales, and make arrests. He neglected to make the attempt. Of course, when it became known that the sheriff's office proposed to do its duty, precautions would be taken to avoid making sales in the presence of the officers. If then the officers should see no sales made, but should find a federal license displayed, and observe other facts reasonably showing that sales had been made, they could swear out warrants. If, however, [699] they should not discover facts sufficient to make a *prima facie* case, but found circumstances leading them to believe that the law had been violated, they could report the matter to the grand jury, with the names of such witnesses as they could furnish. And it would be their duty to do such of these things as might, under the circumstances, be necessary. In the present case the defendant neglected to take the first step by going or sending his deputies to the places where he had reason to believe liquor was being sold. But this neglect, of course, cannot excuse him for not doing the things which it would have been his duty to do if he had taken the first step. He must therefore stand convicted of a neglect of all the duties which would have been his if he had gone to these saloons. What has been said thus far applies whether the offense in question is or not also a breach of the peace. We have but stated the long-recognized duties of a sheriff with respect to all public offenses. But in the case of an open saloon, if no sale is made in the presence of an officer, if no federal license is displayed, and he acquires no such knowledge

as will justify him in swearing out a warrant for past sales, but he finds a stock of liquors, complete bar equipment, and such a state of preparedness as to make it certain that sales will be made as soon as his back is turned, must he leave the person in charge undisturbed, and let the enforcement of the law await the slow process of an investigation by the grand jury? We cannot think so. In the presence of such an unequivocal [700] threat, must the chief law officer of the county, charged with the duty of preventing such offenses, wait until the offense has actually been committed? We cannot agree that the law is so impotent. The sheriff is expressly authorized by our statute to take preventive measures when a breach of the peace is *threatened* in his presence, and, to that end, to make an arrest without a warrant. After a review of the authorities, and a consideration of the manifest purpose of the legislature, throughout the history of the State, in the passage of liquor laws, we held that the unlawful sale of intoxicating liquors is a breach of the peace which it is the duty of the sheriff to prevent when threatened in his presence, and that a saloon, stocked with liquors, fully equipped and ready for business, is such a threat. It is against this holding that the petition to rehear is chiefly directed.

If a violation of the law against the sale of liquor is a breach of the peace, it is conceded that an officer may, without a warrant, arrest for a violation of that law threatened in his presence. And it will scarcely be doubted that the maintenance of a saloon, ready for business, constitutes such a threat. It has been said that any act which reasonably threatens such a violation justifies an arrest as for a threat. *Jones v. State*, 100 Ala. 90, 14 So. 772. The inquiry then is narrowed to the question as to what constitutes a breach of the peace within the meaning of our statute.

It must be remembered that the term "breach of the peace" is not used to describe any specific crime [701] or offense. It is generic and embraces many acts which are indictable as separate offenses. Speaking generally, the definition adopted in *Galvin v. State*, 6 Cold. (Tenn.) 294, according to which it includes all unlawful acts and acts of public indecorum which disturb, or tend to disturb, public peace or good order, is that which is laid down in all text-books and accepted by practically all courts. It has been succinctly described as "a criminal act of the sort which disturbs the public repose." 1 *Bishop's Criminal Law*, section 536. A great multitude of cases, from almost every State in the Union, in which substantially this definition has been adopted, could be cited. But this is unnecessary, since, we

believe, there is no dissent from the general definition. The only difficulty is in applying it to particular facts. It seems to be clear, then, that any act which is unlawful, and which disturbs or tends to disturb peace and good order, is within the accepted definition of a breach of the peace. And the word "peace" in this connection has also come to have a fixed meaning. It means, "the tranquility enjoyed by the citizens of a municipality or community where good order reigns among its members," or, "that invisible sense of security which every man feels so necessary to his comfort, and for which all governments are instituted." *Davis v. Burgess*, 54 Mich. 517, 20 N. W. 540, 52 Am. Rep. 828; *State v. Coffin*, 64 Vt. 27, 23 Atl. 632.

The difficulty in applying this general definition to particular facts will, we think, largely disappear if [702] we will bear in mind the distinction between those breaches of the peace which are offenses against individuals, and those which are offenses only against the public at large or the State, and remember that what is said of the one class is not necessarily true of the other. Thus it has been said:

"The offense may consist of acts of public turbulence or indecorum, in violation of the common peace and quiet, or of an invasion of the security and protection which the law affords every citizen, or of acts such as tend to excite violent resentment. Actual personal violence is not an element of the offense, but when the incitement of terror or fear of personal violence is a necessary element, the conduct or language of the wrongdoer must be of a character to induce such condition in a person of ordinary firmness." 5 Cyc. p. 1024.

By this we understand that there are some breaches of the peace in which the "incitement of terror or fear of personal violence is a necessary element," and, as to these, the act complained of must be such as to reasonably produce terror or fear. They consist of offenses which invade the security and protection which the law affords the individual citizen, and as to which it is sometimes, and probably generally, held that there must be some kind of violence, either actual or threatened. But the language quoted clearly implies that there is a class of breaches of the peace into which the element of incitement to terror or actual fear does not enter, but which are offenses merely [703] because they are incompatible with the tranquility and good order which governments are organized to maintain.

The distinction is well illustrated in *Ware v. Branch Circuit Judge*, 75 Mich. 493, 42 N. W. 998, where it was said:

"It is a significant fact that very few, and it may perhaps be said that none, of the

recognized books of authority on the criminal law contain any such title as 'Breach of the Peace,' with a definition of it. The books almost universally divide crimes into classes; and breaches of the peace, so far as they are found defined at all, are found either as offenses against the lives and persons of individuals, or as public disturbances, except where for certain reasons they are made felonies."

And in the same case the court said:

"The only cases of breach of the peace, not involving upon disturbance in public places, and to the actual annoyance of the public at large, or persons employed, and actually engaged in public functions, require personal violence, either actually inflicted or immediately threatened."

Thus those acts which are breaches of the peace because they are disturbances in public places, or because they are an annoyance to the public at large or persons engaged in public functions, are carefully excluded from the rule requiring violence, actual or threatened, as an element of the offense. Those offenses described as an annoyance to the public at [704] large include those which are "a gross violation of decency and good order," *People v. Ruggles*, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; "acts which tend to corrupt the morals and debase the moral sense of the community," *Lindenmuller v. People*, 33 Barb. (N. Y.) 548; and those which furnish an "evil example of a defiance of the law," *State v. O'Rourke*, 35 Neb. 614, 53 N. W. 591, 17 L.R.A. 830.

In *Ware v. Branch*, *supra*, the offense sought to be punished as a breach of the peace consisted of obscene language used by one in the home of another. There was no element of threat or fear. Speaking of the offense, the court said:

"As described, the performance was the vaporing of a filthy minded person whose tongue was loosed by drinking, and who was certainly an unsavory and undesirable visitor, but nothing legally worse."

There was no claim that the conduct complained of was a public disturbance, for it was said:

"The only ground on which relator has endeavored to base a claim of breach of the peace is that this language was calculated to provoke violence."

The court was therefore dealing with an alleged breach of the peace of the class which invades the rights of individuals. Hence what was said as to the necessity for violence must be referred to that class, and has no application to the class consisting merely of offenses against the public or the State. The courts have not always kept this distinction in mind, and to this fact is due whatever confusion may be found in the authorities.

[706] In England the sheriff was the keeper of the King's peace. In America he is the keeper of the peace of the sovereign people or the State. We think it cannot be said that this peace of the sovereign is not breached or disturbed by any infraction of the laws, at least those enacted for the purpose of preserving good order. It is in this broad sense, we think, that the term is used in the statute authorizing arrests for threatened breaches of the peace. We have no statute which undertakes to define breaches of the peace, and no statute attempting to enumerate all offenses which are breaches of the peace. But our Constitution (article 6, section 12) provides that all indictments shall conclude, "against the peace and dignity of the State." It is difficult to construe this otherwise than as a constitutional declaration that every indictable offense shall be regarded as against the peace of the State; that is, a breach of the peace. And when we remember that every unlawful act which tends to disturb good order is a breach of the peace, what can be more logical than to say that every violation of a criminal law is a breach of the peace of the State? How, in a country where law is supreme, can an act be at once orderly and criminal? If this be the meaning of the Constitution, then an officer is authorized to arrest for any indictable offense threatened in his presence. And this is the construction placed upon the statute of Alabama, from which ours was copied, by the courts of that [706] State. We quote from *Jones v. State*, 100 Ala. 90, 14 So. 773:

"It is alike the law and common knowledge that such officers may arrest without warrant, either to preserve peace and good order or to prevent a threatened violation of the law. . . . The officer may arrest upon seeing such acts as show a reasonable ground for making the arrest; and an act done in his presence which is violative of a general law, or of a municipal ordinance, or which reasonably threatens such violation, authorizes arrest without warrant."

We are aware, however, that there are authorities which recognize some violations of law as not involving a breach of the peace, and it is not necessary for us now to decide whether, under our Constitution and statutes, this distinction exists. Certainly it cannot be denied that a law enacted to preserve peace and good order is a legislative declaration that the prohibited act at least tends to disturb good order. And the infraction of such a law must be a breach of the peace.

That our liquor laws have been enacted for the preservation of peace and good order will scarcely admit of a doubt. From the earliest history of the State, the legislature has recognized the unrestricted retailing of intoxicating liquors as wholly inconsistent

with peace and good order, and has placed upon it restrictions and regulations not deemed necessary in the case of any other business. As early as 1838, this court, speaking through Judge Turley, reviewed [707] the legislation on the subject from 1779 up to that date, and showed that the retailing of intoxicating liquors had always been regarded as dangerous to public peace and productive of disorder; that there had never been a time in Tennessee when persons were permitted to engage in it except under regulations intended to minimize the evils and disturbances known to flow from it; that, with ever increasing anxiety, the legislature was constantly imposing new regulations upon the traffic; that the effort at first was to confine "this dangerous privilege" to persons of probity and trust by permitting none to exercise it except persons who had obtained a license to keep an ordinary; that this proving insufficient "to control within proper limits the evils resulting from retailing spirituous liquors," it was confined to those who could satisfy the county court that they were of sufficient probity and not addicted to any gross immorality; that this failed to accomplish the desired purpose, and the legislature, "being determined to find a remedy for the evil," enacted that the privilege should be confined to those who could, by creditable witnesses, show that they were of good moral character and were provided with bedding, stables, and house room for the accommodation of lodgers and travelers, and that their design was in good faith to keep a house of public entertainment, and that the retailing of liquors was not the principal object in asking a license; that the taxing of the privilege was next tried; that almost immediately the placing of [708] further restrictions upon the business was begun by requiring an oath not to sell to slaves and not to permit gaming on the premises. *Dyer v. State*, Meigs (Tenn.) 250.

A mere recital of these acts leaves no doubt that the legislature was all the time struggling to guard against and minimize the breaches of the peace which it recognized as inevitably resulting from, at least, the unrestricted sale of intoxicating liquors. This view is confirmed by subsequent acts, too numerous to mention, by which sales were prohibited at places and on occasions when and where breaches of the peace would be most annoying and dangerous to the public, and peace and order most important.

It may be said that the chief purpose of the original four-mile law was the protection of the morals and habits of the youth of the State while attending colleges and universities. As the prohibition was only against sales within four miles of incorporated institutions of learning, this may be

true, though, we think, there was also present in the legislative mind a purpose to protect these institutions from the disorders and disturbances of the peace which had been found to attend the sales of liquor in their vicinity. But whatever may be said of the purpose of the original act, no doubt can be entertained of the legislative purpose in passing the acts by which its operation was extended. It is a part of the history of the State that the object in the first extension, was to rid the people of crossroads groceries, with their attendant [709] turbulence and disorder, which had become a menace to the peace of almost every rural community, and that the idea of the four-mile law was seized upon to accomplish that result. So productive of disorder did the legislature evidently regard the business of selling liquor that it was thus confined to where the public could have the police protection afforded by incorporated towns and cities. These laws, as well as numerous ordinances passed by towns and cities, were upheld by this court as enacted for the preservation of peace and good order. And when, after years of trial, the legislature extended the law so as to make it apply to towns and cities, the conclusion would seem to be that it decided that, in the presence of liquor selling, even such police protection was not sufficient to preserve the peace as it should be preserved.

We are not unmindful that considerations of morals and health also enter into the passage of such measures. But the fact that other considerations have combined with a purpose to preserve the public peace and order do not denude them of their character as peace measures.

But, if any express legislative declaration was necessary to give these laws the character we have ascribed to them, we have such a declaration in a statute to which we have not yet referred. After prohibiting the retailing of liquor without a license, the legislature enacted, in effect, that a license should be issued to no person until he should have given a bond to keep the peace in his place of business. We [710] refer to Shannon's Code, section 993, subs. 2, by which the applicant for a license is required to give a bond, one of the conditions of which is that he will "keep a peaceable and orderly house." This act has never been repealed, and the present prohibition against selling liquors is confined to places within four miles of a schoolhouse. If, therefore, a place can be found not so located, the business may still be lawfully conducted, but no one is permitted to engage in it without giving the required bond. We thus have the legislature's characterization of the privilege of selling intoxicating liquors as a beverage as one attended with so much danger to the peace

of the community that those who would exercise it must first protect the public by giving a bond to keep the peace.

There can, we think, be no doubt that an act which the legislature has, since the earliest days of the State, permitted to be done only under such restrictions as it was thought would preserve the peace, as a condition to the doing of which it has required a bond to keep the peace, and which it has finally prohibited altogether, is necessarily a breach of the peace. We can conceive of no clearer case of a breach of the peace than an act which the legislature has first permitted to be done only under a peace bond and then has prohibited.

Again, the legislature has by the act of 1913 declared the engaging in the sale of intoxicating liquors to be a public nuisance, and we cannot escape the conclusion that it belongs to that class of nuisances [711] which this court has always treated as tending to disturb the peace and good order of the community. Long ago it was held that such public nuisances as bawdyhouses "endangers the public peace and good order, by drawing together profligate and disorderly persons" (*Childress v. Nashville*, 3 Sneed (Tenn.) 358), and that "generally any practices tending to disturb the peace and quiet of communities, or corrupt the morals of the people, are indictable as public offenses by the common law." *State v. Graham*, 3 Sneed (Tenn.) 134. And the language last quoted was cited in the very recent case of *Graham v. State*, 134 Tenn. 285, 183 S. W. 983, in support of the holding that the conducting of moving picture shows on Sunday was a public nuisance and an indictable offense. In the latter case, replying to the contention that it was not shown that the public had been disturbed, the court, through Mr. Justice Buchanan, said:

"The proof in the present case makes it clear that the picture-show business of the plaintiff in error was conducted by him on successive Sundays, to the observance of passers-by in the matter of seeing the large crowds going in and out of the show, and the show was located on Market street, a leading thoroughfare of the city of Chattanooga."

Clearly, open saloons, at least when conducted in violation of law, in the same way as bawdyhouses, "endanger the public peace and good order by drawing together profligate and disorderly persons." And certainly, if the peace and quiet of the community [712] is disturbed by seeing crowds going in and out of picture shows on Sunday, less cannot be said of lawless saloons along public streets. On all days except Sunday, picture shows are lawful and the passing in and out of them of orderly crowds has no tendency to disturb peace and tranquility. A different

rule applies on Sunday, because the law secures to the public a higher degree of peace and quiet on that day than on other days. The principle is that that is a disturbance of the peace which interferes with the degree of peace and quiet which the law contemplates shall prevail at a particular time and place; hence the well-recognized rule that what may not be a breach of the peace at one time and place may very well be such a breach at another time and place. *Delk v. Com.* 166 Ky. 39, Ann. Cas. 1917C 884, 178 S. W. 1129, L.R.A.1916B 1117. The constant violation of the Sunday laws, by acts entirely lawful and orderly on other days, disturbs the peace and tranquility of the community because it is a flaunting in the face of the public of a disregard for the laws of the land and the rules of organized government. The open violations of laws intended to preserve peace and good order necessarily breed in the public mind a feeling of insecurity, and thus disturb the peace and tranquility of the community. When we apply these principles to an open saloon, at a place where it is unlawful to sell liquor at any time, the conclusion is obvious. Such a place is a constant disturber of peace and good order. Nor are we without high authority [713] from other States for this conclusion. The Supreme Court of Georgia has said:

"A place where intoxicating liquors are sold in violation of law is a menace to the peace, good order, and happiness of any community, and legislation declaring such a place to be a public nuisance is wise and salutary." *Legg v. Anderson*, 116 Ga. 401, 42 S. E. 720. See also *State v. Tabler*, 34 Ind. App. 393, 72 N. E. 1039, 107 Am. St. Rep. 256.

It is said, however, that the act declaring a saloon a nuisance provided the method by which such nuisances should be abated, and that the sheriff is not authorized to institute proceedings for that purpose. But the remedy provided is merely cumulative and does not abrogate any other remedy. It is rather to be used when, through the neglect of officials or for other reasons, the law is not being enforced in the ordinary way. The sheriff's duties are therefore the same that they were before the passage of that act. And the declaration of the act that the conducting of a saloon is a nuisance was nothing more than a restatement of what was already the law. Ever since the sale of intoxicating liquors as a beverage has been unlawful, the open saloon has been a public nuisance of that class which disturbs the public peace.

Another line of authorities leads to the same conclusion. There can, we think, be no disagreement with the statement that the keeping of a disorderly house is a breach of

the peace. The accepted definition of a disorderly house is, "Any place where illegal [714] practices are habitually carried on is a disorderly house." 2 Words and Phrases (Second Series) 76, citing numerous cases. These authorities establish the rule that a place in which liquors are sold in violation of either prohibitory or regulatory statutes is a disorderly house. And, as we have seen, when saloons were permitted under the law, our own legislature regarded them as so likely to be disorderly houses that every applicant for license was required to give bond to keep a peaceable and orderly house. We entertain no doubt, therefore, that in Tennessee a saloon open, equipped, and ready for business is a threat to breach the peace if it is not in fact, itself a breach of the peace.

Whatever may be thought of a single sale of liquor as a breach of the peace, there can be no doubt that the running of an open saloon in defiance of a law is a nuisance of the class that disturbs public order, and that such a place is a disorderly house. A bawdy-house, as we have seen, is a menace to peace and good order, and therefore a breach of the peace. And counsel for defendant themselves put the unlawful sales of liquor in the same class by coupling them with "the kindred and concomitant offenses of gambling and keeping bawdyhouses."

The argument is now made, however, that violence, actual or threatened, is a necessary ingredient of a breach of the peace, and several authorities are pressed upon our attention. If it is meant by this that the act complained of must either itself be violent, [715] or of such a nature as that its tendency is to provoke or incite or lead others to violence or turbulence of some kind, the contention is correct as to those breaches of the peace which invade the security and protection of individuals. But the insistence seems to be that no act can be a breach of the peace which has not in itself some element of violence. And to this we cannot agree. Such a holding would exclude the possibility of a breach of the peace by the use of words, no matter how certain it is that such words will provoke violence, and many other acts universally recognized as breaches of the peace. Replying to just such a contention, it has been said:

"Actual personal violence is not an essential element in the offense. If it were, communities might be kept in a constant state of turmoil, fear, and anticipated danger from the wicked language and conduct of a guilty party, not only destructive of the peace of the citizens, but of public morals, without the commission of the offense. The good sense and morality of the law forbid such a construction." *Davis v. Burgess*, 54 Mich. 517, 20 N. W. 542, 52 Am. Rep. 828.

Counsel quote from 4 Am. & Eng. Enc. of Law (2d ed.) 902, "Actual or threatened violence is an essential element of a breach of the peace." But this must be read in connection with the statement on the next page, "at any rate, various acts having a tendency to produce a breach of the peace are themselves breaches of the peace." And in a note to the portion of the text quoted by counsel it is said: "Actual personal violence, [716] is not an essential element in the offense of a breach of the peace;" and *Davis v. Burgess*, 54 Mich. 517, 20 N. W. 542, 52 Am. Rep. 828, is cited. Taken together, these quotations mean no more than that, while the author thinks violence an essential element of the offense, the necessary violence is present either when the act done is itself violent, or when, though not violent, it is of such a nature as to tend to result in or provoke violent acts, and thus threatens violence. This is manifest when we examine the two cases cited in support of the text quoted by counsel. Both cases expressly decide that the act itself need not be violent, but, if it is likely to result in violence, it is a disturbance of the peace. Thus in one of them (*State v. Warner*, 34 Conn. 276) the court said:

"It cannot be denied, and is not denied on the part of the accused, that his language was sufficiently scurrilous, abusive, and indecent, and calculated to stir up and provoke contention and strife, and so far to disturb the peace."

The other case is *Ware v. Branch Circuit Judge*, 75 Mich. 496, 42 N. W. 1000, which was a prosecution for a breach of the peace, and it was said:

"It is not necessary that the peace be actually broken to lay the foundation to such a proceeding. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required."

Counsel also refer to 8 Ruling Case Law, p. 285, where it is said:

[717] "Breaches of the peace generally manifest themselves by some outward, visible, audible, or violent demonstration, not from quiet, orderly, and peaceable acts secretly done, though such acts may be *male prohibita*. Hence the carrying of arms in a quiet, peaceable, and orderly manner, concealed on or about the person, is not a breach of the peace. Neither does such an act, of itself, tend to a breach of the peace."

The language quoted is taken from *Roberson v. State*, 43 Fla. 156, 29 So. 535, 52 L.R.A. 751, and reference is made to *Judy v. Lashley*, 50 W. Va. 628, 41 S. E. 197, 57 L.R.A. 413. And these two cases do so hold. There is, of course, force in the argument that that cannot be a breach of the peace which is done secretly and is known to no

one except the offender. As long as he merely conceals weapons about his person, no one can be actually disturbed by his act. This is true, not because the act itself lacks violence, but because it is secret, and because one's peace cannot be disturbed by that of which he has no knowledge. But the case is very different when an unlawful act is done openly, and is of such a nature as, in the natural course of events, it is calculated to lead to disturbances of peace and good order. So whether we would hold the carrying of concealed weapons a breach of the peace or not, these cases are clearly not in point. Moreover, the statement quoted immediately follows a statement of the law applicable to breaches of the peace in almost [718] the exact language we have quoted from *Davis v. Burgess*. Nor is our own case of *Hurd v. State*, 119 Tenn. 584, 108 S. W. 1064, in point. In that case there was no effort to justify the attempted arrest upon the ground that Hurd was carrying a pistol. The attempt was to arrest for an assault committed, but not in the presence of the officer.

But counsel say that in Massachusetts and Kentucky it has been directly decided that the unlawful sale of liquor is not a breach of the peace. *McLennon v. Richardson*, 15 Gray (Mass.) 74, 77 Am. Dec. 353, it is said, is authority for this contention. We do not think so. The question in that case was whether an officer had the right to break open the doors of a shop in which, it was alleged, the proprietor sold intoxicating liquors contrary to law, and was at the time engaged in selling and drinking intoxicating liquors and in gaming, and to arrest, without a warrant, those found present. The court held that he did not, but called the attention to the fact that it was not alleged that, at the time, there was any noise or disorderly drinking going on in the shop. It was thus made plain that the officer acted merely upon suspicion or information received from others. There was therefore no offense either committed or threatened in his presence. And an officer has no more right to arrest on suspicion or information, without a warrant, for a breach of the peace than for any other offense. Hence there was no occasion to discuss, and the court did not discuss the question as to what constitutes a breach of the peace.

[719] Besides, it must be remembered that we have not held that an officer may break open doors and force an entrance into any place upon suspecting or being informed that a breach of the peace will then be committed or threatened in his presence.

The Kentucky case referred to is *Cornett v. Com.* (Ky.) 78 S. W. 858. But that case decides nothing except that the unlawful sale of liquor is not a breach of the peace to

prevent which one could, under the law of Kentucky, be required to give bond to keep the peace. And this is exactly what we held under the Tennessee statutes. By the statute of Kentucky (Cr. Code Prac. sections 382, 391), such a bond can be required only to prevent an offense against the person or property of another, or a felony or an act of such violent character as to endanger human life. In holding invalid a bond which undertook to bind the defendant not to violate the liquor laws, the court said:

"Under these provisions, it has been held that a conviction of the defendant of an offense not amounting to a felony, and not involving a breach of the peace, is not a breach of the bond."

But this must be read in view of the case before the court. So read, it only means that the unlawful sale of liquor was not an offense against the person or property of another, or a felony, or an act of such violent character as to endanger human life, and hence did not belong to that class of breaches of the peace to prevent which the statute authorized a bond [720] to be taken. We are the more ready to put this construction upon the language quoted because that court, in later cases, is clearly committed to the rule that violence is not an essential element of a breach of the peace. The case of *Delk v. Com.* 166 Ky. 39, 178 S. W. 1129, L.R.A. 1916B 1117, holds that indecent and obscene language used in the pulpit by a preacher is a breach of the peace, and, after a most comprehensive review of the authorities, concludes that actual violence is not an essential element of the offense, and that "not only all violations of the public peace or order, but acts tending to the disturbance thereof," are breaches of the peace. To the same effect are 5 Cyc. p. 1024, *Bishop's New Criminal Law*, vol. 1, section 539, and *Roberson's Criminal Law*, vol. 2, section 581, and 8 *Ruling Case Law*, section 305.

This brings us to the case of *Robison v. Miner*, 68 Mich. 549, 37 N. W. 21, the only case to which our attention has been called in which there is, in our opinion, a direct holding that the unlawful sale of liquor is not a breach of the peace. And in that case the court was divided on the question. The constitutionality of a statute of Michigan regulating the liquor traffic was involved (*Laws* 1887, No. 313). All of the judges agreed that some of its provisions were invalid. They disagreed, however, as to others. One of the sections (section 17) about which they differed was that providing that all places, excepting drug stores, where liquors were sold, should be closed on [721] certain days and during certain hours on all other days; that the officers should close all places found open at such times; that persons vio-

lating these provisions should be deemed guilty of a breach of the peace and arrested without process. The majority opinion held the provisions allowing the officers to close the places and make arrests without process invalid, saying:

"Under our system we have repeatedly decided, in accordance with constitutional principles as construed everywhere, that no arrest can be made without warrant except in cases of felony, or in breaches of the peace committed in the presence of the arresting officer. This exception, in cases of breaches of the peace, has only been allowed by reason of the immediate danger to the safety of the community against crimes of violence, and it was confined, even in such cases, to instances where the violence was committed in the presence of the officer. There are not many such cases. The common and statute law provide for very few specified breaches of the peace, and there are none that are not specified. An indictment charging a person as a peace breaker, and not with any specified crime, would be good for nothing. Assaults and riotous conduct make up the largest part of the list. But there can be no breach of the peace within the meaning of the law that does not embrace some sort of violent as well as dangerous conduct. The manifest purpose of this statute is to bring certain [722] things that are not breaches of the peace within that denomination to avoid the necessity of a warrant. But, as already suggested, the Constitution cannot be so evaded. The cases covered by the statute present some peculiar features. No doubt keeping open places of sale late in the evening may lead to breaches of the peace, and, when they actually occur in an officer's presence, arrest may be made for that."

In the face of the authorities we have cited, we cannot assent to the proposition that actual violence is necessary to constitute a breach of the peace. And this is the premise upon which the opinion is grounded, and without which both its reasoning and its conclusion are unsound. Nor can we agree that, if there is now a known list of breaches of the peace provided by "the common and statute law," that list cannot be added to by further legislative acts. If there are now offenses, which by "statute law" are breaches of the peace, and for which arrests may be made without a warrant, we perceive no reason why future statute law may not put other offenses in the same category. Moreover, the opinion quoted wholly ignores what, as we have seen, practically all the authorities hold, that an unlawful act which tends to produce or bring about a breach of the peace or to disturb good order is itself a breach of the peace. Otherwise the statement that "no doubt the keeping open places of sale

late in the evening may lead to breaches of the peace," would have led to the conclusion that such unlawful keeping open was a breach [723] of the peace even without the aid of a statute so declaring.

We are clearly of the opinion that much the better reasoning and the sounder conclusion are to be found in the opinion of Chief Justice Sherwood in the same case. He held the provisions in question valid, but at the same time, as we think, fully recognized every constitutional right that belongs to the citizen. In addition to the provisions mentioned, there were also provisions authorizing officers to close such places if certain requirements as to bond, taxes, and other things had not been complied with. Speaking of these, the Chief Justice said:

"Neither do I think it competent, under our Constitution, for the legislature to authorize a sheriff, marshal, constable, or police officer to close up a man's business at a time and place where and when he is allowed, under the law, to carry on such business upon complying with certain precedent conditions, when they have been performed, because such officer thinks he has good reason to believe that the dealer has been or is carrying on his business unlawfully, or has incurred a penalty or forfeiture in the manner he is carrying it on, as is permitted under section 7 of this act. A lawful business can only be interfered with, or a person's property taken from him or destroyed, after the owner has been served with proper process, and he has had his day in court, and been allowed the benefit and advantages of due process of law, and judgment of condemnation has passed against [724] him. It is then, and not till then, the ministerial officer can act, and such action must always be confined to the execution of the judgment and mandate of the court. The protection the law gives to the business and property of the citizen is not left to the discretion of a sheriff, a marshal, or a policeman, but to the law of the land, with courts, and officers under their direction to execute it. Of this protection to private property no owner can be lawfully deprived for a single moment."

But after quoting section 17, which contained the provisions first referred to above, he said:

"This section prohibits the business being done at the time and in the places named, or the places being kept open, and a violation of the law in these respects is declared to be a breach of the peace, and the offense is punished accordingly. . . . The offense, too, is one that only needs to be seen to be detected. . . . If . . . the officer is not permitted to close the doors of places of this sort, where and when it is forbidden to

open them, or to carry on the business, and the offense is a breach of the peace, under such circumstances it is very clear that the community and society would be deprived of the most beneficial results intended by the legislation. To close the doors of saloons opened during the hours specified in this section is not, as is contended, destroying a man's lawful business, but to prevent him from committing a breach of the peace by doing an unlawful act, one forbidden and made criminal by law. I think the [725] legislature may well authorize the officer to close the door of the saloon under such circumstances. I think this power is included in the power to prohibit, which has long since been adjudicated in this State to exist. I see nothing in this section unconstitutional or objectionable, nor anything more authorized than a reasonable exercise of the police power of the State will permit.

. . . There is no doubt that, under the law as established by this court, it is entirely competent for an officer to make arrests without warrant of a person who is committing a breach of the peace in his presence, or is about to commit the same. Such was the rule at common law, and in my judgment it is good common sense. . . . It is the common knowledge of mankind that frequent quarrels, violence, and crime are induced by the excessive use of intoxicating liquor in places where it is kept and sold. And it is impossible to say that, when such places are kept open in the nighttime until after peaceful citizens have retired to rest, it is not a breach of the peace, in fact, and is no less such when made so by law; and when the offense is observed by those charged with the duty of maintaining the peace and enforcing the law, and who may serve process, I have no doubt of their power to make the arrest of the offender without process, and I cannot therefore hold the seventeenth section of the act objectionable in that regard."

We think the clear distinction thus drawn between the protection which the law gives to one and his [726] property while engaged in a lawful business and the power which officers of the law may exercise toward him and his property to prevent him from using that property to breach the peace by committing an unlawful act is entirely sound. We would not detract, by one word, from the security which the Constitution guaranties to every man in his person and property. But when a man embarks himself and his property in the conduct of a business which it is unlawful to conduct, both become subject to such force as may be necessary to prevent his carrying out his unlawful purpose. The Constitution gives him no right to violate and defy the law, and when he has been pre-

vented from doing that which is unlawful he has been denied no constitutional right. The business of selling intoxicating liquors as a beverage has been outlawed in Tennessee. He who engages in it makes himself subject to the penalties of the law just as any other lawbreaker. He cannot use his property in such business and expect it to be protected by the law with the same sacredness that property held and used for lawful purposes is protected. The majority opinion in the case referred to is the only case we have seen which we regard as deciding that the unlawful sale of liquor is not a breach of the peace. But believing that it is based on the fundamental error that actual violence is necessary to such an offense, and that it is therefore out of line with the overwhelming weight of authority, we find ourselves unable to follow it or adopt its conclusions. Moreover, [727] we do not think this majority opinion can be reconciled with the later ruling of the same court in *Ware v. Branch*, which we have already quoted. And in the still later case of *Scougale v. Sweet*, 124 Mich. 311, 82 N. W. 1061, the question was whether the playing of baseball on Sunday, which, by a statute similar to our Sunday statute, was made unlawful under a small penalty, but was not expressly declared to be a breach of the peace, could be held to be a breach of the peace. After a careful examination of the authorities, the court accepted the definition adopted by this court in *Galvin v. State*, 6 Cold. (Tenn.) 294, *supra*, and said:

"Where the statute prohibited the arrest of any person on Sunday, except in cases of treason, felony, and breaches of the peace, a ball game upon Sunday was held to be a breach of the peace. In *re Carroll*, 9 Ohio Dec. (Reprint) 261, 12 Cinc. L. Bul. 9. Under our statute, and under the authorities referred to, this game of baseball was a breach of the peace."

Surely it cannot be said that a saloon, at a place where the law prohibits the sale of intoxicating liquors, is less unjustifiable or less unlawful than a game of ball on Sunday, and undeniably it tends with no less directness to break the peace. It is true that in *Yerkes v. Smith*, 157 Mich. 557, 122 N. W. 223, the majority opinion in *Robison v. Miner* was quoted with approval. But *Scougale v. Sweet* was also approved. The holding was that a game of baseball on Sunday is not necessarily a breach of the peace, though it may be and is when played in a public [728] place and attended by a crowd assembled unlawfully and tumultuously so as to create disorder. This conclusion was reached because the statute did not make the playing of such a game an indictable misdemeanor, but only made it unlawful and

subjected the offender to a penalty. For this reason it was said that, to authorize an officer to make an arrest, there must be some overt act of violence or disorder. This is far from a holding that an act which the legislature, for the purpose of preserving peace and good order, declares to be a misdemeanor, is not a breach of the peace.

True our prohibitory statutes do not, in terms, declare the unlawful sales of liquor to be breaches of the peace. But, ever since it was first found necessary to regulate the liquor business, this court has consistently held the statutes and ordinances providing such regulations to be peace measures; that is, measures adopted for the purpose of preserving peace and good order. At the same time it was declared, at least 50 years ago, in accord with practically all the authorities, that any unlawful act which disturbs or tends to disturb peace and good order is a breach of the peace. Certainly no strained or unreasonable construction is required to say that the violation of the law which the legislature found it necessary to enact in order to preserve peace and good order disturbs or tends to disturb peace and good order. And when, after this court had held these regulations to be for the preservation of peace and order, the legislature [729] deemed it necessary to entirely prohibit, by law, the business which it had previously permitted only under a bond to keep the peace, it cannot be doubted that the purpose of the latter law was the same, and that offenses under it must be placed in the same category.

In *re Kellam*, 55 Kan. 700, 41 Pac. 960, is pressed upon our attention. But that case is not in conflict with anything we have decided. It merely holds invalid an act which undertook to authorize officers to make an arrest, without a warrant, not only upon seeing an offense committed, but also "upon reasonable suspicion that an offense has been committed." We have not, however, held that an arrest, without a warrant, can ever be rightfully made on suspicion or on information received from others. On the contrary, we have held exactly the opposite, saying distinctly that, to authorize an arrest for a misdemeanor not committed in the presence of an officer, a warrant is always necessary. In fact, we have not held that it was the duty of the defendant to do anything on suspicion or information except to go to the places which he suspected or had reason to believe were being run as saloons, and to observe what any customer could observe, and then to take only such action as would be justified by what he saw.

Counsel argue that it cannot be said that the unlawful sale of liquor is a breach of the peace because, they say, a proper con-

struction of the statutes excludes such a conclusion. The insistence is that because [730] the legislature has limited the right of the sheriff to arrest and require security to keep the peace to cases in which the accused is armed for the purpose of committing certain offenses, and has provided for such security in no other cases except upon the complaint, before a magistrate, of one whose person or property is threatened, an intention has been expressed that nothing else shall be considered breaches of the peace. We do not agree to this. Rather do we think the legislature, recognizing the great number and variety of acts which may constitute that offense, did not deem it necessary to the public peace that, in all cases, security should be required. Those offenses which were deemed to be most seriously menacing in their nature were selected, and as to them the sheriff was required to take steps to place the offenders under bond. In addition, a method was provided by which one whose person or property was threatened could himself take steps to that end. All other breaches of the peace were deemed sufficiently guarded against by requiring the sheriff to prevent and suppress them, and authorizing him to make arrests, without warrants, when they are threatened in his presence. Moreover, when the business of selling liquor was lawful, it was, as we have seen, only lawful after a bond had been given to keep the peace. Hence, even if counsel were right in the contention that in Tennessee the only breaches of the peace are those things as to which the legislature has protected the public by providing means of requiring a bond [731] to keep the peace, the conducting of a saloon would come clearly within the rule. It is, in fact, conspicuously within the rule; for it furnishes, we believe, the only example of requiring a peace bond without some sort of judicial proceeding.

Counsel complain that our opinion leaves them in doubt as to what the sheriff should do after arresting a man for a threatened sale of liquor. But if it is borne in mind that such arrests are preventive rather than punitive measures, we think there can be no difficulty on that score. Circumstances can be fancied or imagined under which the performance of any of the duties devolving on the sheriff may become embarrassing and irksome. But practically there is no serious trouble. We have held that the duty of the officer to make these preventive arrests arises only when he finds one under such circumstances as amount to a threat to sell liquor unlawfully. We have not and cannot undertake to set out all the circumstances which will amount to such a threat. We have, however, used a saloon equipped, open, and ready for business as an example, and held

that it was the duty of the officer to arrest the person in charge for the purpose of preventing the threatened sales of liquor. We do not mean to say that there are not other circumstances which would justify such arrests. We selected open saloons for an illustration because the record showed that they existed and ought to have been dealt with by the defendant. We have not held that such arrests should be followed by confining the [732] offender in jail. We said in the course of argument that the Alabama court had held that there might be circumstances under which a person arrested to prevent a breach of the peace might be rightfully confined in jail. But this was said merely to illustrate the point that such, and only such, force is justified as is reasonably necessary to prevent the threatened offense. We can well imagine circumstances under which, in times of great excitement, such imprisonment might be the only practicable means of preventing great disorder and turbulence. But we think it can rarely, if ever, be necessary to prevent threatened sales of liquor, and we do not now hold that it can ever be justified in such cases. The duty of the sheriff, when he has seen no sales made, but makes an arrest to prevent sales threatened in his presence, is to prevent the sales which the offender is then ready and equipped and threatening to make. When this is accomplished, his duty for that occasion is ended. He may do this by removing the liquors from the place. The proprietor will then not be equipped to sell and the sales threatened in the presence of the officer will have been prevented, and there will be no further occasion to detain the person arrested. Or he may close the place, and thus prevent the sales, and then let the person arrested go free. We said in our former opinion that he will have the right to close the place and keep it closed until the purpose to conduct it as a saloon is abandoned. This perhaps does not quite accurately express what we meant to say. [733] He should keep it closed until the danger of the sales then threatened has passed. This will be accomplished when the liquors have been removed and the necessity of keeping the place closed will no longer exist and that particular incident will be ended. In other words, he must do what is necessary to prevent the sales then threatened, and leave future sales and future threats to be dealt with as they arise. In practice, a few such arrests will effectually put an end to open saloons, and the same good judgment which is necessary to the discharge of his other duties will enable him to perform these duties without serious difficulty.

These are the things which it is the duty of a sheriff to do to prevent violations of

law. They involve the exercise of the undoubted power of the government to prevent unlawful acts as well as to punish for offenses committed. Speaking of this power and the wisdom of its use, the Supreme Court of the United States has said:

"Certainly it seems to us to be quite as wise to use the processes of the law and the powers of the court to prevent the evil as to punish the offense as a crime after it has been committed." *Eilenbecker v. District Ct.* 134 U. S. 31, 10 S. Ct. 424, 33 U. S. (L. ed.) 801.

But it seems to be argued by counsel that it is a serious invasion of the rights of citizens to permit the sheriff, without process, to seize liquors or close places of business for the purpose of preventing breaches of the peace. But if, for that purpose, a [734] man may be arrested, and thus deprived of his liberty, he certainly cannot complain because he is deprived of a mere property right which he is using as a means of breaching the peace. That, for the purpose of preventing a public offense, an officer may seize and detain the things about to be used in the commission of the offense, is no new doctrine. The rule is well stated in a headnote to *Spalding v. Preston*, 21 Vt. 9, 50 Am. Dec. 68, which fairly interprets the decision in that case as follows:

"The officers of government have authority, derived from the general rights of the government, without any statute whatever upon the subject, to exercise all necessary force for the prevention of crime, either by the arrest of individuals, or by the seizure and detention of the instruments for committing crime."

More or less to the same effect are *Shanley v. Wells*, 71 Ill. 78; *O'Connor v. Bucklin*, 59 N. H. 589; *Ross v. Leggett*, 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608; *Ex p. Morrill*, 35 Fed. 261.

In a supplemental brief, counsel for defendant have quoted from *Quinn v. Heisel*, 40 Mich. 578, as follows:

"We are of opinion that a threat or other indication of a breach of the peace will not justify an officer in making an arrest, unless the facts were such as would warrant the officer in believing an arrest necessary to prevent an immediate execution thereof, as where a threat is made coupled with some overt act [735] in attempted execution thereof. In such cases the officer need not wait until the offense is actually committed. To justify such arrest the party must have gone so far in the commission of an offense that proceedings might thereafter be instituted against him therefor, and this without reference to any past similar offense of which the person may have been guilty before the arrival of the officer. The object of permit-

ting an arrest under such circumstances is to prevent a breach of the peace, where the facts show danger of its being immediately committed."

The only thing in this quotation which is not fully in accord with what we have held is the statement that, "to justify such an arrest, the party must have gone so far in the commission of an offense that proceedings might thereafter be instituted against him therefor." We have not had access to the statutes of Michigan, but the numerous Michigan cases to which our attention has been called make it plain that there is, in that State, no statute like ours, expressly authorizing an arrest for a threatened breach of the peace. Viewed in the light of this fact, the language quoted strongly supports our conclusion in this case. Regarding the right of an officer, by the common law, to make an arrest, without a warrant, as confined to breaches of the peace actually committed in his presence, the court nevertheless recognized his preventive duty to the extent of holding that his duty to interfere begins whenever any act is done which amounts to an attempt to commit the offense. But treating this as a [736] correct statement of the common-law rule, our legislature evidently intended to enlarge the preventive duties of the officer when it authorized him to arrest for a threatened breach of the peace. Under the common law, the Michigan court held that an attempt would justify an arrest. Under our statute, a threat is put in the same category.

It is insisted that the sheriff is not the only peace officer, that the judges and others are also conservators of the peace, and that, if the sheriff is onerated with the duties we have held belong to his office, the same duties rest upon these other conservators of the peace. Of course, we are not now called on to define the duties of any officer except a sheriff. But we may remark that, while there are many officers who, by virtue of their offices, are also conservators of the peace, our statutes, in line with the nature of the office from the most ancient times, make the sheriff the chief conservator of the peace in his county. His official character has been shown by the authorities already quoted. We have held that he is charged with the duties described not merely because he is called by the statute a conservator of the peace, but because they have always belonged to his office, and because, in express terms, our statutes make it his duty to suppress and prevent public offenses and breaches of the peace. It is sufficient now to say that not all conservators of the peace are charged with all the duties of the sheriff. The making of an arrest is only one of the things to be done for the purpose [737] of preserving the peace.

Every officer charged with the duty of doing any of these things is, to that extent, a conservator of the peace. But, in order to determine what are his duties, we must look not only to the fact that he is a conservator of the peace, but to the particular duties which the law attaches to his office.

It is insisted that the case of *McCrowell v. Bristol*, 5 Lea (Tenn.) 685, is authority against the right of an officer to close a saloon. But that case was decided when the saloon business was lawful in Tennessee, and all that was held was that municipal authorities could not, without judicial proceedings, declare a saloon a nuisance on account of the manner in which it was conducted, and abate it. But now the saloon business is unlawful. And it has never been the law in Tennessee that officers could not stop any public offense committed or about to be committed in their presence.

It is finally insisted that no willful neglect of duty has been shown. On this question defendant is precluded by his admission that he did nothing in Memphis except to serve process. He may not have understood some of his duties as we have defined them. We have not, however, removed him merely because he failed to make arrests for threatened violations of the law. In view of the advice given him by counsel, and of the fact that there had been no previous decision of the question, if he had made an honest effort to suppress and prevent violations of the law by doing the other things we have held it was his duty [738] to do, we would probably hold that his failure in this respect was not a willful neglect of duty, and that he should not be removed. But the record shows and he admits that he did nothing but serve such process as was placed in his hands. And any man of intelligence, who, as sheriff, under the conditions disclosed by this record, did nothing but serve process, must be deemed to have willfully failed and neglected to perform the duties of his office.

There is nothing in what we have decided to justify the excited statement of counsel that there is involved a "controversy between the people and their liberties, and a doctrine which would seriously oppress the one and impair the other." We have only applied to the class of offenses under consideration the same rule that has from time immemorial been applied to other offenses of no more gravity and fraught with no more danger to the public. We have merely said that it is the duty of the faithful officer to interfere to prevent offenses of this kind, just as he has always interfered when similar offenses were threatened in his presence. The rules we have laid down authorize the interference with a citizen only when he is

about to do that which the law denounces. And we refuse to recognize as one of the liberties guaranteed by any government to its citizens the privilege of violating its laws. Nor is there any element of oppression of the people in making effective the mandate of their own laws that, for the good of the public, they shall not do certain things.

[739] After examining the questions involved with the care merited by their importance and the earnestness and ability of counsel, we are satisfied with the conclusions heretofore announced, and the petition to rehear will be dismissed.

NOTE.

In the reported case the court, in removing a sheriff from office for a failure to enforce the laws against the sale of intoxicants, enters on a most comprehensive discussion of the duty of a sheriff to act of his own initiative for the enforcement of the law. It is held that while he need not "patrol the county" or employ detectives to ferret out crime, he is more than a mere process server, and is charged with an affirmative duty to prevent public offenses and suppress breaches of the peace. He must be reasonably alert with respect to possible violations of the law and is not entitled to wait until they come to his personal knowledge but must follow up information received from any source. It is also held, after a full discussion, that the open sale of liquor in violation of law is a breach of the peace which the sheriff as the chief peace officer of the county is empowered and required to suppress without awaiting the initiation of a prosecution by others or the issuance of a warrant. The failure of a public officer to enforce the law as a ground for his removal is fully discussed in the note to *State v. Donahue*, Ann. Cas. 1913D 18. See also the more recent case of *State v. Howse*, Ann. Cas. 1917C 1125, and *State v. Linn*, reported ante, this volume, at page 139.

PEUSER

v.

MARSH.

New York Court of Appeals—July 11, 1916.

218 N. Y. 505; 118 N. E. 494.

Conditional Sales — Remedies of Vendee — Breach of Warranty.

Where the seller of a chattel by conditional sale seeks to reclaim it by means of an action of replevin, the buyer may defend by pleading a breach of warranty by way of recoupment
Ann. Cas. 1918B.—58.

in diminution or extinction of the price, as provided by the Uniform Sales Act (Laws 1911, c. 571) § 150.

[See note at end of this case.]

Peuser v. Marsh, 167 N. Y. App. Div. 604, affirmed.

Appeal from Appellate Division of Supreme Court, Third Judicial Department.

Action by Peter C. Peuser, plaintiff, against Elizabeth D. Marsh, defendant. Judgment for defendant at Special Term of Supreme Court. Judgment reversed by Appellate Division of Supreme Court. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

Thomas B. Merchant for appellant.

H. J. Hennessy for respondent.

[507] WILLARD BARTLETT, Ch. J.—This appeal presents the question whether in the case of a conditional sale, where the seller seeks to reclaim the goods by means of an action of replevin, the buyer may defend by pleading a breach of warranty by way of recoupment in diminution or extinction of the price. By the Uniform Sales Act, adopted in this state in 1911 and made article V of the Personal Property Law (Laws of 1911, ch. 571), it is expressly provided that where there is a breach of warranty by the seller the buyer may at his election "accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price." (§ 150.) It is contended, however, that this provision does not apply to conditional sales at all where the title has not passed from the seller to the buyer; or, if it does apply to conditional sales, it is only where the seller sues for the purchase price of the goods and not where he is endeavoring to get them back.

In the present action the plaintiff sues to recover possession of a piano, together with a stool and scarf. The complaint alleges that the said chattels were purchased by the defendant from an agent of the plaintiff under a contract of conditional sale whereby the title was not to vest in the defendant until the payment of \$260, of which \$25 was to be paid in merchandise, \$16 in cash, and the balance in monthly installments of \$6 each, and that the defendant has failed to pay the sum of \$141, with accrued interest thereon, which was due and payable on the 1st day of August, 1914. Each of the defenses which is assailed by the demurrer sets up certain warranties and the breach thereof to the defendant's damage in the sum [508] of \$200. The defendant further avers that, relying upon the warranties, she had paid to the plaintiff \$119 to apply upon the purchase price, and that by reason of the premises the defendant has become the own-

er of the piano and the plaintiff is indebted to her in the sum of \$59. This is in effect a plea that the breach of warranty has operated to extinguish any further liability on account of the purchase price. The position of the defendant is that she has paid all that she is legally obligated to pay under the contract, and, therefore, that she is entitled to consider and does consider the goods as her own. She claims to be exercising the right given by the statute to the buyer where there is a breach of warranty by the seller, namely, to keep the goods and set up the breach of warranty by way of recoupment in extinction of the price.

It is clear that conditional sales fall within the purview of the Uniform Sales Act (§ 82). Although replevin is strictly a possessory action *Roach v. Curtis*, 191 N. Y. 387, 84 N. E. 283, and the term *recoupment* generally signifies a deduction from a money claim (*Deeves v. Manhattan L. Ins. Co.* 195 N. Y. 324, 336, 88 N. E. 395) the right to possession in a case like this depends upon the payment of the purchase price; and as the statute provides that the purchase price may be extinguished (which is equivalent to saying it may be paid) by recouping such damages as the buyer may have sustained by the seller's breach of warranty, we can see no sufficient reason for holding that such a defense is not available in a replevin suit. Where a question as to the construction of a statute relating to legal procedure is evenly balanced in other respects, that view should prevail which tends to promote the welfare of litigants by preventing circuitry of action. It is obviously to the interest of both parties to a contract of conditional sale like that in suit here to have their respective claims adjusted and determined in one law suit; and we think that the legislative intent to permit this to be done is discoverable in the language of the statute—whether the [509] seller sues for the purchase price or sues to recover back the goods.

The judgment of the Appellate Division should be affirmed, with costs, and both questions certified answered in the negative.

Hiscock, Chase, Cuddeback, Hogan, Cardozo and Pound, JJ., concur.

Judgment affirmed.

NOTE.

Right of Conditional Vendee to Recover Damages for Breach of Warranty.

In *New Hamburg Mfg. Co. v. Webb*, 23 Ont. L. Rep. 44, 20 Ann. Cas. 817, it was held that a conditional vendee cannot, before title has vested in him, recover general damages for a breach of warranty. The same rule has been laid down in several recent cases.

Thus in *Bunday v. Columbus Mach. Co.* 143 Mich. 10, 5 L.R.A. (N.S.) 475, wherein it appeared that certain machinery was sold on the instalment plan, the title to remain in the seller until the price thereof should be paid in full, it was held that the contract was executory in character and that an action for a breach of warranty would not lie in advance of the actual transmission of title.

So in an action of replevin by the vendor to enforce a breach of the condition by a recovery of the property, it has been held that the vendee could not defend by recoupment or set-off for a breach of warranty, under a code provision allowing to be set off "any matter arising out of the plaintiff's demand, and for which the defendant would be entitled to recover in a cross action;" or "any matter growing out of the original consideration or any written instrument, for which the defendant would be entitled to recover in a cross action." *Blair v. Johnson*, 111 Tenn. 111, 76 S. W. 912, wherein the court said: "In these actions it is contemplated that the plaintiff's demand shall be abated or lessened by that of the defendant. But how can this be, when the two actions proceed on wholly different lines, the plaintiff, by a possessory action, demanding the possession of certain property, and the defendant demanding damages by reason of the breach of a contract concerning that property? Take, for illustration, the facts of the present case. The sale of the wagon was upon a condition. The condition has failed, and the plaintiff has, undoubtedly, a right to the possession of the property. There was a warranty of soundness, and, assuming as true the matters which were offered to be proven, the warranty was broken, and the defendant is entitled to damages, to the extent, at least, of the difference in value between the article as represented and as it actually turned out to be. *Smith v. Cozart*, 2 Head (Tenn.) 528. There would be a judgment then for the plaintiffs to the full extent of their claim, also one for the defendant for the full amount of damage to which he would be entitled under his warranty, and neither would abate or lessen the other, or bear any relation thereto, except that they originated in a dealing in and about the same article of personal property." In like manner, it was held in *People's Electric R. Co. v. McKeen Motor Car Co.* 214 Fed. 73, 130 C. C. A. 513, that in an action of replevin by the vendor in a contract of conditional sale to recover the property because of the buyer's default, the latter could not successfully assert damages for a breach of warranty in defense. Compare *W. W. Kimball Co. v. Massey*, 126 Minn. 461, 148 N. W. 307, wherein the court said: "The sale was conditional and executory, and upon a breach by one the other was entitled to re-

scind. If defendant was justified in rescinding for the breach of warranty, he was entitled to a return of the instalments paid. That was all he asked by the counterclaim. The defendant did not seek to retain the possession, nor ask for the return of the piano. The provision that a counterclaim is proper when it is 'connected with the subject of the action' should receive a liberal construction."

Damages have been allowed for a failure of the goods to conform to the contract where the contract of sale was conditional although the buyer returned the goods after giving the seller notice that the goods were defective. *First Church of Christ, Scientist v. Southern Seating, etc. Co.* 76 Wash. 367, 136 Pac. 127, wherein the court said: "Neither can the fact that the pews have been left in the possession of plaintiff militate against its right of recovery. If the pews had been sold under an ordinary contract of sale and title had passed and the action had been for damages as for breach of warranty, the retention and use of the pews would have been inconsistent with the measure allowed in this case. The terms of the contract, however, preclude the application of this principle. The title was reserved in the vendor and the pews have been at all times subject to its order."

In *New York* it was held in several cases prior to the enactment hereinafter referred to that a warranty was an incident only of consummated or completed sales, and that an action for the breach of warranty could not be maintained by the buyer until the title to the property had fully passed to the buyer. *Spaus v. Stolwein*, 75 Misc. 1, 134 N. Y. S. 603; *Hauss v. Savarese*, 87 Misc. 330, 149 N. Y. S. 938; *Carpenter v. Chapman*, 139 N. Y. S. 849; *Osborn v. Gantz*, 60 N. Y. 540; *Levis v. Pope Motor Car Co.* 202 N. Y. 402, 95 N. E. 815. An amendment to the Personal Property Law of New York (Laws 1911 c. 571; Personal Property Law, § 150, McKinney's Consol. Laws, Book 40, p. 246) provides as follows: "(1) Where there is a breach of warranty by the seller, the buyer may, at his election, (a) accept or keep the goods, and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price; (b) accept or keep the goods and maintain an action against the seller for damages for the breach of the warranty; (c) refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty; (d) rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid." Under that provision it has been held that in an action on a conditional sale note which was given as part

of the purchase price of a piano, the buyer might counterclaim and show in support of the counterclaim that the seller warranted that the piano sold would not break and was fit for the purpose for which it was intended and that the warranty had been breached. *G. B. Shearer Co. v. Kakoulis*, 144 N. Y. S. 1077. See also *Ohl v. Standard Steel Sections*, 167 N. Y. S. 184. In the reported case it is decided that in an action of replevin by the seller of a chattel on conditional sale, the buyer may recoup such damages as he may have sustained by the seller's breach of warranty.

THOMPSON

v.

CITY AND COUNTY OF DENVER.

Colorado Supreme Court—May 1, 1916.

61 Colo. 470; 158 Pac. 309.

Public Officers — Officer de Jure — Right to Compensation — Payment to de Facto Officer.

The rule that an officer de jure cannot recover from a municipal corporation salary for the period he was deprived of his office where it was paid to an officer de facto applies to a police operator, declared by the city charter to be an officer; it being immaterial that he was an appointive officer, and that he was wrongfully discharged.

[See note at end of this case.]

Right of de Facto Officer to Compensation.

A city's unqualified acceptance of services performed by one as officer estops it to invoke any rule of law to defeat payment of his salary for such period.

Error to District Court, City and County of Denver: *SHEAFOR*, Judge.

Action by James Thompson, plaintiff, against City and County of Denver, defendant. To review judgment rendered, plaintiff brings error. The facts are stated in the opinion. **AFFIRMED.**

Robert H. Kane for plaintiff in error.

James A. Marsh and William R. Kennedy for defendant in error.

[470] *BAILEY, J.*—James Thompson, plaintiff below and plaintiff in error here, was one of the police operators of the City and County of Denver for three years prior to the 1st day of February, 1910, and on or about that

date was suspended upon charges filed against him by the Fire and Police Board. On March 14th, 1910, a hearing was had before the board, the charges sustained, and plaintiff discharged from the service. Thompson took that decision on appeal to the City Civil Service Commission, where the matter rested for over two years. About the 31st day of May, 1912, upon request of the Fire and Police Board, the commission forthwith ordered that the appeal be sustained, and Thompson reinstated, which was accordingly done by formal order of the board on June 1st, 1912. Upon reinstatement he served only fifteen days, when the same charges were filed against him by newly installed members of the Fire and Police Board, resulting [471] in his second discharge from the service. Thereupon this action was brought to recover damages, consisting of the salary which plaintiff was thus deprived of earning during the period of discharge, and for the period from June 1st to June 15th after reinstatement, less what he actually earned in that time in other pursuits, the amount of the claim being \$1,815.97 with interest. The trial court rendered judgment for plaintiff in the sum of \$46.86, the amount of salary from the date of reinstatement to the date of removal, but refused to award anything for the period of discharge, on the ground that another had been paid the salary for the same period, one Kaiser having occupied the position meanwhile, discharged the duties and received the salary therefor.

Prior to the time the charges were made plaintiff received his appointment by examination in the regular way, served his probationary period of six months, and then became a permanent appointee, in conformity with the provisions of section 200 of the charter of the municipality, concerning appointments in the classified service, which reads as follows: "Every original appointment in the classified service shall be for six months, at the end of which time, if the conduct and capacity of the person appointed have been satisfactory, he shall be permanently appointed; otherwise he shall be out of the service."

The duties of police operator, as outlined in the brief of counsel for defendant in error, are to receive reports from policemen on the beats within the municipality, at a telephone switch board, make records of the same, receive calls for the patrol wagon, and generally to exercise the duties of a central operator with reference to the police telephone system. Section 65 of the city charter provides that the police force shall be composed of the chief of police and such subordinate officers, policemen and other employees, to be appointed by the board, as may be necessary, etc. Section 153 thereof provides that all persons in the employ of the [472] city and county, or any department thereof, whose salary or compen-

sation is not fixed by this charter, are hereby declared to be employees, and in enumerating the members of the police department and fixing their respective salaries it names, among others, police operators at an annual salary of \$1020.

The judgment is affirmed upon the authority of *El Paso County v. Rohde*, 41 Colo. 258, 95 Pac. 551, 16 L.R.A. (N.S.) 794, 124 Am. St. Rep. 134, and *Henderson v. Glynn*, 2 Colo. App. 303, 39 Pac. 265, which hold that an officer *de jure* cannot recover from a municipal corporation salary paid by it to an officer *de facto* during the period the officer *de jure* was deprived of his office; in other words, that payment of salary by the municipality to an officer *de facto*, who discharges the duties of the office is a good defense to an action therefor against it by the officer *de jure*.

Counsel not only assail the soundness of this rule, but contend further that even though the propriety of its application be admitted in cases like those cited, involving respectively the salary of County Treasurer and District Judge where the loss thereof was occasioned by the intrusion of a third party, it cannot properly be applied to a case like the present, involving salary of a police operator the loss of which was occasioned by wrongful discharge. The argument and citation of authority in support of this contention confirms the statement in the *Rohde* case to the effect that there is noticeable conflict in the decisions upon the subject. The rule adopted in this state is based on public policy, to the effect that the people cannot be compelled to pay twice for the same service, and in principle we do not see how the instant case can be fairly distinguished from those in which this court has applied it.

Section 153 of the charter of the municipality in effect declares police operators to be officers, and it therefore follows that they are, at least in some respects, public officers, their duties being intimately connected with and a part of [473] the police system. The question presented is whether there is anything for consideration in this case of sufficient weight and clearness to distinguish the character of the plaintiff's relation to the municipality from that of a County Treasurer or District Judge, in respect to a claim for salary paid another, so as to take it out of the operation of the rule laid down in the two cases to which reference has been made. Certainly no such distinction can be safely made upon a basis of comparative dignity between offices, nor does it lie within the fact that some officers are appointive and others elective. Logically the rule should, we think, be applied alike to all public officers.

The case of *Denver v. Burnett*, 9 Colo. App. 531, 49 Pac. 378, is cited and relied upon by plaintiff in error to support his contention.

Burnett recovered judgment against the city for one year's pay as a policeman, which was reversed because the bill of exceptions, which purported to contain all the evidence, failed to show any proof of the compensation to which he may have been entitled, that the prerequisites of the appointment had been complied with, or action upon the part of the city by which its liability might be established. That was a complete disposition of the matter on review, and expressions of the court beyond that point are mere *dicta*.

Upon the assignment of cross-error to the finding in favor of plaintiff in the sum of \$46.86, salary from the date of his reinstatement to the date of removal, that is June 1st to June 15th, 1912, we are of opinion that by the city's unqualified acceptance of services performed by plaintiff during that period, it is estopped to invoke any rule of law to defeat payment of the sum so earned and claimed.

The judgment is, therefore, affirmed.

Gabbert, C. J., and White, J., concur.

Rehearing denied July 3, 1916.

NOTE.

The reported case adheres to the rule prevailing in the majority of American jurisdictions that a municipality which has paid to a *de facto* officer the salary of the office during the period of his occupancy is not liable to the *de jure* officer for salary for the same period. That rule, the court says, is applicable to appointive as well as to elective officers, and no distinction is to be made with respect to the grade or dignity of the office. The cases passing on the right of a *de jure* officer to recover from the state or municipality salary paid to a *de facto* officer during the latter's incumbency are reviewed in the notes to *Nall v. Coulter*, 4 Ann. Cas. 671; *Tanner v. Edwards*, 10 Ann. Cas. 1091; *Cleveland v. Luttner*, Ann. Cas. 1917D 1134; and *Andrews v. Portland*, 10 Am. St. Rep. 280. The closely related question of the right of the *de jure* officer to recover from the *de facto* officer salary paid to him is discussed in the notes to *Chubbuck v. Wilson*, 12 Ann. Cas. 888; *Jones v. Dushman*, Ann. Cas. 1916D 472; *Andrews v. Portland*, 10 Am. St. Rep. 280; and *Howard v. Burke*, 140 Am. St. Rep. 159.

STRATTON ET AL.

v.

WILSON.

Kentucky Court of Appeals—May 9, 1916.

170 Ky. 61; 185 S. W. 522.

Husband and Wife — Antenuptial Agreement — Validity — Concealment of Facts.

To be bound by the terms of an antenuptial settlement, the prospective wife, before entering into the contract, and at the time, must have been apprised without misrepresentation or concealment of the nature and extent of her prospective husband's estate and the value of her marital rights therein which she by its terms is surrendering.

Same.

An antenuptial settlement as to which all the facts were fully stated to the bride before the marriage is not invalidated because she signed it before being so advised.

Provision Contemplating Divorce — Validity.

A stipulation in an antenuptial settlement providing for a fixed sum for alimony in the event of divorce or separation is void, as providing for a future separation after marriage.

Effect of Partial Invalidity.

Where the consideration is valid and several separable promises are based upon it, some of which are legal and others illegal, while the illegal promises are void, the legal ones will be enforced.

[See note at end of this case.]

Same.

An antenuptial settlement of \$25,000 to the wife as widow and \$10,000 to her if divorced or separated, where the marriage is consummated, will be enforced on the death of the husband as to the \$25,000 settlement, notwithstanding the illegal promise to pay alimony.

[See note at end of this case.]

Contract Favored in Law.

Contracts for antenuptial settlements are favored by the law, and will not be held invalid for trifling or technical reasons.

Executors and Administrators — Allowance to Widow.

Where there is protracted litigation between the next of kin living outside the state and a widow appointed administratrix, during which the widow, although confined by a marriage settlement to a cash provision in lieu of widow's rights, occupied the home-stead, allowances for minor housekeeping expenses and court costs may be allowed in the discretion of the trial court.

Compensation of Administrator.

Under Ky. St. § 3883, as to allowance to a personal representative, where the property of the estate is distributed in kind, and the administrator is put to little or no trouble, he should not be allowed the maximum sum

of five per cent of the value of the property thus distributed.

Same.

Under Ky. St. § 3883, because the personality is distributed by the administrator in kind, it does not necessarily follow that he should not be allowed anything for his services, but a reasonable allowance should be made to him.

Counsel Fees of Administrator.

Counsel fees of an administratrix are necessarily left largely to the discretion of the trial court.

Gifts — Between Husband and Wife — Death of Husband.

Where a husband had on a trip abroad given his wife express checks for their expenses amounting to \$800, and at another time had sent her \$2,000 in a draft, and there is no showing that he intended that she should account therefor, she is entitled to retain the same on his death.

Executors and Administrators — Rights of Widow — Occupation of Homestead.

Under statutes providing that the widow may occupy the homestead until allotment of dower, homestead, or the estate is otherwise distributed, the widow is not by an antenuptial settlement deprived of such right of occupation, especially where the only other person interested in the estate is a nonresident living a great distance from the homestead and it is necessary to the preservation of the property that it should be occupied.

Appeal from Circuit Court, Oldham county.

Action by Julia E. Stratton et al., plaintiffs, against Ada Stratton Wilson, defendant. From judgment rendered, all parties appeal. The facts are stated in the opinion. **AFIRMED.**

Alexander Scott Bullitt, William Marshall Bullitt and Keith L. Bullitt for plaintiffs.

David & Davis and D. H. French for defendant.

[62] THOMAS, J.—The questions presented for determination on this appeal grow out of litigation to settle and distribute the estate of Wilton A. Stratton, who died intestate on October 18, 1913, at Los Angeles, California, but domiciled [63] at the time in Oldham county. Previous to 1912, the decedent had lived for a great number of years in the city of Louisville, and in the spring of that year he purchased a country home near Crestwood, in Oldham county, where he made his home for the rest of his life. He was married to the appellant, who was then Miss Julia Eschmann, on February 24, 1913, the wedding taking place in the city of New York. On the 18th day of February preceding the marriage, the parties signed and executed the following contract, omitting signatures:

"THIS AGREEMENT made and entered into this 22d day of February, 1913, by and between Wilton A. Stratton, party of the first part, and Julia Eschmann, party of the second part, both of Oldham county, in the State of Kentucky.

"WITNESSETH: That whereas the said first and second parties are about to enter into a contract of marriage, and whereas it is desired between them to settle and adjust all property right or claims between them arising out of said proposed marriage, and whereas the said party of the first part, Wilton A. Stratton, wishes to make provision for said Julia Eschmann in lieu of dower or distributive share of his estate, both real and personal, and whereas said parties have agreed between themselves upon a provision for said second party, Julia Eschmann, and she has agreed and binds herself to accept same in lieu of any and all claims upon the estate of said Wilton A. Stratton during his life, or after his life should he die before her.

"Now, THEREFORE, this contract and agreement between said Wilton A. Stratton, party of the first part, and Julia Eschmann, party of the second part.

"WITNESSETH: That the said Wilton A. Stratton hereby agrees and binds himself, his heirs, administrators and assigns to pay to the said Julia Eschmann upon his death, if she survives him, she then being his wife, the sum of twenty-five thousand (\$25,000.00) dollars out of his estate in full settlement of any and all claims of dower or distributable share of said estate, real and personal, and should said Julia Eschmann die before said Wilton A. Stratton, then nothing shall be paid to her heirs, executors, administrators or assigns; and he further binds himself that if at any time after the solemnization of said marriage, he and said Julia Eschmann [64] should become separated or divorced, he will pay to her upon such divorce being obtained by either of them the sum of ten thousand (\$10,000.00) dollars in full of any and all claims said Julia Eschmann might hold against him for alimony, or maintenance, or attorneys' fees in any such divorce proceedings.

"The said Julia Eschmann agrees to accept said sum of twenty-five thousand (\$25,000.00) dollars upon the death of said Wilton A. Stratton in full settlement of any and all claims she might have as his widow for dower or distributable share of his estate, or should she become divorced from him at any time to accept said sum of (\$10,000.00) dollars above set forth in full settlement of any and all claims for alimony or maintenance, or attorneys' fees.

"Said Wilton A. Stratton furthermore agrees and binds himself during the continuance of the marital relationship between him

and the said Julia Eschmann to provide for her a good and comfortable living, so long as she lives and resides with him, but should she abandon him for any reason and refuse to live with him, then his responsibility from the time of said abandonment or refusal to live with him shall be limited to the sum of ten thousand (\$10,000.00) dollars above provided for, and only upon the conditions there provided for the payment of said ten thousand (\$10,000.00) dollars.

"IN TESTIMONY WHEREOF, witness the signatures of said first and second parties, the day and year above written."

The contract was executed in duplicate but each party was not delivered a copy until the day they left Louisville for New York, which was the 22nd of February; and thus, although the contract had been signed by each of them on the 18th, it bears the date of actual delivery.

Briefly stated, the circumstances under which the marriage was agreed to and the contract executed, are these: Neither party had ever been married. Mr. Stratton was about 62 years old and Miss Eschmann about 52 years old. She was then and had for some considerable time immediately previous, been employed by Mr. Stratton as housekeeper at a salary of \$35.00 per month. He was not in the best of health and to regain and repair it he concluded to take a trip abroad. [65] He seems to have become very much pleased with the services of Miss Eschmann, not only as a housekeeper but in her attentions to his personal welfare as well, and he desired that she attend him upon his contemplated trip. To avoid any grounds for suspicion or scandalous gossip, he conceived the idea of marrying Miss Eschmann before starting on the trip and suggested it to his cousin and personal friend, Edward T. Farmer, but at the time stated that he would be unwilling to enter into the marriage unless there could be an understanding between himself and Miss Eschmann as to property rights growing out of the marriage. The deceased at that time was worth something like \$230,000.00, thirty thousand dollars of which was real property situated in Jefferson and Oldham counties, and the remainder was personal property, almost the entire portion of which consisted of solvent bonds and corporation stock, each being a well-paying investment.

The first conversation with Farmer concerning the proposed marriage occurred about February 7, of that year, and the subject was further discussed between them some four or five days thereafter. On the 17th day of February the matter was discussed by the three, Stratton, Farmer, and Miss Eschmann, and the terms of it, as afterwards incorporated into the writing, were each and all agreed to and the writing drawn up and subscribed by the parties the next day as we

have stated, but not delivered until the 22nd. The attorney who drafted the contract, Mr. John J. Davis, realizing that Miss Eschmann should be apprised of the extent of the property of her contemplated husband, went to the home of Mr. Stratton on the 19th day of February, and there fully informed her of the amount of the property which Mr. Stratton owned; and, as the attorney states, of her rights in and to such property as surviving widow. To this she replied: "I didn't know that he had so much or that I was entitled to so much," whereupon the attorney replied: "Well, you know it now. The marriage has not been consummated and there is nothing that you couldn't withdraw from at this time," whereupon she replied, "It is too late. I have already signed the contract. I signed too quick." The marriage was afterwards consummated as we have stated, and the trip abroad was made lasting until some time in October. [66] Upon their return they did not come direct to their home but proceeded to the city of Chicago, where a stop of a few days was made, after which they went to Los Angeles, California, where, on October 18, the death of the husband occurred. The only heir at law of the decedent is the appellee, Mrs. Ada Stratton Wilson, who is the only child of a brother of the deceased. After the death of her husband, the appellant as his widow, returned to the Crestwood home and has since occupied it, in the meantime qualifying as the administratrix of the estate of her deceased husband.

The litigation in which the judgment was rendered from which the appeal is prosecuted, consists of several separate suits and proceedings concerning the estate, all of which were consolidated in the court below, and for the purpose of this opinion, it is not necessary that they be either separately stated or noticed. The chief controversy between the parties and the storm center of this litigation is, as to the validity of the antenuptial contract which we have herein copied, the widow contending that she is not bound by it, and that she is therefore entitled to her distributable share of her husband's estate as though no contract was made; while the heir is insisting that the contract is valid, and was at the death of the decedent in full force, and the widow is, therefore, entitled to but \$25,000.00, the amount named in the contract. This latter view is the one taken by the trial court, and from the judgment so holding the widow has appealed.

In the court below there were three grounds urged by the widow as to why the contract is not binding upon her, they being: (1) That the contract is void on its face; (2) that before signing it she was not aware of the value of the estate of her future husband, and that she was therefore induced by this fraudulent concealment to place her name to it and to

agree to its terms, and, (3) that the contract after their marriage was orally rescinded by herself and her husband before his death.

We will consider these in the reverse order. As to the third ground stated, without passing on the question as to whether this character of contract can be orally rescinded, it is sufficient to say that there is no evidence of any character of a rescission, except the testimony of the widow, which is manifestly incompetent under section 606 of the Civil Code of Practice. [67] This is so apparent that counsel for her did not mention it in the argument of the case, nor does he refer to it in his brief. We, therefore, do not deem it necessary to give this contention further consideration.

As to the second ground urged against the contract, it cannot be denied but that it is the settled rule that the prospective wife, in contracts of this character, in order to be bound thereby, should, before entering into the contract and at that time, be apprised "of the nature and extent of her prospective husband's estate and the value of her marital rights therein which she by its terms is surrendering." *Tilton v. Tilton*, 130 Ky. 281, 113 S. W. 134, 132 Am. St. Rep. 359. Other cases in point are: *Daniels v. Banister*, 146 Ky. 48, 141 S. W. 393; *Redwine v. Redwine*, 160 Ky. 282, Ann. Cas. 1917A 58, 169 S. W. 864, and *Gaines v. Gaines*, 183 Ky. 260, 173 S. W. 774. These cases very properly hold that such a contract to be binding on the prospective wife must be free from fraud, misrepresentation, deceit or concealment; but they do not go farther than this. The fact that the contract had been signed before the appellant had been placed in possession of all the facts, cannot militate against the validity of the contract, provided all the facts were freely and fairly stated to her before the marriage was consummated. Up to that time nothing had occurred to which any of the provisions of the contract could attach, and all that was necessary for the status of the parties to remain as it was then, was a refusal to marry. It was not necessary even that the signed contract providing for the payment of alimony, should be destroyed. Appellant by her action, in subsequently marrying the deceased, plainly manifested her willingness to accept the provisions of the contract, and this, too, after she had been informed as to the extent of her prospective husband's estate, as well as what would be her rights as his widow if no contract was entered into. This, we conclude, effectually disposes of the second contention.

The first ground urged against the validity of the marriage contract presents a more serious question and will require from us a more extended consideration. This contention is based upon the insistence of counsel for appellant that all of that portion of the

contract providing for the payment of alimony, should a separation of the parties occur after marriage, followed by a divorce, is absolutely void, and that this void stipulation invalidates the entire contract. At the threshold [68] it may be conceded, and indeed is conceded by counsel for appellee, that the stipulation as to alimony is void, as the law will not permit parties contemplating marriage to enter into a contract providing for, and looking to, future separation after marriage. This principle of law appears to be well settled and is supported by an unbroken line of authorities. Those from this court are: *Gaines v. Poor*, 3 Metc. (Ky.) 503, 79 Am. Dec. 559; *Loud v. Loud*, 4 Bush (Ky.) 453; and *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605.

The rule so announced is but a manifestation of a long settled policy of the law, to the effect that it is beneficial to society that the marital relation should not be disturbed or its happiness marred, but that it should be upheld and encouraged, and that the parties to it should not be led into the breaking of its vows by the allurements of any stipulations which they may enter into before marriage. So the question is: What effect does the stipulation as to alimony, which is conceded to be void, have upon the other stipulation for the payment of \$25,000.00 upon the death of the husband, in lieu of all other interests of the widow which she would otherwise obtain from his estate, and which stipulation is conceded to be valid?

The rule is, if there is a single promise based upon a single consideration and both of them are void, the contract is wholly unenforceable; but where the consideration is valid, and several promises are based upon it, some of which are legal and others illegal, so that they may be separated, the legal ones will be enforced while those which are illegal will not, and the illegality of the latter will not prevent the enforcement of the former. So in Volume 9, Cyc. 564, we find it stated:

"Where an agreement founded on a legal consideration contains several promises or a promise to do several things, and some only of the things to be done are illegal, the promises which can be separated, or the promise so far as it can be separated, from the illegality, may be valid. The rule is that a lawful promise made for a lawful consideration is not invalid merely because an unlawful promise was made at the same time and for the same consideration. Thus if the terms of a contract in restraint of trade can be construed divisibly as to the limits, it may be valid as to the limits which are reasonable, although other limits imposed are excessive, unreasonable and void."

[69] This court has approved the text in the following cases: *Brown v. Langford*, 3 Bibb (Ky.) 497; *Swan v. Chandler*, 8 B. Mon.

(Ky.) 97; Collins v. Merrell, 2 Metc. (Ky.) 163; Kimbrough v. Lane, 11 Bush (Ky.) 556; Averbeck v. Hall, 14 Bush (Ky.) 506; Bugg v. Holt, 29 Ky. L. Rep. 1208, 97 S. W. 29; McLane v. Dixon, 30 Ky. L. Rep. 683, 99 S. W. 601; Smith v. Corbin, 135 Ky. 727, 123 S. W. 277; Newport Rolling Mills Co. v. Hall, 147 Ky. 598, 144 S. W. 760.

A few references to what this court said in some of the cases referred to will serve to illustrate the rule as adopted in this State. In the Kimbrough case, it is said: "And it is equally well settled that if any part, however small, of the entire *consideration* of a contract be vicious, the whole contract is void." And in the Averbeck case, it is said: "It is well established that if a contract, the *consideration* of which is an agreement to impede, hinder or defeat the administration of the criminal or penal laws, is void as against public policy. It does not avail that, in this instance, there is a sufficient consideration, independent of this vicious agreement, to support the contract. A part of the entire consideration being vicious, the whole contract is void." In the still later case of Newport Rolling Mill Co. v. Hall, *supra*, this court quoting with approval from other of the cases, *supra*, said:

"The general rule is that if the obnoxious feature of a contract can be eliminated, without impairing its symmetry as a whole, the courts will be inclined to adopt this view as the one most likely to express the intention of the parties; but if the good and bad are so interwoven that they cannot be separated without altering or destroying the general meaning and purpose of the contract, the good must go with the bad and the whole contract be set aside. In Smith v. Corbin, 135 Ky. 727, 123 S. W. 277, it is said:

"In other words, it is a well known rule of law that where there are contained in the same instrument distinct engagements or covenants, by which a party binds himself to do certain acts, some of which are legal and some illegal, the performance of those which are legal may be enforced, although the performance of those which are illegal may not."

"In Brown v. Langford, 3 Bibb (Ky.) 497, the court said:

"Where there is a condition or covenant to do several things, a part of which is against the common law and the rest lawful, the condition or covenant will be [70] void as to so much as is unlawful, and good for the residue. But this does not hold where a part of the consideration is unlawful. There is no question but that a promise founded upon several considerations, one of which is vicious, is void; and the same principle requires that a covenant should be held to be so if the consideration be in part affected with turpi-

tude.' To the same effect is McLane v. Dixon, 30 Ky. L. Rep. 683, 99 S. W. 601; Averbeck v. Hall, 14 Bush (Ky.) 506; Collins v. Merrell, 2 Metc. (Ky.) 163; Swan v. Chandler, 8 B. Mon. (Ky.) 97.

"We are disposed to the view that this contract may be treated as a severable one, and that the objectionable clause may be stricken from it without affecting the validity of the remainder of the contract. The clause in question does not particularly concern the consideration specified in the contract, and it is generally in reference to contracts in which a part of the *consideration* is illegal that the courts have ruled that the entire contract was tainted. Where a part of the consideration upon which the contract rests is vicious, the courts as may be seen from the cases cited will not undertake to separate the good consideration from the bad, but will discard it as a whole."

It then becomes necessary to determine what constitutes the *consideration* for the two promises made by the prospective husband and found in this marriage contract. The two promises being, to pay the appellant in the event of a separation and divorce the sum of \$10,000.00 in lieu of all alimony, and to pay her \$25,000.00 in the event of the death of her prospective husband in lieu of all interests in his estate. That the *marriage* was the *consideration* for these two promises, there can be room for but one opinion. In volume 21 Cyc. page 1246, it is said: "Marriage is a good consideration for antenuptial settlement of property on the intended wife. It has been said indeed that it is not only a valuable consideration, but a consideration of the highest value." This text is supported by numerous authorities from almost every State in the Union and in England, as well as by many text-writers upon the subject. The cases from this court so holding are: Forwood v. Forwood, 86 Ky. 114, 5 S. W. 361; Sanders v. Miller, 79 Ky. 517, 42 Am. Rep. 237; Mallory v. Mallory, 92 Ky. 316, 17 S. W. 737. This being so, it would seem under the rule, *supra*, that as the consideration of marriage in the instant case is an entire, [71] as well as a valid one, the conceded legal promise to pay \$25,000.00 based upon it, should be upheld and enforced, notwithstanding the associated illegal promise to pay alimony which is based upon the same valid consideration. Indeed, there is no escape from this conclusion unless the facts of this case are to be differentiated in some way from those in the cases *supra*. We have given unsparing pains to the investigation of the authorities, not only those herein given, but the ones to which counsel refer us as well, and we fail to find in any of them any justifiable grounds for making a distinction between the facts therein and those here.

As we view the authorities, the error, to our minds, in the contention of counsel for appellant lies in the fact that he confuses the *promises* in the contract with the *consideration* therefor. In other words, he insists that the two promises found in the contract, the one being legal and the other illegal, as we have found, constitute the consideration for the marriage contract, which, as we have seen, is contrary to all the authorities, including the opinions of this court. As illustrating this, he strongly relies on the opinion of this court in the case of *McLane v. Dixon*, supra. In that case, McLane, a white man, was living in a state of concubinage with a negress named Motina Dixon. By him she had given birth to some illegitimate children, and he was about to be proceeded against in a bastardy proceeding to provide maintenance for the children. It is shown that at this juncture he entered into a contract with the mother to support the children and at his death make provision for them in his will, provided, however, the mother of the children would continue to live with him as theretofore. He failed to make the provision for the children in his will as agreed, which it was claimed was to be a house and lot worth \$800.00, and his estate was sued to recover the value of the house and lot. But this court, denied the plaintiff the right to recover, not because the agreement to provide for the children was illegal, but because a part of the *consideration* for the promise to make the devise upon which the suit was based, was illegal, in that it contracted for the continued existence of an unlawful relation between the plaintiff and the decedent. The opinion was proper and in perfect accord with the rule herein stated. If, in that case, the consideration for the promise had not been tainted [72] with the worst form of illegality, there would have been no obstacle in the way, as far as the contract was concerned, of rendering judgment in favor of the plaintiff. But, as we have seen, we are dealing with no such case. The consideration here has been entirely executed, which in some jurisdictions materially affects the case, even should the rule contended for by appellant's counsel be applied. *Appleby v. Appleby*, 100 Minn. 408, 10 Ann. Cas. 563, 111 N. W. 305, 117 Am. St. Rep. 709, 10 L.R.A. (N.S.) 590, and authorities therein cited.

It must also not be forgotten that the contract under consideration not only contained two promises on behalf of the future husband, but they related to entirely separate and distinct events; the events to which the illegal promise related never occurred and there has been no occasion to invoke the aid of the court to enforce it. The event, however, to which the other promise related, has occurred, and its enforcement is sought in

this suit. Many of the authorities relied upon for reversal had under consideration only the enforcement of the *illegal* promise therein, which was similar to the one here, and of course, the courts in this instance, denied the relief which was demanded, just as we would if the stipulation as to the payment of \$10,000.00 alimony was before us in proceedings wherein either of the parties was seeking to enforce it. This is particularly so as to the case of *Neddo v. Neddo*, 56 Kan. 507, 44 Pac. 1, upon which considerable stress is made in appellant's brief. Moreover, in the case of *Appleby v. Appleby*, supra, the antenuptial contract had in it a stipulation referring to future separation, it being as follows:

"Provided always, and this promise and covenant is made with the reservation, that in the event said marriage does not take place, or said party of the second part shall not be my husband at the time of my death, or in the event at the time of my death the parties signing said Exhibit A. are not living together as husband and wife . . . then all and every claim and right on the part of said party of the second part to demand or receive said annuity or take any benefit under this agreement or in my estate shall thereupon and forthwith cease and be of no force or effect."

The provision was being made by the contemplated wife for the future husband and it was to be an annuity of \$10,000.00.

[73] There was as much of an inducement for the wife in that case to bring about such a state of affairs as to cause a divorce, and thus save to her estate the annuity of \$10,000.00 for the life of her husband, as there is in this case (as argued by appellant's counsel), for the deceased (*Stratton*) to be guilty of conduct causing a separation and thereby save to his estate \$15,000.00. However, in disposing of this feature of that contract the court very pertinently said:

"The second proposition of appellant is that the antenuptial contract was void, because it tended to induce a separation between husband and wife. This contention is founded upon that part of the contract, repeated in the will, wherein it was provided that if, at the death of Mrs. Appleby, appellant should not be her husband, or in the event they 'shall not then be living together as husband and wife,' any and all right to the annuity shall 'cease and be of no force or effect.' It is elementary that contracts which tend to induce a separation of husband and wife are, upon the same principle of public policy which discountenances contracts in restraint of marriage, utterly void and of no force or effect. There is but one voice in the decisions upon this question. *Cartwright v. Cartwright*, 22 L. J. Ch. (Eng.) 841; *H— v. W—*, 3 Kay & J. (Eng.) 382; *Brown*

v. Peck, 1 Eden (Eng.) 140; Randall v. Randall, 37 Mich. 563; Boland v. O'Neil, 72 Conn. 217, 44 Atl. 15; Hutton v. Hutton, 3 Pa. St. 100. But the contract under consideration does not bring the case within this principle. A broad view of its provisions will not justify or warrant the conclusion that its purpose was to facilitate, or that it tended in any measure to induce, a separation of the parties. On the contrary, it is clear that its purpose and tendency was to induce continued cohabitation as husband and wife. Appellant was firmly obligated to comply with the contract in this respect, and a failure forfeited the annuity. It was not incorporated in the contract to furnish the wife, upon some whimsical or capricious notion, induced, perhaps, by a condition of not unusual occurrence, a family jar, not ordinarily of long duration, an excuse to separate from her husband. The contract held out to her, as in many of the cases cited by appellant, no pecuniary or other inducement to bring about a separation. Causing one would result in no benefit or advantage to her. The [74] result would in such an event only increase the charity fund to which she devoted her estate.

"It is unnecessary to enter into an extended discussion of the authorities upon this subject. Many analogous cases are found in the books, but the decisions all turned where the contracts were held void, upon the construction of the particular language and phraseology of each. The case of *In re Hope Johnstone* [1904] 1 Ch. (Eng.) 470 is an instructive one, and may be referred to. In that case, Hope Johnstone, the husband, conveyed certain property in trust for the benefit of his wife for life, 'or so long as she shall continue the cohabiting wife or widow.' It was there contended that this was an inducement to separation, and hence void; that a separation would result beneficially to the husband; and that he could, by improper treatment of the wife, bring about a separation and reap the benefit of his wrongful conduct. The court brushed these arguments aside and sustained the contract. The case is squarely in point."

The character of contract with which we are dealing is a favorite of the law and will not be held invalid for trifling or technical reasons. Wherever they are fair and free from fraud and concealment, the courts delight to enforce them when it can be done by reconciling the facts under which they are executed with the well recognized rules of law governing the execution and validity of contracts. Hence, it is stated in 21 Cyc. page 1242: "Such settlements have long been favored by courts of equity, provided that the rights of third persons have not been infringed." And, in the notes to the case of *Becker v. Becker* [241 Ill. 423, 89 N. E.

737], 26 L.R.A.(N.S.) 858, upon this and other points considered in this case, it is said:

"Marriage is a sufficient consideration to support an antenuptial agreement, either between the immediate contracting parties or third persons. Indeed it is ranked as among the most valuable of considerations, although distinguishable from other valuable considerations in that it is not capable of being reduced to a value which can be expressed in dollars and cents, and also in that, after the marriage, the status cannot be changed by setting it aside, rescinding, or canceling it, and hence the parties cannot be placed in *status quo*. Therefore sound policy requires the enforcement of contracts entered into prior thereto and which induced the marriage. *Lloyd v. Lloyd*, 2 Myl. & C. (Eng.) 192; *North [75] v. Ansell*, 2 P. Wms. (Eng.) 618; *Mitford v. Mitford*, 9 Ves. Jr. (Eng.) 87; *Corbie v. Free*, C. & Ph. (Eng.) 64; *Burridge v. Row*, 1 Y. & C. Ch. (Eng.) 583; *Turner v. Warren*, 160 Pa. St. 336, 28 Atl. 781; *Metz v. Blackburn*, 9 Wyo. 481, 65 Pac. 857; *Barnes v. Barnes*, 110 Cal. 418, 42 Pac. 904.

"It is a rule of law established at an early time that, in the interpretation of covenants, they will be construed to be either dependent or independent of each other, according to the intention and meaning of the parties and the good sense of the case, and technical words will be construed according to such intention. So, where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action can be maintained for the breach of the covenant on the part of the defendant without averring performance in the declaration. This rule is enforced with great liberality as to covenants contained in marriage settlements, and such covenants will be held to be independent rather than dependent, unless the clear language of the contract requires a contrary holding, at least where, to hold that the covenant was dependent would be to defeat the right to the performance of an antenuptial marriage settlement, the primary consideration of which was marriage."

We have read with great care and interest the brief of counsel for appellant, manifesting as it does, great earnestness and zeal in behalf of his client to the effect, that the provision in the contract under consideration, for alimony, being void, vitiates the entire contract, but we must confess that he has failed to convince us with his views. On the contrary, we are constrained to the conclusion that the trial court in holding the stipulation for the payment of the \$25,000.00 to the appellant as the widow of her deceased husband in lieu of all other property in his estate, is the correct view of the law as applicable to the facts found in this record.

By the judgment, the court allowed to appellant as administratrix certain items which are contested by cross-appeal prosecuted by appellee. The matters thus drawn in question by the cross-appeal are: A credit for poultry feed amounting to \$40.05; one paid to Otto Breen for taking care of the home place at Crestwood, \$115.00; bill of costs paid to the clerk of the Oldham circuit court, \$29.20; \$800.00, which is alleged to be a [76] balance of some express checks carried by the couple on their trip abroad, and which were made payable to Mrs. Stratton before their departure; \$2,000.00 being the amount of a draft which had been ordered by the husband to be sent to the wife at Chicago and made payable to her; \$6,055.00 as commission allowed to her as administratrix, and \$1,000.00 allowed to her as attorneys' fee. There is also complaint on the cross-appeal that the court refused to charge the appellant as administratrix with rents for the homestead during the time that she has occupied it since her husband's death.

As to the first three of these items it is sufficient to say, that, as we have stated in the beginning, there has been much bitter and protracted litigation between the appellant and appellee concerning the estate of Mr. Stratton. Even the right of the appellant to administer upon his estate is questioned and was bitterly fought. There is a total absence of harmony or kind feelings existing between the parties. The trial court was fully aware of all of this and with the entire record before him he made the allowances in question, and we are not disposed, especially in view of their comparative insignificance, to question his ruling in this particular.

As to the item of \$6,055.00 for commissions, section 3883 of the Kentucky Statutes provides, that the allowance to a personal representative shall not exceed five per cent on the amounts received and distributed by him. It is further therein provided, however, that allowance may be made to him for extraordinary services in the discharge of his duties in attending to, and administering the estate in his hands, but such allowance shall not exceed the amount of a fair compensation "for the time occupied and expenses incurred in protecting, attending to, collecting, and settling such estate, and five per cent on all amounts received and distributed." This court has held in a number of cases that where the property was distributed in kind, and the administrator was put to no trouble or comparatively none, he should not be allowed the maximum sum of five per cent of the value of the property thus distributed. (*Stanberry v. Robinson*, 16 Ky. L. Rep. 309, 27 S. W. 973; *Fidelity Trust, etc. Co. v. Watkins*, 19 Ky. L. Rep. 957, 42 S. W. 753; *Garr v. Roy*, 20 Ky. L. Rep. 1697, 50 S. W. 25;

Glover v. Cheek, 24 Ky. L. Rep. 1281, 71 S. W. 438; *Reed v. Reed*, 23 Ky. L. Rep. 2186, 66 S. W. 819; *Clark v. Young*, 24 Ky. L. Rep. 2395, 74 S. W. 245.) It was furthermore held [77] in these cases that because the personalty was distributed in kind, it did not necessarily follow that the personal representative should not be allowed anything for his services, but that in such cases the court should make a reasonable allowance to him to be governed by the facts of each case. In the *Glover* case, *supra*, there came into the hands of the personal representative for actual distribution, only \$52,797.09. Bequests in the will were satisfied by the transfer to the devisees, shares of the capital stock of certain corporations. There was also some litigation concerning the estate, but this court determined that the personal representative should be allowed \$5,000.00, which was nearly ten per cent of the amount which actually came into his hands for distribution. To have allowed five per cent on the entire amount of personal property belonging to the decedent would have amounted to much more than this.

In the *Stanberry* case, *supra*, there came into the hands of the personal representative stocks and bonds of the value of \$213,924.23, which he distributed in kind, and the court made him an allowance for these services the sum of \$6,000.00, which, upon appeal to this court, was affirmed.

The allowance complained of here is substantially the same as that in the *Stanberry* case, although the amount of the property involved is not quite so large. In view of these decisions and the size of this estate, after reviewing the record, we are not inclined to dispute the correctness of the judgment of the court in fixing this allowance.

As to the attorneys' fee, what we have said will largely apply to it. Matters of this character are necessarily left largely to the discretion of the trial court. That the appellant was entitled to have a reasonable attorneys' fee allowed to her cannot be questioned, and without further elaborating this opinion we are not disposed to criticize the action of the court below in fixing this fee at \$1,000.00.

As to the two items of \$800.00 and \$2,000.00, the proof shows that these sums were given to the appellant by her husband, and although it might have been the expectation that they would be consumed in paying the expenses of their trip, still there is nothing to show that he intended or expected that his wife should account to him for any of this money upon their return, or that [78] he had any other purpose in view than to divest himself of these sums and to vest his wife with absolute ownership therein. We are acquainted with no law whereby the wife should be charged by her husband's estate

with money which he may have advanced to her in his lifetime, in the absence of some kind of understanding to that effect.

As we have seen, the only person interested in this estate, besides the widow, is the appellant, whose home is in the State of Oregon. The statutes provide that the widow shall have a right to occupy the homestead of the deceased husband until allotment of dower, homestead, or the estate is otherwise distributed. We are not inclined to the opinion that, because there was an antenuptial contract, the widow was thereby deprived of this right given to her by the statutes. The effect of the contract is to limit the estate which the widow, as one of the distributees of decedent, may take in her deceased husband's property. It does not affect any other right which she may have as widow. Moreover, as the only other interested person in the estate of the decedent was a non-resident and lived a great distance from the homestead, and it being necessary to the preservation of the property that it should be occupied and looked after, all of which was beneficial to the heir, we are not disposed to permit the latter under such circumstances to charge the widow with rent when her occupancy was beneficial to the property which was inherited by the heir.

It results, therefore, that the judgment on both the appeal and cross-appeal should be, and it is affirmed.

Whole court sitting.

NOTE.

Effect of Partial Invalidity of Antenuptial Contract.

There appears to be but little authority with respect to the effect on an antenuptial contract of the invalidity of one of the provisions embodied therein.

In the reported case it appeared that the parties to a proposed marriage entered into an antenuptial agreement containing a stipulation for the payment of a certain sum to the wife on the death of the husband, in lieu of all other interests which she would otherwise obtain from his estate. The agreement also contained a void stipulation for the payment of alimony in case the parties should become divorced. The court holds that as the agreement was based on a valid consideration, namely that of marriage, the promise to make the payment in lieu of the widow's dower interest was enforceable, notwithstanding there was associated with it the illegal promise to pay alimony which was based on the same consideration as the other promise.

In *Bibelhausen v. Bibelhausen*, 150 Wis. 365, 150 N. W. 516, an action by a widow to impeach and cancel an antenuptial agree-

ment, it appeared that by the terms of the agreement she released all her future claims to her intended husband's property or estate, including the dower right, in consideration of the marriage and of \$500. The release was to be operative in case of his death or the parties otherwise separating. Holding that under the circumstances of the case the release was not invalid, the court said: "It is observed that counsel claim the trial court pronounced the release void as against public policy, because of the feature designed to preclude the intended wife from having any claim on Mr. Bibelhausen's estate in addition to the stipulated \$500, in the event of a separation of the parties after marriage. If such be the case, we are unable to discover it from the court's opinion, nor does it seem to have support, as an original proposition. . . . Such an agreement might be an inducement to separate, and might promote continuance of the marriage relations, according to circumstances. In the particular case, the added clause might not have been binding upon the condition happening requisite to its vitality. Such condition did not happen, and the particular feature does not, necessarily, militate against the dominant purpose of the instrument."

The case of *Appleby v. Appleby*, 100 Minn. 408, 10 Ann. Cas. 563, 111 N. W. 305, 117 Am. St. Rep. 709, 10 L.R.A.(N.S.) 590, is based on the same principle as that of *Bibelhausen v. Bibelhausen*, supra, and is set out at length in the reported case.

As to the general validity of an antenuptial agreement for the release of dower or a like interest in the property of the intended spouse, see the notes to *Kroell v. Kroell*, 4 Ann. Cas. 801; *Rieger v. Schaible*, 16 Ann. Cas. 700; *Hannon v. Hannon*, Ann. Cas. 1914B 616. The effect on an antenuptial agreement for the release of dower or a like interest, of the failure of the consideration for the agreement, is discussed in the note to *Dickason v. English*, Ann. Cas. 1918A 1165.

BABB ET AL.

v.

STATE.

Arizona Supreme Court—February 26, 1917.

18 Arizona 505; 163 Pac. 259.

Witnesses — Credibility — Effect of False Testimony — Instructions.

In prosecution for stealing horses, where impeaching testimony was taken, it is error to instruct that the testimony of impeaching

witnesses should be weighed in the same manner as that of other witnesses, and, when impeaching witnesses attack the credibility of others and testify falsely, the jury might disregard entirely the impeaching testimony in so far as false and give to the testimony of the witnesses attacked such weight and credence as is deserved.

Same.

An instruction to disregard false testimony must be conditioned on the witness wilfully or knowingly swearing falsely, and the omission of the qualifying words "wilfully and corruptly" is error.

Instruction as to Credibility — Singling Out Particular Witness.

In prosecution for horse stealing, instruction that if testimony of a witness, naming him, had been attacked through bias, and that if beyond a reasonable doubt such witness testified truthfully, his testimony should have the same weight and credence as that of any other witnesses, is erroneous and prejudicial as singling out the testimony of a single witness and giving undue prominence to an isolated fact.

Invasion of Province of Jury — Positive and Negative Testimony.

In prosecution for horse stealing, instruction that positive evidence of one credible witness is entitled to more weight than the testimony of several witnesses who testify negatively or to collateral circumstances is erroneous, as invasive of the jury's province to determine the weight of evidence.

Jury — Custody and Conduct — Reading Newspapers.

Under Pen. Code 1913, § 1063, providing that the jury may be placed in charge of officer, whose duty it is to keep jurors together until reconvention of court, to suffer no person to speak to them, nor to do so himself on any subject connected with the trial, and section 1064, requiring the jury to be admonished not to converse among themselves on any subject connected with the trial, or to anyone else, or to form or express any opinion until the cause is finally submitted, it is error to permit one juror to have in his possession and read to the others a newspaper account, reciting a former charge of larceny against one of the defendants.

[See note at end of this case.]

Appeal from Superior Court, Maricopa county: PHILLIPS, Judge.

Criminal action. Harry Babb et al., convicted of horse stealing, and appeal. REVERSED.

[506] The appellants ask for a reversal of this case on the ground that the court misdirected the jury as to the law and for misconduct of the jury. The instructions complained of are as follows:

"(1) Where witnesses have appeared and sworn to matters tending to impeach the veracity of other witnesses, you will judge

and weigh the testimony of said impeaching witnesses in the same manner as that of any other witness, and when such witnesses have attacked the credibility of any other witness and you believe from the evidence in this case that said impeaching witnesses have testified falsely, you may disregard entirely such impeaching testimony as appears to you to be false, and give to the testimony of the witnesses who have been attacked such weight and credence as you believe he deserves.

[507] "(2) And I charge you, gentlemen of the jury, that if you believe that the testimony of the witness Dean Becker has been attacked by witnesses through prejudice and bias or some special interest in this case, you may consider that fact in determining how much weight and credence you will give to the testimony of said impeaching witnesses, and I charge you, further, that in considering the testimony of said witness Dean Becker you should take into consideration all the surrounding facts and circumstances, and in connection therewith, and taking into account the probability or improbability of the truth of his story, and if from all the evidence, facts and circumstances brought out on this trial it appears to you beyond a reasonable doubt that the said witness Dean Becker has testified truthfully, then you should give his testimony the same weight and credence as any other witness

"(3) The positive testimony, gentlemen of the jury, of one credible witness to a fact, which in the light of all other evidence in the case appears reasonable and believable, is entitled to more weight than the testimony of several witnesses, equally credible, who testify negatively, or to collateral circumstances merely persuasive in their character from which a negative may be inferred."

(4) The misconduct of the jury is presented in the form of an affidavit of one of the appellants upon motion for a new trial. In the affidavit it is stated that the trial of the cause was begun on the twelfth day of February, 1914, and continued from day to day until the afternoon of the nineteenth day of February, when the case was finally submitted to the jury; that the verdict of guilty was returned on the twentieth day of February; that the jury was ordered to be kept together, that officers were sworn to take charge of it and keep it together during the trial; that on the nineteenth day of February, 1914, a certain article was published in the "Arizona Republic" purporting to relate certain facts of and concerning the commission of the offense charged and that the following statement appearing in said article, among others, to wit:

"Phillips has formerly been in trouble in Yuma, where it is alleged he embezzled sev-

eral dollars from a former employer [508] and was saved from the penitentiary only because he made good on the cash taken."

That the things contained in said statement were not presented to the jury in the course of the trial, either before or after the above publication, in any other manner than through the newspaper; that on the day of its publication and while the case was still pending before the jury a copy of the "Arizona Republic," containing said article, came into the possession of the jury, and that they and each of them read said article; that one of said jurors read said article aloud to the other jurors while they were being held together, and before they had arrived at the verdict.

Alexander & Christy for appellants.

Wiley E. Jones, George W. Harben and R. W. Kramer for appellee.

Ross, J. (after stating the facts).—1. The appellants were charged with stealing five head of horses. The evidence relied upon by the prosecution for conviction was both direct and circumstantial, and both the prosecution and defense introduced a great deal of impeaching evidence. Just why it was thought necessary by the court to limit the application of the rule "*Falsus in uno, falsus in omnibus*," to the impeaching testimony it is difficult to determine. Certainly the basis for such an instruction does not exist in this record, as there was a sharp and irreconcilable conflict in the direct evidence of the witnesses, as well as in the impeaching evidence. We see no reason why the application of this principle of law should have been restricted to one fragment of the testimony instead of the whole testimony.

The first instruction is subject to further criticism, in that it omits the element of knowledge or willfulness. "An instruction to disregard false testimony must be conditioned on the witness willfully or knowingly swearing falsely, and the omission of the qualifying words 'willfully and corruptly' is error." *Blashfield's Instructions to Juries*, § 383. The jury ought not to be advised that they may disregard the testimony of a witness who has testified falsely to one fact or in [509] respect to one fact, for the reason that the rest of his testimony may be true and fully supported by credible corroboration. The instruction calls the attention of the jury to their right to disregard the impeaching testimony when it appears to be false, and at the same time enjoins on them the duty of weighing the impeached or attacked evidence. The same rule should be applied to both; neither should be given prominence over the other.

2. The appellants say that the second instruction is erroneous—"because the evidence in the case was conflicting, and the court in said instruction singled out the witness Becker for the prosecution in the instruction, and made the acquittal of the defendants upon whether or not the jury believed him."

The vice in the first instruction is greatly intensified by the language of this instruction, for, in addition to directing the jury's attention to particular facts and phases of the testimony, this instruction singles out the most important witness for the prosecution, and practically tells the jury that if they believe his testimony, they should convict the appellants. Becker had testified that he lived at the home of appellant Babb; that he had seen the stolen horses in Babb's field; that he had assisted the appellant Phillips at night in taking the horses out of the field and removing them some twelve or fifteen miles therefrom in order to avoid detection. Both of the appellants deny this, and several witnesses for the defense testify that at the time mentioned the horses were not in appellants' possession or field. The importance of Becker's testimony is apparent—should the jury believe it, there were circumstances in the case that made the appellants' guilt inevitable.

The instruction, after directing the jury's attention to the possible bias and prejudice or special interests of the witnesses whose testimony conflicted with Becker's, advised them that if they believed Becker beyond a reasonable doubt, they "should give his testimony the same weight and credence as any other witness." Of course the "weight and credence" given to any witness believed "beyond a reasonable doubt" is absolute verity. In effect, therefore, the jury were told that if they believed Becker, they should convict the appellants. It is hard to imagine an instruction more damaging [510] or prejudicial than this one. In 12 Cyc. 649, the rule is stated as follows:

"The court should be careful in charging the jury and stating the evidence not to give undue prominence to any phase or facts which the evidence tends to establish, but to leave the jury to determine its weight and importance. It is therefore proper to refuse, and generally error to give, an instruction which singles out or emphasizes particular parts of the evidence or gives undue prominence to isolated facts, or which directs the attention of the jury to a particular fact among a great number of facts. An instruction which singles out certain witnesses and makes an acquittal depend upon whether or not the jury believe them is error where the evidence is conflicting. So the court cannot select a particular witness, or class of witnesses, and

instruct that if the jury believe he, or they willfully testified falsely as to any material fact, they may reject or distrust all their evidence."

The instruction gave undue prominence to "an isolated fact," the testimony tending to impeach Becker and to "a particular fact among a great number of facts." It singled out a certain witness and made the acquittal of appellants depend upon his testimony; the evidence being conflicting. In *Schultz v. State*, 125 Wis. 452, 104 N. W. 90, the court said:

"It is not proper for the court to select one witness from several and apply to him or his testimony exclusively rules of consideration equally applicable to others." 38 Cyc. 1680; *Loose v. State*, 120 Wis. 115, 97 N. W. 526; *Wastl v. Montana Union R. Co.* 17 Mont. 213, 42 Pac. 772.

3. In the third instruction the court clearly comments upon the weight of the testimony, wherein he tells the jury that the positive evidence of one credible witness is entitled to more weight than the testimony of several witnesses who testify negatively or to collateral circumstances. In those jurisdictions wherein the judge is not prohibited by statute or organic law from instructing the jury with respect to matters of fact, nor from commenting on matters of fact, instructions with reference to the relative weight of positive and negative testimony, when properly qualified or limited to the facts of the case, are allowed, but, even in those jurisdictions, if the witnesses who testify positively and those who testify negatively have equal opportunities of seeing and hearing, the rule that positive [511] evidence is the better must be so modified and explained as that the jury, if they so choose, may resolve the controversy in favor of the negative testimony. It is said in one case:

"Evidence of a negative nature may, under particular circumstances, not only be equal, but superior to positive evidence. This must always depend upon the question whether the negative testimony can be attributed to inattention, error, or defect of memory, and whether the witnesses had equal means and opportunities for ascertaining the facts to which they testify and exercise the same. . . . It has been often held that it is not true, as a matter of law, that negative evidence may not be sufficient to overbalance positive testimony (citing authorities). In such cases, the jury or judge have to weigh, consider, and decide for themselves somewhat regardless of general rules." *State v. Chevalier*, 36 La. Ann. 81.

Blashfield's Instructions to Juries, section 337, says:

"In the jurisdictions where the statutory or organic provisions exist, prohibiting the

trial court from expressing any opinion as to the weight of evidence, such an instruction is erroneous."

Our Constitution (section 12, article 6) provides:

"Judges shall not charge juries with respect to matters of fact nor comment thereon, but shall declare the law."

To tell the jury that positive evidence is stronger than negative evidence, or that the evidence of one witness may outweigh the evidence of several witnesses, is clearly a charge upon matters of fact and a comment thereon. It is a usurpation of the powers and duties of the jury. The court's duties are limited to a declaration of the law. When evidence has been admitted as competent and material in a case, it is the exclusive function of the jury to pass upon its weight and credibility. *Erickson v. State*, 14 Ariz. 253, 127 Pac. 754; *Lujan v. State*, 16 Ariz. 123, 141 Pac. 706; *Blashfield's Instructions to Juries*, § 116; 12 Cyc. 599-632; *Haun v. Rio Grande Western R. Co.* 22 Utah 346, 62 Pac. 908; *Russell v. Oregon R. etc. Co.* 54 Ore. 128, 102 Pac. 619.

4. Under the order of the court the jury was placed in charge of a sworn officer, whose duty it was "to keep the jurors together until the next meeting of the court, to suffer no [512] person to speak to them or communicate with them, nor to do so himself, on any subject connected with the trial." Section 1063, Penal Code 1913.

It is further provided that: "The jury shall also, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves, or with anyone else, on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them." Section 1064, Id.

Thus it will be seen that the law has provided by very strict rules that the jury shall not, after being sworn, receive any evidence outside of the court in the due course of the trial or be subject to any extrajudicial influences or suggestions whatever during the pendency of the case. Notwithstanding these precautions of the law, the jury was permitted to obtain on the last day of the trial, that had lasted six days, a copy of a newspaper, stating that one of the appellants had been guilty of a felony, to wit, embezzlement, and that he was saved from the penitentiary only because he made good on the cash taken. One of the jurors, it is shown, read the article aloud to all the other jurors. It was new matter, foreign to the issue on trial, and could not, by any rule of evidence, have been introduced before the jury. The natural and inevitable result, it would seem,

of permitting such a charge to come before the jury without any opportunity to explain it away, even if it had been competent evidence, would be to influence and prejudice the jury against the appellants. They might well have reasoned that if the appellant, Phillips, was a common criminal, the probabilities were that he was guilty of the crime for which he was on trial.

While it is not a commendable practice to permit juries to read from newspapers detailed statements of the evidence when correctly reported, it is not apparent that any prejudice would be created in the minds of the jury against the defendant; therefore courts have uniformly refused to grant new trials by reason thereof. But where a newspaper report has departed from a fair and honest statement of the evidence and has interpolated facts derogatory to the defendant and likely to excite passion and prejudice on the part of the jury [513] against the defendant, the courts, as a general rule, have not hesitated to grant new trials. As was said in *Capps v. State*, 109 Ark. 193, Ann. Cas. 1915C 957, 46 L.R.A.(N.S.) 741, 150 S. W. 193; quoting from *Styles v. State*, 129 Ga. 425, 12 Ann. Cas. 176, 59 S. E. 249.

"When a juror enters upon the trial of a criminal case, the law contemplates his withdrawal from the public, and makes no provision for addresses to him from outside sources, for his entertainment or otherwise, which are calculated, directly or indirectly, to excite any passions or emotions with respect to the matter upon which he is to sit in judgment. Perfect impartiality in the juror is the object of the law. Anything not legitimately arising out of the trial of the case, which tends to destroy the impartiality of the juror, should be discountenanced."

See also *U. S. v. Ogden*, 105 Fed. 371; *State v. Tilden*, 27 Idaho 262, 147 Pac. 1056; *People v. Stokes*, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207; *People v. Leary*, 105 Cal. 486, 39 Pac. 24; *People v. Chin Non*, 146 Cal. 561, 80 Pac. 681.

It is claimed by the respondent that the jury in this case could not have honestly or intelligently returned any other verdict than the one they did, and therefore this court should affirm the judgment. It is difficult for this court to say what the verdict of the jury might have been if they had been correctly instructed as to the law, or if they had not read the newspaper article complained of. The evidence consists of 800 pages of typewritten matter; we have read it sufficiently to discover that there is great conflict of testimony. We do not feel like assuming the functions of the jury and determining the weight of the testimony, especially in view of the palpable misdirection of the jury as to the law and the possible

Ann. Cas. 1918B.—59.

and indeed probable, prejudice and bias created in the minds of the jury against the appellants by reason of the very damaging statement contained in the newspaper.

Judgment of the lower court is reversed and cause remanded, with the directions that appellants be granted a new trial.

Franklin, C. J., concurs.

NOTE.

It is held in the reported case that the reading by the jury in a criminal case of a newspaper which contains a statement derogatory to the accused with respect to a matter wholly extraneous to the issue on trial is ground for a new trial. The reading of newspapers by a jury during the trial as a ground for setting aside the verdict is discussed in the notes to the following cases: *Fields v. Dewitt*, 6 Ann. Cas. 349; *Styles v. State*, 12 Ann. Cas. 176; *Capps v. State*, Ann. Cas. 1915C 957; and *Com. v. Fisher*, 134 Am. St. Rep. 1027.

POOLE

v.

POOLE ET AL.

Kansas Supreme Court—July 10, 1915.

96 Kan. 84; 150 Pac. 592.

Husband and Wife — Power of Husband to Dispose of Personality.

The general rule is that the law has placed no restriction or limitation on the husband's right to make such disposition of his personal property during his lifetime as he may elect. [See note at end of this case.]

Same.

Where the transfer or gift is colorable and there is a voluntary transfer or conveyance by which the husband reserves to himself an interest in or a power to dispose of the property, it may be declared void as against the widow and she may participate in its distribution upon the theory that the title still remained in the husband at his death.

[See note at end of this case.]

Same.

A widow sued as an heir of her deceased husband to set aside gifts and transfers of personal property made by him to the defendants, who are his sons by a former marriage. The transfers were made without the wife's knowledge, when the husband was eighty-three years of age and possessed of no other property, and immediately following the dismissal of an action brought by her for

separate maintenance, that action having been settled upon his conveying to her certain real estate and agreeing to pay her a monthly allowance. The court found that he made the gifts and transfers to his sons in anticipation that he would not live long and to prevent the plaintiff from inheriting a share in the property as his widow, and in the further anticipation of the probability that the resumption of the marriage relation with plaintiff would not last long or be permanent, and that she might separate from him and bring another action for alimony or divorce, and to defeat her right to a division of his property, held, following *Small v. Small*, 56 Kan. 1, 42 Pac. 323, 30 L.R.A. 243, 54 Am. St. Rep. 581, that the gifts to the sons not being colorable but absolute transfers of the title to the property, binding upon the grantor, are binding upon the heirs, and cannot be attacked by the widow as made in bad faith because of the intent thereby to deprive her of an interest in the property either as wife or widow.

[See note at end of this case.]

Gifts — Property Subject — Note Payable to Donor's Estate.

Where a person takes a note payable to his estate he does not thereby deprive himself of the right to dispose of it during his lifetime.

Witnesses — Competency — Transaction with Person Since Deceased — Waiver.

The incompetency of a witness to testify concerning communications or transactions had with a person since deceased is waived by the objecting party showing on cross-examination the fact that such a communication or transaction occurred.

(Syllabus by court.)

Appeal from District Court, Geary county:
KING, Judge.

Action by Emaline D. Poole, plaintiff, against John Poole et al., defendants. From judgment rendered, all parties appeal. The facts are stated in the opinion. **REVERSED.**

Lee Monroe and W. S. Roark for plaintiff.

John E. Hessin and J. V. Humphrey for defendants.

[85] **PORTER, J.**—This suit was brought by Emaline D. Poole as administratrix of the estate of her deceased husband, William D. Poole, and in her own right as his widow and heir at law. The defendants are the four sons of the deceased. The plaintiff seeks to cancel certain releases, transfers and surrenders of property made by William D. Poole in his lifetime to the defendants, and the prayer of the petition asked for judgment in her own right for the sum of \$8,000 and interest upon a note executed by the defendants to William D. Poole, and for the foreclosure of a mortgage securing the note.

In addition to the general denial the answer pleaded a written release of the note and mortgage by William D. Poole in his lifetime and denied that the defendants had in their possession or control any property belonging to their father at the time of his death. The court made findings of fact in substance as follows:

1. In 1903 William D. Poole was a widower and owned 2,400 acres of farm land in Geary county where he resided, and also owned about 200 head of cattle. On March 26, 1903, he conveyed 843 acres of the land to his four sons, reserving a life estate to himself, and at the same time conveyed to them the balance of the 2,400 acres without any reservation. On the same date the sons gave him their note by which they promised at his death to pay to his estate the sum of \$8,000 with eight per cent interest per annum from maturity. The note was secured by a mortgage upon the 843 acres of land in which he had reserved the life estate.

2. In May, 1904, William D. Poole turned over to his sons, the defendants, about 200 head of cattle under an oral agreement [86] by which the sons at the end of five years were to turn back to him cattle of like kind or value, and on the same day he rented to his sons the 843 acres of land subject to his use of the homestead and dwelling house thereon, in consideration of which the sons agreed to pay him thereafter an annual rental of \$1,630. The sons were partners and carried on a farming and stock business under the name of Poole Brothers and continued in this during all the times mentioned in the findings.

3. In October, 1904, when William D. Poole was seventy-six years of age and the plaintiff was fifty-four years of age, they were married, the plaintiff at the time having full knowledge of the transfer and conveyance of the property mentioned in findings 1 and 2.

4. In May, 1907, William D. Poole gave to his sons all his interest in the 200 head of cattle and released them from the payment of the annual rent for the 843 acres of land, in consideration of which the sons agreed to pay him from time to time such sums of money as he should require or ask for, and under this arrangement the sons paid him at different times from March, 1910, to May, 1911, sums aggregating \$3,485.

5. In November, 1910, William D. Poole and his wife went to California for the benefit of his health and remained there about nine months.

6. While in California they had domestic troubles and separated and the wife brought suit there for alimony and separate maintenance, claiming in the action that he owned the \$8,000 note and mortgage and five shares of stock in a bank at Manhattan and other

property in Geary county, Kansas. The old gentleman telegraphed for his youngest son, Grover, to come to him, and in response the son went to California and negotiated a settlement with the plaintiff of the suit for alimony. In the settlement William D. Poole conveyed to her four unimproved lots in Junction City of the value of \$1,200 or \$1,300, and agreed to pay her \$25 a month for her use and benefit and to pay the taxes on the Junction City property, and also paid her attorney's fees in the action amounting to \$250. The action was then dismissed and the parties resumed their relations as husband and wife and shortly thereafter returned to Kansas. The court expressly found that the plaintiff insisted [87] in the settlement of the California case that the note for the \$8,000 should be transferred to her for her security and protection, but that this was not acceded to by William D. Poole and that it was not included in the settlement.

7. Soon after the settlement of the suit for alimony, and while William D. Poole and his son Grover were still in California, William D. Poole secretly, without the knowledge of the wife, transferred and delivered the certificate for the five shares of bank stock to Grover Poole, in the name of and for the use and benefit of Poole Brothers, and at the same time delivered to him a written release of the \$8,000 note secured by the mortgage on the 843 acres of land. The shares of bank stock and the mortgage in question constituted all the property that William D. Poole owned or had left. This transfer, at the time he was eighty-three years of age and in poor health, was made without consideration and in contemplation and expectation on his part, and on the part of his son Grover, that the old gentleman would not live long and that his wife would probably survive him and be one of the heirs to whatever property he owned at his death, and were also made by William D. Poole in consideration of the probability that the resumption of the marriage relation with plaintiff would not last long or be permanent, and that she might separate from him and bring another action for alimony, or divorce and alimony, for which reasons the transfer of the bank stock and the release of the mortgage were made in bad faith by William D. Poole and were accepted by Grover Poole on behalf of the defendants in order to defeat the plaintiff's right as an heir to this property in case she survived him, or to defeat her right to a division of this property in case another suit should be brought by her for alimony, or divorce and alimony.

8. The note and mortgage having been lost, were not delivered to the defendants. The plaintiff offered testimony tending to show that the signature of William D. Poole to

the release was a forgery. On this issue the court found the signature to be genuine.

9. The transfer of the property mentioned in finding No. 1. and the gift of the cattle and also the release of Poole Brothers from payment of rent on the 843 acres were all made in good faith at the time when there was no difficulty or domestic [88] trouble between the plaintiff and William D. Poole, and with no intention to defraud the plaintiff.

10. After the parties returned from California to Kansas the plaintiff again separated from her husband and brought an action for divorce and alimony, which action was never tried but abated by the death of the husband.

11. William D. Poole died November 24, 1911, intestate, the few debts that he owed being fully paid by his sons. He left surviving him as his heirs the parties to this suit.

12. A half interest in the amount due on the \$8,000 note is \$4,487.08, and a half interest in the value of the bank stock is \$545.64.

13. There was no completed gift, transfer or delivery of the \$8,000 note by William D. Poole, to the plaintiff.

14. Defendants John, William and Bryant Poole, ratified all that their brother Grover did in taking and receiving the written release and transfer of the bank stock.

As conclusions of law the court found that the plaintiff has no interest in the 2,400 acres of land nor in the cattle and rents; but that she is entitled as an heir to a half interest in the note and mortgage and the same interest in the bank stock. She was therefore given judgment against defendants for one-half of the amount due on the note, for the foreclosure of the mortgage, and for one-half the value of the bank stock.

There are two appeals, neither side being satisfied with the judgment. The defendants' main contention, briefly summarized, is that the plaintiff's suit is grounded upon her rights under the statute of descents and distributions; that since she is not a creditor of the deceased her suit must fail because as an heir she is only entitled to one-half the property belonging to the husband at the time of his death; that he had the right in his lifetime to dispose of it as he pleased since it belonged to him.

The findings of fact exclude the idea that the gifts were "colorable," and, on the contrary, show an actual transfer of the title and ownership of the property to the sons. In *Small v. Small*, 56 Kan. 1, 42 Pac. 323, 54 Am. St. Rep. 581, 30 L.R.A. 243, it was held that the statute of descents and distributions is in no respect a limitation on the right of the husband while living to dispose of his personal property by gift in accordance with his wishes and with the [89] express intent of

depriving his widow of any interest therein as an heir. The syllabus in that case reads:

"Subject to certain limitations not applicable to this case, and as against any post-mortem claim of his widow, a married man, in Illinois or in Kansas, may, during coverture, give away to his children absolutely the bulk of his property, when the known effect of the gift will be to deprive the widow of the fair share of the property which otherwise would have fallen to her."

The case of *Small v. Small*, supra, is reported with annotations in 30 L.R.A. 243, and in 54 Am. St. Rep. 581. The general rule is that the law has placed no restriction or limitation on the husband's right to make such disposition of his personal property during his lifetime as he may elect. In *Padfield v. Padfield*, 78 Ill. 16, it was said:

"To hold that a feme covert has a vested interest in her husband's personal estate, that he is unable to divest in his lifetime, would be disastrous in the extreme to trade and commerce." (p. 20.)

The general rule is not recognized, however, in some jurisdictions. The decisions of some of the courts are based upon statutes giving the wife dower in personal property. (See cases cited in Note, 10 Ann. Cas. 1053.) Where the transfer or gift is merely colorable and there is a voluntary transfer or conveyance by which the husband reserves to himself an interest in or a power to dispose of the property, it may be declared void as against the widow and she may participate in its distribution upon the theory that the title still remained in the husband. (*Small v. Small*, supra; *Padfield v. Padfield*, supra; *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211; *Cameron v. Cameron*, 10 Smedes & M. (18 Miss.) 394, 48 Am. Dec. 759; *Lightfoot v. Colgin*, 5 Munf. (Va.) 42; *Stewart v. Stewart*, 5 Conn. 317; *Dunnoch v. Dunnoch*, 3 Md. Ch. 140; *Jones v. Somerville*, 78 Miss. 269, 28 So. 940, 84 Am. St. Rep. 627.)

At the time the note and mortgage and the bank stock were transferred to the sons the plaintiff and William D. Poole had settled their domestic difficulties, and so far as the evidence shows lived together amicably for several months thereafter. She had dismissed her action for separate maintenance and by the settlement had obtained from her husband valuable property rights and an agreement for the payment of a monthly allowance. Aside from the facts that they had had domestic [90] difficulties and that she had brought her suit in California there was no evidence, at least none is set forth in the abstracts, tending to show that either the husband or the sons anticipated that she would begin another suit for support or for divorce and alimony. It must be said, there-

fore, that the evidence to sustain the finding that the gifts were made in anticipation that she would begin another suit is very slight, and of course the burden of proof was upon plaintiff to show that the transfers were fraudulent.

We are not left in any doubt as to the exact theory upon which the trial court proceeded in arriving at the conclusion that the transfers should be set aside. The written opinion of the court is set forth in the abstract, from which it appears that the court held the transfers fraudulent because their purpose was to defeat the marital rights of the wife and to deprive her of rights as an heir. The court in the opinion stated the law to be as declared in 14 Cyc. 68, under the title "Descents and Distributions," as follows:

"A sale, gift, or other transfer of personal property, however, made fraudulently for the mere purpose of depriving the wife of her distributive share is invalid as to her."

In the same paragraph in Cyc. it is stated that:

"As to personal property, the rule is that the husband may deprive his wife of her distributive share by a sales gift, or other transfer made in good faith during his lifetime."

Then follows the excerpt quoted by the court. In the opinion the trial court further said that the case of *Small v. Small* "is not at variance with the authorities above referred to for the decision in the *Small* cases states that the transfers in question there were made in good faith." The cases cited in Note 37 (14 Cyc. 68) in support of the text relied upon by the trial court are directly opposed to *Small v. Small* so far as they hold that the intent to deprive the wife of her distributive share is of itself a fraud upon her. That was the purpose of the husband in the *Small* case. The "good faith" to which Chief Justice Martin refers in the *Small* case was not affected in the slightest degree by the fact that the husband made the gifts with the secret intent to deprive the wife of her distributive share. It was in "good faith" notwithstanding such intent because he actually parted with his title; he did not reserve an interest in the property [91] in himself; in other words, the transfer was not colorable. The cases which are fully in accord with *Small v. Small* are cited in the same page of 14 Cyc. (68) under note 36, from the courts of a dozen states which have held that, although the transfer is made to defeat the rights of the wife, it is not fraudulent if a *bona fide* transfer is made for that purpose. Among the decisions cited in the note are *Padfield v. Padfield*, 78 Ill. 16, and *Richards v. Richards*, 11 Humph. (Tenn.) 429. In the Tennessee case the husband gave his property to his children for the purpose

of excluding his widow from any share therein and she was held to be without remedy.

Counsel for plaintiff cite a number of cases where in actions brought by the wife for alimony courts have set aside transfers of property made by the husband for the purpose of defeating her action, and in some of the cases cited the transfers were made prior to the commencement of any suit by her. We have examined most of these cases. In some of them the court found that the transfers were fraudulent because the husband retained an interest in the property. (Platner v. Platner, 66 Ia. 378, 23 N. W. 764.) In others the husband had obtained conveyances of his wife's property which he subsequently conveyed fraudulently to a third person. In an action afterwards brought by her for divorce and alimony the transfers were set aside as fraudulent. All of the cases cited were suits where the wife sued the husband. We have found no cases and have been referred to none where the widow claiming under the statute of descents and distributions has been permitted to defeat an actual transfer of personal property made by the husband in his lifetime, on the ground that his purpose was to defeat her marital rights, or to defeat her right to share in the property as his widow and heir. The *jus disponendi*, which is an incident to the ownership of personal property, is jealously guarded by the courts because it lies at the foundation of trade and commercial transactions; and to restrict or cut down this inherent right of the owner in order to accomplish an equitable division of property between the widow and other heirs is not in accord with sound public policy. (Small v. Small, 56 Kan. 1, 42 Pac. 323, 54 Am. St. Rep. 581, 30 L.R.A. 243; Richards v. Richards, supra.)

It may be conceded that the trial court arrived at a judgment [92] which results in an equitable division between the widow and sons of the property in controversy if it belonged to the deceased at the time of his death. But this is one of the cases where the maxim that "equity follows the law," a maxim said to be quite restricted in scope, must be held to apply. It presents a situation where the rights of the parties are clearly defined and established by law, first, by the statute of descents and distributions under which the plaintiff seeks to recover, and second, by the settled rule of law upon which rests the decision in Small v. Small, supra.

"Wherever the rights or the situation of the parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable." (Magniac v. Thomson, 15 How. (U. S.) 281, 299.)

The opinion in Small v. Small quotes with approval (p. 16) the following statement from Williams v. Williams, 40 Fed. 521:

"Of course, the sale or gift must be absolute and *bona fide*, and not colorable only. And if the sale or gift would bind the grantor, it would bind his heirs." (p. 522.)

The findings show conclusively that there was an actual gift of the cattle to the sons accompanied by delivery; that there was a written release of the note and mortgage; that these transfers were not "colorable." They were *bona fide* transfers. That they were secret or that knowledge of them was purposely withheld from the wife or that the sons paid no consideration can make no difference. (Small v. Small, 56 Kan. 1, 42 Pac. 323, 54 Am. St. Rep. 581, 30 L.R.A. 243.)

Reliance is placed by plaintiff upon McKelvey v. McKelvey, 79 Kan. 82, 99 Pac. 238, but that case is not in point. The property there was not personalty but real estate, which the husband attempted fraudulently to dispose of by a judicial sale upon a collusive judgment obtained against him, intending, however, to dispose of the land in a way that he could get it back. The transaction was colorable and not an actual one, besides being fraudulent for other reasons.

It must be held, therefore, that the court erred in awarding plaintiff a widow's share in the note, the mortgage securing it, and the bank stock.

In the cross-appeal of the plaintiff she contends that she is [93] entitled to recover her interest as an heir in the value of the cattle and the rentals of the 843 acres of land; that there was no competent evidence to sustain the finding that William D. Poole released the sons from their obligation to pay rent or that he made them a gift of his interest in the cattle. This contention is based upon the claim that the court permitted the sons to testify concerning transactions with a deceased person. The trial court followed the correct rule in permitting the witnesses to testify on the express ground that in the cross-examination plaintiff had brought out the fact that there was some kind of an agreement between the father and sons, and that this opened the door and permitted defendants to show what the agreement was. (Nicolls v. Esterly, 16 Kan. 32; Plowman v. Nicholson, 81 Kan. 210, 105 Pac. 692, 106 Pac. 279.)

Evidence of the agreement having been properly admitted, it is of little consequence whether the other testimony objected to was admissible or not, since the trial was by the court. However, the testimony of the sons denying that they had in their possession or control any property or money belonging to the deceased at his death negatives rather than affirms that there was a communication

or transaction with the father in his lifetime. (Murphy v. Hindman, 58 Kan. 184, 48 Pac. 850; Gaston v. Gaston, 83 Kan. 215, 109 Pac. 777; Kerr v. Kerr, 85 Kan. 460, 461, 116 Pac. 880; Coblentz v. Putifer, 87 Kan. 719, 125 Pac. 30, 42 L.R.A.(N.S.) 298.)

Nor is this testimony open to the objection that it was merely a conclusion of law; it involved at most a mixed question of fact and law.

There is a further contention that the case must be distinguished from *Small v. Small*, 56 Kan. 1, 42 Pac. 323, because it is said there was an agreement, tacit and expressed, both prior and subsequent to the marriage, that plaintiff should receive one-half this property at his death in compensation for the unusual care and attention he required, and a further express agreement of the same kind as an inducement to the dismissal of the California case. The answer to this is that the findings which the court made exclude the idea that there was any such understanding or agreement. The fact is, the court found against the plaintiff's contentions in this respect. There is an express finding that William D. Poole never acceded to [94] her request that the note and mortgage should be included in the settlement of that action. We find no substantial reason for setting aside the findings. The plaintiff makes another contention rather inconsistent with the last mentioned, namely, that the note having been made payable to the estate of William D. Poole, it was beyond his power to dispose of it. None of the many cases cited supports the contention. Some of them are cases where a person in his lifetime took a note payable direct to his heirs after his decease, or to some third person named. Some of the others are cases where the note was not executed until after the death of the person owning the estate, and was made payable direct to the administrator or to the estate. All that the court decided was that the administrator could maintain an action to recover on the note. We think that there is no force in the contention that William D. Poole constituted himself a trustee for his heirs when he took the note payable to his estate. It was executed eighteen months before he married the plaintiff, and at a time when the only heirs in being were the defendants. As suggested, the contention of the plaintiff is directly opposed to her claim that she is entitled to a share in the note by reason of an agreement made long afterwards. We hold, however, that where a person takes a note payable to his estate he does not thereby deprive himself of the right to dispose of it during his lifetime by accepting payment or by releasing and discharging the obligators. In this case the note was delivered to William D. Poole and remained in his possession and control,

so far as the findings show, until it became lost or mislaid.

It follows from what has been said that plaintiff's contentions cannot be sustained, and that the judgment is reversed and the cause remanded with directions to render judgment in favor of defendants.

Burch and Mason JJ., dissenting.

NOTE.

Right of Husband, as against Wife, to Dispose of His Personalty during Coverture.

In General, 934.

Disposition as Affecting Widow's Distributive Share, 935.

Disposition as Affecting Alimony, 936.

In General.

The purpose of this note is to review the recent cases passing on the right of a husband, as against his wife, to dispose of his personalty during coverture. The earlier cases are collected in the notes to *Robertson v. Robertson*, 10 Ann. Cas. 101; and *Lines v. Lines*, 24 Am. St. Rep. 487.

The correlative right of a wife to make a gift of her personalty to another than her husband is discussed in the notes to *Wright v. Holmes*, 4 Ann. Cas. 583; *Vosburg v. Mal-lory*, Ann. Cas. 1914C 880; and *Johnson v. Calley*, 99 Am. St. Rep. 884.

No restriction or limitation is made by the law on the power of a husband to make such disposition of his personal property during his lifetime as he may elect. In *re Warner*, 167 Cal. 686, 140 Pac. 583; *Sheckells v. Sheckells*, 42 App. Cas. (D. C.) 131; *Petty v. Petty*, 4 B. Mon. (Ky.) 215, 39 Am. Dec. 501; *Brown v. Fidelity Trust Co.* 126 Md. 184, 94 Atl. 523; *Poole v. Poole*, 129 (Md.) 287, 99 Atl. 551; *Schmoltz v. Schmoltz*, 116 Mich. 692, 75 N. W. 135; *Griffith v. Griffith*, 74 Ore. 225, 145 Pac. 270. And see reported case.

In the case of *In re Warner*, *supra*, the court said: "The general rule of common law is well stated in 15 Am. & Eng. Enc. of Law, 834, as follows: 'It may be stated as a general rule that at common law the husband, as against every person except his creditor, has a right to dispose of his personalty in any manner he thinks proper during his lifetime, and during coverture the wife has no interest in the property except so far as the husband may be liable for her support and maintenance.'"

Quoting from *Dunnock v. Dunnock*, 3 Md. Ch. 146, it was said in *Brown v. Fidelity Trust Co.* *supra*: "To hold that either a husband or wife has a vested interest in the

other's personality that the one is unable to divest in his or her lifetime, would be disastrous in the extreme to trade and commerce. Owing to commercial necessities, personality must be left free for exchange, and to be so, some one must be vested with full power to sell and transfer it free from any latent or contingent claims."

In *Beach v. Fireovid*, 84 Kan. 357, Ann. Cas. 1912A 670, 114 Pac. 206, there was involved the following statutory provision: "It shall be unlawful for either husband or wife (where that relation exists) to create any lien, by chattel mortgage or otherwise, upon any personal property owned by either or both of them, and now exempt by law to resident heads of families from seizure and sale upon any attachment, execution or other process issued from any court in this state, without the joint consent of both husband and wife." It was held that the statute did not prevent the owner of exempt property from turning it over in good faith to a creditor in payment of a debt without the consent of his wife since the transaction was in legal effect an absolute sale and not a mortgage. See to the same effect *Barker v. Kelderhouse*, 8 Minn. 207; *Kelly v. Fleming*, 113 N. C. 133, 18 S. E. 81.

Under a statutory provision that "a chattel mortgage by the husband on the household and kitchen furniture shall be void unless the wife join therein and her privy examination be taken in the manner prescribed by law, as on conveyances of real estate," it has been held that a piano owned by a husband and placed in his home for the use of his wife and daughters, was within the purview of the statute and that a chattel mortgage thereof by the husband was invalid unless the wife signed it. *Thomas v. Sanderlin*, 173 N. C. 329, 91 S. E. 1028.

Disposition as Affecting Widow's Distributive Share.

The statutory provision under consideration in *Jordan v. American Security, etc. Co.* 38 App. Cas. (D. C.) 391, was as follows: "Where a testator bequeathes or devises a considerable part of his personal estate to his wife, and it appears not in any part of his will or codicil that he intended his said devise as a legacy only to his wife, and that she might nevertheless have the third part of his remaining estate, it shall be at the election of such wife . . . to make her election." It was held that where a husband who owned personality of the value of about \$20,000, half of which his wife would take on his death in the absence of a will, bequeathed his wife \$10 by a will falsely reciting that she had already been satisfactorily provided for, the wife need not re-

nounce the bequest in order to take the share of the estate which the law gave her.

In *Ellmaker v. Ellmaker*, 4 Watts (Pa.) 89, it was held that a contract by which the wife agreed to relinquish all right of dower in law or in equity in consideration of a certain sum to be paid to her in lieu of interest in the husband's estate, did not operate to exclude the widow from a share of the personal estate under the statute of distribution. The court said: "Who so ignorant as not to know that a husband may dispose of his chattels during the coverture without his wife's consent, and freed of every post mortem claim by her; or that he can dispose of his land freed of her dower but with her concurrence? The current transactions of life publish the former; and a knowledge of the latter is proved by experience to be universal. The effect of the marriage settlement, therefore, is not to exclude the wife from a share of the personal estate under the statute of distribution."

The recent decisions are in accord in holding that a voluntary transfer or conveyance by which a husband, reserving to himself a benefit from or power of disposal over the property, parts with its ownership for the purpose of defeating his wife's interest in his estate, is invalid as against the wife. *Justh v. Wilson*, 19 D. C. 529; *Blankenship v. Hall*, 233 Ill. 116, 84 N. E. 192, 122 Am. St. Rep. 149; *Smith v. Corey*, 125 Minn. 190, 145 N. W. 1067; *Donaldson v. Donaldson*, 249 Mo. 228, 155 S. W. 791; *Pollman v. Schaper*, 258 Mo. 710, 167 S. W. 953; *Snayberger's Estate*, 62 Pa. Super. Ct. 390. And see the reported case.

In *Pollman v. Schaper*, *supra*, it was held that in a suit by a widow to avoid gifts of money made in his lifetime by her deceased husband, the evidence must show that the gifts were given with the fraudulent intent to defeat her right to dower.

A wife may complain of frauds done in contemplation of marriage and avoid conveyances made by the husband in fraud of her marital rights since she stands on the same footing as a creditor in this regard, but she must show that the transfer of the property was made with a view of defrauding her. *Donaldson v. Donaldson*, 249 Mo. 228, 155 S. W. 791.

In *Snayberger's Estate*, 62 Pa. Super. Ct. 390, it appeared that a husband three years before his death gave to each of his nine children by a former wife a promissory note not under seal and without consideration. It was held that the notes could not be paid out of the assets of the estate to the detriment of the widow.

Where a sale of personality by a husband was for an adequate consideration and the evidence tended to show that the sale was open and fair, the fact that it was made to

a son who provided for his father and took care of the home, was held not to establish an intent to defraud the wife, there being no evidence of any undue influence on the part of the son. *Lusse v. Lusse*, 140 Mo. App. 497, 120 S. W. 114.

It has been held that if the husband's purpose in making a gift to his children of his personalty, is to prevent his wife from obtaining her distributive share of the property the gift will be declared illegal. But the widow must show not only that the effect of the gift is to prevent her obtaining her distributive share but also that the gift is illegal. *Evans v. Evans* (N. H.) 100 Atl. 671.

In *Smith v. Corey*, 125 Minn. 190, 145 N. W. 1067, the court said: "We are met by a finding of the trial court that there was no fraud on the part of Gorey and it is supported by the evidence. A court cannot say with minute exactness just how much the husband may give away without subjecting himself to a just charge of fraud. He may make gifts. He is not required to keep one-third of his property intact for his wife. Fraud is the basis of the relief which the widow gets. It is entirely clear that Corey, as far back as 1905, when the trust deed was made, had in mind that his wife should not have so much as one-third of his property. There were reasons for this which appealed to him. He had four living children by his first and second wives. He had none by his third. She had three by her first husband. He was unwilling that her children should have much of his property."

It is generally held that a husband cannot by a gift causa mortis defeat the statutory right of his wife to a part of the personal estate whereof the husband dies seized or possessed since the gift does not take effect until the death of the donor. *Delta, etc. Land Co. v. Benton*, 171 Ill. App. 635; *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 102 N. E. 282; *Weber v. Salisbury*, 149 Ky. 327, 148 S. W. 34.

The mere fact that the gift is made in contemplation of death does not make it invalid as depriving the donor's widow of her share where the gift is not colorable but is absolute and in consideration of love and affection and sufficient provision is made for the widow. *Delta, etc. Land Co. v. Benton*, 171 Ill. App. 635.

Where a wife was made the donee of one-fourth of a gift causa mortis by the husband and was the beneficiary of a life insurance policy amounting to as much as her statutory share of the money given away, it was held that no fraud could be inferred. *Weber v. Salisbury*, 149 Ky. 327, 148 S. W. 34.

Disposition as Affecting Alimony.

A conveyance of personalty by a husband with the intent to deprive the wife of alimony

is fraudulent and will be set aside in a suit instituted by her for that purpose. *Sheckells v. Sheckells*, 42 App. Cas. (D. C.) 131; *Dieke v. Dieke*, 182 Ill. App. 13; *Griffith v. Griffith*, 74 Ore. 225, 145 Pac. 270.

In the case first cited it appeared that a husband executed a bill of sale of his interest in his deceased father's personal estate a year before his wife brought a suit for divorce. In the divorce proceedings the wife attacked the bill of sale as fraudulent. It was held that the burden of proving a fraudulent intent was on the wife, and the mere fact that the transfer of the personalty was not recorded did not affect her rights where the property was in the actual possession of the transferree.

It has been held that an assignment by a husband of his interest as devisee in an estate made to evade payment of alimony might be declared void in the wife's proceeding for separate maintenance after the decree awarding a weekly allowance, but that where the order for the payment of alimony did not make the allowance a lien on the husband's interest in the estate, the husband's assignment thereof pending the wife's petition to have that interest subjected to the payment of alimony was valid if it was made in good faith and for a valuable consideration. *Dieke v. Dieke*, 182 Ill. App. 13.

IN RE HAYES ET AL.

Florida Supreme Court—December 20, 1916.

72 Fla. 558; 73 So. 362.

Constitutional Law — Liberty of Speech and of Press.

The thirteenth section of the declaration of rights of the constitution of Florida, which provides that "every person may fully speak and write his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press," etc., does not secure immunity from punishment to any citizen who falsely and with the purpose to defame, attacks in the newspapers the character of any other citizen, or impugns the integrity, honor and authority of the courts.

[See note at end of this case.]

Same.

The exercise of the right to "fully speak and write" one's sentiments on all subjects, a right secured by our constitution, is always subject to the preservation of the governmental authority of the state as conferred by law.

[See note at end of this case.]

Contempt — Inherent Power to Punish.

This court has the inherent power, independent of statutory authority, to punish as for a direct contempt any person who during the pendency of a cause before this court publishes an article referring to such cause which reflects upon the efficiency and integrity of the court.

[See 16 Ann. Cas. 759; 117 Am. St. Rep. 950.]

Newspaper Publication as Contempt.

Publishers of newspapers have the right, but no higher right than others, to publish the conduct of the courts, but such right is limited by the obligation to observe respect for truth and fairness.

[See 50 Am. St. Rep. 573.]

Constitutional Law — Liberty of Speech and of Press.

Under the right of freedom of speech and of the press, the public have a right to know and discuss all judicial proceedings, but this does not include the right to attempt, by wanton defamation and groundless charges of unfairness and partisanship, to degrade the tribunal and impair its efficiency.

[See note at end of this case.]

(Syllabus by court.)

Original contempt proceedings against Percy S. Hayes and Bryan Mack. The facts are stated in the opinion. **MOTION TO QUASH DENIED.**

John P. Stokes for motion.

[559] **PER CURIAM.**—This is the first time in the history of Florida that this court has issued a rule against the editor and reporter of a newspaper to show cause why [560] they should not be attached for contempt because of the publication of a libelous article impugning the integrity, dignity and authority of this court. It is to be hoped that the good sense of our people, their love of order and respect for the institutions of our government will operate to restrain the impulsive and ill-natured words of those among us who seem to be so alert to suspect and ready to condemn and that proceedings of this nature may not become necessary in the future to restrain the vicious tendencies of those who traffic in scandal and sensation and which lead them to attacks upon the integrity and authority of our institutions.

It is true that respect to the courts is the voluntary tribute which the people pay to worth, virtue and intelligence and every man who has the honor to occupy judicial position in our government should strive to attain to that standard of judicial purity and efficiency which right thinking people require of their judicial officers; but it is also true that malicious, designing persons may greatly impair the authority and efficiency of our courts by using the powerful arm of the press

to scatter abroad suspicion and distrust by unfounded accusations against the intelligence, impartiality, integrity and mental honesty of the judges of our courts of justice.

Such accusations are an insult to the people whose agents the courts are; the injury accomplished is to the institution which the people by their government have established. The author and distributor of such publications therefore is an enemy to his people, a veritable traitor to his government whose protection he enjoys.

Mr. Chief Justice English in the case of *State v. Morrill*, 16 Ark. 384, said: "It was well remarked by counsel, that no court could coerce public respect for its decisions; and we may add that no sane judge would attempt [561] it. If it were the general habit of the community to denounce, degrade and disregard the decisions and judgments of the courts, no man of self-respect and just pride of reputation would remain upon the bench, and such only would become the ministers of the law, as were insensible to defamation and contempt. But happily for the good order of society, men, and especially the people of this country, are generally disposed to respect and abide the decisions of the tribunals ordained by government as the common arbiters of their rights. But where isolated individuals, in violation of the better instincts of human nature, and disregardful of law and order, wantonly attempt to obstruct the course of public justice, by degrading and exciting disrespect for the decisions of its tribunals, every good citizen will point them out as proper subjects of legal animadversion." "The court looks to the sober judgment of all reflecting and intelligent men, and to none with more confidence than the enlightened and liberal conductors of the press, who, as before remarked, have generally manifested a disposition to maintain public respect for the judicial tribunals of the country."

In the case of *Watson v. Williams*, 36 Miss. 341, the court said: "In this country all courts derive their authority from the people, and hold it in trust for their security and benefit. In this State all judges are elected by the people, and hold their authority in a double sense directly from them; the power they exercise is but the authority of the people themselves exercised through courts as their agents. It is the authority and law emanating from the people, which the judges sit to exercise and enforce. Contempts against these courts in the administration of their laws are insults offered to the authority of the people themselves and not to the humble [562] agents of the law whom they employ in the conduct of their government. The power to compel the law-

less offender against decency and propriety, to respect the laws of his country and submit to their authority (a duty to which the good citizen yields hearty obedience without compulsion) must exist, or courts and laws operate at least as a *restraint* upon the upright who need no restraint, and a license to the offenders whom they are made to subdue." How appropriate is this language to our State government whose constitution provides for the election by the people of the judges of our Supreme Court.

In the case of *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257, the court said: "We are well aware that the trust reposed in us to protect the people's court from degradation is a *delicate* as well as a sacred trust. The power claimed, it is said, is arbitrary and liable to abuse. That is no reason why the power should not exist and be reposed somewhere. The few instances in which this power has been used during the last century shows that it was wisely placed and may be safely left in the hands of the courts. It is well established by the authorities that the power is inherent in courts of justice to summarily punish constructive as well as direct contempts. And in this country, where the courts are in the divisions of power by the Constitutions of the several States constituted a separate and distinct department of government clothed with jurisdiction and not expressly limited by the constitution in their powers to punish for contempt the inherent power that is thus necessarily granted them cannot be taken away by the legislative department of the government."

For seventy-one years this State has enjoyed the advantages and benefits of Statehood in the government [563] of the United States and as pointed out herein this is the first time in its history that this court has felt the necessity for the exercise of the power to bring any one before it and punish him for seeking through the public press to destroy its efficiency by shaking the confidence of the people in its integrity. There has been no disposition and there is none now on the part of this court to seek opportunities to exercise this power. It has passed unnoticed some ill-advised criticisms and untrue statements regarding its decisions, deeming them to have originated in the disappointment and poignancy of defeat which calm deliberation and sober thought would rectify in the minds of our people, but this is the first time that it has met a deliberate and meditated insult from the editor and reporter of a newspaper who published an article charging this court with hostility toward counsel, stubbornness, partiality and partisanship in a cause then pending in and being heard and considered by the court. In the conclusion at which we have arrived, we have not for-

gotten that we have no right in this manner to avenge individual wrongs, although the best years of the lives of some of the judges of our Supreme Court have been given conscientiously to an honorable discharge of the duties devolving upon them; a fair and just consideration of all causes brought before us, and into whose hearts the unkind and malicious thrust of this contemptuous article has sunk with bitter cruelty we remember only the studied injury to the people's court, for as Judge Okey Johnson of West Virginia said, "It is a matter of stern and inflexible duty from the performance of which under our official oaths we dare not shrink. For we well know that as the ermine was spotless when we put it on, the people expect us to leave it as untarnished for our successors."

[564] The profession of journalism is a great profession. It has enrolled in its membership some of the brightest minds in the history of our country. It has claimed men of the highest standard of integrity, indefatigable workers for the upbuilding of our common country and the establishment of our splendid institutions. They use the "liberty of the press" as a means for the promotion of all that is good and noble among their fellow men; they discuss in the columns of their publications public questions in a spirit of fairness and always abhor and loathe the methods of those scandal mongers who traffic in sensational stories to their sordid profit. Our people have nothing to fear from the true journalist, our government and our institutions are safely guarded by them in the field of their labors. Nor has the freedom of the press anything to fear from the judiciary in this State. It may be said to the credit of the press in this State that except in very few instances it has upheld and maintained respect for the judiciary. But it is from the operations of the pseudo-journalist that the people expect and receive injury and insult. That class who claiming the protection of that clause in our constitution which provides that "Every person may fully speak and write his sentiments on all subjects" (Declaration of Rights Section 13), dips his pen in the ink of morbid thoughts and with the recklessness born or irresponsibility attacks the integrity and honor of governmental institutions, and the characters of men and women with equal abandon, ignoring the admonition contained in the same section of the Declaration of Rights, viz: that they shall be held "responsible for the abuse of that right" to speak and write their sentiments on all subjects.

It was not the purpose of the framers of our constitution nor the people in adopting it to permit any citizen [565] to attack unjustly in the public prints the character of any other citizen nor to impugn the integrity,

honor and authority of our courts with impunity. "There is nothing in the language of the constitution which authorizes one man to impute crimes to another for which the law has provided the mode of trial and the degree of punishment. . . . The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation and with an eye solely to the public good and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity." Chief Justice McKean in *Republica v. Oswald*, 1 Dall. (Pa.) 319, 1 U. S. (L. ed.) 155.

Our government is one of laws. The exercise of any right secured by the organic law is always subject to the lawful rights of other persons in the premises and especially is the exercise of a right by any person subject to the preservation of the governmental authority of the State as conferred by law.

It is of paramount importance that each department of our government should be protected and preserved against the attempts of designing persons to undermine its authority and destroy its efficiency. The Executive branch of our government is charged with the duty of enforcing the law as made by the Legislature and construed by the courts, yet the officers of that branch of the government whose duties are largely, if not entirely, ministerial, are protected by law from interference with the discharge of their duties. The Legislative branch whose acts are subject to the courts' construction has the power vested in it by constitutional provision to punish [566] by fine and imprisonment any contempt committed in its presence, and so the courts whose duty it is to construe the law and upon whom there is no check save the sovereign power of the people and the conscience, honor, ability and mental honesty of the judges have the inherent power to punish summarily any effort on the part of a citizen to destroy their authority and efficiency. As was said by this court in *Ex p. Edwards*, 11 Fla. 174, "It is not to be denied (and the numerous authorities cited at the hearing by the counsel for the contestants abundantly establishes the position), that, in the absence of any statutory limitations or restrictions, the power of the several courts over 'contempts' is omnipotent and its exercise is not to be enquired into by any other tribunal. This is the great bulwark established by the common law for the protection of courts of justice, and for the maintenance of their dignity, authority and ef-

iciency, and neither in England nor in the United States has this unrestricted power been seriously questioned." The Justices of the Supreme Court and Judges of the Circuit Court are liable to impeachment by the House of Representatives for any misdemeanor in office, but for the possession of ability and the exhibition of fairness, impartiality and mental honesty in the trial of causes before them they are responsible to the sovereign people.

The trust reposed by the people of the State of Florida in the Justices of our Supreme Court is the highest and most sacred of all trusts. The property, the liberties and lives of our citizens are rights which constantly are before this court for adjudication and in any cause pending before this court the exhibition by the justices of ignorance, stubbornness, hostility to any party to the cause or his representatives, unfairness, partiality and partisanship would destroy the efficiency and authority of [567] this court, bring it into contempt of the people and prepare the way for breaches of the peace and possible bloodshed among our citizens. Is it reasonable to suppose that any man who has been honored by the people of his State with a position upon this tribunal is unmindful of the sacred trust reposed in him? Would any fair minded, honorable citizen of this State having the best interests of his government at heart seek to destroy the dignity, influence and efficiency of this court by imputing to the justices thereof infidelity to their trusts merely because a decision upon a point of evidence, admitted by opposing counsel before the court to be correct, happens to run contrary to the preconceived idea and wishes of some interested spectators? Yet the defendants in this proceeding have in a published article referring to a cause then pending in and being considered by this court, unhesitatingly laid at the door of our Supreme Court the charge of hostility to counsel, stubbornness, ignorance of the law, partiality and partisanship. That charge reduced to its last analysis is nothing less than a charge of prejudice, partiality and partisanship practiced by the judges of this court in their official capacity, and if true deserves the severest condemnation and seriously impairs the efficiency and authority of this court. So long as this court is constituted of men who sincerely desire to administer justice according to the rules of law it will jealously guard its integrity by purity of conduct, fairness and impartiality in its decisions and the exercise of the best judgment which their abilities command. That judgment may not meet with the approval of self appointed censors of public morality and civil virtue, but when such persons so far ignore their loyalty to the government as to attempt the

destruction of the efficiency of this court by imputing to its judges a lack of integrity and honest purpose, [568] it will rebuke such conduct to the end that the people may be protected from further insult and injury at the hands of such persons, that due respect for propriety and decency be maintained and the dignity of the court vindicated from the disrespect shown to it.

The Supreme Court has, independent of statutory authority, inherent power to punish for contempt of court. *Coleman v. Roberts*, 113 Ala. 323, 21 So. 449, 59 Am. St. Rep. 111, 36 L.R.A. 84; *State v. Morrill*, 16 Ark. 384; *In re Shortridge*, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78, 21 L.R.A. 755; *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L.R.A. 787; *In re Clayton*, 59 Conn. 510, 21 Atl. 1005, 21 Am. St. Rep. 128, 13 L.R.A. 66; *Bradley v. State*, 111 Ga. 168, 36 S. E. 630, 78 Am. St. Rep. 157, 50 L.R.A. 691; *Dahnke v. People*, 168 Ill. 102, 48 N. E. 137, 39 L.R.A. 197; *Fishback v. State*, 131 Ind. 304, 30 N. E. 1088; *Dunham v. State*, 6 Ia. 245; *In re Wolf*, 52 Kan. 366, 34 Pac. 1048; *Arnold v. Com.* 80 Ky. 300, 44 Am. Rep. 480; *Cartwright's Case*, 114 Mass. 230; *In re Chadwick*, 109 Mich. 588, 67 N. W. 1071; *Watson v. Williams*, 36 Miss. 331; *Ex p. Crenshaw*, 80 Mo. 447; *In re Moore*, 63 N. C. 397; *Hale v. State*, 55 Ohio St. 210, 45 N. E. 199, 60 Am. St. Rep. 691, 36 L.R.A. 254; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *In re Debs*, 158 U. S. 564, 15 S. Ct. 900, 39 U. S. (L. ed.) 1092; *Ex p. Terry*, 128 U. S. 289, 9 S. Ct. 77, 32 U. S. (L. ed.) 405; *Ex p. Edwards*, 11 Fla. 174. Publications concerning a pending cause which reflect upon the court constitute contempt. *People v. Stapleton*, supra; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *Field v. Thornell*, 106 Ia. 7, 75 N. W. 685, 68 Am. St. Rep. 281; *Burdett v. Com.* 103 Va. 838, 48 S. E. 878, 106 Am. St. Rep. 916, 68 L.R.A. 251; *State v. Tugwell*, 19 Wash. 238, 52 Pac. 1056, 43 L.R.A. 717.

Publishers of newspapers have the right, but no higher right than others to bring to public notice the conduct of [569] the courts, provided the publications are true and fair in spirit. The liberty of the press secures the privilege of discussing in a decent and temperate manner, the decisions and judgments of a court of justice, but the language should be that of fair and honorable criticism, and should not go to the extent of assigning to any party or the court false or dishonest motives. There is no law to restrain or punish the freest expression of disapprobation that any person may entertain of what is done in or by the courts. Under the right of freedom of speech and of the press the public have a right to know and discuss all judicial proceedings, but this does not include the

right to attempt by wanton defamation, groundless charges of unfairness and stubborn partisanship to degrade the tribunal and impair its efficiency. 6 R. C. L. pp. 254-512. "The liberty of the press is subordinate to the independence of the judiciary and it is not expedient that any class in the community should be privileged to attack the courts with the view to interfere with the rights of litigants or to embarrass the administration of justice. Liberty of the press must not be confounded with license or abuse of that liberty." 6 R. C. L. p. 510. Our statute provides that "Every court shall have power to punish contempts against it" etc. Sec. 1345 Gen. Stats. of 1906, Florida Compiled Laws 1914.

The conduct of unprincipled men traducing the institutions of a State to the end that their political ambitions may be realized is an unsafe guide for the young man who desires to succeed in the honored field of journalism and is an example too degrading to be imitated and too vicious to be condoned by the self respecting journalist. He can not fan the flames of suspicion and distrust by printing a false article relating to a cause then pending in court, and imputing to that court a lack of [570] integrity, without violating the law and transgressing every conception of decency. Newspaper editors and reporters have the right to publish the proceedings of the courts, including the pleadings, proofs and remarks of the court and counsel, yet they must see to it that they publish them truthfully and correctly. But they have no right to give publication to the impressions made by such court proceedings upon their minds by the use with reference to the court itself of such contemptuous and opprobrious adjectives as that the court was "partisan," "stubborn," "hostile to counsel" and "ignorant."

It is the judgment of the court that the writing and publication of the article mentioned and referred to in the rule issued in these proceedings constitute a contempt of court and that the defendants Percy S. Hayes and Bryan Mack are guilty of contempt of this court because of the writing and publication of said article.

The respondents through their counsel interposed a demurrer to the rule issued in this cause which will be treated as a motion to quash. The points presented by the motion are not well taken. The rule is not "process," nor does it come within the provisions of Section 22 of the Declaration of Rights. See *State v. Frew*, 24 W. Va. 416, text 471, 49 Am. Rep. 257; *In re Moore*, 63 N. C. 397; *State v. Morrill*, 16 Ark. 384. The truthfulness of the publication and a good motive inspiring it need not be negatived by the rule any more than ignorance of the meaning of words should be. The quoted ex-

tracts from the publication constitute the gist of the offense and general statements following may be treated as surplusage. Such a publication as the one under consideration does not come within the constitutional provisions securing the freedom of the press. So the motion to quash is denied.

[571] Taylor, C.J., and Cockrell, Whitfield and Ellis, JJ., concur.

Shackleford, J., absent.

NOTE.

The reported case, in holding that a newspaper publication reflecting on the integrity of the supreme court constituted a contempt of court, discusses at length the scope of the constitutional guaranty of liberty of speech and of the press, saying that "it was not the purpose of the framers of our constitution nor the people in adopting it to permit any citizen to attack unjustly in the public prints the character of any other citizen nor to impugn the integrity, honor and authority of our courts with impunity." The constitutional liberty of speech and of the press is discussed in the notes to Ex p. Harrison, 15 Ann. Cas. 1; Schwartz v. Edrington, Ann. Cas. 1915B 1180; and Booth v. People, 78 Am. St. Rep. 229, 260.

HOLSTEIN

v.

BENEDICT.

Hawaii Supreme Court—January 22, 1915.

22 Hawaii 441.

Appeal and Error — Questions Presented by Record.

The general rule applied, that on exceptions to instructions given or requests therefor refused, the charge given to the jury should be in the record.

Same.

Only errors of law apparent on the record are reviewable on error. Facts which do not appear in the record may not be brought to the attention of the supreme court by means of exhibits attached to briefs of counsel.

Implied Contracts — Services by Member of Family.

Where maintenance and services are rendered between relatives living together as one household there is a presumption that they were intended to be gratuitous. In order to recover therefor the plaintiff must overcome

this presumption by proving affirmatively either an express contract for remuneration or circumstances showing a mutual understanding or expectation between the parties that there would be compensation.

[See 8 Ann. Cas. 203; Ann. Cas. 1913C 307.]

Scintilla of Evidence — What Amounts to More than Scintilla.

To amount to more than a scintilla the evidence must be of a character sufficiently substantial, in view of all the circumstances of the case, to warrant the jury, as triers of the facts, in finding from it the fact to establish which the evidence was introduced.

[See note at end of this case.]

(Syllabus by court.)

Error to Circuit Court, Second Circuit: EDINGS, Judge.

Action by Thomas Holstein, plaintiff, against Paul H. Benedict administrator of Estate of Kelupe Silva, deceased, defendant. Judgment for plaintiff. Defendant brings error. The facts are stated in the opinion. **REVERSED.**

Enos Vincent for plaintiff in error.

E. R. Bevins for defendant in error.

[442] ROBERTSON, C. J.—The defendant in error recovered judgment in the circuit court of the second circuit for the sum of \$158, and costs and attorney's fees, against the plaintiff in error in an action of assumpsit for maintenance and support furnished and services rendered, as it was alleged, to one Kelupe Silva, since deceased, of whose estate the plaintiff in error was the administrator.

Three of the assignments of error relate to the giving or refusing of certain instructions. These cannot be considered for the reason that the court's charge to the jury is not in the record. *Kaupena v. Kaio*, 20 Hawaii 653, 655.

Another assignment questions the validity of the judgment on the ground that after verdict but before judgment was entered, Benedict had been discharged as administrator and one Lufkin appointed in his place. It does not appear that those facts were brought to the attention of the court below. Counsel for the plaintiff in error has attempted to bring them before this court by attaching to his brief a certified copy of an order approving the accounts of Benedict, discharging him, and appointing Lufkin in his place. Facts which do not appear in the record may not be laid before this court in any such manner upon the expectation that they will be considered. Only errors of law apparent on the record are viewable on error. *Vierra v. Hackfeld*, 8 Hawaii 436; R. L. Sec. 1871. The action [443] of counsel in attach-

ing a copy of the order mentioned to his brief is disapproved.

The principal assignments of error go to the merits of the case and raise the question whether the verdict was supported by the evidence. Undisputed testimony showed that on the day of the death of her husband, June 13, 1912, Kelupe Silva went to the home of Thomas Holstein at Waikapu, Maui, and continued to live there until November 18, 1912; that Mrs. Silva was an elderly woman and suffered from asthma; and that she was the grand-aunt by marriage of Mrs. Holstein, plaintiff's wife. The plaintiff's claim was for one dollar a day as the reasonable value of the food and attendance furnished to Mrs. Silva by the plaintiff and his wife during the period stated. The plaintiff testified that he took care of Mrs. Silva believing that he would be paid by her in some way, though there was no promise on her part to pay any sum, and he never informed her that he intended to charge her anything. There was no evidence of any conversation between the plaintiff and Mrs. Silva with reference to her living at his home. Against the objection of the defendant the wife of the plaintiff testified to a conversation she had had with Mrs. Silva, as follows: "After she had lived with us a couple of months, one day I spoke to her: 'Perhaps it may be well for you to return to your own house now, we go and fix your house,' and she said 'I hope you will be kind enough to let me stay with you—you will be paid some day.'" We may assume that the evidence was admissible either as part of the *res gestae* or as a declaration against interest, and that, if there was anything else in the case to support the plaintiff's claim, it might be regarded as of some probative force. But the question arises whether that testimony standing alone constitutes more than a mere scintilla of evidence to support the verdict, there being nothing else in the case to meet the principles of law applicable to cases of this kind. Those principles are stated in 15 Am. & Eng. Enc. of Law (2d ed.) 1083 et seq., thus: "Ordinarily [444] where services are rendered and voluntarily accepted, the law will imply a promise on the part of the recipient to pay for them; but where the services are rendered to each other by members of a family living as one household, there will be no such implication from the mere rendition and acceptance of the services. On the contrary, the presumption is that the services are intended to be gratuitous, and in order to recover therefor the plaintiff must affirmatively show either that an express contract for remuneration existed or that the circumstances under which the services were rendered were such as exhibit a reasonable and proper expectation that there would be compensation. The reason

for this is that the household family relationship is presumed to abound in reciprocal acts of kindness and good will which tend to mutual comfort and convenience of the family; and the rule stated applies not only to members of a family who are related by blood, but to those distantly related, and to those who are in fact not related at all, provided they live together as members of one family. The presumption that services rendered by one member of a family to another were gratuitous is not a conclusive one. It may be overcome by showing an express agreement for payment, or by showing circumstances which will support the implication that the services were to be paid for. The burden is, of course, on the person rendering the services to overcome the presumption which the law raises that such services were rendered gratuitously." The case of *Luka v. Fyfe*, 4 Hawaii 569, is in point, and it was there pointed out that the rule is peculiarly applicable to the hospitable habits of the Hawaiians. Mrs. Silva was a Hawaiian, and the plaintiff is part Hawaiian.

The burden was upon the plaintiff to prove by more than a scintilla of evidence either an express agreement, or circumstances, beyond the fact that the services were rendered, showing a mutual understanding or expectation that payment would be made for the services. An express agreement was not claimed. [445] Did the statement of Mrs. Holstein constitute evidence from which a mutual understanding between the parties could reasonably be inferred? The cases are not in harmony on the point as to what constitutes a scintilla of evidence. "A mere scintilla of evidence, if it means anything, means the least particle of evidence—evidence which, without further evidence, is a mere trifle." *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 476, 51 N. E. 851. "A scintilla of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror." *Crosby v. Seaboard Air Line Ry.* 81 S. C. 24, 61 S. E. 1064, 1067. "Evidence may go beyond a mere scintilla, and yet not be substantial." *Jenkins, etc. Co. v. Alpena Portland Cement Co.* 147 Fed. 641, 643, 77 C. C. A. 625. This court has held that the expression "more than a scintilla of evidence" means "some substantial evidence." *Robinson v. Honolulu Rapid Transit etc. Co.* 20 Hawaii 466. For illustrations of the application of the rule that a judgment must be supported by more than a mere scintilla of evidence, see *Richards v. Ontai*, 19 Hawaii 451, 458; *Tyler v. Wise*, 21 Hawaii 148, 153; *Scott v. Hawaiian Tobacco Plant*, 21 Hawaii 493, 497. In *Smith v. Hamakua Mill Co.* 14 Hawaii 669, 677, the evidence which was held not to amount to more than a scintilla

was described as "very slight" and "very unsatisfactory." Each case must turn upon its own circumstances, and we are not prepared to say that in every case where, in the opinion of the appellate court, the evidence in support of a claim was very slight and unsatisfactory it is to be regarded as an insufficient foundation for a verdict. To amount to more than a mere scintilla the evidence must be of a character sufficiently substantial, in view of all the circumstances of the case, to warrant the jury, as triers of the facts, in finding from it the fact to establish which the evidence was introduced. In the case at bar the plaintiff, to prove his case, was obliged to overcome a rebuttable presumption which the law raises in this class of cases. The statement made by Mrs. Silva after she had been living at the plaintiff's [446] home for two months, "I hope you will be kind enough to let me stay with you—you will be paid some day," was brought out by the suggestion of Mrs. Holstein that the time had come for Mrs. Silva to return to her own home. It clearly could not be construed as an admission that she had expected from the start to pay for the board and attendance rendered her, and, we think, could not reasonably be regarded as evidence of a mutual understanding between her and the plaintiff that she was to make compensation therefor from and after the time of the statement.

We are of the opinion that the verdict was not supported by more than a scintilla of evidence, and that it must be vacated. The case is remanded to the circuit court with instructions to set aside the judgment to grant the defendant's motion for a non-suit, and to enter judgment thereupon for the defendant.

NOTE.

What Constitutes Scintilla of Evidence.

Generally, 943.

Illustrations:

Evidence Held to Amount to Scintilla, 944.

Evidence Held to Amount to Less than Scintilla, 949.

Evidence Held to Amount to More than Scintilla, 951.

Generally.

In some jurisdictions there is in force what is known as the "scintilla of evidence rule," whereby, whenever there is any evidence, however slight, tending to prove an issue, it must be submitted to the jury; or, as it has been stated, a verdict may be directed only where there is no evidence, however slight, and no

inference to be drawn from the facts, which will support the opposite theory. Under that rule, if a party produces a scintilla of proof in his favor, he is entitled to have his case submitted to the jury. The doctrine grew out of the extreme reluctance of the courts to invade the province of the jury by sanctioning the practice of directing a verdict, but according to the more modern and more reasonable view the scintilla rule fails to discriminate carefully between prerogatives of the court and jury, and is deemed to require the submission of evidence to a jury which might afford no reasonable justification for a verdict. See 6 Am. & Eng. Enc. Pl. & Pr. 675, et seq. In a few of the cases arising under the so-called "scintilla rule," the courts have indicated the quantum of evidence sufficient to constitute a "scintilla" of evidence, but it is to be observed that the cases are not in harmony.

Thus, the words "scintilla of evidence" have been interpreted by the South Carolina court to mean such evidence as is sufficient to warrant a reasonable jury in rendering a verdict on it. *Dutton v. Atlantic Coast Line R. Co.* 104 S. C. 16, 88 S. E. 265. Or, as was said in *Taylor v. Atlantic Coast Line R. Co.* 78 S. C. 552, 59 S. E. 641 (quoted in *Crosby v. Seaboard Air Line Ry.* 81 S. C. 24, 61 S. E. 1064): "A scintilla of evidence is any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror."

In the reported case it is held that to amount to more than a mere scintilla the evidence must be of a character sufficiently substantial, in view of all the circumstances of the case, to warrant the jury, as triers of the facts, in finding from it the fact to establish which the evidence is introduced.

In *Oliver v. State*, 34 Ark. 632, the court held that "any evidence whatever," however weak, to support the verdict, was a "scintilla" of evidence, but stated that the scintilla doctrine did not prevail in that state. And in *Catlett v. St. Louis, etc. R. Co.*, 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254, in discussing the foregoing statement, the court said that they took it, therefore, that the phrase "any evidence however slight," did not mean a scintilla merely.

So, it has been said that a "scintilla" of evidence is a "spark" of evidence, *Conely v. McDonald*, 40 Mich. 150; *Cunningham v. Union Pac. R. Co.*, 4 Utah 206, 7 Pac. 795; see also *Minahan v. Grand Trunk Western R. Co.* 138 Fed. 37, 70 C. C. A. 463; or "the least particle" of evidence, *Conely v. McDonald*, 40 Mich. 150; see also *Offutt v. World's Columbian Exposition Co.*, 175 Ill. 472, 51 N. E. 651, reversing 73 Ill. App. 231; *Boyle v. Illinois Cent. R. Co.* 88 Ill. App. 255; *Nolan v. Morris*, 108 Ill. App. 261; or a

"crumb," the "dust of the scales," Connor v. Giles, 76 Me. 132. In Offutt v. World's Columbian Exposition Co. supra, by way of dictum, since the "scintilla of evidence rule" is not in force in Illinois, the court said: "A mere scintilla of evidence," if it means anything, means the least particle of evidence—evidence which, without further evidence, is a mere trifle."

The word "scintilla," however, as applied in the Kentucky practice does not mean that the case must be submitted to the jury where there is merely a "spark" or a "glimmer" of evidence, but means that when there is some evidence to support the plaintiff's case, the court will not undertake to determine either its weight or sufficiency by taking the case from the jury; nor will the court, on all the evidence, take the case from the jury merely because the evidence on one side may be stronger, both numerically and in probative value, than the evidence on the other side, but will, when there is conflict in the evidence, leave the disputed question of fact to the jury. Louisville, etc., R. Co. v. Johnson, 161 Ky. 824, 171 S. W. 847. So, it has been held that it is the essence of the "scintilla rule" that there must be some evidence, however slight, on which the jury may rationally find a verdict for the party producing it. Clark v. Young, 146 Ky. 377, 142 S. W. 1032; Louisville, etc. R. Co. v. Chambers, 165 Ky. 703, Ann. Cas. 1917B 471, 178 S. W. 1041.

In Denny v. Williams, 5 Allen (Mass.) 1, in determining that there was not a scintilla of evidence tending to show a delivery or acceptance of goods sufficient to satisfy the statute of frauds, and to sustain a verdict for the plaintiff, the court said: "What this 'scintilla' is, needs to be stated a little more definitely; otherwise it may be understood to include all cases where, on a motion for a new trial, a verdict would be set aside, as against the weight of the evidence. It would be impossible to draw a line theoretically, because evidence in its very nature varies from the weakest to the strongest by imperceptible degrees. But the practical line of distinction is, that if the evidence is such that the court would set aside any number of verdicts rendered upon it, toties quoties, then the cause should be taken from the jury, by instructing them to find a verdict for the defendant. On the other hand, if the evidence is such that, though one or two verdicts rendered upon it would be set aside on motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under instructions. This rule throws upon the court a duty which may sometimes be very delicate; but it seems to be the only practicable rule which the nature of the case admits."

In Bagley v. Bowe, 105 N. Y. 171, 11 N. E. 386, 59 Am. Rep. 488, reversing 50 N. Y.

Super. Ct. 100, it was held that in a case which of right was triable by a jury, the court could not take from that tribunal the ultimate decision of the fact, unless the fact was either uncontradicted or the contradiction was illusory, or where to use the current word, the answering evidence was a "scintilla" merely.

In Wittkowsky v. Wasson, 71 N. C. 451, it was held that under the rule that where there is any evidence to support a plaintiff's claim, it is the duty of the judge to submit the question to the jury, "any evidence" does not mean the slightest scintilla of evidence, but evidence from which a jury may reasonably infer the existence of the alleged fact.

Illustrations.

EVIDENCE HELD TO AMOUNT TO SCINTILLA.

In each of the following cases, the evidence was held to amount to a scintilla, but not to be sufficient to take the case to the jury:

In Ellis v. Oliphant, 159 Ia. 514, 141 N. W. 415, it appeared that on the day on which some of the defendant's sheep had been killed by dogs which were said by a witness to have been all dark colored, the defendant dragged the carcass of one of the sheep to a ditch in the pasture where the sheep had been kept, and surrounded it with several traps. On the second day thereafter the plaintiff's collie dog, which was light in color, was caught in one of the traps and killed by the defendant in order to end its misery. It was not claimed that the dog was in the act of chasing, worrying or injuring sheep at the time he was caught, but it was insisted that his presence there was an indication that he had been one of the group of dogs which did the original damage. In an action for damages for the wrongful killing of the dog, it was held that there was but a mere scintilla of evidence, not regarded as sufficient to take the case to the jury, on the theory that any of the damage to the sheep had been done by the plaintiff's dog.

In Alderson v. Hume, 40 Okla. 533, 139 Pac. 955, an action of replevin, the plaintiff alleged that he was the owner of the property seized on execution and entitled to its immediate possession, and introduced evidence which clearly established his ownership. The defense was that the plaintiff fraudulently claimed to be the owner of the property for the purpose of protecting the real owner against the executions issued. The testimony of the plaintiff on direct examination was that he was the absolute owner of the property at the time it was levied on as the property of the judgment debtor, and the only evidence relied on to create an inference to the contrary was the cross-examination of the plaintiff himself. It was held that as

there was no more than a mere scintilla of evidence, the trial court should have withdrawn the case from the jury.

Schoepfiin v. Coffey, 162 N. Y. 12, 56 N. E. 502, was an action for both slander and libel. In the complaint, after stating the slanderous words which were alleged to have been spoken in the presence of two named persons, and the fact that they were reporters, the plaintiff alleged that thereby the defendant caused these statements to be printed and published, thus containing no direct allegation as a fact that the defendant caused them to be printed and published, but averring it as a conclusion from the preceding allegations. The most that the proof established was that a person whom the defendant knew to be a reporter, asked him as to a report which was in circulation concerning the matters alleged in the complaint, stating that he understood the defendant had asserted the facts, which were subsequently published, and the latter admitted having done so. This statement was not made for publication and there was other evidence tending to show that he did not intend and had no design to procure its publication. It was held that the trial judge erred in not directing a verdict for the defendant, as it was not enough to authorize the submission of a question as one of fact to the jury, that there was a scintilla of evidence or a mere surmise.

In *Strauss v. American Chewing Gum Co.* 134 Mo. App. 110, 114 S. W. 73, an action for the price of goods sold, the defense was that the articles were sold on a warranty as to the quality, and that the plaintiffs had breached the warranty. There was no substantial evidence that the articles were sold on a warranty. The plaintiffs' evidence was positive, direct, and uncontradicted by the defendant that the articles were sold by sample, and that those furnished were equal in quality to the sample. It was held that while there was a mere scintilla of evidence that it was agreed that the articles should be as good as another like article, there was no substantial evidence to that effect sufficient to warrant a jury in finding that they were represented or warranted to be equal in quality to the other article. Hence it was held that it was the duty of the trial judge peremptorily to instruct the jury to find for the plaintiff.

In *Holland v. Kindregan*, 155 Pa. St. 156, 25 Atl. 1077, an action of ejectment for a strip of land, formerly part of a public road, it appeared that in 1846 certain land was conveyed to James Holland described in one of its courses as running along "the southwest side of Mill road." In 1852, a report of commissioners was filed vacating Mill road. In October, 1853, James Holland con-

Ann. Cas. 1918B.—60.

veyed a piece of ground to the defendants' predecessor in title, describing it "as beginning at a stake on the southwest side of Mill road, a corner, etc., and thence along the southwest side of said Mill road," etc. In 1883, James Holland conveyed a piece of ground to the plaintiff, describing one of the courses as beginning on a corner "formerly the middle of the Mill road, which was vacated by order of court about 1852, thence along the same," etc. In 1891, James Holland conveyed to the plaintiff the land in controversy which is the southern half of the bed of the old Mill road. The plaintiff claimed that before the deed of October, 1853, the Mill road had been actually closed, and in support of this claim James Holland testified that in that year he put a fence in the middle of the road to mark the line of his property. The court held that the evidence of James Holland amounted at most to but a scintilla, and that the action of the judge below in entering a judgment for the defendants non obstante veredicto, was correct.

Fadden v. McKinney, 87 Vt. 316, 89 Atl. 351, was an action of trespass for breaking and entering the plaintiff's close, to which a count in trover was joined for taking and carrying away certain household goods owned by him. It appeared that a daughter of the plaintiff, with whom he had disagreed, sent a truckman to the plaintiff's house to remove her and her husband's furniture, and it was claimed that in the moving of these things the plaintiff's furniture and personal effects were taken also. There was no direct evidence to connect the daughter's husband with the transaction. He had given her the money to pay for removing their personal effects and had been told by his wife when and where they were to move and whom she had employed to move their goods, and had left the house in the morning for his work before the work of moving was begun. It was held that, so far as his liability was concerned, something more than a mere scintilla of evidence was required to support a verdict for the plaintiff, and that where, as here, liability rested entirely on circumstantial evidence which did not reasonably tend to support his connection with the trespass, he was entitled to have a verdict in his favor directed.

In *Baulec v. New York, etc. R. Co.* 59 N. Y. 366, 17 Am. Rep. 325, an action for damages for the death of a fireman, alleged to be due to negligence, it appeared that the accident occurred at a junction of the defendant's road with the New Haven road, and, as the evidence tended to show, was occasioned by the negligence of the defendant's switchman at that point, who, after the passage of a New Haven train, changed the signal so that

it indicated that the switch was right for the Harlem train, on which the plaintiff's intestate was a fireman, without in fact changing the switch. The plaintiff produced evidence that some six or seven months before this accident a New Haven freight train met with a similar accident at this same switch, but the proof as to the accident left the question in doubt whether it was chargeable to the same switchman or to the engineer on the train. It was a dark night. The tracks of the two roads ran parallel for some distance. The switchman had set the switch for the New Haven road. It did not appear that the bell on the engine of the New Haven train was rung or its whistle sounded. The switchman not hearing it supposed it was a special on the Harlem road and changed the switch and the train ran off. It appeared that the general agent of the road having authority to employ and discharge switchmen investigated the occurrence, and after the evidence of the facts continued the switchman in his position, which retention was alleged to exhibit a want of proper care and prudence on the part of the defendant. The court held that there was not sufficient evidence to carry the case to the jury, saying: "It is not enough to authorize the submission of the question, as one of fact, to a jury, that there is 'some evidence. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, would not justify the judge in leaving the case to the jury.' (Per Willaims, J., *Toomey v. London, etc. R. Co.* 3 C. B. N. S. 146, 91 E. C. L. 146.)" It is, however, to be noted that the scintilla rule is not in force in New York. *Dwight v. Germania L. Ins. Co.* 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729.

In *Toomey v. London, etc. R. Co.* 3 C. B. N. S. 146, 91 E. C. L. 146, 27 L. J. C. Pl. 39, 6 W. R. 44, 140 Eng. Rep. (Reprint) 694, the facts were as follows: The plaintiff, an illiterate person, went to a railway station, and while waiting for the train, inquired of a person on the platform, unconnected with the railway, where he should find a urinal. This person told him to go to the right: he did so, and found two doors, on one of which was painted the words "For Gentlemen," and on the other the words "Lamp-room," there being a light over the former, but none over the latter. The plaintiff, being in a hurry and unable to read, opened the wrong door, stepped forward, and fell down some steps, seriously injuring himself. Williams, J., said: "I think there was no evidence of negligence on the part of the company or their servants which ought to have been submitted to the jury. It is not enough to say that there was some evidence; for, every person who has had any experience in courts of justice knows very well that a case of this

sort against a railway company could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury: there must be evidence upon which they might reasonably and properly conclude that there was negligence. All that appeared, was, that the plaintiff inquired of a stranger the way to the urinal, and, being told to go in a particular direction where there were two doors, unfortunately opened the wrong one, and through his own carelessness fell down some steps. If there had been any evidence to show that these steps were more than ordinarily dangerous, that possibly might have led to a different conclusion. But all that appears is, that the door in question led down some steps into a room which was used for the purposes of the company, and not for the convenience of the public. I cannot say that there was such evidence of negligence in the defendants as the learned judge was bound to leave to the jury."

Where the only evidence on which a party rests his right to succeed consists of a statement of facts, inherently impossible and absolutely at variance with well-established and universally recognized physical laws, that which purports to be evidence is insufficient to institute a compliance with the requirements of the scintilla rule as to the quality of evidence necessary to convey a case to the jury and a verdict of the jury thereon will be reversed. *Louisville, etc. R. Co. v. Chambers*, 165 Ky. 703, Ann. Cas. 1917B 471, 178 S. W. 1041.

In each of the following cases, the evidence was held to amount to a scintilla and to be sufficient to take the case to the jury:

In *Mason, etc. Co. v. Highland (Ky.)* 116 S. W. 320, it appeared that the plaintiff was employed as a day laborer in the construction of a tunnel and alleged that while he was engaged in removing rafters supporting the temporary walls used in constructing the tunnel, he was thrown to the ground and seriously injured through the negligence and carelessness of the defendants, their agents and servants. In the defendants' answer, they pleaded that the plaintiff was not employed by them but that, if he was injured at all, it was while in the service of an independent contractor who was engaged in lining the tunnel with brick. The evidence as to whether the contractor was an independent contractor, within the usually accepted meaning of the term, or whether he was, in part, a servant occupying the position of general manager or supervisor for his employer, was held, under the scintilla rule, to be enough to warrant the trial court's submission of the question to the jury. See also

Louisville R. Co. v. Buckner (Ky.) 113 S. W. 90, set out at length *infra* in the subdivision *Evidence Held to Amount to More than Scintilla*.

In *American Dist. Tel. Co. v. Oldham*, 143 Ky. 320, Ann. Cas. 1913E 376, 146 S. W. 764, it appeared that the plaintiff, a fireman, in responding to an alarm, jumped off the reel with another man, each having hold of the hose, for the purpose of unwinding it from the reel, which was driven on up the street. They wrapped the hose around a guy post some ten or twelve feet in height for the purpose of holding the hose, and after this had been done and in going from the guy post to the engine, the post fell on him and inflicted injuries. Some twelve years prior, the city's fire alarm service had an alarm box on this post and about that time the American District Telegraph Company placed one of its wires thereon. Four or five years later, the wires and box of the fire alarm service were removed from the post and it was used only by the telegraph company. The post was hollow at the ground and rotten. It was held that, under the scintilla rule, there was sufficient evidence for the plaintiff as to the liability of the city, to take the case to the jury.

In *Barr v. Poor*, 28 Ohio Cir. Ct. Rep. 257, the court said that though the record hardly presented a meritorious action, or a case where a verdict, had there been one for the plaintiff, could be permitted to stand, yet, as an examination of the evidence showed that there was a scintilla of evidence on all the essential points, it should have been submitted to the jury.

In each of the following cases, it was held that the evidence amounted to a scintilla, and, while sufficient to take the case to the jury, was not sufficient to support a verdict:

In *Louisville, etc. R. Co. v. Hall*, 94 S. W. 26, 29 Ky. L. Rep. 584, it appeared that the plaintiff was an engineer in the service of the defendant. One day he pulled an extra train from Henderson to Owensboro reaching Owensboro at 11:30 P.M. The extra had in it a dead engine and some work cars with the working crew upon them. When he reached Owensboro he was ordered to run from there eastward as the third section of No. 64. About thirteen miles east of Owensboro he ran into the second section of No. 64 and in jumping from the engine at the time of the collision received serious injuries. He brought suit to recover damages on the ground that the servants in charge of the second section were guilty of gross negligence in stopping it upon the track and failing to give any signal or warning to him. The company pleaded that the collision was by reason of his own negligence and asserted

a counterclaim against him for the loss it sustained in the injury to its engine and cars by reason of the collision. The proof showed that the first section of No. 64 had left Owensboro more than an hour before the second section left. It was required by the rules of the company that the third section should leave ten minutes behind the second section and, as they were both to run on the time of No. 64, they should have kept ten minutes apart at all points on the road. If for any reason No. 64 stopped upon the track it was incumbent upon those in charge of that train immediately to send a flagman back a given distance and give certain signals. The plaintiff testified that after leaving Owensboro he ran at the speed allowed him by the time card and that about thirteen miles from Owensboro he ran into the second section standing on the track, and the required signals had not been given. That the signals were not given was conceded, but the men on the second section testified that their train broke in two; that they made an emergency stop and before any signal could be given to the plaintiff he dashed into them by reason of the fact that he was running so close to them as to give no time for the signals. The company insisted that under all the evidence a peremptory instruction should have been given the jury to find for the defendant. The plaintiff testified for himself placing the blame for the accident on the second section. He then introduced on his own behalf the men in charge of the second section and they all placed the blame for the accident on him. It was held that while, in view of the plaintiff's testimony, there was a scintilla of evidence sufficient to take the case to the jury, it did not follow that a scintilla was sufficient to support a verdict in his favor.

In *Cincinnati, etc. R. Co. v. Zachary*, 106 S. W. 842, 32 Ky. L. Rep. 678, an action for damages for death alleged to be due to the defendant's negligence in failing to keep a connecting track in a reasonably safe and fit condition for use, whereby a car was derailed and the decedent thereby thrown from it and killed, but for the testimony of a witness which tended to prove, circumstantially, that the decedent was thrown from the car by its derailment, there was no evidence of actionable negligence on the part of the defendant. It was held that while the "scintilla rule" obtained in the state, under which it was the duty of the trial court to submit the case to the jury if there was a scintilla of evidence to sustain the plaintiff's case, yet there was no rule permitting a verdict to stand on a scintilla of evidence against overwhelming and credible evidence to the contrary.

In each of the following cases, the evidence therein was held to amount to a mere scin-

tilla, and to be insufficient to support a verdict:

In *Smith v. Hamakua Mill Co.* 14 Hawaii 669, an action for ejectment, in which the defense was adverse possession, the evidence which was pointed to as tending to support the verdict either by showing weakness in the defendant's proof of hostility or as independent proof by the plaintiff of a recognition of title in the true owners, was held to be so very slight and so very unsatisfactory as to be insufficient to sustain the verdict and to amount to a mere "scintilla" of evidence.

In *Georgia R. etc. Co. v. Harris*, 1 Ga. App. 714, 57 S. E. 1076, an action for damages for injuries alleged to have been inflicted on his horse by a street railway company, the plaintiff attempted to substantiate his case by the following proof only: At about eleven o'clock one morning the horse escaped from the plaintiff's lot. At about six or seven o'clock the next morning, the horse was found standing under a tree about thirty or forty feet away from the track of the company's "river line," and the ground was pawed up around where it was standing. Its hip was broken about where the breeching usually strikes a horse, but there were no marks of external violence or bruises of any kind on its skin or flesh, nor had the hair been knocked off. The plaintiff testified that between the rails of the car line he saw one horse track pointing in the direction of the place where the horse was found; but between this place and the place where the horse was standing there were no other signs. The city inspector corroborated his testimony as to the injury to the horse. It was held that in such a case of circumstantial evidence, a mere inconclusive inference, or, as the English courts have expressed it, a mere scintilla, was not to be regarded as any evidence, so as to require the submission of its sufficiency to the jury, and a verdict for the plaintiff.

In *Richards v. Ontai*, 19 Hawaii 451, an action of assumpsit to recover a sum alleged to be due for rent under a lease of certain premises, the defendants pleaded by way of set-off a claim for compensation for the use of water furnished to the plaintiff. There was some evidence, including a series of three letters, adduced on the subject of the acceptance of an oral contract with respect to the water rates by the tenants, one of whom in a letter had imposed a term with respect to the cutting of the grass on a certain field, which was rejected by the plaintiff. The plaintiff testified that the tenant had, some time subsequent to the date of the letter rejecting the term, said that "it was all right." The court held that the remark must be regarded as a mere scintilla, insufficient to support a finding of acceptance

in view of other evidence, and standing alone. It was further held that even if it could be said that the scrap of evidence under consideration was not a mere scintilla, but was sufficient to support a finding of an oral acceptance of the contract by the tenant, still the undisputed evidence showed a cancellation of the contract by the plaintiff, concurred in by the tenant.

In *Tyler v. Wise*, 21 Hawaii 148, the undisputed evidence showed that a contract, complete in its terms, was entered into between the parties by telegraph and letter while the plaintiff was in Chicago. The defendants were to furnish the plaintiff employment as a singer in Honolulu for a period of at least twelve weeks at a salary of \$35 per week and were to furnish her transportation from San Francisco to Honolulu and return and advance to her the cost of transportation from Chicago to San Francisco, the latter amount to be repaid by her in weekly instalments of \$10. The plaintiff sang under her contract at a theatre operated by the Honolulu Amusement Company until it refused to permit her to sing. She was told before leaving San Francisco that the amount of time would be twelve weeks "if I (defendant) finished out with the Honolulu Amusement Company." It was held that assuming that it was within the power of the trial court to construe this qualification as having been intended to refer to the plaintiff's contract with defendants, rather than the defendants' contract with the Honolulu Amusement Company, it was at best a mere scintilla of evidence, and not sufficient to support a finding that the contract as originally entered into was modified to that extent in San Francisco.

In *Scott v. Hawaiian Tobacco Plantation*, 21 Hawaii 493, an action of assumpsit for labor performed in clearing certain land, a document was introduced in evidence which was described as being a "statement of account due" the plaintiff's assignors "for clearing land," and which set forth their claim to be "by clearing of guavas, root and branch, clearing and placing in shape for cultivation (5 1/20) five and one-twentieth acres of land @ \$50.00 per A. \$260," and was signed "Correct: Hawaiian Tobacco Plantation, Ltd., by Wm. B. Schrader, Mgr." In an attempt to deprive this document of the character of an account stated, Schrader testified that he did not intend it to be an admission of the amount due, but merely of the fact that the work had been done. It was held that in view of the language of the document signed by Schrader and of all the other evidence, that the statement that he merely intended to certify that the land had been cleared, must be regarded as a mere scintilla of evidence and that the finding that the paper was not

an account stated was unsupported by the evidence.

For evidence which, standing alone, is held not to constitute more than a mere scintilla of evidence, and so not to support a verdict in an action of assumpsit against an estate for maintenance and support furnished and services rendered to the deceased, see the decision in the reported case.

In *Ewing v. Goode*, 78 Fed. 442, an action against a surgeon and oculist for want of proper skill and care, it was held that the evidence that the plaintiff, who was undergoing treatment by the defendant, suffered any injury from the latter's failure to supply another physician during his absence, because of his office girl's neglect (if she was guilty of any), was not more than a scintilla, if that.

In *Gould v. Gilligan*, 181 Mass. 600, 64 N. E. 409, an action of tort for personal injuries caused by the running away of a pair of horses with a cart belonging to the defendant and then striking the plaintiff eight hundred and fifty feet away from the point where they started, all the evidence from eyewitnesses as to how the horses came to run away showed that the driver was at the tail of the cart when the horses started, and that they were suddenly frightened by a barrel being rolled against their heels by a boy. There was no evidence that the driver was not there unless by a remote and uncertain inference from the testimony of some witnesses that he did not appear for fifteen or twenty minutes upon the scene of the accident, which was eight hundred and fifty feet away from the point from which the horses started. Naturally, on such evidence, the argument for the plaintiff said nothing about the driver's being away from his horses, but was directed to the way of leaving the reins, to the failure to see the barrel more quickly, and so forth. Naturally also, the court in its charge followed the course of the argument and instructed the jury on the aspects of the case which had been discussed. But at the end of the charge the counsel for the plaintiff objected that the judge had assumed that the driver was by his cart when the horses started, and requested him to call the jury's attention to the position that the driver was not by his cart at that time. It was held that the judge was justified in refusing to put forward for the first time at the end of his charge a view of the case for which there was but the merest scintilla of evidence, if it fairly could be said that there was any evidence at all.

In *Canode v. Sewell* (Tex.) 182 S. W. 421, an action for the death of an employee alleged to have been produced by the negligence of the master, on account of a defective elevator, it appeared that there was a noise

of falling glass, or tools, and dust was first seen falling down the elevator shaft. Then, within some inappreciable length of time, the elevator hoive in sight with a fellow servant desperately attempting to stop it, and the deceased practically dead on top of the cage. It was held that the evidence was insufficient to support a verdict for the plaintiff as there must be more than a scintilla of evidence; there must be "evidence sufficient to warrant a reasonable belief of the existence of the fact which is sought to be inferred."

The doctrine of "scintilla" of testimony for the purpose of submitting an issue to the jury or granting a motion for a new trial on such testimony has, however, been abandoned in Texas. *U. S. Express Co. v. Taylor*, 156 S. W. 617.

EVIDENCE HELD TO AMOUNT TO LESS THAN SCINTILLA.

In each of the following cases, the evidence was held to amount to less than a scintilla:

In *Taylor v. Atlantic Coast Line R. Co.* 78 S. C. 552, 59 S. E. 643, the plaintiff alleged that after having been carried beyond and then brought back to her station, on an excursion trip, and while leaving the cars thereat, she, in the presence of the employees of the defendant company at the depot of said station, was surrounded by a drunken crowd of colored people, who violently pushed and jolted her and abused her with menacing speeches, using profane, violent and obscene language, and that one of the employees of the defendant company ran off, telling plaintiff that he was going for his pistol in order that he might protect her and at the same time leaving her alone in the midst of a great throng of negroes and never returned. The plaintiff was carried by a colored woman, to a house a distance of at least two hundred yards where she begged to be cared for during the night and was given lodging. There was nothing in the testimony tending to show the allegations of the complaint. No one threatened, abused, molested, assaulted or injured her. She merely touched, "caught against," some of the negro men as she made her way through the crowd at night. There was no suggestion that they purposely subjected her to any personal indignity. The crowd of excursionists and their friends were doubtless noisy; no doubt some of them were more or less intoxicated, and their language was offensive to the plaintiff. The agent, it appeared, endeavored to remedy this, enjoining them to be quiet in the presence of the lady. It was held that there was not even a scintilla of evidence to support a verdict for her.

In *Territory v. Mackey*, 8 Mont. 168, 19 Pac. 395, an indictment based on a statute (Comp.

St. Mont. § 1482, p. 1055) declaring it a misdemeanor for any person to obliterate, deface or destroy any notice placed on a mining claim, the established definition of a mining claim being "a parcel of land containing precious metal in its soil," a witness testified that he was the locator of the claim, and in starting to mine a cross-cut found quartz and vein matter, which was the whole of the testimony on this point. It was held that, tested by the foregoing definition of a mining claim, there was not a scintilla of evidence that there was a particle of precious metal in the "quartz" or "vein matter."

In each of the following cases, it was said that the evidence amounted to less than a scintilla:

While the statements to that effect are dicta, for the reason that in the jurisdictions cited the scintilla doctrine has been held not to apply (*Ozanne v. Illinois Cent. R. Co.* 151 Fed. 900, *affirmed* 157 Fed. 1004, 85 C. C. A. 678; *Simmons v. Chicago, etc. R. Co.* 110 Ill. 347; *Bartelott v. International Bank*, 119 Ill. 259, 9 N. E. 898; *Dwight v. Germania L. Ins. Co.* 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729; *Heffernan v. Prudential Ins. Co.* 88 Misc. 93, 150 N. Y. S. 644; *Hyatt v. Johnston*, 91 Pa. St. 196; *Cover v. Manaway*, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552), they are, nevertheless, of interest in determining the quantum of evidence constituting a scintilla of evidence.

In *Hyatt v. Johnston*, 91 Pa. St. 196, it was conceded by the defendant that the first firm of which he was a member was indebted to the plaintiff for merchandise, in a larger sum than that claimed in the suit, and it was contended that acceptances of the second firm, of which the draft in suit was one, were taken by the plaintiff in absolute payment of the original indebtedness, and that the plaintiff was thus released therefrom. For the purpose of proving these facts certain letters were offered and admitted, one of which, even if it could be regarded as an admission that the acceptances were those of the second firm, could not be construed to mean that they were taken in absolute payment. It was said that there was scarcely a scintilla of evidence to show that the acceptance was taken in absolute payment.

In *Hathaway v. East Tennessee, etc. R. Co.* 29 Fed. 489 (applying Georgia rule), the following facts appeared: The plaintiff was an employe of the defendant corporation, as flag-man. He was injured, while in the performance of his duty, in the following manner: The freight train was moving slowly from the station. The engineer told the plaintiff, who was on the track, that he was going to move out slowly, and to get aboard. The plaintiff replied: "All right; I will signal you to go ahead fast, as soon as I get on the cab." The plaintiff went down the side

track until the cab was opposite to him. It was not really a cab, but a box car used in lieu of a cab. There was a ladder by the door, and an iron loop or step fastened to the car, under the door of the car, used as a cab. The plaintiff caught hold of the ladder with his hands, and attempted to get into the door. Before he made his step, as he testified, his feet struck a pile of sand. He lost hold of the ladder, and, falling on the pile of sand, rolled under the moving cars, and was injured as described. It was a dark night, with a "drizzly" rain. The plaintiff had a lantern on his arm. He stopped, to await the cab, near the pile of sand, and at that end in the direction from which the train was going. The sand, it was stated in the declaration, had been put there since he made "his last trip down the road." That, he testified, was the day before the accident. The plaintiff's witnesses testified that there were one or two carloads of sand in the pile; that it had been brought there to fill a depression or sink in the roadbed and between the tracks. The evidence was clear and undisputed that the pile of sand was only from one and a half to two feet high; that the construction train brought the sand to this spot, and the section hands were to see that it was properly distributed. There was no evidence to show that the sand was improperly placed. There was no satisfactory evidence as to when the sand was dumped at this spot. The plaintiff's witnesses said that there was a sink there that had to be filled. The declaration averred that the sand was unnecessarily placed at this spot, and unnecessarily kept there. It was said that there was literally no scintilla of evidence to support this statement.

In *Allen v. U. S. Fidelity, etc. Co.* 269 Ill. 234, 109 N. E. 1035, *affirming* 193 Ill. App. 193, an action on an indemnifying bond given to the sureties on a county treasurer's official bond, it appeared that the county treasurer who was also ex officio supervisor of assessments in his county, had retained a certain sum as his compensation for acting in the latter capacity, illegally, it was alleged. There was no evidence in the record that showed, or even tended to show, that he was guilty of larceny or embezzlement in retaining this money. Not only his testimony, but all the evidence found in the record and all the facts bearing on this question in the record of the chancery suit instituted by the county board against him and the sureties on his bond, to reform it and recover the amount, and which was introduced in evidence, proved beyond question that he kept the money because he was advised by competent attorneys, who represented the sureties on his official bond in the case at bar, that he was entitled to retain it as compensation

for his services as supervisor of assessments. The revenue statute then in force, as amended subsequently, stated that he should receive such compensation, but at the time he went out of office there might have been an honest difference of opinion as to whether the statute did not give him that right. The court said that they did not find even a scintilla of evidence in the record that indicated that the acts of the county treasurer in keeping the money involved moral turpitude on his part, and that under the rule in that state that if there was no evidence, or but a scintilla of evidence, tending to prove the averments of the declaration, the jury should be directed to return a verdict for the defendant, the trial court had rightly directed a verdict in their favor.

In *Fisick v. Lorber*, 95 Misc. 574, 159 N. Y. S. 722, an action for injuries received from the operation of the defendant's automobile by his chauffeur, the question was whether or not, after he had finished his meal at his home, the chauffeur was proceeding to the garage directly for the purpose of storing the car for the night, or was about to take him family to visit some one or for a ride. The court held that the mere fact that he went by one street rather than another, for a short distance, amounted merely to a negligible deviation from the direct route. It held that it could not find in this fact even the proverbial "scintilla" of evidence that he was entering on a joy ride or for any purpose of his own; and that even such a scintilla furnished no adequate foundation on which to base a finding.

Lonzer v. Lehigh Val. R. Co. 196 Pa. St. 610, 46 Atl. 937, was an action for the death of the plaintiff's husband, an engineer, killed by the derailling of his train, due to a subsidence of the track. The recognition of the dangerous condition of the track was such that the company had begun a change of location, and pending the completion of the work had posted a notice on the bulletin board in the assistant trainmaster's office for nearly three weeks before the accident that "All trains will run slow between Sugar Loaf Switch and South Sugar Loaf, account track settling." It was the duty of deceased to examine this bulletin board before starting and at the end of each run, that is, six times every day that the notice was up, and the inference was irresistible that he must have seen it. But beyond this there was the positive testimony of the fireman that the deceased had a copy of the order which he showed to the witness. The plaintiff made an effort to show that the notice was not posted until after the accident, and a single witness, the engineer of a shifting engine, was called to this point in rebuttal. It was said, however, that this evidence hardly amounted to a scintilla.

In *Henderson v. Northam* (Cal.) 168 Pac. 1044, the action was for injuries alleged to have been sustained as the result of the negligent operation of an automobile. For the purpose of showing the existence of a copartnership, engaged in the enterprise of racing the car for money, between the owner and her drivers and that the owner of the car had taken it to that city for the purpose of entering it in races to be run there as a partnership adventure, the court, over the defendant's objection, received evidence to the effect that on the afternoon of April 26th, some one paraded the track in front of the grand stand, and by means of a megaphone announced to the large crowd assembled on the grounds that the defendant had entered her car with Toft as driver in a fifty-mile race to be run the next day for a wager of \$2,500; the announcer introducing some one unknown to the witness as Toft. While the witness could not say that the owner was present and heard the announcement, he did see her in her car at one end of the grand stand about fifteen minutes before the announcement, and later, about fifteen minutes after the announcement had been made, saw her drive away. In answer to the contention that her conduct and silence constituted an admission by acquiescence, the court said: "Conceding, however, that she did hear the statement made and that it was her duty to contradict the same, there is not a scintilla of evidence in the record which tends to prove that she remained silent. Indeed, for aught that appears to the contrary, she may by like use of a megaphone have repudiated the declaration as being false and untrue."

EVIDENCE HELD TO AMOUNT TO MORE THAN SCINTILLA.

In each of the following cases, the evidence was held to amount to more than a scintilla:

In *Whitehead v. Valley View Consol. Gold Min. Co.* 26 Colo. App. 114, 141 Pac. 138, it appeared that the plaintiff brought an action against the defendant company and certain officers of the company in their official capacity, alleging that she was the owner of a certain certificate of stock calling for 10,000 shares of the capital stock of the company; that she delivered the same to the president of the company for the sole purpose of having it transferred to her on the books of the company; and that she had demanded of the president and each of the individual defendant officers of the company the certificate to be issued in lieu of the original certificate, but that they had refused to deliver it to her. The evidence showed conclusively that the certificate of stock was delivered to the president of the company by the plaintiff; on his solicitation

and request, and on his representation that the plaintiff ought to have that certificate of stock taken up and new stock issued to her in lieu thereof. It also showed that the president caused the same to be canceled by the secretary of the company, and in lieu of it various certificates of stock, representing the same amount in the aggregate as the original certificate, were issued to the president, the secretary, and other officers of the company who were made defendants. It was held that the trial court had erred in granting a nonsuit at the close of the plaintiff's testimony, as there was more than a scintilla of evidence in support of her case.

In *Louisville R. Co. v. Buckner* (Ky.) 113 S. W. 90, it appeared that the plaintiff's intestate was in the employ of the city as a street sweeper; and it was the contention of the plaintiff that, while standing in the south track of the defendant's railway at its intersection with another street, looking eastwardly and engaged at work, he was struck and so injured by one of the defendant's cars, approaching him from the rear, as to cause his death. On the other hand, it was the defendant's contention that, just before the car struck the employee, he was knocked in front of it by lumber projecting from a passing wagon, and that the car could not be stopped in time to prevent its striking him. It was conceded by the defendant's counsel that there was a scintilla of evidence which authorized the submission of the case to the jury, and it was held that there was some evidence, and more than a scintilla, to sustain the plaintiff's theory of the manner in which the employee received his injuries, and to support a verdict in his favor.

In *Washington v. Missouri*, etc. R. Co. 90 Tex. 314, 38 S. W. 764 (reversing 36 S. W. 778), the action was for damages for death due to negligence. The evidence showed that the plaintiff's intestate was seen walking along a footpath on the defendant's right of way, which people were in the habit of using and which was in a deep cut. Shortly afterward there was a wreck caused by the collision of two sections of a freight train which had become uncoupled, and the body of the intestate was found under the tank of an oil car in the train, which had been derailed, a few feet from the track. It was held that there was more than a mere scintilla of evidence and that the case ought to have been submitted to the jury.

In *Butts v. Atlantic*, etc. R. Co. 133 N. C. 82, 45 S. E. 472, an action to recover damages for personal injuries received by being struck by a train, there was testimony tending to prove that the plaintiff was traveling along a public highway within the corporate limits of the city where the highway crossed the track at an acute angle, both the plaintiff and the train going in the same relative direc-

tion; that no signal for the crossing was given either by bell or whistle; and that the plaintiff stopped, looked, and listened, and heard nothing. It was held that, taking the plaintiff's evidence as true, and construing all the evidence in the light most favorable to the plaintiff, there was more than a scintilla of evidence tending to prove his contention.

In *Craft v. Norfolk*, etc. R. Co. 136 N. C. 49, 48 S. E. 519, the plaintiff testified that the defendant cut a canal whereby the waters of a branch, which previously thereto flowed into a creek below his land, were turned into that creek at a point above his land; that this diversion caused the water in the creek, which was his eastern boundary, to rise and overflow his land to such an extent as to destroy his crop for two previous years. Another witness testified for the plaintiff in substantial corroboration. It was held that there was more than a scintilla of evidence tending to prove the plaintiff's contention.

In *Cox v. High Point*, etc. R. Co. 147 N. C. 353, 61 S. E. 183, the evidence showed that in the morning a mail clerk, in his usual health, who had been found by a physician less than a month before to be in normal condition, left his home in the discharge of his duty to enter and remain in the mail car from Ashboro to High Point, not exceeding twenty-eight miles; that he was in the car at the time it jumped the track and by striking or being thrown against iron racks or tables was bruised on his body and in the region of his kidneys. Acute Bright's disease developed resulting in pneumonia and causing his death. It was held that his administrator in an action for damages for his death had introduced evidence which was very much more than a mere scintilla, and that the issue should have been submitted to the jury.

In *Currie v. Gilchrist*, 147 N. C. 648, 61 S. E. 581, an action to recover the possession of land, wherein the evidence showed a lapse of the two titles, it was held that there was more than a scintilla of evidence as to the location of the boundaries described in the grant and deeds on which the plaintiff relied to show title.

In *Forayth v. Zebulon Cotton Oil Mill Co.* 167 N. C. 179, 83 S. E. 320, the evidence tended to prove that the plaintiff was employed in the cotton seed room of the defendant to put cotton seed in the seed conveyor, in which position the plaintiff had been working for several weeks. The room in which the conveyor was operated was a large room with a revolving shaft above, which operated the machinery. The room was usually filled with cotton seed, piled up high. The evidence showed that this was necessary in the operation of the defendant's business, for the purpose not only of storing the cotton seed,

but of feeding the conveyor. At the time of the injury the cotton seed was piled up in the room so that the plaintiff, after work hours, crawled on his all-fours between the end of the shafting and the side of the house, and, coming in contact with the shafting, was injured. The alleged negligence consisted in the failure of the defendant to provide a reasonably safe way for the plaintiff to get out of the building without climbing over the cotton seed near the revolving shaft in the manner in which he did. There was evidence tending to prove that there was a way provided for the plaintiff and other employees to get out, and that it was possible for them to go from the place where plaintiff was working and cross over to the other side of the building, across the cotton seed, and in that way avoid the shafting and get to the door. There was other evidence tending to prove that the plaintiff, with a few minutes' work with a shovel, could very easily have shoveled aside the cotton seed and thus made his way to the door. It was held that there was more than a scintilla of evidence tending to prove the plaintiff's contention that his injury had been caused by the defendant's negligence.

In *Zollicoffer v. Zollicoffer*, 168 N. C. 326, 84 S. E. 349, it appeared that the owner of a certificate of stock requested the plaintiff to take and keep it for his daughter, but he declined to do so, stating that she was the one to hold it. Thereupon she indorsed it to the daughter and placed it in her Bible. It was held that the evidence on the question of delivery, while very slight, was more than a scintilla and was sufficient to carry the case to the jury.

The Hawaiian statute (R. L. sec. 1798) requires that all questions of fact shall be submitted to the jury for their determination without any comment on the reliability of the witnesses or the weight of the evidence by the trial judge. It, however, contains a provision that it shall not "be construed to prohibit the setting aside of a verdict rendered by such jury, in a proper case, as being against the weight of evidence, and the granting of a new trial therein." In *Robinson v. Honolulu Rapid Transit, etc. Co.* 20 Hawaii 466, the court held that the foregoing proviso could not be construed as authorizing a trial judge to set aside a verdict simply because in his judgment it was against the weight of evidence, when there was some substantial evidence to support it, and the verdict had not been attacked on any other ground. In other words, it was held that, in a case where the verdict was supported by more than a scintilla of evidence, it was not "a proper case" in which to set aside the verdict on the sole ground that it was against the weight of the evidence.

STATE EX REL COLLINS

v.

SENATOBIA BLANK BOOK AND STATIONERY COMPANY.

Mississippi Supreme Court—July 9, 1917.

115 Miss. 254; 76 So. 253.

Printing — Public Contract — Limitation to Residents — Validity.

Laws 1916, c. 135, § 3, prohibiting the letting by boards of supervisors of counties of contracts to furnish the county with blank books, stationery, etc., to any bidder who is a nonresident of the state, who has not a printing plant in the state or who is not a bona fide resident of the state actually engaged in the printing business is not violative of Const. U. S. art. 1, § 8 (8 Fed. St. Ann. 363), giving Congress the right to regulate commerce among the several states, since such provision of the constitution is not intended to affect contracts which have an indirect or remote bearing on commerce between the states, and a state in the exercise of its police power may make regulations which indirectly affect interstate commerce; it being only direct interferences with the freedom of such commerce that bring the case within the exclusive domain of federal legislation.

[See note at end of this case.]

Same.

Laws 1916, c. 135, § 3, is not violative of Const. U. S. art. 4, § 2 (9 Fed. St. Ann. 158), providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, since counties are mere political subdivisions of the state for the purpose of exercising a part of its powers and may exert only such powers as are expressly granted to them or necessarily implied from those granted, so that regulation of their contracts is a regulation of the contracts of the state, and no person engaged in stationery business is entitled to absolute right to contract with the state.

[See note at end of this case.]

Same.

Laws 1916, c. 135, § 3, is not violative of Const. U. S. Amend. 14 (a) (9 Fed. St. Ann. 392, 416, 538), providing that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of laws.

[See note at end of this case.]

Same.

Laws 1916, c. 135, § 3, is not violative of Const. § 107, providing that stationery, printing, etc., used by the legislature and other departments of the government shall be performed under contract subject to the approval

of the governor and state treasurer, since a county is not a department of the state but a political subdivision.

[See note at end of this case.]

Constitutional Law — Policy of Statute.

The wisdom of laws, etc., is a matter for the legislature, and it is the sole duty of the courts to say whether the act as passed is violative of the state or federal constitutions.

Quo Warranto — Violation of Charter by Corporation.

Quo warranto is the proper remedy for the attorney general of the state to pursue, where a corporation practiced fraud in obtaining its charter and the acts of the alleged corporation under the charter have been all in violation of law.

Demurrer — Effect as Admission.

A demurrer to an information in quo warranto proceeding admits all the allegations contained in the information, and it is the duty of the appellate court in reviewing the case to assume that the allegations are true as stated.

Appeal from Circuit Court, Tate county:
DINKINS, Judge.

Quo warranto proceeding. Ross A. Collins, Attorney General, relator, and Senatobia Blank Book and Stationery Company, defendant. Judgment for defendant. Relator appeals. The facts are stated in the opinion. **REVERSED.**

R. H. & J. H. Thompson, Fulton Thompson and Ross A. Collins for appellant.

Mayer, Wells, May & Sanders for appellee.

[256] SYKES, J.—This was a *quo warranto* proceeding instituted in the circuit court of Tate county by the state of Mississippi, on the relation of the Attorney-General, against appellee, a corporation, organized under the laws of Mississippi, domiciled in Tate county. The defendant demurred to the information, which demurrer was sustained by the circuit court, and the cause dismissed; from which judgment sustaining the demurrer, this appeal is prosecuted.

Among other things, the information alleged: That shortly after the passage of chapter 135, Laws of 1916 (p. 193), prohibiting the letting by boards of supervisors of the several counties of contracts to furnish the counties with blank books, stationery, etc., to any bidder who is a nonresident of the state of Mississippi, who has not a printing plant in the state, or who is not a *bona fide* resident of the state actually engaged in the printing business, the charter of incorporation of appellee was applied for and granted. That the objects and purposes of the application for this charter of the appellee were not to enable it to do a lawful business in the

state, but that its objects and purposes were unlawful and fraudulent; its objects and purposes were to circumvent the statutes of the state and to perpetrate a fraud on the laws of the state. That the objects and purposes of the incorporators were to enable Geo. D. Bernard & Co., of St. Louis, Mo., a nonresident printing, blank book, and stationery company, to make contracts with the various boards of supervisors of the counties of the state in the name of the appellee company for the furnishing of the blank books and stationery and necessary printing required by law to be done by them.

A part of the information reads as follows:

"In short, the defendant company was incorporated to be, and is, a mere dummy of the said Geo. D. Barnard & Co. Defendant company never has had, and has not now, a printing nor a blank book nor a stationery plant [257] in this state of sufficient capacity to execute the contracts which it has obtained formerly from several counties of the state, as hereinafter shown, nor to execute the several contracts which it has sought to obtain from any other counties. Its entire purpose has been to obtain contracts for blank books, stationery, and printing from the counties in its name and to have the said contracts executed by Geo. D. Barnard & Co., the aforesaid nonresident printing, stationery, and blank book company.

"In pursuance of such fraudulent intent and purpose, and with the design and intent to defeat the laws of this state, the said defendant corporation, falsely pretending to be a *bona fide* resident of this state and a domestic printing, blank book, and stationery company, has deceived and defrauded the boards of supervisors of various counties of this state."

The information prays for judgment of forfeiture and ouster against the appellee.

The demurrer admits the allegations alleged in the information, and its sole object and purpose is to challenge the constitutionality of chapter 135 of the Laws of 1916 (p. 193).

Section 1 of this act provides the method to be followed by the board of public contracts in the making of contracts for the state printing proper and for the different departments of the state government. That section of the act does not deal with the contracts for printing stationery, etc., for the counties. Section 3 of the act relates to the letting of the contracts by the various boards of supervisors and is the act before us for construction. As amended, this act now reads as follows:

"The boards of supervisors of the several counties of the state shall, on the last Monday in July, 1916, or as soon thereafter as practicable, and on a corresponding date

every two years thereafter, after having advertised in some local newspaper for thirty days inviting sealed proposals, let to the lowest responsible bidder [258] contracts for the purpose of record and blank books, tax receipts, warrant books, pay certificates, stationery, office supplies, legal form and such other books and blanks as are used by the county and district officers. They shall classify same into the following classes: (1) Blank books and record books; (2) printed blanks and printed stationery; (3) ruled and printed blanks; (4) tax receipts, warrants and such forms in simple binding; (5) stationery and office supplies and furniture, not including specially ruled or printed work; and the same shall be let by classes, and all contracts for county printing of the second and third classes shall be by the supervisors and awarded to the lowest responsible bidder of local printing establishments in the respective counties, provided the same can be satisfactorily done there. Also local dealers of the various counties shall be allowed the same privileges of bidding for the furnishing of files, furniture, etc., in the fifth class, as is herein provided for the local printing establishments for the second and third class. If no contract is made for any one of the schedules except those held by the local printers of the respective counties, the officers shall buy supplies not contracted for through the contractor, provided his prices are equal to those of other printing establishments. Contracts for other classes may be awarded to worthy and capable printing establishments of this state, actually engaged in the printing business, and paying taxes thereon in the state, and classified schedules shall be furnished by the board of supervisors to prospective bidders on request, clearly showing and clearly defining what is wanted of each of said classes of work, and besides, the clerk of the board of supervisors shall, at least ten days before the awarding of contracts, forward by mail, postage prepaid, such classified schedules to at least twelve printers or printing establishments of character and ability, all of whom shall be residents of this state. Proposals shall be addressed [259] to the clerk of the board of supervisors and shall be so marked as to designate what it is."

The demurrer in this case challenges: First, the constitutionality of this act, alleging that it violates the commerce clause, section 8, article 1, of the federal Constitution; second, that it violates section 1 of the Fourteenth Amendment of the federal Constitution; and, third, that it violates section 107 of the Constitution of Mississippi; fourth, that said information does not charge any present or past violation of any law. It is also argued in the brief of the

appellee that this act is violative of article 4, section 2, of the federal Constitution. There are other assignments in the demurrer, but they are not seriously pressed upon us by the appellee, and we do not think it necessary to notice any save those above enumerated.

We shall first consider the question as to whether or not this act is violative of any of the provisions of the Constitution of the United States above mentioned. Article 1, section 8, gives Congress the right "(3) to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." (8 Fed. St. Ann. 363). Article 4, section 2:

"(1) The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." (9 Fed. St. Ann. 158).

Section 1 of the Fourteenth Amendment:

"(a) No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (9 Fed. St. Ann. 392, 416, 538).

That the legislature has the power to enact laws regulating the letting of contracts for its printing and that of its subdivisions is not and cannot be questioned. That the county is a subdivision of the state is also not questioned.

[260] The first question, then, is: Does this act violate any of the enumerated provisions of the federal Constitution? The act in question does not attempt to regulate any contracts save those of the state itself and its subdivisions, which are, upon the last analysis, contracts of the state. In other words, by this act the state is but regulating and saying with whom it will make its own contracts for work of this character. It is well also to bear in mind that an individual has a perfect right to make a contract with any one whom he pleases. It follows, also, that the state has a right to make a contract with any one whom it pleases unless it contravenes in some way either the federal or the state Constitution. The law in question in no way attempts to regulate interstate commerce. The section of the act in question is a direction to the officers of the counties prescribing the manner and from whom they shall receive bids for the county supplies mentioned in the act. These county officers are agents of the county and can only act by legislative authority, and in the making of these contracts these acts only relate to the regulation of the state's and its subordinates' own business. Neither the state nor any county can be forced, without its

permission, to enter into a contract with an individual or a corporation without its (the state's) permission, unless there is some provision in one of these Constitutions requiring it to do so. There is no such express provision in either of the Constitutions. While the state cannot be compelled without its consent to enter into a contract with any individual or corporation, yet the act in question expressly provides how both resident and nonresident citizens or corporations may qualify to bid for the work provided for under this act. The sum and substance of the act is merely to compel those who desire to do this work for the state or its subdivisions to become amenable to the process of the courts of the state and to do certain of the work within the limits of the state. These are reasonable regulations for the welfare of the state and its [261] subdivisions; the object being to protect the state from bidders who are without the jurisdiction of the state and also having in view the upbuilding of the state by the construction within its limits of the establishments necessary to do this work. This may very well be classed as a police regulation.

In these days of quick communication and transportation among the states of the Union, in its broadest sense, any contract made by a state or its subdivision may in some way indirectly affect interstate commerce. That is to say, most likely some of the raw or manufactured material which may be used in its public buildings or in the furnishing or outfitting of any of the county or state offices, may be transported into the state from another state. This in no way is an interference with interstate commerce. The supreme court of the United States, in a case which is directly in point on this proposition, has stated the law in these apt terms:

"The right of a state, in the exercise of the police power, to make regulations which indirectly affect interstate commerce, has been frequently sustained. In the present case it may be that the use of this kind of asphalt, under municipal authority conferred by the state, will in a limited degree affect interstate commerce; but it certainly is not one of those direct interferences with the power over, and express control of, the subject given by the Constitution to Congress. In this day of multiplied means of intercourse between the states there is scarcely any contract which cannot, in a limited or remote degree, be said to affect interstate commerce. But it is only direct interferences with the freedom of such commerce that bring the case within the exclusive domain of federal legislation." *Field v. Barber Asphalt Paving Co.* 194 U. S. 618, 24 S. Ct. 784, 48 U. S. (L. ed.) 1142.

In the case above quoted from, in further discussing the question as to whether or

not the commerce clause of the federal Constitution was violated, the court says:

[262] "It is not intended to affect contracts which have a remote and indirect bearing upon commerce between the states."

It was necessary to transport into the state of Missouri the asphalt contracted for in that work.

The remaining objections to this law, under the federal Constitution, are disposed of in the case of *Atkin v. Kansas*, 191 U. S. 207, 24 S. Ct. 124, 48 U. S. (L. ed.) 148. The state of Kansas passed laws making it a criminal offense for a contractor to permit or require an employee to perform labor upon public works in excess of eight hours a day. This law was violated by the appellant, who was convicted, and prosecuted an appeal to the Supreme Court of the United States. The appellant *Atkin*, when he violated this law, was constructing a brick pavement for the municipality of Kansas City. The contention of the appellant in that case was that the law in question violated the first section of the Fourteenth Amendment.

"These questions—indeed, the entire argument of defendant's counsel—seem to attach too little consequence to the relation existing between a state and its municipal corporations. Such corporations are the creatures—mere political subdivisions—of the state, for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the state. They are, in every essential sense, only auxiliaries of the state for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged or altogether withdrawn at the will of the legislature; the authority of the legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed. (Citing authorities.) In the case last [263] cited (*Williams v. Eggleston*, 170 U. S. 304, 310, 19 S. Ct. 617, 42 U. S. (L. ed.) 1047, 1049), we said that 'a municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature.' . . .

"The improvement of the boulevard in question was a work of which the state, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for it is one of the functions of government to provide public highways for the convenience and comfort of the people. In-

stead of undertaking that work directly, the state invested one of its governmental agencies with power to care for it. Whether done by the state directly or by one of its instrumentalities, the work was of a public, not private, character.

"If, then, the work upon which the defendant employed Reese was of a public character, it necessarily follows that the statute in question, in its application to those undertaking work for or on behalf of a municipal corporation of the state, does not infringe the personal liberty of any one. It may be that the state, in enacting the statute, intended to give its sanction to the view held by many that, all things considered, the general welfare of employees, mechanics, and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen, and enable them the better to discharge the duties appertaining to citizenship. We have no occasion here to consider these questions, or to determine upon which side is the sounder reason; for, whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the state to declare that no one undertaking work for it or [264] for one of its municipal agencies should permit or require an employee on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.

"If it be contended to be the right of every one to dispose of his labor upon such terms as he deems best—as undoubtedly it is—and that to make it a criminal offense for a contractor for public work to permit or require his employee to perform labor upon that work in excess of eight hours each day is in derogation of the liberty both of employees and employer, it is sufficient to answer that no employee is entitled, of abso-

lute right and as a part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do.

"So, also, if it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and, upon ground merely of justice or reason or wisdom, [265] annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution. It cannot be affirmed of the statute of Kansas that it is plainly inconsistent with that instrument; indeed, its constitutionality is beyond all question." *Atkin v. Kansas*, 191 U. S. 207, 24 S. Ct. 124, 48 U. S. (L. ed.) 148.

The same contentions so earnestly and ably insisted upon by the appellee in the present case were insisted upon in the *Atkin* Case, so liberally quoted from. Paraphrasing part of the above quotation, a complete answer to the argument in this case of appellee is as follows: It is sufficient to answer that no person engaged in the stationery business is entitled, of absolute right and as a part of his liberty, to contract with or to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do.

The act in question in no way violates any provision of the Federal Constitution.

It is contended by the appellee that the act violates section 107 of the Constitution of the state of Mississippi, which reads as follows:

"All stationery, printing, paper, and fuel, used by the legislature, and other departments of the government, shall be furnished, and the printing and binding of the laws, journals, department reports, and other printing and binding, and the repairing and fur-

nishing the halls and rooms used for the meeting of the legislature and its committees, shall be performed under contract, to be [266] given to the lowest responsible bidder, below such maximum and under such regulations as may be prescribed by law. No member of the legislature or officer of any department shall be in any way interested in such contract, and all such contracts shall be subject to the approval of the Governor and State Treasurer."

A complete answer to this contention is that section 107 is not in question here. It only relates, according to its plain provisions, to contracts for the stationery, etc., of the legislature and other departments of the state government, which contracts are subject to the approval of the Governor and the State Treasurer. The contracts of subdivisions of the state, such as counties, are not intended to be approved by the Governor and the State Treasurer. They are not departments of the state, as are contemplated by the above section, but are mere subdivisions of the state. This is manifest when we consider the laws of the state relating to these various state contracts contemplated by section 107. Section 1 of the act here in question relates to those contracts covered by section 107 of the Constitution. The construction of that section is not here involved, and for that reason we do not feel called upon to consider its constitutionality in this case.

Kindred acts of other states have been held not violative either of their state or the federal Constitutions, in the cases of *Tribune Printing, etc. Co. v. Barnes*, 7 N. D. 591, 75 N. W. 904, and *In re Gemmill*, 20 Idaho 732, 119 Pac. 298, 41 L.R.A.(N.S.) 711, Ann. Cas. 1913A 76. In the latter case there is quite an extended case note discussing the constitutionality of these various acts.

The able counsel for appellee severely criticize and arraign the wisdom of this act. They say it is but a shallow pretense to give a monopoly to resident printers and stationers of Mississippi. With the wisdom of the act this court has nothing to do. That is a matter entirely for the lawmaking body. It is solely our duty to say whether or not the act as passed by the legislature is violative of any of the provisions of the state or federal [267] Constitutions. We find none of the provisions of either Constitution violated.

It is further contended that an information by *quo warranto* was not the proper remedy for the attorney-general to pursue. The information alleges that the incorporators ob-

tained this charter for fraudulent purposes; that the charter was fraudulently obtained; that all of the acts of the corporation and of its incorporators are violations of the law of the state. We find in the brief of appellee a quotation from the case of *State v. Minnesota Thresher Mfg. Co.* 40 Minn. 213, 41 N. W. 1020, 3 L.R.A. 510:

"But we think it may be safely stated as the general consensus of the authorities that, to constitute a misuser of the corporate franchise such as to warrant its forfeiture, the *ultra vires* acts must be so substantial and continued as to amount to a clear violation of the condition upon which the franchise was granted, and so derange or destroy the business of the corporation that it no longer fulfills the end for which it was created. But in case of excess of powers it is only where some public mischief is done or threatened that the state, by the attorney-general, should interfere."

The information in this case not only alleges that a fraud was practiced upon the state in obtaining the charter, but that the acts of this alleged corporation under this charter are all violations of the law. Under the facts alleged in the information, and under section 4017 of the Code of 1906, *quo warranto* was eminently the correct procedure. The demurrer, of course, admits all the allegations contained in the information, and it is our duty to assume, in reviewing this case, that these allegations are true as stated. The information should have been answered.

The judgment of the lower court is reversed, and the cause remanded, with leave to the appellee to answer within thirty days after the mandate of this court is filed in the lower court.

Reversed and remanded.

NOTE.

It is held in the reported case that a statute forbidding the letting of any county contract for blank books, stationery or the like to any person who has not a printing plant in the state or is not a resident of the state engaged in the printing business is neither an interference with interstate commerce nor an abridgement of the privileges or immunities of the citizens of the several states. The validity of a statute requiring public printing, etc., to be done within the state is discussed in the note to *In re Gemmill*, Ann. Cas. 1913A 76.

170 Ky. 512.

AMERICAN SOUTHERN NATIONAL BANK

v.

SMITH ET AL.

Kentucky Court of Appeals—June 1, 1916.

170 Ky. 512; 186 S. W. 482.

Banks — Banking Commissioner — Status and Powers.

Under Laws 1912, c. 4, § 2, providing for a banking commissioner and prescribing his powers and duties, the commissioner is not a "receiver" nor an "assignee for the benefit of creditors," the powers of a receiver being limited by the appointing court, and of the assignee by the powers and rights of his assignor, but those of the commissioner are limited only by the statute.

Power to Regulate.

Banks are proper subjects of regulation by the police power, since they are the chief repositories of the money of the country, and their solvency should be safeguarded.

Powers of Banking Commissioner — Bringing Action.

Under Laws 1912, c. 4, § 2, creating the office of banking commissioner and prescribing his duties and powers, the commissioner, on taking charge of an insolvent bank, may sue to recover its assets, the purpose of the act being to properly administer the affairs of insolvent banks, in doing which collection of assets is necessary.

Corporations — Ultra Vires Contracts.

"Ultra vires contracts" include not only those entirely without the scope and purpose of the charter privileges and objects, but also those beyond the limitation of the charter powers, though within the purposes contemplated by the articles of incorporation.

Exceeding Debt Limit — Effect.

A bank which lends money to another bank in excess of the borrower's charter powers cannot defeat recovery by the banking commissioner of assets pledged to secure such loan, on the ground that the contract is wholly void, and neither party can obtain relief under it, since the contract was merely in excess of charter powers, and not outside of the corporation purposes.

[See note at end of this case.]

Same.

A bank which lends money to another bank in excess of the borrower's charter powers cannot claim the right to be placed in statu quo, though it had no actual notice of the charter limitation, since the doctrine of constructive notice of such limitations applies.

[See note at end of this case.]

Same.

The receiver, or the banking commissioner who has taken charge of an insolvent bank, may disaffirm a contract under which the bank borrowed money in excess of its charter powers and pledged certain assets, and sue to

recover the assets without returning the money borrowed, since he represents the creditors of the bank.

[See note at end of this case.]

Same.

The right of the banking commissioner in charge of an insolvent bank to disaffirm an ultra vires contract by which the bank borrowed money in excess of its powers and pledged assets, and to sue to recover the assets, cannot be defeated on the ground that the bank received full value when the loan was made, so that its assets were not impaired and creditors could not complain.

[See note at end of this case.]

Same.

The rule, upholding the liability of a bank which loaned money to another bank in excess of the borrower's charter powers and accepted a pledge of assets in security, to return such assets, without return of the money loaned, is the same regardless of how the creditor bank comes into court.

[See note at end of this case.]

Appeal from Circuit Court, Jefferson county, Common Pleas Branch, Third Division.

Action by Thomas J. Smith, Banking Commissioner, et al., plaintiffs, against American Southern National Bank, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Henry Burnett, W. H. Batson and Graddy Cary for appellant.

John J. Williams and John M. Lassing for appellees.

[513] THOMAS, J.—In 1906, the George Alexander & Company bank was duly incorporated as a banking institution with its principal office and place of business at Paris, Ky., and had a capital of \$40,000.00, divided into shares of \$100.00 each; and by its charter, which was executed on the 11th day of April of that year, it was authorized to engage in and conduct a general banking business in the State of Kentucky. Since that time its charter has been amended to the extent of changing its name to "George Alexander & Company State Bank." In all other respects its articles of incorporation are the same as when first executed, [514] and reference will hereafter be made to it as the Alexander bank. The eighth clause of its charter is in these words:

"8th. The highest amount of indebtedness or liability which the corporation may incur, shall not at any time exceed ten thousand dollars (\$10,000.00), over and above its liabilities to depositors and its liabilities upon bills of exchange, checks or drafts upon other banks having its funds upon deposit."

The appellant (whom we shall hereafter refer to as defendant), is a banking institution with its principal place of business located in the city of Louisville, and when first organized, its name was American National Bank, but since then its name has been changed by proper proceedings to the one it now has, American Southern National Bank.

On July 1, 1907, the Alexander bank borrowed from the defendant the sum of \$15,000.00, executing its note therefor, and on December 31, of the same year, it borrowed an additional \$18,000.00, for which it executed its note, and to secure the payment of both these notes, it entered into a contract with the defendant by which it pledged to the latter, solvent notes to the aggregate amount of \$35,000.00, and in addition thereto, agreed to keep on deposit with the defendant until the payment of the two notes, a sum of not less than \$10,000.00. The indebtedness represented by these two notes was not reduced by the Alexander bank, nor was there any change in the collaterals except, perhaps, that some of them were from time to time removed, and other collaterals with equal solvency would be substituted for the originals.

With matters in this condition, the Alexander bank was, on May 19, 1914, under the Act of the Legislature of 1912, relating to banks and providing for a Banking Commissioner, duly and regularly placed in the hands of the appellant, who was then and is now the Banking Commissioner for this State. There is no question made in the case but that the Alexander bank was at that time hopelessly insolvent, it being agreed that its indebtedness to its depositors and some other creditors amounted to more than \$100,000.00 above its assets. After taking charge of the Alexander bank, the plaintiff demanded of the defendant the payment to him of the deposits which the Alexander bank had with defendant, [515] then amounting to \$10,837.45, and further demanded that it deliver to him the collaterals which it held to secure the payment of the two notes mentioned, but both of these requests were refused. The plaintiff, as such commissioner, in making these demands, proceeded upon the theory that inasmuch as the two notes aggregating \$33,000.00 exceeded the limitation provided for in clause eight of the charter of the Alexander bank, *supra*, it was *ultra vires* and void, and that he was entitled to recover, not only the deposit, but the collaterals as well, all to go into the general fund for distribution among the creditors.

After the refusal of the defendant to comply with these requests, this suit was instituted against it for the purpose of compelling it to do so, which resulted in a judgment against it for the excess of the combined sum of the collaterals which it had collected, plus

the deposits over \$10,000.00, the limit of the indebtedness which the Alexander bank could contract. The defendant, after the declared insolvency of the Alexander bank, had collected a sufficiency of the collaterals, together with the deposit to pay its entire indebtedness, and it delivered to the plaintiff the remaining collaterals, which it had not collected; the total amount of the judgment being \$25,573.64, with interest from January 5, 1916, the date of its rendition.

It is first insisted that the right to bring this character of action, if one exists at all, is not vested in the Banking Commissioner; but the relief sought, if available at all, can be prosecuted only by a creditor, or creditors. In other words, that the Act of 1912 and the general laws of the land, as is announced by the courts and text-writers, do not vest the Commissioner with any greater powers or rights than were possessed by the insolvent bank, whose business he is engaged in winding up, and that the bank, as such, would not have had the right to maintain this action without at least tendering back to the defendant the consideration which it received for the two notes. It seems to be conceded that the execution of the two notes by the Alexander bank was *ultra vires* at least as to the excess of \$10,000.00. The decisions of the courts in regard to the powers and rights of a receiver, or an assignee for the benefit of creditors, are not by any means binding precedents in the determination of the question which we have before [516] us. The Banking Commissioner is not a receiver appointed by the court, nor is he an assignee for the benefit of creditors in the ordinary acceptation of that term. In the one case, the authority, rights, and powers of the receiver are qualified and restricted by the court appointing him, while the assignee for the benefit of creditors obtains his authority, rights and powers from his assignor; and in the very nature of things, he cannot confer upon his assignee that which he did not possess. The banking business throughout the country has in modern times grown to such an extent that almost the entire commercial activities of the country are conducted through and by banks. They are the repositories of the larger per cent of all the money of the country, and because of these and other conditions, through and by which they are so intimately associated with business and with the individual citizen, the countries under which they are organized have long since considered them appropriate institutions for statutory regulation, to the end that their solvency may be safeguarded, and that the citizen depositing his money therein may be assured, as much as possible, that upon demand it will be forthcoming. Sound public policy, therefore, has long since determined that this char-

acter of corporations are subject to the visitatorial powers of the government creating them, which is manifested by the character of legislation embodied in the Act of 1912, passed by our legislature. These observations are fortified by the author of Thompson on Corporations, 1st ed., sec. 460, wherein it is said:

"Perhaps no class of corporations are more completely under police regulations of the States than banking companies. The police power, in its visitatorial aspect, as exercised by Congress and the several States, extends to the minutest details of the banking business. These corporations are not, strictly speaking, *quasi* public in their nature; but they are of such a character that the State can and does protect the public by any and all reasonable regulations necessary to that end. The peculiar relation that banks sustain to the public, and by this is meant their depositors, is such that it is the business and the duty of the State to see that corporations embarking in such an enterprise are entitled to the confidence of the public, and that depositors who in good faith entrust their money to these institutions shall be [517] protected. It was said by one court that 'it is conceded that the business of banking, by reason of its very intimate relations to the fiscal affairs of the people, and the revenues of the State, is, and has ever been considered a proper subject of legislative control, and strictly within the domain of the internal police power of every State.'"

And in the same section, quoting with approval from *Blaker v. Wood*, 53 Kan. 499, 36 Pac. 1115, 24 L.R.A. 854, it is said:

"Enactments controlling the loaning of money, and regulating the rate of interest upon the same, have been sanctioned from the earliest times, and the nature of the business done by banks in dealing in money, receiving deposits for safekeeping, discounting paper, and loaning money, is such, and is so affected with a public interest, as to justify reasonable regulation for the protection of the people. The confidential and trust relations which exist between the bank and its patrons, and the difficulty that depositors and those dealing with the bank necessarily encounter in detecting irregular practices and in ascertaining the real financial condition of banks, are sufficient to justify inspection and control."

In furtherance of these general purposes which it is evident the statute was intended to foster and encourage, we are disposed, if the question was one of first impression, to construe the statute so as to vest the Banking Commissioner, when winding up the affairs of an insolvent bank, with all the power and authority in the collection of the distributable assets of the bank, that a credi-

tor himself would have in a proceeding which he might institute for that purpose. As illustrating the general doctrine in regard to the powers, rights, and authority of those entrusted with the duty of winding up the affairs of insolvent corporations, as well as the modern tendency of the courts in extending and enlarging those powers so as to accomplish the purpose in view, and to avoid a multiplicity of suits, reference may be had to sections 2850, 5158, 5159, 5360, and 6396 of Thompson on Corporations. From section 5158, we quote:

"But this rule (that the receiver takes no greater right than the corporation) is subject to the exception that a receiver so far represents the general creditors that he is authorized to avoid transactions in fraud of their rights."

[518] And again from section 5159:

"However, the receiver's powers and authority have been necessarily and beneficially enlarged in some States by statute, and in other States by judicial interpretation. . . . Other cases illustrate the doctrine that a receiver may assert rights which the corporation or its management could not enforce."

In section 6396 of the same works, we find it stated:

"Some of the courts take the view that the receiver stands in the shoes of the corporation itself, the same as a voluntary assignee stands in the shoes of his assignor, and cannot maintain any action or set-off in defense which the corporation itself could not have maintained or set-off. But this is generally regarded as a narrow view, for the receiver is generally given the right to litigate for the benefit of creditors where acts have been done in fraud of their rights, though the act in question may be valid as to the corporation itself."

Numerous authorities are cited to support these various texts, but this court upon at least three occasions has had under consideration our banking act relative to the powers which it confers upon the Banking Commissioner, in which it used language impliedly, if not expressly, upholding the right of the Commissioner to prosecute this character of suit. These are to be found in the three cases of Commercial Banking, etc. Co. v. Citizens' Trust, etc. Co. 153 Ky. 566, Ann. Cas. 1915C 166, 156 S. W. 160, 45 L.R.A. (N.S.) 950, and *Cartmell v. Commercial Bank, etc. Co.* 153 Ky. 798, 156 S. W. 1048, and *Ex p. Smith*, 160 Ky. 83, 169 S. W. 582.

In the first case mentioned the Commercial Bank & Trust Company, organized under the laws of this State with powers to conduct a general banking business, and engaged in such business in the city of Louisville, arranged with Lloyd W. Gates, the Treasurer

of Jefferson county, for him to deposit the money which he held as treasurer with it, and to secure him in such deposit, it executed to him a bond with the Citizens Trust & Guaranty Company of West Virginia, as its surety, but deposited with its surety, under an agreement to do so, in pledge, the sum of \$100,000.00 of its assets, consisting of certificates of deposits and negotiable notes. Subsequently, and on January 13, 1913, the Commercial Bank & Trust Co. was placed in the hands of the Banking Commissioner, under the provisions of the Act of [519] 1912. A controversy arose as to whether the Guaranty Company could hold these collaterals, and if not, whether they could be recovered by the Banking Commissioner. It was alleged by the surety of the bank, the Guaranty Company, that its liability as such surety would be greater than the collaterals which it held, but the commissioner insisted that these collaterals were a part of the assets of the defunct Commercial Bank & Trust Company, upon the ground that it had no authority to so use them. He further insisted that he, as such commissioner, had the right to recover them for the benefit of creditors. The case was decided against him by the lower court, but upon appeal to this court the judgment was reversed and the contention of the commissioner was upheld. In a very exhaustive and lucid opinion, the court upon the questions which we have discussed, said:

"There being no express authority given to a bank to secure a deposit, by pledge of its assets, and it being apparent that such a practice would have a tendency, and pave the way, to the perpetration of fraud, by putting it in the power of the officers of a bank to give a preference to favored customers, it cannot successfully be maintained that a bank has the implied right or power to do so. Banks undoubtedly have the right to do many acts and things not expressly authorized by their charters, or specifically designated in the general laws adopted for their organization, regulation and government. These are termed implied powers, but such powers are those found necessary to enable the banks properly and expeditiously to carry out and enjoy the powers, rights and privileges, expressly given them. Before a bank should be adjudged entitled to exercise any power, not expressly given, it should be clearly established that such power is essential to the proper conduct of its business and necessary to enable it properly to enjoy, use and carry out its express powers. When such test is applied to the claim of right, on the part of a bank, to prefer one of its depositors over another, it is apparent that the right should be denied. The exercise of such a power would necessarily be fraught with great possibilities for the perpetration of fraud, and would undoubtedly have a tendency to destroy the

faith of the depositing public in banking institutions."

[520] And further on in the opinion it is said:

"The rigid enforcement of this principle will not deprive banks of the right to exercise any of their legitimate functions; but, on the contrary, will build them up in the confidence of the depositing public; for, when depositors know that the bank not only may, but must, deal fairly with them, banks will take that position in the confidence of the public in which these great institutions deserve to be held. . . . If banks are made to observe strictly the law and not allowed to divert their assets from their proper and legitimate channel, it will be in rare instances indeed that depositors will feel the need of special security for their funds when placed in banks."

In the latter case referred to, a number of depositors of a bank sought to oust the Banking Commissioner after taking charge of an insolvent bank which had properly gone into his hands and to substitute in his place a receiver to be appointed by the court. The opinion goes into a thorough consideration of the object and purposes of the legislature in passing the banking act of 1912, as well as the ends to be accomplished and the means by which they should be accomplished, and concludes by holding that the method provided by the act for the winding up of an insolvent bank, though the commissioner therein provided, is exclusive, and the right contended for, to have a receiver appointed after the Banking Commissioner had taken charge, was denied. In the course of the opinion it is said:

"This legislation has, as its ultimate aim, the protection of the depositing public, and it is doubtful if any legislation enacted in recent years is calculated to have so beneficial an influence and effect. . . . The object and aim of the law, in the appointment of a receiver, is to see that the assets of the institution in charge of which he is placed, are properly, honestly, and economically administered. The ends of the law are satisfied, if the estate is administered in this way, whether the person charged with its administration be termed a banking commissioner, a trustee or an assignee."

In the Smith, Ex p. case, the question was, whether the Banking Commissioner had a right to sell the real estate belonging to the defunct bank without an order of court directing him to [521] do so. It was held that although the act was silent upon that question, still the general purposes of the act were broad enough to give him that power, the language used being as follows:

"The banking act is silent upon these matters except that as it authorizes and directs the Banking Commissioner to liquidate insol-

vent banks, by implication it authorizes him to dispose of the real estate belonging thereto.

The banking act confers upon the commissioner extraordinary powers, and it should be given a broad and liberal interpretation."

Considering the purposes and intention of the legislature in enacting the law, as well as the tendency of the courts to facilitate as much as possible, and with as little cost as possible, the winding up of insolvent banks, as well as the trend of this court, as exhibited in the opinions, *supra*, we are convinced that this action was properly brought by the Banking Commissioner.

Strictly speaking, a corporate contract was at first declared to be *ultra vires* only when it was entirely without the scope and purpose of its charter privileges, and did not pertain to the objects for which the corporation was chartered. (Section 2768, Thompson on Corporations, vol. 10, Cyc. 1146.) For a long time this restrictive definition prevailed, and the courts holding to this narrow definition declined to enforce the contract at the instance of either party upon the ground that it was wholly void, but would leave the parties where it found them. But the modern definition of such a contract has been broadened so that the designation now includes, not only those contracts just mentioned, but also others which are beyond the limitations of the powers conferred by the charter, although within the purposes contemplated by the articles of incorporation. That the contract in question, at least to the extent of the loan to the Alexander bank of more than \$10,000.00, comes within the latter definition, is clearly beyond question. It is so held by a great many courts, and most of all the text-writers, and by this court in at least the two cases of the Covington First Nat. Bank v. D. Keifer Milling Co. 95 Ky. 97, 23 S. W. 675, and Bell, etc. Co. v. Kentucky Glass Works Co. 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180.

Having, then, seen that the suit can be maintained by the Banking Commissioner, and that at least to the [522] extent of \$23,000.00 the debt which the Alexander bank created with the defendant was *ultra vires*, it remains to determine what are the rights of the parties under the conditions presented by the record. It is earnestly insisted by counsel for appellant: (1) That the contract, being *ultra vires*, is void and that neither party can obtain any relief under it from the courts, and (2) that if this should be incorrect, that the Alexander bank, or the Banking Commissioner who represents it, should be required to return the consideration for the *ultra vires* portion of the contract before any relief should be given.

As to the first contention, it might be correct, which, however, is not decided, if the

contract was of the *ultra vires* nature within the first definition given above, but not being of that character, the position of counsel is wholly untenable.

In support of the second contention, it is earnestly insisted that the defendant is an innocent party, and that it had no notice of the limitations in the articles of incorporation of the Alexander bank, and that it is, therefore, entitled to be placed in *statu quo* by either the consideration of the *ultra vires* portion of the contract returned to it, or that it should be permitted to recover against the plaintiff on a claim for money had and received by the Alexander bank. It may be true that the defendant did not have actual notice of the limitations in the charter of the Alexander bank, but under all of the authorities, including the cases upon the subject from this court, it was charged, at the time of the lending of the money with constructive notice of such limitations. This principle is stated in Thompson on Corporations, section 2802, thus:

"The rule (of constructive knowledge) also applies where a corporation having apparent power to do so purchases paper or borrows money, and without the knowledge of the other party, does so for an unauthorized purpose, or in excess of the lawful debt limit."

In the Keifer Milling Company case, *supra*, upon this point, this court said:

"The articles of incorporation were, as required by statute, recorded and independent of presumed notice by the First National Bank of Covington, of the provision in regard to the limit of indebtedness, the D. Keifer Milling Company was empowered to contract, it is a well settled rule that a person dealing with a corporation [523] must, at his peril, take notice of its charter or articles of incorporation. (See Morawetz on Private Corporations, volume 2, sections 591, 592.)"

And in the Kentucky Glass Works Co. case, *supra*, upon the same point, it said:

"Independent of the fact that its articles are accessible in the county clerk's office or in the office of the Secretary of State, every one dealing with it is bound, at his peril, to know the limitations of its powers, just as a person dealing with an agent, must, at his peril, ascertain the extent of the agent's authority."

The rule was reiterated by this court in the case of Citizens' Bank v. Waddy Bank, 126 Ky. 169, 103 S. W. 249, 128 Am. St. Rep. 282, 11 L.R.A.(N.S.) 598, wherein it was said:

"The limit of indebtedness for borrowed money which the Bank of Waddy could contract was \$7,500.00, and every person dealing with the corporation is charged with notice of its powers under its articles of incorporation."

We must, then, deal with the question as though the defendant, when it loaned the money, knew at the time that the Alexander bank did not have power under its charter to borrow money in any sum exceeding \$10,000.00. We are cited to a great number of cases from many states, as well as from the Federal courts, to the effect that a corporation, as such, when sued upon the character of contract under consideration cannot rely upon the want of its power to make the contract without returning to the other party the consideration which it received, but in each case, the facts were, that the corporation which had exceeded its powers and which the courts said must do equity by returning the consideration, was a solvent and going concern. No question as to the rights of creditors was involved, and the holding of the courts in such cases may be conceded to be correct, especially so far as this case is concerned, because those composing the corporation, being the stockholders, could not complain, as they had received the consideration and perhaps appropriated it for corporate purposes. The creditors of such corporations could not complain because they were only interested to the extent of their respective debts, and as the corporation was solvent, thus guaranteeing the payment of its debts, there remained nothing upon which the *ultra vires* nature of the contract could operate. As neither [524] the corporation nor the stockholders in such a case could complain, and there being no necessity for a creditor to complain, there existed no obstacle in the way of applying the doctrine contended for. The rule, however, is altogether different when the borrowing corporation to such an *ultra vires* contract is insolvent. In section 2850, Thompson on Corporations, it is said:

"Certainly in the case of an insolvent corporation, the act may be disaffirmed by the receiver in behalf of the creditors." See also Covington First Nat. Bank v. D. Kiefer Milling Co. 95 Ky. 97, 23 S. W. 675; Bell, etc. Co. v. Kentucky Glass Works Co. 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180; Citizens' Bank v. Waddy Bank, 126 Ky. 169, 103 S. W. 249, 128 Am. St. Rep. 282, 11 L.R.A. (N.S.) 598; Casey v. Cavarve, 96 U. S. 467, 24 U. S. (L. ed.) 779; Kraniger v. People's Bldg. Soc. 60 Minn. 94, 61 N. W. 904; Chattanooga Bank v. Memphis Bank, 9 Heisk. (Tenn.) 408; Morse on Banking, sec. 749b.

In the Keifer Milling Company case, *supra*, the milling company, being a corporation, was not authorized to become indebted by its charter in a sum exceeding \$30,000.00. It had, however, become indebted to the First National Bank of Covington in the sum of \$77,000.00. The milling company made an assignment, and the bank filed its claim for

the amount of the debt, and sought a pro rata upon the entire amount of it, but this court refused to allow it to participate in the assets only to the extent of \$30,000.00, being the amount of the indebtedness which the milling company was authorized to contract, and in doing so, said:

"Whether if this was simply a contest between the bank and the milling company, violation and disregard by the latter of the provision of the articles of incorporation would be a sufficient defense, we need not determine; but the enforcement of that provision is demanded by the assignee for benefit of other creditors, who have been prejudiced by the unauthorized and illegal dealing of the bank with an unfaithful officer of the milling company, whereby its insolvency was precipitated, if not actually caused; and in such case, a participant in the fraudulent transaction, not other innocent creditors, should suffer."

In the Kentucky Glass Works Company case, there was a provision in the articles of incorporation of the borrowing corporation, that: "The highest amount of indebtedness, or liability to which said corporation should at any [525] one time subject itself shall be \$8,000.00." This corporation was the Kentucky Glass Works Company, and being insolvent, it made an assignment for the benefit of its creditors, which was followed by a suit to settle its estate. It had before that time contracted an indebtedness by borrowing money from the Kentucky National Bank, amounting to \$48,600.00, to secure which it had executed a mortgage upon its property, and in the settlement suit, the bank attempted to enforce its mortgage, but this court declined to give it the relief which it sought, because, and only because, its debt exceeded the limit prescribed in the charter of its borrower, the Kentucky Glass Works Company; the court saying:

"Were this question between the corporation and the bank, there would be little difficulty. In this case, it appears that the money was actually received by the company, and used in its business, and the company would be estopped from refusing to make restitution of that whereof it had received the benefit. . . . A creditor whose own debt against the corporation does not transgress the limitation—who does not know, and has no reason to know, that the limitation had been exceeded, has a right to rely upon the 'implied warranty on the part of the corporation through its officers, that the power has not been exhausted, and that the conditions do not exist which render it unlawful for the corporation to contract the debt.' And this reason, it seems to us, applies equally as against the creditor who participated in creating the excessive indebtedness, and

was bound to know that it was so doing. The bank was charged with knowledge of the indebtedness limit in the articles of incorporation of the company. In the face of that knowledge, it joined with the company in the creation of an indebtedness against it far in excess of what the company was authorized to incur. The bank knew that the indebtedness was being exceeded; the other creditors did not; and this puts them, in our judgment, upon an entirely different footing.

"An immense number of citations have been made by counsel; most of them are cases between the corporation and the creditor, or between the shareholders and the creditor, in which the corporation or shareholders sought to evade the payment of the excessive indebtedness on the ground that it was *ultra vires*."

[526] The court then proceeds to the consideration of many questions now urged upon us by counsel for defendant deciding each of them against his contention, one of which is, that the only effect to be given to the limitation of indebtedness in the articles of incorporation is, that it might afford grounds for a proceeding by the State to annul the charter, and that this should be the only effect given to it, but this court in the opinion, *supra*, in answering that contention, said:

"In this Commonwealth such a doctrine would render the inhibition of the statute an absolute dead letter. Of what avail would it be to obtain a judgment of ouster and dissolution of the corporation at the suit of the State, when it could be reincorporated in half an hour's time? What attention would be paid to this inhibition in the statute by persons contracting with corporations, if the only penalty for a violation of the statute were a possible dissolution of the corporation? Moreover, it is hard to discover what ground the Attorney General would have for hoping to succeed in a suit for ouster and dissolution of a corporation for the offense of making a valid contract.

"But it is sufficient to say that this is not the doctrine in Kentucky. In this State it has been adjudged that such a contract, made in violation of law, while enforceable as between the parties, is not enforceable by either participant as against the rights of third persons."

It is, however, contended that the creditors of the Alexander bank have not been deprived of anything, and their rights, consequently, not impaired, because that bank, at the date of the borrowing of the money, got value received, and consequently the assets of the banks were not depleted, or impaired, and therefore the creditors have no equities justifying the plaintiff as their representative, in prosecuting this action. In reply it may be said, that it is exceedingly likely that many

of the creditors of the Alexander bank, at the time the commissioner took charge of its affairs, may not have been such in 1907, at the date of the borrowing of the money. Furthermore, the purpose of the limitation is to not allow the officers of the bank to have an opportunity to misappropriate by way of unauthorized dividends, or otherwise, the proceeds of an unauthorized borrowing, and thus imperil the security of creditors by [527] unlawfully increasing the indebtedness of the corporation. However this may be, it is sufficient to say that in the cases from this State *supra*, the rule is held to be as indicated and not to be affected by this circumstance.

We are earnestly urged to retract the doctrine of the two cases of Covington First Nat. Bank v. D. Kiefer Milling Co. 95 Ky. 97, 23 S. W. 675, and Bell, etc. Co. v. Kentucky Glass Works Co. 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180, from this court, but we are by no means convinced that it is our duty to do so. Aside from the fact that the doctrine therein announced has remained in this state unimpaired for more than twenty years, during which time many legislatures have met without making any effort to change the rule, we are convinced that the rule announced by those cases is both a wholesome and sound one, and especially so when applied to banking institutions. As stated in an earlier part of this opinion, they are the arteries of commerce, and the laws looking to the preservation of their financial integrity should be strengthened rather than weakened. Many of them hold in their coffers the accumulations of a lifetime in the way of deposits, and if those dealing with them are not to be charged with a knowledge of the limitations found in their articles of incorporation, and visited with some penalizing consequences should such limitations be violated, the door would be opened for a diversion of the assets of the corporation from their proper and legitimate channels, and the security of creditors, including depositors, would be rendered exceedingly hazardous, and the healthful condition and prosperity of the bank would be endangered. It is better that the rule should be adhered to, even though in isolated cases it might work a hardship, than for it to be withdrawn, followed by the possible consequences which we have considered.

This will impose no onerous burden upon the prospective creditor. In fact, it is but requiring him to do that which, from time immemorial, has been a rule observed and followed by the prudent business man, and that, too, at a time when there was no sort of limitation upon the authority of his prospective debtor to become indebted. This business rule says to the lender of money

to be secured by real estate liens, "examine the title by referring to the abstract." It also says to the prospective creditor, when taking personal security for his debt, "investigate the solvency of the makers of the [528] note." It says to the prospective purchaser, "look well to the title;" and it says to the ordinary transaction whereby an obligation is assumed to another, for the latter to require and obtain security from the former that he will fully perform his contract. If, without any law imposing limitations upon the authority to contract, business prudence demands these precautions, it is difficult to see how it could be considered exacting for the law, in order to protect others who are entirely innocent, and who confide, and have a right to confide, in the belief that the required limitation is intended to have some purpose, the most feasible of which was for their protection, to deny to the derelict creditor the full fruits of his bargain as against other innocent ones. There are three ways by which the contemplated creditor may inform himself; he can investigate the records of the county court at the home of the corporation; the same information can be obtained from the office of the Secretary of State, at Frankfort, and lastly, he can say when applied to, "although I am not from Missouri, show me." We are convinced that it is no difficult task to see upon which side of the proposition the interest of public policy lies.

There can be no difference in the application of this rule upholding the liability as to how the offending creditor gets into court. It is equally applicable to him when he is brought into court by process, as when he voluntarily enters there for the purpose of enforcing his debt. The remedy given is not for the purpose of punishing him for voluntarily coming into court, but to divest him of property wrongfully obtained and withheld as against the corporate creditors.

We, therefore, conclude that the judgment appealed from is correct, and it is affirmed. Whole court sitting.

NOTE.

Construction of Debt Limit Provision in Charter of Private Corporation.

Introductory, 966.

Validity of Debt in Excess of Limit:

General Rule, 966.

Rule in Kentucky, 969.

Rule in England, 970.

Effect of Failure to Pay in Capital Stock, 972.

Effect of Increase of Limit on Pre-existing Debt, 973.

Effect of Impairment of Assets of Corporation, 973.

Introductory.

A private corporation organized for pecuniary profit, unless forbidden by its charter, may as one of the powers necessarily implied from its creation incur indebtedness for any purpose connected with the business which it is authorized to transact. See 7 R. C. L. tit. *Corporations*, p. 590. As a check on improvident management a debt limit is, however, sometimes imposed by the charter, and the present note is devoted to a discussion of the construction of such a provision.

Validity of Debt in Excess of Limit.

GENERAL RULE.

The rule supported by the greater weight of authority is that the indebtedness of a private corporation in excess of the limit fixed by the charter is valid at least to the extent of the consideration received by the corporation. *Sioux City Terminal R. etc. Co. v. Trust Co. of North America*, 173 U. S. 99, 19 S. Ct. 341, 43 U. S. (L. ed.) 628 (construing Iowa statute and following decisions of that state); *Allis v. Jones*, 45 Fed. 148; *Humphrey v. Patrons' Mercantile Assoc.* 50 Ia. 607; *Garrett v. Burlington Plow Co.* 70 Ia. 697, 20 N. W. 395, 59 Am. Rep. 461; *Heuer v. Carmichael*, 82 Ia. 290, 47 N. W. 1034; *Peatman v. Centerville Light, etc. Co.* 100 Ia. 245, 69 N. W. 541; *Marshall Field Co. v. Oren Ruffcorn Co.* 117 Ia. 157, 90 N. W. 618; *Traer v. Lucas Prospecting Co.* 124 Ia. 107, 99 N. W. 290; *Sherman Center Town Co. v. Morris*, 43 Kan. 282, 23 Pac. 569, 19 Am. St. Rep. 134; *Auerbach v. Le Sueur Mill Co.* 28 Minn. 291, 9 N. W. 799, 41 Am. Rep. 285; *Perry, etc. Co. v. Holbrook Opera House Co.* 91 Neb. 19, 135 N. W. 219. See also *Oswald v. Minneapolis Times Co.* 65 Minn. 249, 68 N. W. 15.

In *Auerbach v. Le Sueur Mill Co.* supra, applying this rule, the court said: "The ends of justice may require, as in this case, that the corporation which has exceeded its powers should be estopped by its own acts from pleading, in defense of its assumed obligations, that they were ultra vires. . . . In this case the defense sought to be made to the note is that in giving it the article of the defendant's incorporation, limiting the amount of its indebtedness, was violated. The debt was incurred in the ordinary prosecution of the business of the corporation. The defendant received and appropriated the money which was the consideration of the note, and, having authority to issue negotiable paper, it put forth the note in question, negotiable, calculated to circulate as, and perform the office of, commercial paper, and expressing upon its face the obligation and promise of the maker to pay to the bearer,

at all events, the sum named. It has come into the hands of a bona fide purchaser, and simple justice, as well as plain principles of law, forbid that courts should listen to the plea that in this particular case the corporation had not authority to issue its note. It ought to be and it is estopped. To so hold does not weaken the sanction of the law which restrains the exercise of corporate power within the limits prescribed by the creative act. To refuse to recognize and enforce, when necessary to the attainment of justice and prevention of wrong, such contracts, made in violation of the corporate charter, is not to afford a remedy for the wrongful acts of the corporation. When, in a case like this, the unauthorized contract has been executed by the corporation, and it has reaped the benefits of it, public policy does not require the courts to refuse to administer justice between the parties in accordance with the plain principles of law. In such a case, the remedy for the violation by the corporation of its charter power lies elsewhere. We are here seeking to administer justice as between these contracting parties. If justice did not invoke the application of other principles of law, the defense of ultra vires might be sufficient; but the doctrine of estoppel, as a principle of law, is as positive and well-recognized as is the law that a corporation may not exceed its corporate powers, and, although the defendant exceeded its authority, it should be denied the right to assert the fact of its own wrong, when to allow its plea would work injustice and wrong to him who has been misled by its acts performed within the general scope of its powers. What has been said should be regarded only as said with reference to this case, and should not be considered as stating a rule of law which should prevail generally in the case of contracts not negotiable. While the broader ground last referred to was considered by the court below, and discussed by counsel in this court, yet upon the facts found by the court such was not this case, and, the question being an important one, we ought not to anticipate its presentation for adjudication by an opinion not called for by the facts in this case."

So in *Sherman Center Town Co. v. Morris*, 43 Kan. 282, 23 Pac. 569, 19 Am. St. Rep. 134, affirming a judgment against a corporation in an action to recover a sum which exceeded the debt limit created by its charter, the court said: "If we could ascertain from the testimony that the town company had not received the benefit or proceeds of the merchandise purchased by its president and secretary, we would have no hesitation in saying that the plaintiff below was not entitled to recover. It does not appear from the charter that the corporation had any author-

ity or power to engage in buying and selling general merchandise. It appears, however, from the testimony, that, at the time the contract was executed, the stock of merchandise was at Voltaire, in Sherman county. After the contract was executed and a part of the purchase money paid, the merchandise was removed from Voltaire to Sherman Center, where the business of the town company was carried on, and where a majority of the directors of the company reside. There is testimony tending to show that the company sold the merchandise and appropriated its proceeds to its own use and benefit. The town company did not show or offer to show, that the president and secretary of the company purchased or received the merchandise for their own use and benefit, or that they applied the proceeds to their own use and benefit. The general rule is, that where a contract executed by a corporation is ultra vires, and the corporation received the money or property paid upon such contract, the money or the value of the property may be recovered to prevent injury resulting from the application of ultra vires upon a corporate contract, if no fraud is intended or has been committed. . . . We think that the limitation of \$500 in the charter of the corporation cannot be regarded of any more force than a by-law. The statute of the state provides that the charter of an ordinary private corporation shall set forth the amount of its capital stock, but does not require its indebtedness shall have other limit. Therefore the limitation of \$500 is for the direction of the officers and agents of the corporation, and may be considered directory only. It does not annul the contract."

In *Humphrey v. Patrons' Mercantile Assoc.* 50 Ia. 607, it appeared that the amended articles of incorporation of a corporation provided that its indebtedness should be limited to \$2,000. The plaintiff as the manager of the defendant corporation had borrowed \$1,000 for it and became personally responsible for the debt. The loan was used for the payment of goods purchased on credit by the corporation, but at the time of the transaction the company's indebtedness exceeded the limit allowed by its articles of incorporation. The loan being paid by the plaintiff, he brought suit against the defendant for a recovery of the amount loaned. Discussing the effect of the limit imposed by the charter on the company's power to contract indebtedness, the court said: "In our opinion, however, the limit imposed by the amended articles upon the company's power to contract indebtedness would not necessarily have the effect to exempt the company from liability for indebtedness assumed to be contracted in excess of the limit. It has been held, it is true, that a municipal corporation is not liable for in-

debtedness assumed to be contracted in excess of the limit fixed by the constitution. *Carter v. Dubuque*, 35 Ia. 416. But we know of no case where a private corporation has not been held, at least to the extent of the consideration received, for indebtedness assumed to be contracted in excess of the limit imposed by the articles of incorporation. There is good reason for making a distinction between municipal and private corporations in this respect. The creditor of a municipal corporation may, far more properly than the creditor of a private corporation, be required to take notice at his peril as to when the limit is reached. . . . A private corporation incurs indebtedness daily, and that, too, which is not to be offset by prospective current income, but which helps swell the indebtedness to which the limitation applies. It incurs the indebtedness in the transaction of its ordinary business, and through its various agents. No specific formal action of its directors in advance would ordinarily be practicable. Its records, therefore, so far as they may be presumed to be accessible to creditors, would not ordinarily show, even if well kept, more than an approximation at a given time to the corporate indebtedness; nor has it any officer charged by law with the duty of keeping a record of the indebtedness, or of any action through which the indebtedness was contracted. Unless, therefore, the corporation is estopped from setting up the limit where the consideration has been received, it would properly be without credit, the very thing for which private corporations largely are organized. This result is to be avoided, if it can be consistently with the protection which the limitation is designed to afford to stockholders, and we think it can be. The stockholders must be regarded as at least partially protected by the receipt of consideration, and if not fully so in every case, they may doubtless have an action (or the corporation may, which represents their interest) against the officers or agents who, without authority, have imposed upon them a liability which has resulted in their loss. . . . The limit of indebtedness was fixed at \$2,000. Within that limit it was authorized to do business upon credit, and although the limit, as appears, was exceeded, yet we are of the opinion, in view of the importance of upholding corporate credit and protecting creditors who have parted with their property in ignorance of the fact that the limit had been exceeded, that the corporation should be estopped from setting up such fact. We conclude, then, that the defendant was liable for the goods bought; and the money advanced by the plaintiff, so far as it was used in paying for the goods, was used in paying obligations which the defendant could not have escaped."

In *Garrett v. Burlington Plow Co.* 70 Ia. 697, 29 N. W. 395, 59 Am. Rep. 461, the question presented for decision was as follows: "Do the facts alleged in the answer, that the holders of the notes, as directors of the company, in the management of its affairs, contracted indebtedness beyond the limit prescribed by the articles of incorporation, and caused the mortgage to be executed to secure the amount due them, defeat their security, and give other creditors a right to share in the proceeds of the property mortgaged?" Answering the question in the negative the court said: "We do not understand counsel for defendants to claim that a debt of a corporation beyond the prescribed limits of its indebtedness is invalid, and, if held by a director of the corporation, cannot be enforced for that reason alone. It may be that a director would be answerable to stockholders or others for negligence or mismanagement of the affairs of a corporation whereby debts were contracted in excess of the limitation prescribed in the articles of incorporation; but it cannot be claimed that such a debt, for a consideration received by the corporation, cannot be enforced against it. May a director enforce such a debt? We understand that he may become a creditor of the corporation, may advance it money, or sell it property, and obligations of the corporation executed therefor may be enforced by him. In this regard he occupies no different position from that of any other creditor; and, if the debt he holds was contracted in good faith, and there is an absence of fraud on his part, he may take security or payment, though the corporation be insolvent, and he may thereby acquire priority in the payment of his claim. Counsel for defendants admit this proposition, with an exception in the case of the insolvency of the corporation. They insist that the directors of an insolvent corporation cannot take it from security, by mortgage or other conveyance creating a lien upon its property, even though given in good faith, and without fraud in the transaction. We are not prepared to admit this proposition. A creditor may accept payment or security from an insolvent debtor free from any claim of other creditors. A corporation may make payment of its debts, or give its property in security therefor, just as a natural person may do. If, therefore, a director holds the indebtedness of an insolvent corporation, he may take payment or security in a good faith and honest transaction. No reason can be given why a director who holds a valid debt against his corporation may not, though it be insolvent, in a fair and honest way, take its property in security. If the property, money, or other consideration of the debt, was fairly used for the benefit of the corporation, was added to

its assets, or used in its business, it would be unreasonable to hold that the director is deprived of rights and remedies held by other creditors. It is not shown in the answer of defendants that there was any bad faith or dishonest practices on the part of the creditors for whom plaintiff is trustee, in becoming creditors of the plow company, and taking security from it. It is true that the courts will scan with care, and even with suspicion, such transactions, and demand that they be accompanied by the utmost good faith. Defendants' answers make no charge of bad faith or fraud in the creation of the debt, or the execution of the mortgage. It is averred that the directors unlawfully contracted indebtedness of the corporation in excess of the limit prescribed by its articles of incorporation. But this has nothing to do with the directors' claims in controversy. As we have before said, they may be liable to proper parties for their negligence or unlawful acts, but honest contracts made with them are not defeated thereby."

In *Perry, etc. Co. v. Holbrook Opera House Co.* 91 Neb. 19, 135 N. W. 219, an action brought against a corporation on a note, the defense was that the note represented the balance of an indebtedness due the plaintiff, and that the amount of the entire indebtedness exceeded the limit authorized by its articles of incorporation. It appeared that at the time the indebtedness was incurred the corporation had on hand sufficient funds to pay the plaintiff's claim, but the money was used for other purposes. Affirming a judgment in favor of the plaintiff, the court said: "In disposing of defendant's contentions, it is sufficient to say that from a careful reading of the bill of exceptions we are satisfied that the defendant failed to establish any of the several defenses set forth in its answer. It is apparent that at the time the defendant purchased the materials used in the construction of its opera house, and contracted to pay the plaintiff therefor, it was not indebted in any sum whatever, and had a sufficient amount of money in its treasury to pay for the same in full; and the fact that defendant used the funds which had been raised for the payment of the plaintiff's claim for other purposes cannot be successfully urged as a reason for defeating the payment of its just debt. Finally, it may be said that the defendant lawfully procured the material furnished to it by the plaintiff, has received and retained the benefit thereof, and has established no valid or legal defense upon which it can escape payment for the same."

In *Allis v. Jones*, 45 Fed. 148, the case made by the petition was stated by the court as follows: "The plaintiff, alleging that he is a general creditor of the defendant corporations the Red Cloud Milling Company

and the Alma Milling Company in the sum of \$11,950, files this bill to annul certain mortgages executed by these milling companies to the Red Cloud National Bank and the First National Bank of Denver, and prays that the affairs of the milling companies may be wound up, and their assets distributed." Holding that as to the plaintiff no ground was shown for the annulment of the mortgages, the court said: "The mortgages were given to secure an indebtedness in excess of the amount of debts the companies, by their charters, were authorized to contract, and it is said this renders the evidences of the indebtedness, and the mortgages given to secure it, ultra vires and void. But on the facts of this case this position cannot be maintained. The money was received by the companies, and used in conducting and carrying on their legitimate corporate business, with the knowledge and consent of all the officers and stockholders. On these facts the banks are entitled to be repaid their money, and the companies could execute a valid security for its payment. *Mor. Priv. Corp.* §§ 714-716; *Jones, Mortg.* § 127; *Union Nat. Bank v. Matthews*, 98 U. S. 621 [25 U. S. (L. ed.) 188]; *Jones v. Habersham*, 107 U. S. 188, 2 S. Ct. 336 [27 U. S. (L. ed.) 401]; *Ohio, etc. R. Co. v. McCarthy*, 96 U. S. 267 [24 U. S. (L. ed.) 693]. Skeen cannot be heard to urge this objection, because he is not a creditor of the milling companies, and Allis became such, if at all, after the debts to the banks had been created, and it would seem, therefore, that he is in no plight to raise the question. The written promise of the milling companies, executed by their secretary and treasurer, to pay the plaintiff's debt, under all the circumstances of this case, made it the debt of the companies. But an application to the plaintiff's case of the strict rules which he seeks to have applied to the bank's claims and mortgages would undoubtedly undermine his own case, and leave him without any claim against the companies."

In *Traer v. Lucas Prospecting Co.* 124 Ia. 107, 99 N. W. 290, it was held that where a corporation borrowed money in excess of its authorized indebtedness, and received the full benefit of the money, a suit on notes representing the loan could not be defended on the ground that the money borrowed was used for an ultra vires purpose.

RULE IN KENTUCKY.

In Kentucky the rule obtains that where a corporation borrows an amount in excess of the debt limit imposed by its charter, the loan is ultra vires, and an action cannot be maintained on it to the prejudice of other creditors of the corporation except for a sum within the debt limit. As between the par-

ties to the loan, however, it may be enforced. *Covington First Nat. Bank v. D. Kiefer Milling Co.* 95 Ky. 97, 23 S. W. 875; *Bell, etc. Co. v. Kentucky Glass Works Co.* 106 Ky. 7, 50 S. W. 2, 1092, 54 S. W. 180, 20 Ky. L. Rep. 1684, 21 Ky. L. Rep. 133, 21 Ky. L. Rep. 156, *modifying* 48 S. W. 440, 20 Ky. L. Rep. 1089; *Citizens' Bank v. Waddy Bank*, 126 Ky. 169, 103 S. W. 249, 128 Am. St. Rep. 282, 11 L.R.A.(N.S.) 598, 31 Ky. L. Rep. 365. And see the reported case.

In *Covington First Nat. Bank v. D. Kiefer Milling Co.* supra, a suit was brought against a corporation for a judgment on demands aggregating about \$7,700, and an attachment was obtained. It appeared that the corporation had made a deed of assignment of its property. The articles of incorporation limited the amount of indebtedness which the corporation could incur to \$30,000. On the trial of the suit the attachment was dissolved and the proceeds of the property conveyed by the deed of assignment was directed to be distributed pro rata to the creditors of the corporation, only \$30,000 of the amount claimed by the plaintiff, however, being adjudged to be ratably paid. Affirming the decree the court said: "It appears that there was in the articles incorporating 'The D. Kiefer Milling Company,' a provision that the company should not, in any event, incur any liability or indebtedness in the aggregate in excess of one-half its capital stock bona fide subscribed, which was \$60,000. The articles of incorporation were, as required by statute, recorded, and, independent of presumed notice by The First National Bank of Covington, of the provision in regard to the limit of indebtedness The D. Kiefer Milling Company was empowered to contract, it is a well settled rule that a person dealing with a corporation must, at his peril, take notice of its charter or articles of incorporation. (See *Morawetz on Private Corporations*, vol. 2, §§ 591, 592.) Whether if this was simply a contest between the bank and the milling company, violation and disregard by the latter of the provision of the articles of incorporation would be a sufficient defense, we need not determine; but the enforcement of that provision is demanded by the assignee for benefit of other creditors, who have been prejudiced by the unauthorized and illegal dealing of the bank with an unfaithful officer of the milling company, whereby its insolvency was precipitated, if not actually caused; and, in such case, a participant in the fraudulent transaction, not other innocent creditors, should suffer."

In *Bell, etc. Co. v. Kentucky Glass Works Co.* 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180, 20 Ky. L. Rep. 1684, 21 Ky. L. Rep. 133, 21 Ky. L. Rep. 156, *modifying* 48 S. W. 440, 20 Ky. L. Rep. 1089, it appeared that a corporation which was indebted to one of its

creditors for a sum exceeding the debt limit authorized by its charter, executed a mortgage to secure the indebtedness. Afterwards the corporation executed an assignment of its property for the benefit of its creditors. In an action to settle the claims of the various creditors of the corporation it was held that the mortgage creditor could enforce the mortgage as against the other creditors only to the extent of the amount of the authorized indebtedness of the corporation. It appeared also that some payments were made on the debt secured by the mortgage, both before and after the execution of the deed of assignment. It was held that the payments made before were to be credited on that part of the debt as to which the mortgage was not a valid security; but as to the payments made after, they were to be credited to that part of the debt as to which the mortgage was a valid security.

A creditor whose own debt against the corporation does not exceed the limit, and who has no reason to know that the limit has been exceeded, is not affected by the fact that there are other debts of which he has no notice, which when added to his own make an aggregate indebtedness greater than the corporation may legally incur. *Bell, etc. Co. v. Kentucky Glass Works Co.* 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180, 20 Ky. L. Rep. 1684, 21 Ky. L. Rep. 133, 21 Ky. L. Rep. 156, *modifying* 48 S. W. 440, 20 Ky. L. Rep. 1089; *Citizens' Bank v. Waddy Bank*, 126 Ky. 169, 103 S. W. 249, 128 Am. St. Rep. 282, 11 L.R.A.(N.S.) 598, 31 Ky. L. Rep. 365.

In *Randolph v. Ballard County Bank*, 142 Ky. 145, 134 S. W. 165, it was held that where the directors of a corporation permit the indebtedness of the corporation to exceed the limit provided for in the charter, they are personally liable for the amount of the debt exceeding the authorized limit, their liability being imposed by a statute (Ky. Stat. § 550). To the same effect see *Stafford v. Cain*, 13 Ky. L. Rep. (Abstract) 639.

In *Fidelity Trust Co. v. Louisville Gas Co.* 118 Ky. 588, 81 S. W. 927, 111 Am. St. Rep. 302, it was held that a provision in the charter of a corporation authorizing it to issue bonds for a specified amount and to execute a mortgage to secure them, did not place a limit on its power to contract other indebtedness which it might incur in the execution of the purposes for which it was organized.

RULE IN ENGLAND.

In England the rule obtains that where a corporation borrows a sum of money in excess of the amount which by its articles of incorporation it is permitted to borrow, the transaction is ultra vires, and no recovery can be had against the corporation for the amount in excess of the authorized limit.

English Channel Steamship Co. v. Rolt, 17 Ch. D. 715, citing *Wenlock v. River Dee Co.* L. R. 10 App. 354, 54 L. J. Q. B. 577, 53 L. T. N. S. 62, 49 J. P. 773; *In re Pooley Hall Colliery Co.* 18 W. R. 201; *Fountainaine v. Carmarthen R. Co.* L. R. 5 Eq. 316.

In the case last cited it appeared that a corporation was empowered by its incorporation act to borrow a specified sum on debentures. After the whole of the amount was raised by the issue of debentures another debenture was issued. After the issuance of this debenture some holders of the original debentures obtained a judgment thereon and had their claims satisfied by execution. Subsequently the company issued other debentures in place of those which were paid. Briefly discussing the rights of the holders of the various debentures, the court said: "It appears that debentures were issued to the full extent of the powers which the directors had of issuing debentures under their act. That being so, they afterwards granted one debenture for £500 to a Mr. Weeks, before any of the other debentures were paid off. Afterwards two of the debenture creditors obtained judgments, and by that means obtained possession of the plant of the railway, and out of the money arising from the sale of the property so taken in execution, several debentures were paid off. When these debentures were so paid off, the directors had a power, subject to certain directions contained in the companies' clauses act, either, on the one hand, of renewing the old debentures, or, on the other hand, of issuing fresh debentures to the same amount; provided that the total limit prescribed by the act was not overstepped."

In the case of *In re Cork, etc. R. Co.* L. R. 4 Ch. 748, it appeared that a railway company was empowered to borrow £131,000 on mortgages or bonds. In June, 1862, the company had issued mortgages for the whole of that £131,000. One D. L. Lewis had been financing the company from April, 1861, and had advanced them moneys upon bills accepted by them, which moneys were applied in discharging liabilities of the company. In August, 1862, the borrowing powers of the company being then exhausted, he represented to the directors that he had great difficulties in renewing the company's bills, and that, if the company would issue to him Lloyd's bonds, he would be able to raise money upon them with greater facility, and would be able to supply the company with funds. The directors accordingly issued and gave to him Lloyd's bonds for various sums. Lewis parted with the Lloyd's bonds to various persons, and claims were made by the holders, and the question in the case was whether the bonds were valid. In giving judgment, Lord Hatherly, L. C., said: "Then

comes the question, whether the present holders can be said to be entitled, under any circumstances, to claim payment upon these bonds. Now, first, it was said by Mr. Jessel that, taking these bonds at the best as a chose in action, even taking them to be that which they really are, a mere acknowledgment of a debt due apparently on a legitimate ground, those who took them must be exactly in the same condition as Mr. Lewis, the original holder, was in; and, therefore, if Mr. Lewis, the original holder, could not recover, on account of the position in which he was placed, with a full knowledge of all the circumstances, and of the manner in which the company had proceeded for the purpose of raising money, then no more could the holders of these choses in action be able to recover, nor could they be entitled to place themselves in a better position than he was in. That would be so if, as between Mr. Lewis and the company, there were really no debt at all, or that this was all a mere sham, and that the directors had not in any way borrowed the money, or authorized the borrowing of the money, and had not been in any way parties to the transaction, or that the company had been in no way parties to the transaction. But if the money was really applied for the legitimate benefit of the company, can it be possible that the company can hold this money as a surplus which is directed to be paid to them under the act, and treat these bonds as constituting no debt whatever by which they are in any way to be affected? They knew that there was a large sum of money which must be raised by some means, and for which the borrowing powers and subscription powers were not adequate; and although the bonds themselves may not be the proper instruments or mode by which that money ought to be raised, still they are instruments issued for the express purpose of inducing others to give faith and credit to Mr. Lewis, as being a person to whom money was owing for the legitimate purposes of the company. And the money having been de facto so applied to the legitimate purposes of the company, is it possible that the company should be allowed to derive the benefit of all the expenditure which has been thus incurred, and claim the surplus for the benefit of the shareholders? Can the shareholders be allowed to say to the bondholders, 'It is true that the debts have been cleared off by means of your money, but you are not the persons who have cleared them off, and you are not to receive the benefit of it, for we are the persons to receive the benefit?' The proper course to be taken seems to me to be this: that, so far as the company have adopted the proceedings of their directors by allowing these moneys to be raised on the issue

of these debentures, and so far as the money raised by the issue of the debentures has been applied in paying off debts which would not otherwise have been paid off, those who have advanced the moneys ought to stand in the place of those whose debts have been so paid off. It is not simply that the bondholders stand as assignees of the debts, which, no doubt, have not actually been assigned, but it has been represented by the directors that the persons who have lent their money on these acknowledgments were lending their money for the purpose of clearing off the debts; in fact, that they were to be put in the position of assignees of the debts."

Effect of Failure to Pay in Capital Stock.

In Commonwealth's Appeal, 24 W. N. C. (Pa.) 530, it appeared that the articles of incorporation of a street railway company provided that "the said company shall have the power and authority to borrow money in any sum or sums not exceeding in amount one-half of the par value of the capital stock." Only ten per cent of the capital was paid in, and the company proposed to issue bonds for a sum not equal to one-half of its authorized capital, but greatly exceeding that proportion of the amount of capital actually paid in. A suit was brought to enjoin the issuance of the bonds except for a sum equal to one-half of the capital paid in, and it was held that the suit could be maintained. The court said: "Whether it be for the purpose of adjusting and paying dividends to stockholders, or of regulating the amount of taxes due to municipalities having the right and power to tax, the amount of stock actually paid is the capital stock of the company. (Citizens' Pass. R. Co. v. Philadelphia, 49 Pa. St. 251.) Neither the cost of the road, nor the authorized capital can be made the basis of dividends or of taxation, but these must rest on the amount of capital stock actually paid in. . . . The company appellant propose to exercise a power, and incur a liability upon the basis of its capital stock, and for this purpose, as for purposes of taxation or payment of dividends, its rights must be measured not by nominal or authorized capital, but by the actual amount of capital paid in. . . . The Lehigh Avenue Railway Company has received just \$100,000 from the subscribers to its stock. So far as the paper books advise us, this is all it has ever asked for in the more than fifteen years of its corporate life, and all it expects to receive. The other \$900,000 of authorized capital are uncalled and unpaid. The par value of all its shares taken together is \$100,000, because that is the sum paid upon them, the value they represent. The par value of each share is fixed in like manner. Its value

is the equal or par of the corporate capital it represents, which is the amount paid upon it by the subscriber, or applied to it out of the earnings of the corporation. . . . It has \$100,000 in its treasury, and no more, yet it asks us to hold that the par value of the stock is \$1,000,000, and permit it to exercise an important power on that basis. This we decline to do. The par value of its shares is measured by the money it has received upon them, and not by the broken promises of those who subscribed for them."

But in *English Channel Steamship Co. v. Rolt*, 17 Ch. D. (Eng.) 715, it appeared that a corporation was authorized by its articles of incorporation to borrow "any sum of money not exceeding two-thirds of the capital of the company for the time being not called up." Only about a third of the number of shares authorized were actually issued. The company executed a mortgage of a ship to secure a loan for a sum exceeding two-thirds of the amount not called up on the shares issued, but not exceeding the authorized capitalization of the company. An action was brought by the liquidators of the company to have the mortgage declared invalid. Holding that the action could not be maintained, the court said: "The capital of the company is £100,000, but Mr. Pearson said, 'How can you reckon as capital that which has not been issued?' It is a very common thing indeed for companies to do so, and it is not at all contrary to usage in companies to consider that where they have a power of issuing capital they have a right to treat it as capital. If they believe there to be a prospect of getting the capital issued, as no doubt all these gentlemen did, that is the capital within the meaning of this article. They are not to borrow a sum of money 'exceeding two-thirds of the capital of the company for the time being not called up.' That may mean shares not issued or shares issued and not called up. In my opinion, looking at the nature of the transaction—looking at the fact that the directors of every joint stock trading company ought to be armed with the power of borrowing for the purpose of carrying on business as long as they keep within the limits, they were right in doing what they did. Mr. Pearson agreed with the law as laid down by myself in *Gibbs and West's Case*, L. R. 10 Eq. 312. He is content to take it as I laid it down there, that it is to be a reasonable sum, but he says that this is an unreasonable sum. In my opinion, considering the situation of the parties at the time, it was a perfectly reasonable sum; and therefore the case falls within the rules there laid down. If it had been the object of the shareholders that the directors should only borrow to the extent of two-thirds of the shares actually issued, the articles ought to have

said so. I am therefore of opinion that this action brought to set aside this mortgage entirely fails, and must be dismissed with costs in the usual way to be paid by the liquidator out of the assets of the company."

Effect of Increase of Limit on Pre-existing Debt.

In the case of *In re Benedict Tea, etc. Co.* 192 Fed. 1011, it appeared that a corporation while indebted to a creditor for a sum in excess of the amount of indebtedness authorized by its charter, amended its articles of incorporation, and increased the amount of indebtedness which it could incur, to a sum exceeding the amount owed. After the amendment of the articles the corporation executed a promissory note for the amount of the indebtedness. Other creditors of the corporation having filed a petition of involuntary bankruptcy against it, it was held that the note was a valid claim. The court said: "It entered into the contract evidenced by the note for \$4,559.79, and manifestly there was good and valuable consideration for it. Neither the statute nor the articles of incorporation nor justice, nor good morals, in May, 1911, forbade the recognition by the bankrupt of an obligation such as rested upon it fairly to pay for the merchandise it had bought and used. There are not wanting signs that one of the main objects of the stockholders in amending the articles was to enable the corporation to pay the debt. This was a meritorious intention. Certainly it was by no means a vicious one. We think there was no right in the then existing creditors to prevent the amendment or to put conditions upon it. Their right under the circumstances then existing to say that they were to be paid in full as a condition precedent to the amendment becoming effective is not provided for in the statute, nor has it ever been established by any decision of any court in Kentucky. Such right does not exist, and we think should not. At that stage in the affairs of a going concern (as the bankrupt then was), the rights of general creditors resulting from an amendment, if any exist at all, are too vague and indeterminate to be the basis of a claim to priority in any subsequent distribution should the corporation become bankrupt. As the statute does not provide otherwise, we think all general creditors in this instance must share equally. Their rights are to be determined as of the date of filing the petition in bankruptcy."

Effect of Impairment of Assets of Corporation.

In *Cunningham v. German Ins. Bank*, 101 Fed. 977, 41 C. C. A. 609, it appeared that

the articles of incorporation of a company limited its liability to one-half of the capital stock paid up. Paid up stock had been issued to the amount of \$138,000. There being an impairment of the assets so that only \$50,000 was left an entry was made by the bookkeeper charging the capital stock with the loss, but there was no actual reduction of the certificates of stock. After this entry, the company executed a mortgage for \$35,000 to secure a debt due a bank. In proceedings in bankruptcy against the company it was contended that the mortgage was not a valid lien because it secured a debt in excess of the limit authorized by the charter of the company, but the contention was overruled. The court said: "We are of opinion that there was no violation of the law in the creation of the indebtedness here in question. At the time when it was incurred the articles had been so amended as to authorize the increase of capital stock to \$150,000, and there had been taken \$138,000, which had been paid for. The amount of indebtedness is much less than one-half of the latter sum. We attach no importance to the act of the bookkeeper in charging the depreciation of the assets to the capital stock. It was not recognized by any act of the stockholders or of its officers as a reduction of the capital stock. No amendment of the articles was filed or recorded, nor was any stock, or fraction thereof, called in or surrendered. It was a mere matter of bookkeeping, and ended with that. The issuing of stock in lieu of dividends was not unlawful. It was the same thing as if the dividends had been actually paid over, and then, by the stockholders, repaid to the company for the stock."

DWYER

v.

LIBERT.

Idaho Supreme Court—June 30, 1917.

30 Idaho 576; 167 Pac. 651.

Libel and Slander — Actionable Words — Distinction between Libel and Slander.

In determining whether particular words are actionable per se, the same rule does not apply to libel as to slander.

[See 116 Am. St. Rep. 804.]

Words Libelous per Se.

A written communication of a character conducive to blacken the reputation of the person referred to, or excite ridicule or wrath

against him, or destroy public confidence in him, is actionable, without proof of special damage.

Same.

A written publication, charging one with wilful falsehood in the matter of a serious business transaction, must necessarily expose him to contempt and lower him in the common estimation of citizens, and is therefore actionable *per se*.

Privilege — Complaint against Public Officer.

A complaint against a public officer, filed with a body having a right to discharge him, is conditionally privileged upon good faith and the absence of malice.

[See note at end of this case.]

Same.

Where a complaint has been made against D., a public officer, who thereupon requests that the complaint be filed in writing, in order that he may be heard thereon, thereby creates a privilege in the plaintiff, conditioned upon good faith and the absence of malice.

[See note at end of this case.]

Same.

The question of good faith and malice is one for the jury.

[See note at end of this case.]

Pleading — Averments Sufficient to Warrant Exemplary Damages.

Where the general allegations of a complaint are sufficient to show that the wrong complained of was inflicted with malice or oppression, or like circumstances, the complaint will be sufficient to authorize the infliction of exemplary damages.

Damages — Exemplary Damages — Elements Considered — Wealth of Defendant.

Where, under the pleadings of a case, exemplary damages may be allowed, the pecuniary ability of the defendant is a proper matter for the consideration of the jury.

Appeal from District Court, Nez Perce county: STEELE, Judge.

Action by William Dwyer, plaintiff, against W. A. Libert, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Miles S. Johnson and Jas. F. Aitshie for appellant.

Clay McNamee and Palmer H. McIntyre for respondent.

[580] RICE, J.—This is an action for libel brought by the respondent William Dwyer against appellant W. A. Libert. The respondent, shortly prior to the time the action arose, was employed by the city of Lewiston in the capacity of patrolman. Certain charges were made by the appellant to the mayor and city council of the city of Lewiston, resulting [581] in the discharge of the respondent.

Respondent's attorney thereupon appeared before the council and requested that body to request the appellant to file his charges in writing and to have a date set so that respondent might be there for the purpose of a hearing. The council reconsidered its action and requested appellant to file his charges in writing. Appellant thereupon had his charges prepared and filed with the city council, which writing contained the following matter alleged to be libelous, to wit:

"Complainant had several talks with William Dwyer during the few days following and on or about the 30th day of September, 1915, the said William Dwyer informed the complainant that Kittie Begle would be down on Saturday following, at which time the matter would be fixed up by securing the indebtedness with a mortgage, which said conversation was later confirmed by Mr. Dwyer in a conversation with Center Alexander, acting as the agent of Joseph Alexander. That at the time of making this statement to W. A. Libert and confirmation of same to Center Alexander the said William Dwyer was knowingly making false statements in, to wit: That on the 22d day of July, 1915, the said Kittie Begle had redeeded to Kittie Dwyer as her sole and separate property the real property in question, which deed had been held and was so held by said parties at the time of the conversation of September 25th, and was together with a homestead declaration of Kittie Dwyer placed on record in the office of the county recorder on the 28th day of September, 1915, and was so of record at the time the said William Dwyer was promising W. A. Libert to have the said Kittie Begle come down and secure the indebtedness with a mortgage on or about the 30th day of September. That the entire question of having the said Kittie Begle enter into the matter was held out by the said William Dwyer falsely, for the reason that on the 22d day of July, 1915, over two months before the 25th day of September, 1915, the said Kittie Begle had ceased to have any interest legal or otherwise to said property."

The complaint contained no colloquium or innuendo, and no special damages were claimed in the complaint.

[582] It is urged that the complaint does not state a cause of action; that the written charge does not contain language which is libelous *per se*, and that the complaint contains no innuendo showing that on account of the circumstances the matter was libelous as against respondent.

Criminal libel is defined by sec. 6737, Rev. Codes, as follows: "A libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity,

virtue, or reputation, or publish the natural or alleged defects, of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule." In the case of *State v. Sheridan*, 14 Idaho 222, 93 Pac. 656, 15 L.R.A.(N.S.) 497, it was noted that in determining whether particular words were actionable *per se*, the same rule does not apply to libel as to slander. In the case of *Farley v. Evening Chronicle Pub. Co.* 113 Mo. App. 216, 87 S. W. 565, at p. 568, the supreme court of Missouri said: "But written or printed matter which is communicated to third parties stands on a different footing and is often actionable when it would not be if spoken. As intimated, if it is of a character conducive to blacken the reputation of the person referred to, or excite ridicule or wrath against him, or destroy public confidence in him, it is actionable without proof of special damage. The reason assigned for this legal difference between written and spoken language is that writing or printing injurious statements about a person implies a deliberate purpose to do harm, whereas detrimental words are often spoken thoughtlessly or in a passion. Weight is allowed, also, to the more enduring character and wider vogue of published statements. *Odgers, Libel and Slander*, 4th ed. p. 4." (See, also, *Cooley on Torts*, 3d ed. p. 399.)

We have no doubt that the written publication of the words alleged in the complaint is actionable *per se*. Truthfulness is one of the basic virtues, perhaps the most fundamental of all. To charge a man in a written publication with wilful falsehood in the matter of a serious business transaction must necessarily expose him to contempt, and have a [583] tendency to lower him in the common estimation of citizens. (*Riley v. Lee*, 88 Ky. 603, 21 Am. St. Rep. 353, 11 S. W. 713; 25 Cyc. 255; *Hatt v. Evening News Assoc.* 94 Mich. 114, 53 N. W. 952; *Lindley v. Horton*, 27 Conn. 58; *Paxton v. Woodward*, 31 Mont. 195, 107 Am. St. Rep. 416, 3 Ann. Cas. 546, 78 Pac. 215; *Monson v. Lathrop*, 96 Wis. 386, 65 Am. St. Rep. 54, 71 N. W. 596.)

Appellant next contends that there was no evidence of the falsity of the publication, but that, on the contrary, the proof of the truth of the publication was conclusive. The gist of the libel is contained in the statement that at the time of making the statement to appellant, and to one Alexander, that "Kittie Begle would be down on the Saturday following at which time the matter would be fixed up by securing the indebtedness with a mortgage," the respondent was knowingly making a false statement, in that at that time Kittie Begle had reconveyed the property to the wife of respondent, who had filed a homestead declaration upon the same, and therefore Kittie Begle would be entirely unable to

give the mortgage security. The testimony of respondent was to the effect that appellant at the time of the conversation referred to was threatening to bring suit against Kittie Begle, and that respondent had told appellant that he need not send the summons to the town of Nez Perce to serve upon her and thus interfere with her duties, as she would be down to Lewiston on the following Saturday. Respondent denied that he stated to appellant, or Alexander, that she would give a mortgage as security. The wilful falsehood charged was in misleading appellant into believing that he would receive mortgage security for his indebtedness. On this matter the evidence was conflicting, and the determination of the fact was properly left to the jury.

It is next contended that the communication was privileged, for the reason that it was filed with a body that had the right to discharge a public officer. In a case of this kind the communication is qualifiedly privileged, and in order for one who makes such publication to claim the benefit of the [584] privilege, the statement must be made in good faith and in the absence of malice.

In the case of *Foster v. Scripps*, 39 Mich. 376, 33 Am. Rep. 403, we find the following: "But where a person occupies an office like that of a city or district physician, not elected by the public, but appointed by the council, and subject only to removal by the council, we have found no authority, and we think there is no reason, for holding any libel privileged except a *bona fide* representation made without malice to the proper authority, complaining on reasonable grounds." (*Bodwell v. Osgood*, 3 Pick. (Mass.) 379, 15 Am. Dec. 228; *Finley v. Steele*, 159 Mo. 299, 60 S. W. 108, 52 L.R.A. 862; *Howarth v. Barlow*, 113 App. Div. 510, 99 N. Y. S. 457.)

The question of the good faith of the publication and the absence of malice, under the evidence, was properly left for the jury to determine.

It is next contended that as respondent requested the mayor and city council to have appellant file his charges in writing, he thereby consented to the publication of the libelous matter, and is in no condition to complain.

If the only publication that can be proved is one made by the defendant in answer to an application from the plaintiff, or some agent of the plaintiff, demanding explanation, such answer, if fair and relevant, will be held privileged, for the plaintiff brought it upon himself; but a person cannot take advantage of an opportunity given by request of the plaintiff to gratify his malice. (*Laughlin v. Schnitzer* (Tex.) 106 S. W. 908.)

In the case of *Luzenberg v. O'Malley*, 116 La. 699, 41 So. 41, at p. 44, the following language is used: "It would seem to be too

plain to allow of difference of opinion that, when plaintiff challenged defendant to name the 'reasons too numerous to mention' why he was unfit to be district attorney, or even to practice law, he did not request defendant to publish malicious falsehoods about him." (See, also, *Schultz v. Guldenstein*, 144 Mich. 636, 108 N. W. 96.)

In this case it cannot be said that plaintiff requested the publication for the purpose of bringing an action thereon, [585] or consented to the publication of a libel against himself by appellant. Appellant had made verbal charges against him to the proper authorities, upon which charges it seems respondent was dismissed. In order that he might have an opportunity to answer the charges, of which he may have been more or less ignorant, he requested that the appellant file the charges in writing in order that he might be heard thereon. It cannot be said that the respondent requested the appellant to publish libelous matter about him. The request amounts to this, that if appellant in good faith and without malice had any charges to make against him, he would like to have such charges made in writing.

The question of the good faith of the appellant in filing the charges, and as to whether he was actuated by malice, was under instructions of the court, properly left to the jury, and its finding thereon will not be disturbed.

Appellant objected at the trial to the following question, which objection was overruled and exception saved: "Q. Mr. Dwyer, are you generally acquainted with the financial standing and responsibility of Mr. Libert, that is, whether or not he is a poor man or a wealthy man?" Appellant assigns the overruling of defendant's objection as error.

"In actions for libel the weight of authority is conceded to be in favor of the rule that the pecuniary circumstances of the defendant are admissible in favor of the plaintiff as tending to show the influence his words would have and the consequent extent of the injury." (25 Cyc. 508.)

In 2 *Sutherland on Damages*, 4th ed., p. 1315, that authority says: "In other cases it has been held, and the better doctrine from its intrinsic reasonableness is, that so far as the cause of action rests upon an injury to character or an insult to the person compensatory damages may be increased by proof of the wealth of the defendant. This is upon the ground that wealth is an element which goes to make up his rank and influence in society, and thereby renders the injury or insult resulting from his wrongful act the greater. But in such cases as it is rather the reputation for, than the possession of, wealth which is the cause of this increased

rank, [586] the testimony should correspond and only the general question as to his circumstances can be asked, and not the details."

In the instant case, the allegations of the complaint would justify the jury in bringing in a verdict, not only for compensatory damages but also for exemplary damages. The complaint alleges that the charges were false and malicious, and published by the defendant with the deliberate purpose and intention of injuring the defendant in his good name and reputation and causing his dismissal as said patrolman of said city of Lewiston, Idaho.

In the case of *Stark v. Epler*, 59 Ore. 262, 117 Pac. 276, the court said: "The rules of pleading do not require that the allegation relating to exemplary damages should be set out separately from the other averments of the complaint. Special damages must be grounded upon separate allegations, but exemplary damages are so intimately connected with general damages that if the general allegations are sufficient to show the wrong complained of was inflicted with malice or oppression or other like circumstances, the complaint will be sufficient to authorize the infliction of punitive or exemplary damages." (*Sullivan v. Oregon R. etc. Co.* 12 Ore. 392, 53 Am. Rep. 364, 7 Pac. 508; *San Francisco, etc. Home Bldg. Soc. v. Leonard*, 17 Cal. App. 254, 119 Pac. 405; *Isagar v. Metcalf*, 11 Ariz. 283, 94 Pac. 1094; *Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 33.)

It is not necessary to the recovery of exemplary damages that they should be specially claimed in the complaint, but such damages may be recovered under a claim for damages generally. (*Harmening v. Howland*, 25 N. D. 38, 141 N. W. 131; *Shoemaker v. Sonju*, 15 N. D. 518, 11 Ann. Cas. 1173, 108 N. W. 42; *Nashville, etc. Ry. v. Blackmon*, 7 Ala. App. 530, 61 So. 468; *Davis v. Seeley*, 91 Ia. 583, 51 Am. St. Rep. 356, 60 N. W. 183.)

In 2 *Sutherland on Damages*, p. 1316, the author says: "But when exemplary damages are claimed a different question is presented. The defendant's pecuniary ability is then a matter for the consideration of the jury, on the ground that a given sum would be a much greater punishment to a man of [587] small means than to one of larger. For this purpose the reputed wealth of the defendant may be proven, subject to his right to controvert the plaintiff's evidence, and the proof may be directed to his wealth at the time of the trial."

From the issues presented by the pleadings in this case, therefore, the question complained of was not objectionable. (*Binford v. Young*, 115 Ind. 174, 16 N. E. 142; *Marriott v. Williams*, 152 Cal. 705, 125 Am. St.

Rep. 87, 93 Pac. 875; *Barkly v. Copeland*, 74 Cal. 1, 5 Am. St. Rep. 413, 15 Pac. 307.)

The other errors assigned by appellant we do not deem necessary to discuss. The judgment is affirmed. Costs awarded to respondent.

Morgan, J., concurs.

Budge, C. J., sat at the hearing but took no part in the decision.

Petition for rehearing denied.

NOTE.

The reported case holds that a written complaint of misconduct on the part of a police officer, made to the mayor and council who had power to remove him, was qualifiedly privileged and would not sustain an action for libel in the absence of proof of bad faith on the part of the complainant. As to whether a complaint against a public officer or employee, made to a person or body having the power to remove him, is privileged within the law of libel and slander, see the notes to *Jozsa v. Moroney*, 19 Ann. Cas. 1193; *Farr v. Valentine*, Ann. Cas. 1913C 821; and *Holmes v. Clisby*, 104 Am. St. Rep. 103, 122. The privilege attaching to a petition for executive or legislative action is discussed in the note to *McKee v. Hughes*, Ann. Cas. 1918A 459.

PAUL JONES AND COMPANY

v.

WILKINS.

Tennessee Supreme Court—May 13, 1916.

135 Tenn. 146; 185 S. W. 1074.

Contracts — Validity — Sale of Liquor — Knowledge of Purpose to Resell Illegally.

Mere knowledge on the part of a seller of intoxicants that the buyer intends illegally to resell the liquors will not render the contract void, so as to bar the seller's action for the purchase price, though if the seller participates in or contributes to the purchaser's intention to sell illegally, or does any act to facilitate or further the design to transgress the law, or has an interest therein, the right to recover the price is lost.

[See note at end of this case.]

Same.

Where the seller of liquors knew through its local agent that the buyer was running a wide-open liquor saloon in violation of law, and made the shipment to a transfer company, not to the consignee, marked merely
Ann. Cas. 1918B.—62.

with his initials, so that the public would not know to whom it was to be delivered, such seller cannot recover the price, having aided the buyer's design to transgress the law and circumvented the legislature's object in passing acts (Ex. Sess.) 1913, c. 1, requiring common carriers to cause all consignees of liquor to sign, before delivery, an affidavit setting out his name, etc.

[See note at end of this case.]

Certiorari to Court of Civil Appeals.

Action by Paul Jones and Company, plaintiff, against T. B. Wilkins, defendant. Judgment for defendant. Plaintiff petitions for certiorari. The facts are stated in the opinion. WRIT DENIED.

M. A. Hall and R. H. Stickley for plaintiff.
A. J. Calhoun for defendant.

[147] WILLIAMS, J.—This suit was commenced by Paul Jones & Co., a wholesale liquor concern of Louisville, Ky., to recover the sale price of thirty-five cases of whisky sold to Wilkins and shipped to Memphis. The defense was based on the ground that the liquor was sold to Wilkins and by him retailed in Shelby county, in violation of the prohibition laws of this State in force in that city. The trial judge and the court of civil appeals have concurred in a denial of a remedy to plaintiff in the suit; and the cause is before us for review on a petition for certiorari.

The fundamental principles that must govern the controversy are those announced in the case of *Bank of Commerce, etc. Co. v. Burke*, 135 Tenn. 19, 185 S. W. 704, at this term of court. That case involved the legality of a contract of lease, but the opinion also discussed contracts of sale.

[148] The general rule is that in case of the sale of intoxicating liquors mere knowledge on the part of the seller that the purchaser intends illegally to resell such liquors will not render the contract void so as to bar the seller's action for the purchase price. *Tracy v. Talmage*, 14 N. Y. 173, 67 Am. Dec. 132; *Anheuser-Busch Brewing Assoc. v. Mason*, 44 Minn. 318, 46 N. W. 558, 9 L.R.A. 506, 20 Am. St. Rep. 580; *Washington Liquor Co. v. Shaw*, 38 Wash. 398, 80 Pac. 536, 3 Ann. Cas. 153, and note; *Frankel v. Hillier*, 16 N. D. 387, 113 N. W. 1067, 15 Ann. Cas. 265 and note; 9 Cyc. 571.

However, if the seller participates or contributes to the intention of the purchaser to sell in violation of law, or does any act, however slight, to facilitate or in furtherance of the design to transgress, or has an interest therein, the right to recover for the price is lost. The participation in the illegal purpose or act must be in some manner other than

the mere act of making the sale. Authorities, *supra*.

We are of opinion that the facts in this case show such a participation on the part of the plaintiff vendor as to bar him of any remedy. The plaintiff knew through its local solicitor in Memphis that Wilkins was running a "wide-open" retail liquor saloon; the solicitor had bought drinks for himself and others over the bar. The shipment represented by the account in suit was not made to Wilkins as consignee, but to the Lewis Transfer Company for delivery—so agreed in order that the public would not know to [149] whom it was to be delivered. The cases were not marked with the name of T. B. Wilkins, but with the initials, "T. B. W."

The manager of the vendor company testifies that the shipment to the transfer company as consignee was for the purpose of insuring delivery to Wilkins. We fail to see how that end could have been more safely attained by the marking of the outside of the cases with mere initials, rather than with the name and street address of the purchaser, even though it was desirable thus to use the transfer company.

Where it appeared that the plaintiff, a wholesale liquor dealer, supplied a retailer in another State with intoxicating liquors, and aided the latter by shipping to a fictitious consignee part of the liquors, and by packing other portions so as to conceal their true character, it was held that his account could not be recovered. *Kohn v. Melcher*, 43 Fed. 641, 10 L.R.A. 439; *Feineman v. Sachs*, 33 Kan. 621, 7 Pac. 222, 52 Am. Rep. 547; *Corbin v. Houlehan*, 100 Me. 246, 61 Atl. 131, 70 L.R.A. 568.

In *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154, it was held that an action by the seller could not be maintained when, at the defendant's request, the plaintiff marked the packages in a peculiar way, omitting the defendant's name so as to enable the defendant with greater facility to save them from seizure.

Particular pertinency is given to these authorities by the fact that we have in this state a statute (Act [150] Extra Session 1913, chapter 1) that requires common carriers to cause all consignees of liquors to sign, before delivery of goods, an affidavit setting out his name, address, the fact of consignment to affiant, the use to be made of the liquors, etc. It is manifest that the manipulation resorted to by the plaintiff was to circumvent the object sought to be attained by the legislature in the passage of this act.

A correct result has been reached in this case.

Writ denied.

NOTE.

Validity of Sale of Liquors Where Seller Knows Same Will Be Illegally Resold.

Introductory, 978.

Knowledge by Seller of Unlawful Purpose:

View that Sale Is Valid, 978.

View that Sale Is Invalid, 980.

Participation by Seller in Unlawful Purpose, 981.

Introductory.

The earlier cases passing on the validity of a sale of liquors where the seller knows that the same will be illegally resold are discussed in the notes to *Washington Liquor Co. v. Shaw*, 3 Ann. Cas. 153; *Frankel v. Hillier*, 15 Ann. Cas. 265; and *State v. Wilson*, 117 Am. St. Rep. 479, 502. This note reviews the more recent cases.

Knowledge by Seller of Unlawful Purpose.

VIEW THAT SALE IS VALID.

The weight of authority is to the effect that as a general proposition the mere knowledge by the seller of liquors of the fact that the buyer intends to resell the same in violation of law is not sufficient to invalidate the contract of sale. *Green v. Collins*, 3 Cliff. 494, 10 Fed. Cas. No. 5,755; *Sortwell v. Hughes*, 1 Curt. 244, 22 Fed. Cas. No. 13,177; *McWhorter v. Bluthenthal*, 136 Ala. 568, 33 So. 552, 96 Am. St. Rep. 43; *F. W. Cook Brewing Co. v. Vaccaro*, 188 Ill. App. 387; *F. W. Cook Brewing Co. v. Rodasta*, 188 Ill. App. 397; *Moore v. Winstead*, 24 Ind. App. 56, 55 N. E. 777; *Brown v. Wieland*, 116 Ia. 711, 89 N. W. 17, 61 L.R.A. 417; *Hamilton v. Jos. Schlitz Brewing Co.* 129 Ia. 172, 105 N. W. 438, 2 L.R.A. (N.S.) 1078; *Sioux Falls Brewing, etc. Co. v. Kitterman*, 116 Minn. 204, 133 N. W. 468; *Curran v. Downs*, 3 Mo. App. 468; *Storz v. Funklestein*, 48 Neb. 27, 66 N. W. 1020; *Taylor v. Steinman*, 95 Neb. 217, 145 N. W. 358; *Corning v. Abbott*, 54 N. H. 469; *Jones v. Sanborn*, 68 N. H. 602, 40 Atl. 393; *Conemaugh Brewing Co. v. Bennett*, 60 Pa. Super. Ct. 543; *Blandi v. Pellegrini*, 60 Pa. Super. Ct. 552; *Bowie v. Gilmour*, 24 Ont. App. 254. And see the reported case. *Compare Terre Haute Brewing Co. v. Hartman*, 19 Ind. App. 596, 49 N. E. 866; *Gassett v. Godfrey*, 26 N. H. 415. *Compare also Lane v. Lynch*, 38 Fed. 489, 4 L.R.A. 831, wherein the court followed the decision in *Jones v. Surprise*, 64 N. H. 243, 9 Atl. 384, holding the contrary doctrine by virtue of a statute which was subsequently declared invalid in *Durkee v. Moses*, 67 N. H. 115, 23 Atl. 793.

There must be something more than understanding or knowledge on the part of the seller of the buyer's illegal design with respect to a resale in order to render a sale of liquors invalid. *Green v. Collins*, 3 Chff. 494, 10 Fed. Cas. No. 5,755, wherein it appeared that the parties entered into a contract for the sale of liquor in Rhode Island, which was valid by the laws of that state, but the seller knew that the liquor was intended by the buyer to be resold in the state of Massachusetts, where the sale was prohibited by statute. In an action of assumpsit for the price, it was said: "Provision was made by § 61 of chapter 86, Gen. Stat. Mass., that all payments or compensations for spirituous or intoxicating liquors sold in violation of law shall be held to have been received without consideration, and against law, equity, and good conscience. No action of any kind, it is also therein provided, shall be had or maintained in any court for the price of any liquors sold in any other state for the purpose of being brought into this commonwealth, to be here kept or sold in violation of law, under such circumstances that the vendor would have reasonable cause to believe that the purchaser entertained any such illegal purpose. Gen. Stat. Mass. p. 448. Whether the plaintiffs knew or had reasonable cause to believe that the defendant purchased the liquors with the intention of transporting the same into this state, 'to be here kept or sold in violation of law,' was a matter in issue between the parties at the trial, and there was some evidence introduced on both sides of the question. Strong doubts were entertained by the court whether the affirmative of the issue was proved; but it must be assumed, for the purpose of this investigation, that the evidence was sufficient to warrant the jury in finding the issue for the defendant. Conceding as the fact is, that the contract of sale and purchase was valid at the place where it was made, it is unnecessary to enter into any inquiry or discussion upon that subject; and the plaintiffs contend, inasmuch as the sale of the liquors was valid where it was made, that the evidence introduced by the defendant is not an answer to the action, even if it does show that they had knowledge at that time that he intended to remove the liquors into this state, to be kept and sold in violation of the law of the state. . . . The defendant contends that they are not entitled to any remedy in the circuit court, sitting in this district, because they knew or had reasonable cause to believe, at the time they sold the liquors, that he, the defendant, intended to transport the same into this state, to be here kept and sold in violation of that enactment of the state legislature. Stated as above, the proposition is not in the precise language of the

prayer for instruction; but it is not contended that the prayer for instruction meant anything more than the proposition, as the sale was an absolute one, and it is not pretended that there was any arrangement between the parties as to the place where the liquors should be sold. Generally speaking, the validity of a contract is to be decided by the law of the place where it was made, unless it was agreed, either expressly or tacitly, that it should be performed in some other place, and then the general rule is that the contract, 'as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance.' Story on Conf. of L. §§ 242, 280; *U. S. Bank v. Donally*, 8 Pet. 372 [8 U. S. (L. ed.) 974]; *Wilcox v. Hunt*, 13 Pet. 379 [10 U. S. (L. ed.) 209]; *Andrews v. Bond*, 13 Pet. 65 [10 U. S. (L. ed.) 61]; *Don v. Lippmann*, 5 Cl. & F. (Eng.) 13; *Fergusson v. Fyffe*, 8 Cl. & F. (Eng.) 121. Contracts valid by the law of the place where they are made are generally valid everywhere *jure gentium*, and by tacit assent. 2 Kent. Com. (ed. 1866) 454. Remedies, therefore, are the same whether the suit is brought in the district where the contract was made, or in another district of the same circuit, or in any other federal court having jurisdiction of the parties and of the subject-matter in controversy. Viewed in the light of these several suggestions, the principal question presented is whether the evidence which shows that the plaintiffs knew, or had reasonable cause to believe, that the defendant at the time of the sale intended to transport the liquors into this state, to be here kept and sold in violation of the law of the state then in force and unrepealed at the time the suit was commenced, constituted a defense. Marked differences of opinion are observable in the determination of courts of justice in cases where the facts were in most respects the same as in the case before the court; but the better opinion appears to be that the mere knowledge by the vendor that the vendee at the time of the purchase of property intends to use it for an illegal purpose will not, as a general rule, prevent the vendor from recovering from the vendee the value of the property. Exceptional cases may arise in which a different rule must be applied, as where the property purchased is intended for treasonable purposes, or to commit murder, or to promote some other offense of such enormity, and so violative of the fundamental laws of society that silence on the part of the citizen is itself a crime, or would be evidence tending to show that the seller was an accessory before the fact to the commission of the offense. Many cases may doubtless be cited where it is held that a contract cannot be enforced which contemplates what the law forbids, whether the act

forbidden be *malum in se* or only *malum prohibitum*, but those cases do not apply to a contract of sale which is valid by the law of the place where it is made, and where the only circumstance imputed as affecting its validity, is the mere fact that the seller knew, or had reason to believe, that the purchaser intended to remove the property purchased into another jurisdiction, and to sell it there in violation of the law of that jurisdiction. *U. S. Bank v. Owens*, 2 Pet. 527 [7 U. S. (L. ed.) 508]; *Harris v. Runnels*, 12 How. 79 [13 U. S. (L. ed.) 901]; *Kennett v. Chambers*, 14 How. 38 [14 U. S. (L. ed.) 316]. Such exceptional cases may doubtless arise, but the general rule, and the one by which this case must be governed, is that in an action to recover the price of goods sold, it is no defense that the vendor knew that they were purchased to be sold in another jurisdiction, in violation of the law of that jurisdiction, provided it was not a part of the contract that they should be used for that purpose, and provided also that the vendor neither did nor agreed to do anything in aid or furtherance of the unlawful design, beyond the mere sale, with knowledge of the intent of the purchaser."

It was held in *McWhorter v. Bluthenthal*, 136 Ala. 508, 33 So. 552, 96 Am. St. Rep. 43, that it was proper for the court to refuse the following instruction to the jury: "If from the evidence you are reasonably satisfied that at the time of the sale of the liquors or any part of them, the consideration of the note sued on, the defendant bought the same or any part thereof for the purpose of selling the same in Hayneville, Lowndes county, Alabama, and that the plaintiffs knew the defendant was purchasing the same for that purpose, and if in pursuance of such purpose defendant did sell said liquors in violation of the prohibition laws of Lowndes county, Ala. at Hayneville, Ala. you should find for defendant." The court said: "Mere knowledge on the part of the plaintiffs of the purpose of the defendant to sell the liquor in violation of the prohibition law in Lowndes county, and the fact that it was sold by the defendant in violation of such law, did not, as matter of law, constitute a participation by the plaintiffs in the defendant's act."

So in *Wind v. Iler*, 93 Ia. 316, 61 N. W. 1001, 27 L.R.A. 219, it was said: "It is no doubt true that if a nonresident makes sales of liquors in another state to a resident of this state for the purpose and intent of enabling the purchaser to violate the liquor laws of this state, or participates or assists in a design on the part of the purchaser to dispose of them unlawfully in this state, his complicity in the illegal scheme will prevent him from recovering the price in an action against the purchaser . . . and it is also

true that, while mere knowledge on the part of the vendor that the purchaser intends to violate the law may not vitiate the sale, yet it is a fact from which the jury might infer an intent to violate the law."

VIEW THAT SALE IS INVALID.

In some jurisdictions the courts regard a sale of liquors, with knowledge that the buyer will resell the same illegally, as invalid, and deny a recovery for the price thereof. *Small Grain Distilling Co. v. Davis*, 11 Ga. App. 114, 74 S. E. 897; *Crigler, etc. Co. v. Laramore*, 18 Ga. App. 132, 88 S. E. 901; *Taber v. Barton*, 108 Me. 338, 80 Atl. 836; *Bligh v. James*, 6 Allen (Mass.) 570; *Frank v. O'Neil*, 125 Mass. 473; *Wasserboehr v. Morgan*, 168 Mass. 291, 47 N. E. 126; *Pfeifer v. Israel*, 161 N. C. 409, 77 S. E. 421; *Bluthenthal v. Kennedy*, 165 N. C. 372, 81 S. E. 337; *Pfeifer v. Love's Drug Co.* 171 N. C. 214, 83 S. E. 343; *Binswanger v. Stanford*, 28 Okla. 429, 114 Pac. 621; *Pabst Brewing Co. v. Smith*, 39 Okla. 403, 135 Pac. 381; *Klein v. Keller*, 42 Okla. 592, Ann. Cas. 1916D 1070, 141 Pac. 1117; *Wilkins v. Wallace*, 38 N. Bruns. 80; *Ross v. Morrison*, 36 Nova Scotia 518. See also *Somers v. Cranston* (Ga.) 92 S. E. 772; *Richards v. Woodward*, 113 Mass. 285.

In *Crigler, etc. Co. v. Laramore*, supra, it was held that where a salesman in the plaintiff's employ sold the defendant whisky, and was informed at the time of taking the order that "the defendant was buying the whisky for the purpose of selling it in Georgia in violation of the prohibition law" the sale was invalid and that a promissory note given by the defendant for the purchase price was not enforceable. To the same effect see *Pfeifer v. Israel*, 161 N. C. 409, 77 S. E. 421.

So it was said in *Small Grain Distilling Co. v. Davis*, 11 Ga. App. 114, 74 S. E. 897: "The distillery company knew that it was a violation of law to sell whisky in the state of Georgia, and in thus endeavoring to evade the law of this state, the loss of both the whisky and the value thereof was only what it justly deserved."

But knowledge on the part of the seller that the buyer is a liquor dealer does not necessarily prove knowledge on his part that the buyer intends to resell illegally. *Frank v. O'Neil*, 125 Mass. 473.

In *Maine* the statute (R. S. c. 29, § 64) provides that "no action shall be maintained upon any claim or demand, promissory note or other security contracted or given for intoxicating liquors sold in violation of this chapter, or for any such liquors purchased out of the state with intention to sell the same or any part thereof in violation thereof." Under that statute recovery is barred ir-

respective of knowledge on the part of the seller respecting the purchaser's intention. *Taber v. Barton*, 108 Me. 338, 80 Atl. 836. Compare *Torrey v. Corliass*, 33 Me. 333.

Participation by Seller in Unlawful Purpose.

Even in jurisdictions where the mere knowledge of the illegal purpose for which liquor is purchased will not invalidate a contract of sale, it is held that if it enters at all as an ingredient into the contract between the parties that the liquor shall be transported to another state, where its sale is illegal or that the seller shall do some act to assist or facilitate the illegal intention of the purchaser, such as packing the liquors in a way to conceal their character, then the seller will be deemed a participant in the illegal transaction and the contract is invalid. *Green v. Collins*, 3 Cliff. 494, 10 Fed. Cas. No. 5,755. And see the reported case. See also *Winkelmeyer Brewing Assoc. v. Nipp*, 6 Kan. App. 730, 50 Pac. 956.

In *Conemaugh Brewing Co. v. Bennett*, 60 Pa. Super. Ct. 543, the court said: "The defendant illegally sold these liquors at that place. During the progress of this business, he told appellant's secretary that he was having trouble with the officers of the law in Westmoreland county, as to his manner of disposing of the beer sent to him, and requested that it be consigned to persons whose names he would furnish. A list of names was given appellant, and when an order for beer was received, appellant would start down the list, select certain names therefrom, and make shipment in these names, being careful not to ship too many packages to any one man, as 'it would not do to have fifty or 150 or 200 packages sent to one man, because it would be readily understood that no one man would be using that amount of beer.'" In an action to recover for the liquor sold it was said: "When the vendor selected the names from the list, regardless of who ordered the beer, made out the bills of lading and shipped the beer in those names to the defendant, knowing that he was openly violating the law, it thereby aided Barnett in the commission of an illegal act and made its officers and agents thus acting particeps criminis. When the plaintiff, to establish its case, offered in evidence the bills of lading in the names of parties other than the defendant, it became pertinent to inquire why the shipments were thus made. This inquiry developed all the facts and circumstances which were a part of the continuous transaction. Its claim was therefore made to rest on an illegal foundation. It would have been a travesty on the integrity of the law for the court to have submitted the case to the jury when this evi-

dence was developed in the plaintiff's case. That the vendor did not receive or was not to receive any of the money due from the purchasers to the defendant, does not lessen its criminal liability in furnishing the assistance whereby the defendant was enabled to violate the law." In the same case the court further said: "Courts will not enforce contracts which are contrary to the policy of the law restraining and regulating the sale of liquor, or which are against public good, or which will encourage violations of the law. In civil actions involving directly the consideration of such agreements, the measure of proof necessary to establish the existence of such illegal act is not the same as it would be in a criminal action; and when, from the plaintiff's evidence, a contract is shown to be founded on an illegal transaction, which is known as such and participated in by the plaintiff, it is the duty of the court to withdraw from the jury any consideration of the contract and direct a compulsory nonsuit." See to the same effect *Blandi v. Pellegrini*, 60 Pa. Super. Ct. 552.

In *Sioux Falls Brewing, etc. Co. v. Kitterman*, 116 Minn. 204, 133 N. W. 468, it was held to be error to direct a verdict for the seller of liquor in an action for the price where it appeared that he with knowledge of the fact that the buyer had no license for the sale of intoxicating liquors requested, advised and encouraged him to engage in the sale at retail of the liquor sold, a beverage called "Hop Tea" which was in fact ordinary lager beer.

An agreement whereby the seller is to participate and profit in the illegal resale of the liquor, is sufficient to render the sale invalid and to bar a recovery for the price. *Storz v. Finklestein*, 48 Neb. 27, 66 N. W. 1020.

There is such a participation by the seller in the illegal purpose of the buyer as to invalidate the sale where the seller expressly stipulates that he will allow the buyer to use his license and thus appear to sell as his agent. *Bowie v. Gilmour*, 24 Ont. App. 254.

Where the real buyer is unable to procure a license because he is not a citizen, a sale of liquor ostensibly to another for the benefit of the real buyer, in order to circumvent the law, is invalid, and an action for the price is not maintainable. *Scheeline v. Pezola*, 29 Cal. App. 266, 155 Pac. 127.

While the unlawful participation of a seller of liquor in the illegal design of the purchaser will defeat an action by the seller to recover the purchase price of the liquors sold, it will not enable the purchaser to recover the payments made under such a contract. *Wind v. Iler*, 93 Ia. 316, 61 N. W. 1001, 27 L.R.A. 219.

WOLL

v.

JENSEN.

North Dakota Supreme Court—March 26,
1917.

36 N. Dak. 250; 162 N. W. 403.

**Elections — Ineligibility of Candidate
Receiving Majority Vote — Rights of
Minority Candidate.**

A minority vote for a qualified candidate does not entitle such candidate to the office, even though the candidate receiving the highest number of votes was disqualified to hold the office and such fact was known to the voters at the time of the election. However, the failure of the qualified candidate to receive a plurality of the votes cast renders the election a nullity.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Morton
county: HANLEY, Judge.

Action by H. L. Woll, plaintiff, against H. K. Jensen, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

Langer & Nichols and *O. F. Kelsch* for appellant.

Sullivan & Sullivan for respondent.

[252] **BRUCE, Ch. J.**—This is a proceeding to contest the election and determine the right to the office of county superintendent of schools of Morton county. There were but two candidates for the office. The plaintiff received 2,318 votes, and the defendant, 3,215 votes. A motion to dismiss was filed and treated as a demurrer.

The petition alleges that the defendant has not had two years' successful experience in teaching, and has not taught school for two years, and has not had two years' experience in teaching schools, and is therefore ineligible to hold the office of county superintendent under the provisions of § 1122 of the Compiled Laws of 1913. Section 1122 of the Compiled Laws of 1913 provides that "no person shall be deemed qualified for the office of county superintendent in any county, who is not a graduate of some reputable normal school or higher institution of learning, or does not hold at least a second grade professional certificate, and who has not had at least two years' successful experience in teaching, one year of which shall have been in this state."

We refrain from discussing the question of the qualification and title of the defendant,

as it is not necessarily before us. Even if disqualified, the controlling question of the right of the plaintiff to the office remains and must be met. Specifically stated it is, whether one who has received less than the majority of the votes which are cast [253] at an election is elected to such office so that he can claim the same when the voters knowing of the disqualification of his opponent chose to elect the latter by a majority of the votes cast.

We are satisfied that, though the election was a nullity, the plaintiff and appellant is not entitled to the office in question, and that, therefore, the trial judge was justified in dismissing the complaint.

The question before us has been the subject of no little discussion. It seems to be generally conceded that, where the voters do not know of the disqualification, the votes cast for the disqualified candidate cannot be credited to the defeated party, and that the whole election will be deemed a nullity. The only doubt in the minds of the writers has been whether this is true when the disqualification is known. The English rule and the rule of Indiana seems to be that where the disqualification is known the party receiving the minority vote will be entitled to the office, and this on the theory that the voters have wilfully thrown away their votes, and that the office should not go begging on that account.

The weight of American authority, both legislative and judicial, seems to be that no such intention to throw away the vote can be imputed, but that rather the vote for the disqualified candidate must be considered as a protest against the qualified person, and especially should this be the case where there are only two candidates. The authorities lay stress, indeed, upon the proposition that government by the majority seems to be an American maxim, and that no one should be deemed elected against the protest of that majority. It is true that many of the authorities are purely legislative. It is also true that perhaps in no adjudicated case has the question been fairly presented. The dicta of the courts, however, and the positive rulings of the legislative tribunals, are almost unanimous on the proposition that, where there is no statute declaring votes cast for ineligible candidates to be absolutely void, no right to the office can be presumed in the defeated candidate. We hold, therefore, that the plaintiff was not elected to the office. See *McCrary, Elections*, 4th ed. § 327; *Privett v. Bickford*, 26 Kan. 52, 40 Am. Rep. 301; *Throop, Pub. Off.* § 163; *Dillon, Mun. Corp.* 5th ed. § 373; *Saunders v. Haynes*, 13 Cal. 145; *State v. Giles*, 1 Chand. (Wis.) 112, 52 Am. Dec. 149; *State v. Smith*, 14 Wis. 497. Such being the case, the judgment of the District Court is affirmed.

NOTE.

The reported case holds that a minority candidate is not entitled to the office because of the ineligibility of the candidate receiving the majority vote. Repudiating a distinction suggested by some courts, it is held that the fact that the disqualification is known to the voters at the time of the election does not affect the rule. The cases passing on the rights of the minority candidate under such circumstances are reviewed in the notes to *Sheridan v. St. Louis*, 2 Ann. Cas. 480; *Dobbs v. Buford*, 11 Ann. Cas. 117; *State v. Bateman*, Ann. Cas. 1915B 515; and *State v. Bell*, 124 Am. St. Rep. 203.

COMPTON

v.

AKERS ET AL.

Kansas Supreme Court—July 10, 1915.

96 Kan. 229; 150 Pac. 219.

Wills — Election by Widow — Rights as to Intestate Property.

A widow who elects to take under her husband's will thereby bars herself and her heirs from inheriting property of the husband undistributed of by the will.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Sumner county: SWARTS, Judge.

Action by L. D. Compton, plaintiff, against Everett Akers et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

W. W. Schweinn for appellants.

W. T. McBride and Harold W. Herrick for appellee.

[229] WEST, J.—James Pierce devised to his wife his quarter section of land for life and an undivided one-half at her death to his friend L. D. Compton. After his death and the death of his widow, who had elected to take under the will, Compton took possession of the entire quarter section, and by this suit attempted to quiet his title against the heirs of Mrs. Pierce on the theory that by her election she barred herself and her heirs from all interest in the land except her life estate. The appeal presents the one question whether or not, such election having been made, her heirs can inherit.

There is no dispute that under ordinary circumstances the election by the widow precludes her from all rights of inheritance under the law, and this is made plain by the statute of wills. (§ 42, Gen. Stat. 1909, § 9819.) But the real question concerns the effect of such election upon property not disposed of by will. The court below held that the widow's heirs could not inherit.

While the matter of election has been ruled on, the point now raised has not been previously presented in this state. (*Allen v. Hannum*, 15 Kan. 625; *Noecker v. Noecker*, 66 Kan. 347, 71 Pac. 815; *Moore v. Herd*, 76 Kan. 826, 93 Pac. 157; *Ashelford v. Chapman*, 81 Kan. 312, 105 Pac. 534; *Pittman v. Pittman*, 81 Kan. 643, 107 Pac. 235, 27 L.R.A. (N.S.) 602; *Martin v. Battey*, 87 Kan. 582, Ann. Cas. 1914A 440, 125 Pac. 88.)

[230] Of the numerous cases cited and examined and others which have come to our notice, quite a number are governed by the provisions of statutes which make it a matter of merely giving effect to legislative direction, while others involve an election to take under the law and cannot therefore furnish much light or assistance. Those most nearly parallel and applicable will be briefly noticed. *Ragsdale v. Parrish*, 74 Ind. 191, involved an election by a widow to take under the will of her husband which gave her only a life estate in certain of his land, and it was claimed that this did not preclude her from inheriting other land not disposed of by the will, but it was held that the statutes governing the matter were such that when construed together must be held to mean that when a substantial provision was made for the widow by the will she could not, in the absence of a plainly expressed intention to the contrary, take both under the will and under the statute, and the case was distinguished (p. 196) from *Armstrong v. Berreman*, 13 Ind. 422, to be noticed later. In *Langley v. Mayhew*, et al. 107 Ind. 198, 6 N. E. 317, it was held that when a widow accepts the provision made by the will which declares that it shall be in lieu of all other interest she may have in the state, and she gives a receipt expressly agreeing to take under the will in lieu of all other claims, she cannot take under the statute. On rehearing the original opinion was adhered to (107 Ind. 204, 8 N. E. 157), the court stating that as then constituted it would not follow some of the decisions previously made, but was inclined to accept the rule laid down in *Morrison v. Bowman*, 29 Cal. 337. That rule is that "if the husband, by his will, undertakes to dispose of the wife's half of the common property, as well as his own, to her and others, and she elects to accept the benefits intended and provided for her by the will, she thereby becomes divested of her title in and to the undivided half of the common property,

provided an assertion of her community right and interest would necessarily defeat the objects of the will." (Syl. ¶ 3.) This is a well-considered opinion citing and relying largely upon Jarman, Story, and Kent, besides numerous early decisions discussed and followed. In *Jackson's Appeal*, 126 Pa. St. 105, 17 Atl. 535, the testator gave one-third of the estate to his wife, and gave certain other legacies to others, and died without issue, leaving property undisposed [231] of. Shortly thereafter the widow died without having made an election. It was held that as she would be presumed to take under the will her administrator could claim only one-third of the entire estate and was not entitled to any part of that left undisposed of by the will. In *Matter of Hodgman*, 140 N. Y. 421, 35 N. E. 660, it was decided that:

"Where a testator bequeaths his widow a certain sum 'in full satisfaction and recompense of and for her dower or thirds' in his estate, and the widow accepts such bequest, she is estopped from claiming a share as distributee in certain legacies of the testator that had become lapsed." (35 N. E. 661, headnote, ¶ 4.)

In *Walker v. Upson*, 74 Conn. 128, 49 Atl. 904, it was ruled that when a testator gives his wife one-half his estate, allowing her to select it as she may choose, and dies intestate as to the residue, her acceptance under the will precludes her from sharing in such residue. In *Smith v. Perkins*, 148 Ky. 387, 146 S. W. 758, it was held that a widow who received a provision made for her in her husband's will, and took no steps for more than a year to repudiate such provision and take dower, could not thereafter recover dower in lands as to which her husband died intestate, the statute requiring that such relinquishment given by the will must be made within twelve months, and the court said:

"The mere fact that the amount devised to the widow is less than her dowerable and distributable share would have been in her husband's estate cannot alter the legal effect of her act in failing to renounce the provisions of the will." (*Bayes v. Howes*, 113 Ky. 465, 68 S. W. 449.)" (p. 391.)

In another part of the opinion it was said:

"It is wholly immaterial whether the will disposes of the entire estate of the husband or not, for, having made such provision for her as he desired her to have, if she is not satisfied with it, she must renounce it and take under the law. Failing to do this, she loses her rights." (p. 393.)

In *Ellis v. Dumond*, 259 Ill. 483, 102 N. E. 801, it was held that:

"Acceptance by the widow of the provisions made for her in the will bars her right to dower, not only in the estate disposed of by the will, but also in intestate property which

the testator acquired after the will was made but did not dispose of." (Syl. ¶ 1.)

There certain statutes referred to provided in substance [232] that any provision in the will made for the wife should, unless otherwise therein expressed, bar the right of dower in the lands of the deceased, unless such provision should be renounced. In *Malone v. Majors*, 8 Humph. (Tenn.) 577, the statute provided that unless the widow within six months declared her dissent from the provision made by the will, the will would be considered fully satisfactory, and it was decided that she could not thereafter claim any portion of the property as to which her husband died intestate. In *Armstrong v. Berreman*, 13 Ind. 422, the facts were that Armstrong died leaving his widow, Sarah, and no children, having made a will by which he bequeathed to his wife "all the rest of his estate, both real and personal, during her life, and to be disposed of by her at her pleasure." (p. 423.) He also appointed her his executrix. Sarah qualified and returned an inventory showing that the personal estate amounted to \$7,540, with practically no debts. In a short time she died intestate, and it appeared that certain real estate was left by the husband, and out of the controversy over the estate it became necessary to construe the following provision of the statute:

"If a husband or wife die *intestate*, leaving no child, and no father or mother, the whole of his or her property, real and personal, shall go to the survivor." (Syl.)

The court said:

"Suppose a man die, leaving no child, nor father or mother, but having made a will bequeathing a small portion of his estate to a friend, there being a large residuum undisposed of. Shall the surviving wife not take it under the provisions of the section quoted, because of the bequest? As before remarked, we think that, in such case, the surviving wife should be held entitled to the property, so far as it was not otherwise disposed of by a will." (p. 424.)

This was said to be in accordance with the spirit of the statute and the intention of the legislature, and it was suggested that in case of a person dying intestate, disposing of a small part of his property by will and leaving all the remainder undisposed of, it should descend to his children as property of the person dying intestate. The court took up then the question of *escheat* and said:

"But suppose a will be made in such case, disposing of a part only of the estate, where shall the remaining portion go? Will the state not be entitled to it for the support of schools, under this section, although the [233] deceased did not literally die intestate?

... We are of the opinion that the simple fact that *Benjamin Armstrong* made

a will, is no reason why the provision first above quoted, should not apply in favor of his surviving widow. So far as the property was undisposed of by will, the deceased may be said to have died intestate." (p. 425.)

The court then discussed the matter of election, which was practically the same as now provided by section 9818 of our General Statutes of 1909, and held that it had no application to the case of the surviving wife, who claimed the whole estate as an heir, there being no others capable of inheriting before her, the result of the entire decision being that the widow inherited the property not disposed of by the will. In *Lindsay v. Lindsay*, 47 Ind. 283, in considering a case of an election under the law the rule in *Armstrong v. Berreman*, 13 Ind. 422, was followed, and it was said:

"We are entirely satisfied with *Armstrong v. Berreman*, supra, and adhere to it. We think that section 26, supra, should be construed as if it provided that if a husband or wife die, leaving any estate undisposed, and leaving no child, and no father or mother, the whole of such estate shall descend to the survivor." (p. 285.)

In *Dale v. Bartley*, 58 Ind. 101, considering a case of election to take under the law, the court cited (p. 105) with approval *Armstrong v. Berreman* and *Lindsay v. Lindsay*. *Collins v. Collins*, 126 Ind. 559, 564, 25 N. E. 704, 28 N. E. 190, was a case in which a husband devised all his real estate to his wife for life and a certain portion of the fee to his son and daughter. The daughter and her only son died in the testator's lifetime, and the son soon after the father. The widow elected to take under the will. It was held that the devise to the daughter lapsed, and as to the real estate devised to her the testator died intestate. It was held that as to the land devised to the daughter, the will being inoperative, the same was cast upon the heirs of the decedent, one-half going to the widow, the other half to the son; that the election to take under the will divested her of her one-third of the land devised to the daughter, but she still retained her interest in excess of the one-third which was the one-sixth. In *Sutton v. Read*, 176 Ill. 69, 51 N. E. 801, the will gave all the property to the wife to be accepted by her in lieu of dower during her natural life. There was no further disposition made of the real estate, and there was no residuary [234] clause, the fee in the realty being left undisposed of. It was held that the statute applied that all estate not devised or bequeathed should be distributed in the same manner as the estate of an intestate, and that her failure to elect under the statute relating to dower could effect none of her interest except her dower. It was further held that the

provision of the statute that if one died testate, leaving no descendants, the surviving spouse may in lieu of dower take one-half of the realty, did not bar the widow who took under the will from also taking under the statute as to the realty as to which testator dies intestate.

It is laid down as the general rule that unless there is a manifest intention to the contrary the presumption is that the testator intended that his property should go in accordance with the laws of descents and distributions, and that heirs at law will not be disinherited by mere conjecture, but only by express words in the will or by necessary implication arising from them. (40 Cyc. 1412, 1498.) It is also stated that the widow is not put to her election between the provision for her under the will and her rights as heir to the property undisposed of unless "she is put to her election by statutes providing for such cases. But a widow taking under the will is barred of her dower in the property undisposed of, and the widow is not entitled to take both her dower interest and her interest as heirs or distributee of property not disposed of." (40 Cyc. 1970.) Gardener on Wills says:

"The prevailing rule is that, where a widow elects to take under the will, she thereby loses all interest in property in regard to which the testator died intestate, as well as in that upon which the will operates other than that given her in lieu of dower." (p. 611.)

The will itself after giving the wife all of his personal property except one large bay horse, named Charley, provides as follows:

"2nd. I also give and bequeath unto her the rents, use occupancy and right of possession and complete control of the farm on which we now reside during her natural life time.

"3. I give and bequeath unto L. D. Compton of Wichita, Kan. who is now occupied as a Rock Island R. R. employee, the undivided one half interest in and of the north East quarter of section twenty-three (23) in township thirty one south range one east in Sumner County, Kansas. This bequest is to take effect and be in force at and after the death of [235] my wife, Elizabeth. I also give unto him my bay horse 'Charley' which he is to have possession of at the time of my death.

"4. I hereby appoint my wife Elizabeth Pierce Executrix of this my last will and request the Court granting letters hereon to not require of her any bond."

There is certainly nothing in this will indicating any intention that any of the fee in the land should go to the wife, and it would seem that the testator forgot or neglected to provide where the fee in the

remaining undivided half should go. It seems natural and proper that it should go to his heirs as if he had died intestate, which he did in respect to this portion of his property, but other instances might arise in which it would not seem so natural or so proper. If a husband owning large bodies of land should devise all but a small tract to his wife and leave that undisposed of it would seem perfectly fair and proper that her election to take under the will should bar her heirs from inheriting such small tract.

But it will be observed, as already suggested, that in the cases referred to it was usually a matter of statutory construction, and indeed "to this complexion must it come at last," so that the real point before the court is whether the letter of the statute is controlling or whether it is to be construed to mean that the election bars the widow of her inheritance only as to property disposed of by the will. The statute of descents and distributions and the statute of wills have been in force since 1868 and no legislature has seen fit to modify or amend the requirements so far as they affect this case, but it is ordered that "words and phrases shall be construed according to the context and the approved usage of the language." (Gen. Stat. 1909, § 9037, subdiv. 2.)

Section 9818 of the General Statutes of 1909 provides that if any provision be made for a widow in the will of her husband the probate court shall after the probate of such will cite her to appear "and make her election, whether she will accept such provision or take what she is entitled to under the provisions of the law concerning descents and distributions. . . . but she shall not be entitled to both." This would seem to make the statute of wills superior, in case of such election, to the statute of descents and distributions, and to preclude her from resorting to both. Section 9818 requires the probate court to "explain to her the provisions of the will, [236] her rights under it, and also her rights under the law, in the event of her refusal to take under the will. . . . And if the widow shall fail to make such election she shall retain her share of the real and personal estate of her husband as she would be entitled to by law in case her husband had died intestate. If she elects to take under the will, she shall not be entitled to the provisions of the law for her benefit, but shall take under the will alone." But this is not all. The next two succeeding sections provide that if the widow be unable to appear in person a commission may be issued with a copy of the will annexed to take her election, and "it shall be the duty of the court, in said commission, to direct such person to explain to said widow her rights under the will and by law" (§ 9820), and in case

of the widow's insanity or imbecility the court must appoint some reliable person "to ascertain the value of the provision made by the testator for her in his will in lieu of the provision made by law, and the value of her rights by law in the estate of her husband" (§ 9821), and if the court is satisfied that the devise is more valuable than the law's provision it shall elect for the widow to take under the will.

Language less free from ambiguity or more clearly understandable would be hard to find, and we see no sufficient ground for the interpolation of an exception in case of property undisposed of by will.

The ruling of the trial court that the heirs of the widow cannot inherit is affirmed.

MARSHALL, J. (dissenting).—I do not concur in the conclusion reached by this court. Upon the widow's election, the part of the estate undisposed of by will descends to the other heirs, if there are any, but if there are none, she takes the entire estate.

NOTE.

Election by Widow to Take under Will as Affecting Her Right to Intestate Property.

Express Intention to Exclude Participation:

Provision in Lieu of Dower:

Interest in Realty, 986

Interest in Personalty, 988.

Provision Not Relating to Dower, 989.

Implication of Intention to Exclude Participation:

Exclusion Implied from Fact of Gift, 990.

Exclusion Not Implied from Fact of Gift, 993.

Exclusion Implied from Particular Language, 994.

Implication of Exclusion with Respect to Property Conveyed during Coverture, 995.

Express Intention to Exclude Participation.

PROVISION IN LIEU OF DOWER.

Interest in Realty.

As a general rule where a widow elects to accept a provision made for her in her husband's will which expressly declares that the provision shall be in lieu of dower, she is barred from claiming her dower rights in lands that for any reason are undisposed of by the will. *Walker v. Upson*, 74 Conn. 128, 49 Atl. 904; *Harmon v. Harmon*, 80 Conn. 44, 66 Atl. 771; *Gibbon v. Gibbon*, 40 Ga.

562; *Edsall v. Waterbury*, 2 Redf. (N. Y.) 48; *Hone v. Van Schaek*, 7 Paige (N. Y.) 221; *Hatch v. Bassett*, 52 N. Y. 359; *Lee v. Tower*, 124 N. Y. 370, 26 N. E. 943; *Bane v. Wick*, 14 Ohio St. 505; *Chapin v. Hill*, 1 R. I. 446; *Davidson v. Boomer*, 18 Grant Ch. (U. C.) 475; *In re McEwen*, 23 Ont. L. Rep. 414. In *Lee v. Tower*, 124 N. Y. 370, 26 N. E. 943, it appeared that a testator made certain provisions for his wife "in lieu, substitution and satisfaction of her dower, thirds, and all other interest in my estate, real, personal and mixed." The widow elected to take under the will. The question arose as to the right of the widow to dower in a piece of land situated in New York which by reason of an invalid clause in the will became intestate property. It was held that she was not entitled to dower, having made her election to take under the will, the court saying that it was clearly the intention of the testator, as shown by the conditions imposed on the widow by the terms of the will, that she was to take nothing beyond the provision therein made for her.

In *Davidson v. Boomer*, 18 Grant Ch. (U. C.) 475, it was held that where a widow accepted a provision in the will of her husband giving her an annuity in lieu of dower, she was not entitled to dower out of any of the testator's real estate undisposed of by the will, the court saying: "I think it clear that the annuity was given in lieu of dower in all the testator's lands, and is not to be restricted to a satisfaction for dower in those passing under the will. The cases on gifts in lieu of thirds, such as *Pickering v. Stamford*, 3 Ves. Jr. (Eng.) 492, do not apply. The widow, as one of the persons to whom the statute of distributions gives the personal estate in the case of a failure of a gift of personalty, takes both the annuity and her statutory share, as the testator is only to be considered as purchasing the thirds for the benefit of his legatees. But in cases of realty, the testator is deemed to have purchased the dower for the benefit of whosoever the estate may go to, whether it passes under the will or devolves upon the heir by operation of law."

Nor does the fact that the realty is acquired by the husband after having made his will, alter the rule. *Gibbon v. Gibbon*, 40 Ga. 562. So in *Chapin v. Hill*, 1 R. I. 446, wherein it appeared that a widow elected to take under the will of her husband in lieu of her dower or other interest in his estate, it was held that she was barred of her dower in real estate purchased by the husband after the making of his will and as to which he died intestate. The court said: "The question therefore to be decided upon this state of facts is, whether the plaintiff is, by accepting this provision in her husband's will,

barred from recovering her dower in the demanded premises, which were not devised in said will, and as to which her husband died intestate. . . . Although the testator's will could not operate on real estate, by him acquired after its execution, unless such real estate was expressly devised by the will, yet, in ascertaining the intention of the testator, it should be borne in mind, that he was making provision for his wife in lieu of her right of dower in his estate, the extent of which right could only be determined at the death of the testator. . . . This phraseology is not qualified or limited by any other words in the will. For the words which follow, ('or other interest in my estate,') cannot certainly be reasonably construed to limit the legal meaning of the words, 'her dower,' but must be construed to apply to all contingent interest which the plaintiff might have in her husband's estate. It was contended that the provision in this will, in lieu of dower, applies only to the real estate which the testator had at the date of his will, because, the testator did not, by express terms, devise real estate to be thereafter acquired. The fallacy of this reasoning must be apparent, when we consider that it does not apply to the whole subject-matter in its full extent. This provision of this will for the plaintiff was intended to be in lieu of her dower in her husband's estate. The will, at its date, vested in her no absolute right, only a contingent right; even the certainty and extent of which depended on the death of her husband and her acceptance of this bounty, in lieu of an inchoate right, the extent of which would be determined and rendered certain by law and her own election, on the death of her husband."

It has been held that a gift to a wife accompanied by the stipulation that it is made in lieu of dower, will bar her dower rights in lands sold by the husband during coverture. *Steede v. Fisher*, 1 Edw. (N. Y.) 435; *Palmer v. Voorhis*, 35 Barb. (N. Y.) 479.

In *Illinois* it has been held that, under a section of the dower act providing that the widow on an election to take under the will of her husband shall be barred from dower in his lands, she is barred from dower in undisposed lands. *Ellis v. Dumond*, 259 Ill. 583, 102 N. E. 801, wherein the court said: "Under said section 10 of the Dower Act, if she shall elect to accept the provisions made for her by the will she is not entitled to claim dower in any of the lands of which he died seized, whether the same be devised by will or not. This construction of section 10 of the Dower Act is sustained by the views expressed in *Haynie v. Dickens*, 68 Ill. 267, where a similar section of the Dower Act contained in the Revised Statutes of 1845 was construed." In *Ellis v. Dumond*, supra, it

appeared that the widow was claiming dower in after-acquired lands and that by the will it was expressly provided that the provision made for her therein should be in lieu of dower. In *Haynie v. Dickens*, cited *supra*, the claim for dower was made in the undisposed fee after a life estate to the widow but there was no provision in the will excluding her dower interest. In both of those cases the decision seemed to have been based on the construction of the statute and not on the presence or absence of any particular words of exclusion in the will. But see *Sutton v. Read*, 176 Ill. 69, 51 N. E. 801, holding that section 10 of the Dower Act did not apply to intestate property.

Interest in Personalty.

The courts are not in accord as to the effect of the election of a widow to take under the will on her right to the share which the law would otherwise give her in intestate personalty. In a majority of jurisdictions it is held that unless a contrary intention clearly appears from the will a widow will not be barred from her share of intestate personalty by reason of a provision made for her in the will and expressly declared to be in lieu of dower. *Gibbon v. Gibbon*, 40 Ga. 562; *Johnson v. Goss*, 132 Mass. 274; *Edsall v. Waterbury*, 2 Redf. (N. Y.) 48; *Hone v. Van Schaick*, 7 Paige (N. Y.) 221; *Canfield v. Crandall*, 4 Dem. (N. Y.) 111; *Hatch v. Bassett*, 52 N. Y. 359; *Bane v. Wick*, 14 Ohio St. 505; *Davidson v. Boomer*, 18 Grant Ch. (U. C.) 475; *In re McEwen*, 23 Ont. L. Rep. 414.

In *Hatch v. Bassett*, *supra*, wherein it appeared that because of the lapsing of certain legacies a part of the personal estate was undisposed of, the court construing the effect of a stipulation in the will that the provision made for the wife should be in lieu of dower, said: "This annuity was given in lieu of dower. Dower can only be had of real estate, and has no connection with personal. Her acceptance of the annuity only bars her claim to be endowed of the real estate, and will not at all affect her right, arising upon any statute or from any other source, to the personal."

In *Bane v. Wick*, 14 Ohio St. 505, wherein it appeared that the widow elected to take under the will in lieu of dower, it was held that she was not barred of her distributive share of personalty not disposed of by the will, the court saying: "The [statute] . . . provides that 'If any provision be made for a widow, in the will of her husband, she shall within six months after the probate of the will, make her election, whether she will but take such provision, or be endowed of his

lands; but she shall not be entitled to both, unless it plainly appears by the will to have been the intention of the testator that she should have such provision in addition to her dower.' This reverses the rule of the common law, by which a devise or bequest to a widow was presumed to be in addition to her dower, unless the claim, under the will, and the assertion of the right of dower, were so repugnant, that the two could not consistently stand together. By the statute the provision is deemed to be in lieu of dower, unless it plainly appears that the testator intended it to be in addition to it. The bar created by this section has no reference to her rights as distributee. It is a copy of the 11th section of the act in relation to estates in dower, by the curtesy, etc., found in chapter 60 of the Revised Statutes of Massachusetts, of 1835; and it was held in *Ex p. Kempton*, 23 Pick. 163, that it had no application to a widow claiming, in addition to such provision, her third of the personalty undisposed of by the will. The language of the statute under which she was entitled to the third was—"If the intestate leave a widow and issue, the widow shall be entitled to one-third of said residue"—the residue being what was left of the personalty after payment of debts."

In *Edsall v. Waterbury*, 2 Redf. (N. Y.) 48, it was held that a bequest to a widow of the income for life of an estate which consisted solely of personalty, in lieu of dower, the remainder not being fully disposed of, did not bar her claim to a share in the undisposed-of remainder under the statute of distributions, the court saying: "The will provides that the widow shall have the accrued interest and income of the whole estate during her natural life, to be received by her in lieu of dower, or right of dower, and I am asked to decree that she take none of the undisposed part of said estate. But I have no authority to do that. The testator is presumed to know the law, and he made this will, as I must presume, knowing that she would share in the portion not bequeathed by him. I cannot say she shall not participate in the distribution when the statute says she shall."

In *Jackson's Appeal*, 126 Pa. St. 105, 17 Atl. 535, it appeared that a testator left to his widow in lieu of dower one equal third part of all his estate, real and personal, for life, but made no disposition of the remaining two-thirds. The court held that the widow was entitled to no part of the undisposed-of remainder, saying: "We think the orphan's court was clearly right in holding that the widow was not entitled to one-half of the residue of the personal property undisposed of by the testator. The widow having died a few days after the testator,

and having made no election, we must presume she takes under the will. The will gave her the full one-third of all the estate of the testator during her life. There was no intestacy of any portion of the estate as to her. She gets the one-third of it all, including that portion of which the testator died intestate. Taking her one-third of the undisposed-of surplus under the will, she cannot claim the one-half of it against the will. In this respect the case differs from Carman's App. 2 Penny. 332, where the widow took specifically only certain portions of the estate, and the will itself gave her no part of the residue. So also in the case of *In re Reed*, 82 Pa. St. 428, the widow was put to no election between her legacy under the will and this undisposed-of estate. Here, the widow was put to her election as to the whole estate, as well that which passed by the will, as the portion as to which her husband died intestate."

The *Connecticut* cases involving the effect on a widow's right to share in undisposed-of personalty of an election by her to take under a will expressly stipulating that the provision made for her is in lieu of dower, are somewhat confused. Thus in the latest case passing on this point, *Harmon v. Harmon*, 80 Conn. 44, 66 Atl. 771, it was held that she was barred from participation in the intestate personalty, the court saying: "The gift to the widow of at least one-half, and possibly the whole of the income of the entire estate during her life, was expressly made in lieu of dower, and was a valid gift which she accepted and enjoyed, apparently without having claimed any further interest in the estate. The disposal of the entire income of the estate during the lives of his wife and daughter was inconsistent with the intention on the part of the testator that the former should receive a further one-third share of his estate upon his death. The acceptance and enjoyment by the widow of the provision of the will for her benefit, without having claimed any further interest in the estate, debarred her from any statutory share in the personal estate of the testator." That view was also taken in *Leake v. Watson*, 60 Conn. 498, 21 Atl. 1075, wherein it appeared that the widow accepted certain provisions in her husband's will made for her benefit in lieu of dower, which provisions undoubtedly gave to the widow more than she would have obtained by way of dower. The court held that it was plainly the intention of the testator that she should not have any other share in his estate as he evidently did not contemplate that any part of it would become intestate estate. And that "under the circumstances, we think the widow is not entitled to any share of the intestate's estate resulting from the failure of the remainders

over to the heirs of the daughters." But in *Nelson v. Pomeroy*, 64 Conn. 257, 29 Atl. 534, the contrary view was taken, the court saying: "In this state, when a widow elects to take a legacy in lieu of dower, she is considered in the light of a purchaser, and by force of the statute (General Statutes, § 621) if she fails within the time limited to give notice that she declines to accept such legacy, 'she shall be debarred of her dower.' . . . It follows that when, as in this case, the testamentary provision for the widow is nothing more than a bare purchase of her right of dower, the completion of that purchase by formal acceptance of the legacy, or by force of the statute in case of neglect to decline the legacy, bars her claim of dower, but cannot bar her from claiming that share of the intestate personalty to which, independently of the will, she is entitled by the statute of distribution." This same apparent conflict exists in the Connecticut cases in which there was no express provision that the devise or bequest should be in lieu of dower, as will be seen by reference to the cases set out infra, in the subdivision *Implication of Intention to Exclude Participation*.

PROVISION NOT RELATING TO DOWER.

As in case of a provision in the will of a husband specifically declaring that the gift made therein to the wife shall be in lieu of dower, so where the provision for the widow is made in lieu of any other claim that she may have against his estate it is generally held that if she elects to take under the will she is barred from taking any further share in the testator's property even though it is undisposed of by the will. *Lett v. Randall*, 3 Smale & G. (Eng.) 84, 65 Eng. Rep. (Reprint) 572; *Raines v. Corbin*, 24 Ga. 185; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *In re Benson*, 96 N. Y. 499, 48 Am. Rep. 646; *In re Hodgman*, 140 N. Y. 421, 35 N. E. 660. Compare *Pinckney v. Pinckney*, 1 Bradf. (N. Y.) 269.

In the case of *In re Hodgman*, supra, it was held that where a widow accepted the provisions in her husband's will made for her benefit "in full satisfaction and recompense of and for her dower or thirds which she may or can in anywise claim or demand," out of his estate, she was not entitled as a distributee to a share in certain lapsed legacies. The court said: "She had no such right. It was altogether lost when she elected to take the provision which the testator made for her. That was in lieu of her dower and thirds, or, in other words, of any right as dowress or distributee 'which she may or can in anywise claim or demand out of' the estate. There is not the least doubt of the meaning of the provision, and whatever may be said

about the lapsed legacies, she has no interest in them and is entitled to no part of them."

So in the case of *In re Benson*, 98 N. Y. 499, 48 Am. Rep. 646, wherein the words of exclusion were "in lieu and bar of all claims she may have upon or against the" testator's estate, it was held that the widow was barred from sharing in two lapsed legacies.

In *Lett v. Randall*, 3 Smale & G. (Eng.) 84, 65 Eng. Rep. (Reprint) 572, wherein it appeared that the testator gave to his widow an annuity for life, in satisfaction of all claims and demands which, without provision or declaration, she might have at the time of his decease in respect of any part of his estate and effects, it was held that she was not entitled to any interest in property as to which there was an intestacy on the face of the will, the words of exclusion in the will being absolute. The court distinguished the case of *Pickering v. Stamford*, 3 Ves. Jr. (Eng.) 392, on the ground that in that case the claim was made with respect of property actually disposed of by the will, which became distributable through an unforeseen accident. In *Pickering v. Stamford*, cited *supra*, wherein the words were restrictive, a charitable gift having failed, thereby causing a partial intestacy, it was held that the personal representative of the widow was entitled to take her interest in the intestate personalty in accordance with the statute.

A distinction is made in some jurisdictions with respect to after-acquired property but the courts are not in accord on this question. Thus in *Hall v. Hall*, 2 McCord Eq. (S. C.) 269, wherein it appeared that the devise was to the widow for life in lieu and bar of all claim of dower, inheritance, or any other claim on her part, it was held that property purchased by the testator after making his will was intestate property and that his widow was entitled to take her distributive share. The court said: "In determining whether the restriction contained in the will does prevent her from taking a distributive share of the after-acquired property, we are to look to the circumstances of the parties, and to the will, and to the whole will, and to any circumstances arising out of the immediate provisions of the whole will. The intention of the testator is to be carried into effect, unless he has used technical terms, which must receive their technical meaning, and which restrain the operation of such intention. . . . It is impossible, that when he made the will he could have looked forward to the acquisition of a thing, which at the time he did not want. . . . These considerations irresistibly lead me to conclude, that the testator did not intend to exclude his widow from a participation in any after-acquired property. But it is said that whatever may

have been his intention, he has, by the use of technical expression, effected that." The words are, "the provision made for my wife shall be in lieu and bar of all claim or dower, inheritance, or any other claim on her part." He then concludes his will, and may have died the day after, and the possibility of such an event is in the contemplation of all men of reflection when they make wills. If he had died the next day, or the next month, to what would this restriction have applied? It could have applied to nothing else but the property contained in the will. It follows, therefore, that it was meant to apply to that, and to that only, and there is no ground to stand on except as to the technical meaning of the word inheritance, and it certainly cannot be complained of, that he who stands upon the strict law should be judged by the strict law."

But in *Raines v. Corbin*, 24 Ga. 185, wherein the devise and bequest were stated to be "in lieu and in bar of dower, and of the usual allowance to widows for their year's support, and in lieu and in bar of all other claims upon my estate, in any manner whatever," the contrary view was taken. Construing this express conclusion in connection with property acquired after the making of the will, and which did not pass by the will, the court said: "Claims upon my estate,"—by these words the testator must have meant claims against what might be the property which he would have at his death, not claims against what was, or might be the property which he had, or might have, whilst he was living. It was impossible that she could have any claim against his estate whilst he was alive. That this was his meaning, must be too clear for doubt. The claim of the widow to these after-acquired lands, is, then, a claim 'upon' his 'estate.' But it was his intention that the legacy should be in lieu of all claims 'upon' his 'estate,' therefore it was his intention that it should be in lieu of this claim. It follows, then, that the case is one in which she must elect whether she will take the legacy or take these lands."

Implication of Intention to Exclude Participation.

EXCLUSION IMPLIED FROM FACT OF GIFT.

In some jurisdictions it is held that where a widow elects to accept the provision made for her in her husband's will she will be barred from participating in any undisposed-of property under the intestate laws, though the will is silent as to the testator's intention. *Ragsdale v. Parrish*, 74 Ind. 191; *O'Harrow v. Whitney*, 85 Ind. 140; *Collins v. Collins*, 126 Ind. 559, 25 N. E. 704, 28 N. E. 190; *Smith v. Bone*, 7 Bush (Ky.) 367; *Smith v. Perkins*,

148 Ky. 387, 146 S. W. 758; *Chenault v. Scott*, 66 S. W. 769, 23 Ky. L. Rep. 1974; *Craven v. Craven*, 17 N. C. 338; *McClung v. Sneed*, 3 Head (Tenn.) 218; *Malone v. Majors*, 8 Humph. (Tenn.) 577; *Walker v. Bobbitt*, 114 Tenn. 700, 88 S. W. 327, *overruling* *Demoss v. Demoss*, 7 Cold. (Tenn.) 268; *Hardy v. Scales*, 54 Wis. 452, 11 N. W. 590; *Chapman v. Chapman*, 128 Wis. 413, 107 N. W. 668. And see the reported case.

In *Smith v. Perkins*, *supra*, the court stated the Kentucky rule as follows: "Where a husband makes provision, by will, for his wife, the widow has one year from the date of the probate of her husband's will, to determine whether she will take under the will, or renounce the provisions made therein for her, and take under the law. If she elects to take under the will, then she can have no interest in the estate of her husband, except that which the will makes for her, unless it is plain from the language of the will, or can be fairly inferred from such language, that her husband intended that she should have her dower interest in his estate, in addition to the provision made for her in his will. It is wholly immaterial whether the will disposes of the entire estate of the husband or not, for, having made such provision for her as he desired her to have, if she is not satisfied with it, she must renounce it and take under the law. Failing to do this, she loses her right."

In *Chapman v. Chapman*, 128 Wis. 413, 107 N. W. 668, the Wisconsin rule was set out as follows: "Under the provisions of ch. 106, Laws of 1877, the widow was put to her election not only between the provisions in the will and her dower interest, but also as to her homestead rights and share in her husband's personal estate, and this statute has since remained substantially the same. It appears in the revision of 1878, and is now secs. 2171, 2172, Stats. 1898, and provides, in effect, that when provision is made for a woman in the will of her husband she shall make her election whether she will take under the will or under the law, but she shall not be entitled to both, unless it plainly appears by the will to have been so intended by the testator. . . . Under the doctrine established in that case [*Hardy v. Scales*, *supra*], and the statutes of this state as they have since existed, the election statute, secs. 2171, 2172, must be strictly if not literally followed respecting the provision made for the widow, and where she fails to renounce the provision made by the will she is barred from taking any other portion of her husband's estate, although such estate may not be fully disposed of by will."

In *O'Harrow v. Whitney*, 85 Ind. 140, wherein it appeared that the testator failed to dispose of his estate after a gift of all of

it to his wife during her widowhood, the Indiana doctrine was stated as follows: "The fact that she was required to and did make an election between the provision made for her by will and her right to one-third of the land, precludes her from making any such claim. An election presupposes a choice between inconsistent rights, and the selection of one is necessarily a relinquishment of any claim to the other. If it were not it would follow that there had been no election at all; but where an election between inconsistent rights has been made, as averred, the acceptance of one forever precludes the party from claiming the other. If the law had cast the entire estate upon the widow, the acceptance of a portion of it under a will would not preclude her from claiming the residue under the law, for the obvious reason that she has made no election between inconsistent rights. The acceptance, under a will, of that which belongs to a widow by the law, is no election at all; such acceptance is an idle ceremony that in no manner precludes her from claiming her rights under the law. . . . In this case, however, the law did not cast the entire estate upon the widow, but at most one-third, and her election to take all during widowhood, instead of one-third in fee, was an election between inconsistent rights, and necessarily amounted to a relinquishment of all claims to any portion of it under the law. This precise question was decided adversely to the appellees in *Ragsdale v. Parrish*, 74 Ind. 191, and that decision is conclusive upon this question." But in *Armstrong v. Berreman*, 13 Ind. 422, it was held that where there are no children a statute providing that the wife shall take all in such a contingency is applicable and she will not be barred by her election to take under the will. So in *Beshore v. Lythe*, 114 Ind. 8, 16 N. E. 499, wherein it appeared that the provision made for the widow consisted only of a trust estate for the widow and a child for the period of her widowhood, with the widow as trustee, it was held that she was not barred from participation in the undisposed-of property. The court said: "The will conferred upon the appellee no separate or individual estate in the property of the testator. It simply placed his property in her hands for a limited time for the joint use and benefit of herself and the appellant during that period of time. It was not obligatory upon the appellee to accept the control and use of the property on the terms proposed, but when she did so accept, the property became a trust estate in her hands during her widowhood, and she was thereby made a trustee, charged with the management and control of the property, coupled only with a beneficiary interest in its use during the continuance of the trust. When the appellee's widowhood terminated on

account of her subsequent marriage, the trust was at an end. As the will made no further disposition of the testator's property, whatever remained of his estate after the trust expired became subject to the law governing the estates of persons dying intestate, and descended accordingly. As the appellee's acceptance of the terms of the will was not inconsistent with her contingent share in the estate under the law, such acceptance did not operate as a relinquishment of all further claim to the property. When, therefore, the will had expended its force, and the purpose for which the trust was created had been accomplished, one half of the estate, remaining undisposed of, descended to the appellant, and the other half to the appellee."

In the case of *In re McAllister* (Minn.) 160 N. W. 1016, L.R.A.1917C 504, wherein it appeared that certain real estate by reason of a lapsed devise became intestate property, it was held that the widow was barred by her election from taking any further interest under the intestate statute. It was pointed out in that case, however, that under the laws of Minnesota the widow was not required to make an election and had she not done so she would have been entitled to her share in the estate under the intestate statute.

In *Wall v. Dickens*, 66 Miss. 655, 6 So. 515, it was held that under the Mississippi statutes providing that in case a husband died leaving intestate property and no children nor descendants of a child, the widow should take all as his sole heir; a widow taking under the provisions of the will giving her a life estate, but making no disposition of the remainder, would be entitled to the whole estate in remainder. The provision of the code that when a widow elected to take under her husband's will, it should be considered to be in lieu of her dower or share in the personalty, was held to apply only when there were children or their descendants surviving the husband.

In *Durham v. Rhodes*, 23 Md. 233, it was held that the Maryland statute (Act of 1789, c. 10, subch. 13) providing that every devise of land or any estate therein to the wife of the testator should be construed to be intended to be in bar of her dower unless otherwise expressed in the will, was broad enough to cover undisposed-of lands, and where the will contained no expression of intention of the testator either to bar or not to bar the widow, the statute would apply, and she could not claim a dower interest in the undisposed-of property.

In *Virginia*, under a statute providing that the widow must elect within a specified time between the provisions of her husband's will and her legal rights in his personalty and that unless she renounces the will she shall be barred of any further interest in the personalty than is therein given, it has been held that her acceptance of the provisions

made for her in the will bars her from participation in any undisposed-of personalty. *Thornton v. Winston*, 4 Leigh (Va.) 152; *Dupree v. Cary*, 6 Leigh (Va.) 36.

As in the cases where the will expressly provides that the gift is made in lieu of dower (see the preceding subdivision of this note) there is a seeming conflict among the *Connecticut* cases as to the effect of the widow's election to take under the will on her right to share in undisposed-of personal property, so in cases where the will is silent on the subject but the gift made in the will is construed to be in lieu of dower, the decisions are not uniform. Thus in the more recent cases it has been held that the widow is barred by her election to take under the will from any share in the undisposed-of personalty. *Walker v. Upson*, 74 Conn. 128, 49 Atl. 904; *Grant v. Stimpson*, 79 Conn. 617, 66 Atl. 166. But see *Bennett v. Packer*, 70 Conn. 357, 39 Atl. 739, 66 Am. St. Rep. 112, and *Evans's Appeal*, 51 Conn. 435, holding the contrary rule. In the case last cited, however, it appeared that there were no children. In *Grant v. Stimpson*, 79 Conn. 617, 66 Atl. 166, the court stated the rule and attempted to distinguish the *Connecticut* cases as follows: "It is established law in this state that a widow may, by accepting a provision in lieu of dower made for her by her husband's will, debar herself from claiming dower, and, if such provision is clearly intended to be in lieu of all claim on his estate, she will, by accepting it, debar herself from claiming under the statute of distributions her share in any intestate personal property. This is upon the equitable doctrine of election, that a person will not be permitted to hold under and against the same deed or will. In *Evans's Appeal*, 51 Conn. 435; *Nelson v. Pomeroy*, 64 Conn. 257, 29 Atl. 534; and *Bennett v. Packer*, 70 Conn. 357, 39 Atl. 739, each a case where a widow had accepted a provision made for her by will in lieu of dower, it was held that by accepting the testamentary provisions the widows were debarred of dower, but were not debarred of their shares of the intestate personal property under the statute. In each of those cases the intestacy appeared on the face of the will, and, so far as appeared, was voluntary on the part of the testator, and it was held that upon the facts in those cases the widows might justly claim that they accepted the testamentary provision in substitution of the dower right only. But in *Nelson v. Pomeroy*, 64 Conn. 257, 262, 29 Atl. 534, it was suggested in the opinion that where such a provision is made in lieu of all claim on the husband's estate, and accepted, the widow 'will be estopped from claiming any share even of intestate property.' In *Walker v. Upson*, 74 Conn. 128, 130, 49 Atl. 904, where the dispositions in favor of the widow were plainly in lieu of dower, it was held

that her acceptance of them debarred her from claiming under the statute of distributions any share in so much of the estate as was intestate, upon the ground that having chosen to accept a benefit under the will she 'must renounce every claim inconsistent with the accomplishment of the intent manifested by its provisions.' That was a case, like this, where the testator intended and attempted to dispose of his entire estate, but some of the provisions of the will were void, leaving a partial intestacy. The case of *Leake v. Watson*, 60 Conn. 498, 21 Atl. 1075, presented a similar question and was decided in the same way. Whether the widow in the present case, having accepted the provisions of the will in her favor, was debarred of a share of the intestate estate, depends, therefore, upon the construction of the will and the testator's intention as manifested thereby. It is not expressly stated in the will that the provisions in favor of the widow are in lieu of dower or other claim, but the authorities agree that this is not necessary. It is enough if from the whole will it is demonstrated by clear and manifest implication that such was the testator's intention. *Bennett v. Packer*, 70 Conn. 357, 39 Atl. 739. Reading the whole will in view of the situation of the parties, it is entirely clear that the testator intended the provision in favor of his wife to be in lieu of dower and all claim upon his estate. He intended that no part of his estate should be intestate. He gave nearly half of his property to others than his wife and heirs at law. The will mentions the chief items of which the estate consisted, and shows a clear apprehension on the part of the testator of what he had to give, and of the items which he was giving to others and to his widow and heirs at law. He gave his wife the use for life of the entire homestead and of nearly a third of his personal property, besides absolute gifts of the household effects and \$1,500 in bank, evidently intending to provide her a home and the means of supporting herself in it. But the life use of the entire homestead under the will was inconsistent with the life use of one-third of it as dower. 'Of necessity this is in lieu of dower; the use of the whole displaces the use of a part and renders the latter impossible.' *Evans's Appeal*, 51 Conn. 435, 440. Having accepted this provision and enjoyed it during her life, she was debarred of all further claim on the estate and took no vested interest (except such as the will gave her) in one-third of the personal estate named in items four, five, and ten of the will, and her estate is not entitled to any share of the same as intestate estate."

EXCLUSION NOT IMPLIED FROM FACT OF GIFT.

In some jurisdictions it is held that a widow though provided for by the will of her husband is not barred from her statutory interest in any property which may be undisposed of by the will, unless the will clearly shows an intention that she shall take nothing beyond the provision made for her in the will. *Davers v. Dewes*, 3 P. Wms. (Eng.) 40, 24 Eng. Rep. (Reprint) 961; *Dicks v. Lambert*, 4 Ves. Jr. 961, 31 Eng. Rep. (Reprint) 375; *Adams v. Adams*, 5 Metc. (Mass.) 277; *Nickerson v. Bowly*, 8 Metc. (Mass.) 424; *In re Kempton*, 23 Pick. (Mass.) 163; *State v. Holmes*, 115 Mich. 456, 73 N. W. 548; *Sparks v. Dorrell*, 151 Mo. App. 173, 131 S. W. 761; *Vernon v. Vernon*, 53 N. Y. 351; *Lefevre v. Lefevre*, 59 N. Y. 434; *Kaser v. Kaser*, 68 Ore. 153, 137 Pac. 187; *Carman's Appeal*, 2 Penny. (Pa.) 332; *Hodges's Estate*, 5 Pa. Co. Ct. 283; *Borland v. Nichols*, 12 Pa. St. 38, 51 Am. Dec. 576; *In re Reed*, 82 Pa. St. 428; *Grim's Appeal*, 109 Pa. St. 392, 1 Atl. 212; *De Silver's Estate*, 142 Pa. St. 74, 21 Atl. 882; *In re Thompson*, 229 Pa. St. 542, 79 Atl. 173; *Wood v. Mason*, 17 R. I. 99, 20 Atl. 264; *Snelgrove v. Snelgrove*, 4 Desaus. (S. C.) 274; *Philleo v. Holliday*, 24 Tex. 38.

As was said in *De Silver's Estate*, 142 Pa. St. 74, 21 Atl. 882: "The rights conferred by the intestate laws are only taken away by a will which effectually disposes of the entire estate of the decedent." In the case of *In re Thompson*, 229 Pa. St. 542, 79 Atl. 173, the court stated the doctrine as follows: "There being an intestacy as to the residue of the estate, including all the real estate, it must be distributed to those entitled under the intestate laws of the commonwealth. The election of the widow to take under the will does not deprive her of the right to a share of the residue of the estate, of which the testator died intestate. The bequest to the widow was not a fractional part of the whole estate bequeathed in lieu of dower, as in *Jackson's Appeal*, 126 Pa. St. 105, but was a bequest of an interest in part of the testator's personal property. Her election to take the legacy under the will was in lieu of her interest in the part of the estate as to which there was a testacy, but not as to the part of the estate as to which there was an intestacy. *Carman's Appeal*, 2 Penny. 332; *In re Reed*, 82 Pa. St. 428; *De Silver's Estate*, 142 Pa. St. 74."

In the case of *In re Reed*, 82 Pa. St. 428, it was held that a widow taking under the will of her husband was not barred from taking a share in his intestate estate under the statute, the court saying: "His widow was therefore put to no election between her legacy under the will and this undisposed-of estate. It was not the intent of the testator or of the law she should take her legacy in lieu of the estate thus lapsed. He thought of no lapse, and therefore made no provision in lieu of the legacy. The lapse was from the act of God, and the law of the land, which do injury to no one. If then the testator by

reason of the lapse died intestate of this portion, the intestate law must govern its distribution, and this being so what warrant is there for saying that the widow takes nothing under the intestate law? She is therefore entitled to one-third, under the will, of the entire residuary estate, and as to that part of the residue which by the lapse is left without an owner under the will, she is entitled to one-third of it under the intestate law, and the children living at the testator's death are entitled to the other two-thirds in equal proportions."

In *Philleo v. Holliday*, 24 Tex. 38, it appeared that a widow elected to take under the provisions of her husband's will. A provision in the will having been held to be invalid, the testator died intestate as to a remainder in certain personal property. It was held that she was not precluded from her distributive share under the statute as her election did not apply to property undisposed of by the will. The court said: "A case of election does not arise in the claim of the wife to the bequest of the life estate under this will. The principle of election is, that he who accepts a benefit under a will, must adopt the whole contents of the instrument, so far as it concerns him; conforming to its provisions, and renouncing every right inconsistent with it; as where the wife claims something under the will which will disappoint the will. There is nothing in the wife's claim to the life estate which is inconsistent with the will, which will prevent giving full effect to it, or which will have the effect to disappoint the will. Her claim can have no such effect. She cannot be denied her right to her share of the property, of which no valid disposition was made by the will, in consequence of having accepted the bequest."

In *State v. Holmes*, 115 Mich. 456, 73 N. W. 548, it appeared that a widow elected to take under the will a life estate in testator's real and personal property. A clause attempting to dispose of the residuum of the personal estate having been declared to be invalid, it was held that the widow took her share in the personalty as distributee under the statute disposing of intestate property.

In *Kaser v. Kaser*, 68 Ore. 153, 137 Pac. 187, wherein it appeared that a widow elected to take under the will of her husband, it was held that she did not waive her rights to take under the statute her share to a portion of the remainder as to which the husband died intestate. The court said: "The defendant, upon the death of her husband, after the allowance prescribed by law had been made, was entitled to receive one-half of the remainder of all the personal property in her own right: Section 7349, subd. 4, L. O. L. It might seem that, since by the provision of the will she accepted the use of such

entire property during her natural life, she thereby waived her right to insist upon the distribution which the statute thus gave her. Such is not the rule, however, and she must be given the share of the intestate property, though she may have elected to take under the will."

In *Havens v. Havens*, 1 Sandf. Ch. (N. Y.) 324, it appeared the testator provided for his widow in his will but said nothing about the provision being in lieu of dower. The court held that the widow was entitled to dower in the real estate not disposed of by will since there were no provisions in the will showing a contrary intention on the part of the testator.

It has been held that the widow is not barred of her right to dower in undisposed-of lands unless the intention to exclude her clearly appears from the will. In *re McDonald*, 4 Ohio Dec. 396, *disapproving Swihart v. Swihart*, 4 Ohio Cir. Dec. 624, 7 Ohio Cir. Ct. 338. In *Snelgrove v. Snelgrove*, 4 Desaus. (S. C.) 274, it was held that where a widow accepted a provision in her husband's will as to personalty, the devise of real estate being invalid because of an insufficient number of subscribing witnesses, she was entitled to one-third of the testator's real estate of which he died intestate, the court saying: "But the widow would not be barred of dower by any bequest in a will, unless positively excluded by the will, or necessarily by the inconsistency of the provisions. Suppose a testator makes a will of his personal estate, and gives his wife a moderate pecuniary legacy, and then dies intestate as to his real estate. I presume in such a case she may then claim her rights in the real estate under the Act of 1791, or her dower as she pleases, and take the legacy also."

EXCLUSION IMPLIED FROM PARTICULAR LANGUAGE.

In *Wood v. Mason*, 17 R. I. 99, 20 Atl. 264, wherein it appeared that a testator had left all his estate with a remainder over which failed because the double contingency on which it was based did not happen, it was insisted that after giving his entire estate to his wife for life it could not have been the intention of the testator that she should have any part of it absolutely. The court said: "Our statute of descent and distribution (Pub. Stat. R. I. cap. 187, § 9), provides that 'the surplus of any chattels or personal estate of a deceased person, not bequeathed,' shall be distributed, 'one-half part thereof to the widow of the deceased forever, if the intestate died without issue.' The personal estate in the hands of the complainant for distribution is clearly personal estate 'not bequeathed,' and as clearly, therefore, should

go, to the extent of one-half thereof, to the estate of said Elizabeth. . . . The intention of the testator is to govern so far only as he has communicated it by his will, either in terms or by implication; but if he has left intestate estate, the disposition of it is governed, not by his will, but by the statute, the same as if he had made no will."

In *Sparks v. Dorrell*, 151 Mo. App. 173, 131 S. W. 761, the court recognized the rule that a widow electing to take under her husband's will is not barred from participation in the undisposed-of personalty, unless it clearly appears from the will that such was the intention of the testator, but held that the facts in that case clearly showed it to be the intention of the testator that she should take only the provision made for her in the will. The court said: "It appears . . . that the total personal estate of the testator was \$30,000; that the specific legacies and bequests to parties named in the will other than the wife was \$5685; that the widow received out of the personal estate in bequests made to her by her husband, together with other allowances, \$16,598. If, in addition to this, she be allowed to take under section 2939, Revised Statutes 1899, the full one-half of his personal estate, absolutely, subject to debts, she would receive in addition to what was given her under the will a further sum of \$15,000, making a total amount of \$31,598, or the sum of \$1598 more than the entire personal estate, without deducting any sum for costs of administration. Under this condition of the estate, it is apparent that if this rule of construction of the law should be applied and enforced, the other legatees enumerated in the will (by which will the testator bequeathed other specific legacies amounting to \$5685) would receive nothing by its provisions, and to that extent the full operation of the will of the testator would be impaired and defeated. We therefore find that some of the provisions of the will are absolutely inconsistent and incompatible with the widow's claim of statutory dower, and that its provisions as to other legacies would be totally defeated if she were endowed under the statute with one-half of the personal estate and also allowed to take under the will."

So in *Bragg v. Litchfield*, 212 Mass. 148, 98 N. E. 673, it appeared that the testator gave a life interest in his residuary estate to his wife and failed to dispose of the remainder in full. It was held that it was the testator's intention as shown by the will to exclude his widow from the inheritance of a share in the intestate property, the court saying: "The only question that remains is whether the widow shared in the intestate property as a statutory heir. A legacy or devise to one who is an heir at law or a

statutory heir will not prevent him from taking as heir at law or as a statutory heir in case of a partial intestacy unless it is manifest from the whole will that there was an intention to exclude him on the happening of such an event. In the present case we think that it appears from the will taken as a whole that the testator intended the provision which he made for his widow to be a full and final provision for her. He specifically bequeathed to her all his 'furniture, glass and silverware, books, pictures and articles of use and ornament.' Then he directed that she should have the rents, income, interests, dividends and profits from the rest and the residue 'during her natural life, precisely the same as I myself might do, were I living;' and added to this 'full power to sell, exchange, invest and reinvest the same,' and in conclusion provided for the disposition of the rest and residue at her decease. The unavoidable inference from this is, we think, that he intended that she should have the entire use, benefit and improvement of the rest and residue during her life, and to that end clothed her with full power to manage the same as she should think best, but that he did not intend that she should have any part of the principal of the estate except the furniture, glass, etc., which he specifically bequeathed to her."

IMPLICATION OF EXCLUSION WITH RESPECT TO PROPERTY CONVEYED DURING COVERTURE.

Where a widow elects to take under her husband's will, it has been held that she will be barred from dower in land alienated by her husband during his lifetime unless the will clearly shows that it was the testator's intention that she should take property in addition to that provided for in his will. *Buffinton v. Fall River Nat. Bank*, 113 Mass. 246; *Barnard v. Fall River Sav. Bank*, 135 Mass. 326; *Corry v. Lamb*, 45 Ohio St. 203, 12 N. E. 660. In *Adams v. Adams*, 5 Metc. (Mass.) 277, it was held that where a widow had been amply provided for in her husband's will, a clause reading "the other part of my real estate is to be disposed of as the law directs" gave her no dower in the real estate covered by the clause as the will showed no intention on the part of the testator to give her dower therein.

But the contrary view has been taken as to the widow's right to dower in land alienated by the husband during coverture. Thus in *Braxton v. Freeman*, 6 Rich. L. (S. C.) 35, 57 Am. Dec. 775, it was held that a devise to a wife for life of all his property did not bar her from claiming dower in land aliened by the husband during coverture, the court saying that though she was barred by her election from claiming dower in the lands

contained in the gift, it did not affect her right of dower in lands undisposed of by the will. And in *Hall v. Smith*, 103 Mo. 289, 15 S. W. 621, it was held that a widow's election to take under the will barred dower in the lands of which the husband died seized but that in order to bar dower in lands conveyed during coverture an intention to that effect must appear on the face of the will. In *Westbrook v. Vanderburgh*, 36 Mich. 30, it appeared that a widow elected to take under the will. It was held she was not deprived of dower in land conveyed by the husband during coverture and in which she did not join.

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PHELPS

v.

BYRNE.

South Dakota Supreme Court—November 19, 1915.

36 S. Dak. 369; 154 N. W. 825.

Veterans' Preference Acts — Discretion of Appointing Power.

The action of the governor in making appointments under Laws 1913, c. 109, creating the board of public health and medical examiners, is not ministerial, but involves the exercise of discretion, notwithstanding Pol. Code, §§ 3242, 3243, providing that honorably discharged soldiers and sailors shall be preferred for appointment to public office and making a violation thereof a misdemeanor.

[See note at end of this case.]

Mandamus — Enforcement of Preferential Right to Appointment.

Mandamus is not the proper remedy to enforce the appointment by the governor of an honorably discharged soldier to a position on the board of public health and medical examiners, under Pol. Code, § 3242, providing that in every public department and upon all public works, honorably discharged Union soldiers shall be preferred for appointment, since a disregard of such statute does not violate the legal rights of any particular person so as to enable him to maintain civil proceedings in his own behalf.

Original application for mandamus. Oscar W. Phelps, relator, and Frank M. Byrne, respondent. The facts are stated in the opinion. WRIT DENIED.

W. A. Lynch for relator.

Byron S. Payne for respondent.

[370] WHITING, J.—Chapter 109, Laws 1913, creates a board of public health and

medical examiners, and defines the powers and duties of such board. Under its provisions the Governor is empowered and required to appoint the members of such board and to designate one of such appointees as the superintendent of the board. Three vacancies occurred on July 1, 1915, through the expiration [371] of the terms of certain members of such board, one member whose term expired being the superintendent. The act makes no provision for the filing of an application with the Governor by one seeking appointment as a member of such board. It provides that the appointees shall be "skilled and capable physicians" resident in this state, and shall have practiced within this state not less than five years preceding their appointment. Sections 3242 and 3243, P. C. provide:

"Sec. 3242. In every public department and upon all public works of the state of South Dakota, and of the cities, towns and villages thereof, honorably discharged Union soldiers and sailors of the late war shall be preferred for appointment; age, loss of limb or other physical impairment which does not in fact incapacitate, shall not be deemed to disqualify them, provided they possess the requisite qualifications and business capacity necessary to discharge the duties of the position involved.

"Sec. 3243. All officials or other appointing power in the public service who shall neglect or refuse to comply with the provisions of the preceding section shall be deemed guilty of a misdemeanor, and shall on conviction thereof be punished by a fine not exceeding one thousand dollars or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment at the discretion of the court."

The relator presents a petition wherein he alleges, among other things, that he is a citizen of this state; that several months prior to July 1, 1915, he filed with the Governor an application seeking appointment to the office of superintendent of such above-mentioned board when the vacancy should occur therein through the termination of the superintendent's term; that such application disclosed that he was an honorably discharged Union soldier of the War of the Rebellion, a holder of a certificate to practice medicine within this state, a resident physician in good standing within this state for more than ten years, in no manner incapacitated to fill the position sought, and that a vacancy would occur in the position of superintendent of such board on July 1, 1915; that he was the only honorably discharged Union soldier of the late war who was an applicant for such office; that it became and was the duty of the Governor to appoint him to the office sought; that, disregarding such duty, the Governor had appointed another [372] party, not an

honorably discharged Union soldier of the late war to such position; that such appointment was null and void; that the Governor still refuses to appoint relator to such position. Upon the facts thus alleged, he seeks a writ of mandamus commanding the Governor of this state to appoint him to the position sought. Relator's counsel concedes:

"That this court cannot, by mandamus, or by any other process, control the defendant in the exercise of his political functions conferred on him by the Constitution; and that this court cannot control him in the performance of any duty when judgment and discretion is to be exercised."

He, however, asserts:

"That this court can, by this process, control the Governor in the performance of a purely ministerial duty when neither judgment nor discretion is to be exercised."

Although respondent has not questioned the correctness of this assertion, we find it unnecessary to determine or express any views upon the much disputed question of whether a state court can ever control the actions of the Governor of such state, even though the act sought to be controlled is but ministerial in its nature.

We decide nothing but: (1) That, in the exercise of the power to make an appointment to the office in question, the Governor is not performing a mere ministerial act; (2) that mandamus is not the proper remedy to procure the result sought by relator.

Counsel for relator says:

"This law fixes the qualifications of these officers. They must be resident physicians of the state in good standing, and must have resided and practiced five years in this state next preceding their appointment. These are the sole and only qualifications. In addition to these qualifications, however, any physician now engaged in the practice is required to be licensed to practice, and all medical practitioners are subject to have their license revoked for drunkenness, for immoral practice, or unprofessional conduct. This license is a guaranty to the public that every medical practitioner is a skilled and capable physician and in good standing in his profession. In addition to this, it is a guaranty to the Governor that all physicians practicing in the state are skilled and capable physicians and of good standing. The only facts the Governor is required to know are the facts which the law prescribes for qualifications [373] to membership on this board. The license is conclusive of their standing and of their skill. Any licensed physician in this state who had resided and practiced in this state for five years, next preceding the term of appointment prescribed in the law, is eligible to appointment on this board. . . .

"The plaintiff is an honorably discharged Union soldier. This fact makes it incumbent

on the Governor to appoint him a member of this board. He has no discretion, and is not required to use judgment. Here are two men, both physicians, holding license to practice, both residents of this state for the time required by law, one an honorably discharged Union soldier, and the other not. The law says: 'Appoint the soldier,' The Governor says: 'What about my discretion and my judgment?' The law says: 'You have no discretion, nor do you have any right to exercise any judgment.' . . .

"The offices in question are not positions that require business talent. This is a professional board, and its membership are required to be members of the medical profession. The functions of the office are entirely outside of the domain of business."

Counsel has cited no authority to support his position. We apprehend that, if any were to be found, he would have referred to same. If the Governor is given no discretion, then certainly the words "skilled and capable," used in designating what kind of physicians should be appointed, are meaningless, in view of the fact that the law had already prescribed that the members of the board should be "resident physicians of the state, in good standing, and shall have resided and practiced within this state not less than five years." Laws 1913, c. 109, § 1. Private individuals, when seeking professional service, are given the privilege of exercising discretion as to whom they shall select for such service, and this even as among those who have received the state's license to practice the particular profession. It is certainly startling if relator is correct in his contention, and the Governor of this state, and through him the people of this state, are deprived of the right to select for an important official position that person deemed most skilled and capable therefor, and deprived of such right simply because some applicant who holds a certificate making him eligible for such position also chances to be an honorably discharged soldier. It is a matter of common knowledge that the [374] members of no one of the learned professions are all possessed of equal skill and capability; the members of any profession differ in natural ability, as well as in skill acquired through study and experience. Can it be possible that, if vacancies should occur in the officers of secretary of state and Attorney General, the Governor of the state would be free to determine the relative qualifications and business capacities of all those who might aspire to the one office, but, when selecting a person to fill the other office, if some applicant should present not only a license as an attorney at law, but also an honorable discharge as an old soldier, would be foreclosed from comparing such applicant's legal qualifications with those of other applicants, and would be obliged to appoint him to

the office of Attorney General of this state, when, perchance, he would not be willing to intrust in his care his own legal work? If the Governor should be called upon to fill a vacancy upon either the circuit or Supreme Court bench, would the mere fact that some honorably discharged old soldier holding a license as an attorney at law was an applicant for the position to be filled prevent the Governor from appointing some one else to such position, and this regardless of the legal skill and learning of such old soldier, if the Governor believed such old soldier, with all his skill and learning, yet lacked those qualifications essential to a jurist? Human experience teaches that peculiar qualifications are requisite in order that persons may be fitted for particular fields of action. A certificate authorizing one to practice some profession, while it may render its holder eligible to hold some particular office, is no evidence that he possesses any peculiar qualification that may be essential to the proper discharge of the duties of such office. The board of health of this state has general supervision of all the health officers and boards throughout the state; it must investigate sanitary conditions, learn the causes and sources of diseases and epidemics, observe the effect upon human health of localities and employments, and gather and diffuse proper information upon all subjects to which its duties relate; it gathers, collects, and publishes medical and vital statistics; it advises all state officials and boards in hygiene and medical matters, especially those involved in the proper location, construction, sewage, and administration of prisons, hospitals, asylums, and other public institutions; it must adopt, alter, and enforce regulations for the preservation of [375] public health; it must hold examinations of those desiring to engage in the practice of medicine and license those found fitted to become practitioners; it must, in proper cases, revoke the licenses that have been issued by it. The above are some of the duties imposed upon this board by the law creating it. The most important member of this board, the one whose time is supposed to be fully given to the work of this board and upon whom the greatest responsibility rests, is the superintendent thereof. It needs no special knowledge for any one to understand that such a board will either be of inestimable value to the people of this state, or, on the other hand, of practically no value to them, dependent upon the peculiar qualifications of its members, and more especially dependent upon the peculiar qualifications of its superintendent. The state of New York has a statute almost identical in its provisions with sections 3242 and 3243, supra. In *People v. Saratoga Springs*, 54 Hun 16, 7 N. Y. S. 125, the court said:

"The act under which the relator claims the office in question (chapter 464, Laws 1887)

provides that 'honorably discharged Union soldiers shall be preferred for appointment and employment.' It means, as I construe it, that where two or more apply for an office, one of whom is a discharged Union soldier, and all are equally qualified, the soldier shall be preferred; but not where the soldier is not equally qualified for the office as one of the others. There are degrees of fitness for such an office as the one in question. One candidate might barely be able to perform its duties in a reasonably proper manner, and another might have superior qualifications, and be able to do the work much better. In such a case, the appointing power, under the law, would not be bound to appoint the former, although a discharged Union soldier."

And again in *People v. Alma-House Com'rs* 65 Hun 169, 20 N. Y. S. 21, the court, speaking of the same statute, says:

"It was the intention of this statute to give to honorably discharged Union soldiers and sailors a preference for appointment and employment in every public department and upon all public works of the state of New York and of the cities, towns, and villages thereof. . . . Whenever they apply, without disqualification by reason of age, loss of limb, or other physical impairment which does not, in fact, incapacitate, provided they possess the [376] business capacity necessary to discharge the duties of the position involved; but the proviso governs the operation of the whole statute. If the soldier or sailor possesses the business capacity necessary to discharge the duties of the position involved, he has the preference. If he is destitute of such capacity, he is not within the provisions of the law, and can derive no benefit therefrom. Capability is the prerequisite to the reception of the preference. It was not the design of the statute to debase the public service by requiring the appointment of incompetent men to discharge the duties of public positions, or to elevate heroism above competency, independent of other considerations."

The Supreme Court of Minnesota has so fully and clearly discussed the question of whether mandamus is a proper remedy under facts such as are alleged herein that we can do no better than to dispose of this feature of the case by quoting freely from what that court said in *State v. Copeland*, 74 Minn. 371, 77 N. W. 221. The statute before them was almost identical in language with section 3242, P. C. supra. That court said:

"The appointing power is in the board, and not in the courts; and, even if the latter could compel the former to remove the present incumbent, they could not compel the board to appoint the relator. The board would still have discretion as to what soldier or sailor they would appoint. In refusing to appoint the relator, they violate no legal right of his, but, at most, merely violate the

246 Fed. 24.

general mandates of the statute. Hence, if a writ of mandamus was to issue, it would be merely to compel the board to execute the mandates of the law, not in favor of the relator in particular, but in favor of all persons within its provisions. This would be merely to duplicate the act of the Legislature in enacting the statute. Such is not the office of a writ of mandamus. Again, the determination of the qualification of a person for employment in the public service involves the exercise of judgment and discretion, which is vested in the appointing officers or body, and not in the courts. But, if a person can maintain mandamus to compel his own appointment, this would necessarily require the courts to hear evidence and pass upon the fitness of the relator, and thus would devolve the appointing power upon the courts—a result which finds no support in the statute. All this, and much more which might be suggested, satisfies us that disobedience or disregard [377] of the directions of this statute does not violate the legal rights of any particular person, so as to enable him to maintain any civil proceedings in his own behalf. The wrong or offense is merely a public one, and the only remedy, if any, is by removal of the appointing officers for malfeasance in office, or, this failing, by appeal to the people. We can conceive of a statute constituting a full body of civil service rules, which, when applied to the facts, would identify the particular person entitled to an appointment so as to give him a legal right to it which could be enforced by him. But this is not such a law. It may be said that our construction of this statute renders it practically nugatory. This will undoubtedly be so when appointing officers or bodies are disposed to disregard the law, but this is the result either of the defective character of the statute, or of the inherent nature of the subject of which it treats, or of both."

The writ prayed for is denied.

NOTE.

The reported case holds that in making appointments to the state board of health, the members of which are required to be physicians, the governor is not required by the veterans' preference law to appoint a veteran who is entitled to practice medicine. The preference secured by that act, the court holds, is applicable only as between a veteran and a nonveteran of substantially equal qualifications, and the fact that both candidates are licensed to practice a profession does not preclude the governor from an inquiry as to which of them is the more skilled and capable. The cases dealing with the validity and construction of veterans' preference laws are re-

viewed in the notes to *Goodrich v. Mitchell*, 1 Ann. Cas. 288; *Shaw v. Marshalltown*, 9 Ann. Cas. 1039; *Phillips v. DeLasCasas*, Ann. Cas. 1914D 724; and *Brown v. Russell*, 55 Am. St. Rep. 357.

MASSSES PUBLISHING COMPANY

v.

PATTEN.

United States Circuit Court of Appeals, Second Circuit—November 2, 1917.

246 Fed. 24.

War — Espionage Act — Nonmailable Matter — Scope of Enactment.

Espionage Act June 15, 1917, tit. 12, § 1 (Fed. St. Ann. Pamph. Supp. No. 11, p. 16), declaring every letter, newspaper, or other publication, matter, or thing in violation of any of the provisions of that act to be nonmailable, and section 2, declaring nonmailable every letter, newspaper, etc., containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, excludes from the mails any letters or literature in furtherance of any acts prohibited under the other titles of the statute.

Validity of Act — War Power.

Espionage Act June 15, 1917, tit. 12, §§ 1, 2 (Fed. St. Ann. Pamph. Supp. No. 11, p. 16), declaring certain matter nonmailable, do not violate Const. Amend. 1 (9 Fed. St. Ann. 244), declaring that Congress shall make no law abridging the freedom of speech or of the press, as the statute imposes no restraint on the matter prior to publication, and no restraint afterwards except as it restricts circulation through the mails, and while liberty of circulating may be essential to freedom of the press, liberty of circulating through the mails is not essential, so long as transportation in any other way is not forbidden.

[See note at end of this case.]

Same.

Espionage Act, tit. 12, §§ 1, 2 (Fed. St. Ann. Pamph. Supp. No. 11, p. 16), declaring certain matter nonmailable, do not violate Const. Amend. 5 (9 Fed. St. Ann. 288), providing that no person shall be deprived of life, liberty, or property without due process of law, though by the exclusion of complainant's magazine from the mails its business was practically ruined.

[See note at end of this case.]

Constitutional Law — Judicial Review of Statutes — Wisdom of Statute.

It is the function of the legislative department to enact law, and of the judicial department to construe and apply it; and the courts

cannot pass upon the wisdom or justice of statutes, but are simply to ascertain the intent of the lawmakers as expressed therein and to give effect thereto.

War — Espionage Act — Construction — Nonmailable Matter.

The Espionage Act (Fed. St. Ann. Pamph. Supp. No. 11, p. 16) is not intended to repress legitimate criticism of Congress or of the officers of the government, or to prevent any proper discussion looking to the repeal of any legislation which may have been enacted, but only to prevent the dissemination and distribution through the mails of publications intended to embarrass and defeat the government in the successful prosecution of the war.

Same.

The postmaster general is to determine whether a particular publication is nonmailable under the Espionage Act (Fed. St. Ann. Pamph. Supp. No. 11, p. 16), and in so determining is required to use judgment and discretion; and his decision is conclusive on the courts, unless clearly wrong.

Same.

Certain articles and cartoons, published by complainant in its magazine concerning the war, conscription, etc., are held to warrant the postmaster general's determination that it was nonmailable under the Espionage Act, as calculated and intended to obstruct recruiting or enlistment, in violation of title 1, § 3 (Fed. St. Ann. Pamph. Supp. No. 11, p. 10), but not unmailable, as advocating or urging treason, insurrection, or forcible resistance to any law of the United States, in violation of title 12, § 2 (Fed. St. Ann. Pamph. Supp. No. 11, p. 16).

Same.

A cartoon published by complainant in its magazine, representing the Liberty Bell in a broken form, whatever its meaning, does not by itself afford any ground for exclusion of the magazine from the mails.

Burden of Showing Mailable Character of Publication.

Complainant, suing to enjoin the postmaster from excluding its magazine from the mail, pursuant to an order of the postmaster general holding it nonmailable, has the burden of overcoming the presumption that the postmaster general's conclusion was right, or of showing that he had exceeded his power, or exercised it wantonly or maliciously; and this should be done by a preponderance of evidence.

What Matter Is Nonmailable.

The Espionage Act (Fed. St. Ann. Pamph. Supp. No. 11, p. 16) excludes from the mails any publication, the natural and reasonable effect of which is to encourage resistance to a law of the United States, and the words of which are used in an endeavor to persuade to resistance, though the duty to resist is not mentioned directly, and the interest of the persons addressed in resistance is not directly suggested.

Appeal from United States District Court, Southern District of New York.

Action by Masses Publishing Company, plaintiff, against Thomas G. Patten, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **REVERSED.**

Francis G. Caffey for appellant.
Gilbert E. Roe for appellee.

Sitting: **WARD** and **ROGERS**, Circuit Judges,
and **MAYER**, District Judge.

[26] **ROGERS, J.**—The complainant seeks an injunction restraining the defendant, as postmaster of the city of New York, from treating the August issue of a magazine known as *The Masses* as nonmailable matter under the act of Congress of June 15, 1917, commonly known as the "Espionage Act," and commanding him to transmit the said magazine through the mail in the usual way.

Upon the filing of the complaint an order was entered requiring the defendant to show cause why the injunction should not issue. At the hearing affidavits were presented on behalf of the complainant to show that, if the magazines should be excluded from the mails, the business of the complainant would be practically ruined. An affidavit of the Postmaster General of the United States was presented on behalf of the defendant.

Under the provisions of Espionage Act, title 12, it became the official duty of the Postmaster General to determine what matter is nonmailable, and that official had instructed the postmaster of New York that *The Masses* was nonmailable. It appears that before this order was issued the solicitor for the department, the Attorney General of the United States, and the Judge Advocate General of the army, the latter being a lawyer and charged with the administration of the Draft Act of May 18, 1917 (Fed. Stat. Ann. Pamph. Supp. No. 11, p. 85), were consulted, and that they each advised that the circulation of the issue in question would constitute an offense under the Espionage Act. And the Judge Advocate General informed the department that it was his opinion that the necessary effect of the issue of this August number would be to cause insubordination, disloyalty, mutiny, and refusal of duty in the naval and military forces of the United States, and that it would obstruct the recruiting and enlistment service of the United States. The learned District Judge, in a carefully prepared opinion, reached the conclusion that the August issue of the publication in question did not contain any illegal matter and that the injunction should issue.

That part of the Espionage Act which is involved here is title 12, which relates to the use of mails, and it reads as follows:

"Sec. 1. Every letter, writing, circular, postal card, picture, print, engraving, photo-

graph, newspaper, pamphlet, book or other publication, matter or thing, of any kind, in violation of any of the provisions of this act is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier: Provided, that nothing in this act shall be so construed as to authorize any person other than an employee of the Dead Letter Office, duly authorized thereto, or other person upon a search warrant authorized by law, to open any letter not addressed to himself.

"Sec. 2. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared to be nonmailable." (Fed. St. Ann. Pamph. Supp. No. 11, p. 16.)

Section 3 of title 12 relates to the punishment to be imposed upon any person who uses or attempts to use the mails for the transmission [27] of any matter declared to be nonmailable, and is not involved in this proceeding. But, as section 1 of title 12 makes nonmailable any matter which is in violation of any of the provisions of the act, it will be necessary to consider section 3 of title 1, which reads as follows:

"Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years or both." (Fed. St. Ann. Pamph. Supp. No. 11, p. 10.)

It is the clear intent of title 12 to close the United States mails to any letters or literature in furtherance of any acts prohibited under the other titles of the statute. It is said that the act violates the First Amendment to the Constitution, which declares that "Congress shall make no law . . . abridging the freedom of speech, or of the press." (9 Fed. St. Ann. 244.) It is also said that the act violates the Fifth Amendment, which provided that "no person shall be . . . deprived of life, liberty, or property, without

In his Commentaries on the Laws of England process of law. (9 Fed. St. Ann. 288.) and Mr. Justice Blackstone in speaking of

the liberty of the press declares that it is "essential to the nature of a free state." It consists, he says, "in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity." Volume 4, p. 151. And Mr. Justice Story, in his Commentaries on the Constitution, states that "every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press." Volume 2, sec. 1884 (4th Ed.).

In *Patterson v. Colorado*, 205 U. S. 454, 462, 27 S. Ct. 556, 558, 51 U. S. (L. ed.) 879, 10 Ann. Cas. 689 (1907), the court, speaking through Mr. Justice Holmes, declares that the main purpose of the constitutional provision as to free press is "to prevent all such previous 'restraints' upon publications as had been practiced by other governments," and they do "not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." Now clearly the Espionage Act imposes no restraint prior to publication, and no restraint afterwards, except as it restricts circulation through the mails. Liberty of circulating may be essential to freedom of the press, but liberty of circulating through the mails is not, so long as its transportation in any other way as merchandise is not forbidden.

The Act of Congress now called in question does not undertake to say that certain matter shall not be published nor that it shall not be transmitted in interstate commerce. It simply declares that such matter shall not be carried in the United States mails. In *Ex p. Jackson*, 96 U. S. 727, 24 U. S. (L. ed.) 877 (1877), the Supreme Court held that [28] the power vested in Congress to establish post offices and post roads embraces the regulation of the entire postal system of the country, and that under it Congress can designate what may be carried in the mail and what excluded. In that case Mr. Justice Field, speaking for the court, said:

"In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals."

A conviction for depositing in the mail a lottery circular contrary to an act of Congress was sustained. And that decision was adhered to in the case of *In re Rapier*, 143 U. S. 110, 134, 12 S. Ct. 374, 36 U. S. (L. ed.)

93 (1892). In the latter case Mr. Chief Justice Fuller said:

"The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if the government is to be maintained at all."

In *Public Clearing House v. Coyne*, 194 U. S. 497, 24 S. Ct. 789, 48 U. S. (L. ed.) 1092 (1904), the court had before it the constitutionality of a law which authorized the Postmaster General "upon evidence satisfactory to him," and which did not provide for any trial, hearing, or inquiry of any kind, to shut out of the mails the letters of any person or company conducting a lottery or any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses. Mr. Justice Brown, writing for the court, said:

"In establishing such [postal] system Congress may restrict its use to letters, and deny it to periodicals; . . . it may admit books to the mails and refuse to admit merchandise, or it may include all of these and fail to embrace within its regulations telegrams or large parcels of merchandise, although in most civilized countries of Europe these are also made a part of the postal service. It may also refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, as dangerous to its employees or injurious to other mail matter carried in the same packages. The postal regulations of this country, issued in pursuance of act of Congress, contain a long list of prohibited articles dangerous in their nature, or to other articles with which they may come in contact, such, for instance, as liquids, poisons, explosives and inflammable articles, fatty substances, or live or dead animals, and substances which exhale a bad odor. It has never been supposed that the exclusion of these articles denied to their owners any of their constitutional rights. While it may be assumed, for the purpose of this case, that Congress would have no right to extend to one the benefit of its postal service, and deny it to another person in the same class and standing in the same relation to the government, it does not follow that under its power to classify mailable matter, applying differ-

ent rates of postage to different articles, and prohibiting some altogether it may not also classify the recipients of such matter, and forbid the delivery of letters to such persons or corporations as in its judgment are making use of the mails for the purpose of fraud or deception or the dissemination among its citizens of information of a character calculated to debauch the public [29] morality. For more than 30 years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked. The same provision was by the same act extended to letters and circulars connected with lotteries and gift enterprises, the constitutionality of which was upheld by this court in the case of *In re Rapier*, 143 U. S. 110 [12 S. Ct. 374, 36 U. S. (L. ed.) 93]."

The court held that the fact that the Postmaster General could act and that no judicial hearing was provided for was not a fatal objection to the act. It declared:

"That due process of law does not necessarily require the interference of the judicial power as laid down in many cases and by many eminent writers upon the subject of constitutional limitations. . . . If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the government."

The opinion of Judge Cooley in *Weimer v. Bunbury*, 30 Mich. 201, is cited approvingly, in which he said:

"There is nothing in these words ('due process of law'), however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress."

This court holds, therefore, that the Espionage Act, in so far as it excludes from the mails certain matter declared to be unmailable, is constitutional.

The provisions contained in title 12 of the Espionage Act respecting the use of the mails do not abridge the freedom of the press, nor deprive the complainant of its property, within the meaning of the First and Fifth Amendments. Congress has not attempted to prevent the transportation of this publication as

merchandise by the railways or by the express companies, and it has not authorized the confiscation of it, neither has it in any way prohibited publication.

In 1798 Congress enacted what is known as the Sedition Law. Act July 14, 1798, c. 73, 1 Stat. 596. It provided, among other things, for the punishment of any person who published any false and malicious thing against the government of the United States, or any matter intended to excite the people to oppose any law or act of the President in pursuance of law, or to resist, or oppose or defeat, any law. The act provoked great resentment throughout the country, and where it expired by its own limitation in 1801 it was not renewed. From that time until the present no similar legislation, so far as we are aware, has been enacted.

The Espionage Act now under consideration bears slight resemblance to the Sedition Law of 1798. The act as originally drafted provided that every publication "containing any matter of a seditious, anarchistic or treasonable character" should be nonmailable. But when the act was under discussion in the Senate the words above quoted were stricken out; it having been objected that they were too indefinite [30] and left too much room for construction. In *Cooley's Constitutional Limitations*, page 429, that distinguished authority says:

"Repression of full and free discussion is dangerous in any government resting upon the will of the people. The people cannot fail to believe that they are deprived of rights, and will be certain to become discontented, when their discussion of public measures is sought to be circumscribed by the judgment of others upon their temperance or fairness. They must be left at liberty to speak with the freedom which the magnitude of the supposed wrongs appears in their minds to demand; and if they exceed all proper bounds of moderation, the consolation must be, that the evil likely to spring from the violent discussion will probably be less, and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent the discussion."

In *May's Constitutional History*, c. 10, it is said that:

"When the press errs, it is by the press itself that its errors are left to be corrected. Repression has ceased to be the policy of rulers, and statesmen have at length fully realized the wise maxim of Lord Bacon, that 'the punishment of wits enhances their authority, and a forbidden writing is thought to be a certain spark of truth that flies up in the face of them that seek to tread it out.'"

The policy of the government of the United States has conformed to the doctrine above laid down. But the fact that the policy of

the government of the United States has been adverse to limiting freedom of discussion affords little assistance in construing the particular act now under consideration. In *Hadden v. Barney*, 5 Wall. 107, 18 U. S. (L. ed.) 518 (1866), the court speaking through Mr. Justice Field declared that:

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

And in *Dewey v. U. S.* 178 U. S. 510, 521, 20 S. Ct. 981, 985, 44 U. S. (L. ed.) 1170, the court, speaking through Mr. Justice Harlan, declared that:

"This court has nothing to do with questions of mere policy that may be supposed to underlie the action of Congress. . . . Our province is to declare what the law is."

And in *White v. U. S.* 191 U. S. 545, 551, 24 S. Ct. 171, 172, 48 U. S. (L. ed.) 295 (1903), Mr. Justice Day declared:

"It is equally true that it is the business of courts to decide what the law is, and not by consideration of surmises as to the policy of the government have the effect to adjudge that to be law which has not been so enacted by the Legislature."

Moreover, courts have nothing to do with the wisdom or unwisdom of a legislative act. It is the function of the legislative department to enact law, and of the judicial department to construe and apply it. The judges cannot pass upon the wisdom or the justice of the statute, but are simply to ascertain the intent of the lawmakers as expressed in the enactment, and to give effect thereto. *U. S. v. Detroit First Nat. Bank*, 234 U. S. 260, 34 S. Ct. 846, 58 U. S. (L. ed.) [31] 1298. For reasons satisfactory to the law-making body the Espionage Act has been adopted, and being valid is the law of the land.

It is not intended by what has just been said to imply any doubt as to the wisdom of Congress in the enactment of the Espionage Act. The purpose of the act as we understand it was not to repress legitimate criticism of Congress or of the officers of the government, or to prevent any proper discussion looking to the repeal of any legislation which may have been enacted. The United States being at war in defense of American rights, Congress intended by this act, to prevent any use being made of the mails for the dissemination and distribution of publications intended to embarrass and defeat the government in its effort to prosecute the war to a successful termination. The statute is one of great importance and under it the Postmaster General, whose duty it is to execute all laws

relating to the postal service, had to determine whether the particular publication in question was mailable or unmailable matter as defined in the act.

The Espionage Act being constitutional, the question which arises, then, is whether the action of the Postmaster General in excluding The Masses from the mails warranted the District Judge in issuing an injunction commanding him to allow it to be transmitted by mail. The Postmaster General is the head of the Post Office Department. The obligations of his oath of office oblige him to see that the provisions of the Espionage Act are carried into effect, so far as they relate to the use of the mail, and that matter declared by the act to be nonmailable shall be excluded from the mails. The performance of that duty involves the exercise of his judgment and discretion. To what extent can the courts control him by injunction in the performance of this duty?

In *Decatur v. Paulding*, 14 Pet. 497, 599 Appendix 10 U. S. (L. ed.) 559, 609 (1840), a mandamus to compel the Secretary of the Navy to comply with a resolution passed by Congress granting a pension was refused. The Secretary, acting under the advice of the Attorney General, decided that Mrs. Decatur was not entitled to claim the pension under the resolution as she had applied for and received her pension under the general law, and she could not have both. The opinions was by Chief Justice Taney, who said:

"The duty required by the resolution was to be performed by him (the Secretary of the Navy) as the head of the executive department of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress, or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise [his] judgment and discretion. . . . The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it, by mandamus, act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties."

In *U. S. v. Black*, 128 U. S. 40, 9 S. Ct. 12, 32 U. S. (L. ed.) 354 (1888), the court held that a mandamus to the Commissioner of Pensions was properly refused. The Commissioner had decided adversely an application for an increase of a pension under [32] 21 Stat. 281, c. 236. The opinion was by Mr. Justice Bradley, who said:

"The court will not interfere by mandamus with the executive officers of the government

in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is, as service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them."

In *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 S. Ct. 33, 47 U. S. (L. ed.) 90 (1902), the Supreme Court reversed the court below, which had dismissed a bill asking for an injunction to restrain a postmaster from carrying out an order of the Postmaster General withholding mail on the ground that the person to whom it was addressed was engaged in a scheme for obtaining money through the mails by means of fraudulent pretenses. The Supreme Court, in reversing the judgment, did so with instructions to issue the temporary injunction as applied for. The case was decided upon a demurrer, so that the allegations in the bill of complaint were taken as true, and the bill averred facts showing that the complainant's business was legitimate and not fraudulent. If the business was not fraudulent, the Postmaster General had no authority under the act to withhold the mail.

In *U. S. v. Hitchcock*, 190 U. S. 316, 23 S. Ct. 698, 47 U. S. (L. ed.) 1074 (1903), it was held and that neither an injunction nor a mandamus would lie against an officer of the Land Department to control him in discharging an official duty which required the exercise of his judgment and discretion. Mr. Justice Peckham, writing for the court, said:

"Whether he [the Secretary of the Interior] decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. . . . The responsibility, as well as the power, rests with the Secretary, uncontrolled by the courts."

In *Bates, etc. Co. v. Payne*, 194 U. S. 106, 24 S. Ct. 595, 48 U. S. (L. ed.) 894 (1904), the bill asked for an injunction to compel the Postmaster General to transmit through the mails, as matter of the second class, a publication alleged to be a periodical and to enjoin him from enforcing an order made by him denying it entry as such. The bill was dismissed and the injunction denied. Mr. Justice Brown, writing for the court, said that:

"Where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions

of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong."

Again he says:

"The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and [33] discretion of the head of a department, his decision thereon is conclusive, and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

And he concludes:

"While, as already observed, the question (that decided by the Postmaster General) is one of doubt, we think the decision of the Postmaster General, who is vested by Congress with the power to exercise his judgment and discretion in the matter, should be accepted as final."

In *Public Clearing House*, supra, the court held that it was within the power of Congress to intrust the Postmaster General with the power of seizing and detaining letters upon evidence satisfactory to himself and that his action would not be reviewed by the court in doubtful cases. The act authorized the Postmaster General, upon evidence satisfactory to him that any person was conducting a scheme or device for obtaining money or property through the mails by fraudulent pretenses, to instruct postmasters at any postoffice at which registered letters arrived directed to any such person to return the same to the postmaster at the office at which they were originally mailed with the word "Fraudulent" stamped upon the outside.

In *Smith v. Hitchcock*, 226 U. S. 53, 33 S. Ct. 6, 57 U. S. (L. ed.) 119 (1912), a bill was filed to restrain the Postmaster General from revoking orders according second-class mail privileges to the plaintiffs. The ground of the bill was that the privileges had been annulled without granting the hearing required by the act (31 Stat. 1099, 1107), and that the publications were periodical publications within the meaning of the act (20 Stat. 355, 358, 359). The Postmaster General had decided that the publication was not a "periodical" and could not be carried as second-class matter, but would have to go as third-class and pay the higher rate. Mr. Justice Holmes, speaking for the court said:

"Thus a question of law is raised, although, as suggested in *Bates*, etc. Co. v. *Payne*, 194 U. S. 106, 108, 24 S. Ct. 595, 48 U. S. (L. ed.) 894, we should not interfere with the decision of the Postmaster General, unless clearly of opinion that it was wrong. . . . We have no such clear opinion."

See also *Lewis Pub. Co. v. Morgan*, 229 U. S. 288, 33 S. Ct. 867, 57 U. S. (L. ed.) 1190; *Parish v. MacVeagh*, 214 U. S. 124, 131, 29 S. Ct. 556, 53 U. S. (L. ed.) 936; *Johnson v. Drew*, 171 U. S. 93, 18 S. Ct. 800, 43 U. S. (L. ed.) 88; *Burfenning v. Chicago*, etc. R. Co. 163 U. S. 321, 323, 16 S. Ct. 1018, 41 U. S. (L. ed.) 175.

This court holds, therefore, that if the Postmaster General has been authorized and directed by Congress not to transmit certain matter by mail, and is to determine whether a particular publication is nonmailable under the law, he is required to use judgment and discretion in so determining, and his decision must be regarded as conclusive by the courts, unless it appears that it is clearly wrong.

We come, therefore, to consider the authority vested by Congress in the Postmaster General to determine whether he acted within his jurisdiction when he excluded the complainant's magazine from the mails. The Espionage Act is entitled:

[34] "An act to punish acts of interference with foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes."

Title 12 of the act is the only one relating to the use of the mails. And section 1 of that title expressly declares that:

"Every . . . publication . . . of any kind, in violation of any of the provisions of this act is hereby declared to be nonmailable matter and shall not be conveyed in the mails."

As any publication which is in violation of any provision of the act is nonmailable, an examination of the act as a whole is necessary, and shows that the following matter is made nonmailable:

(1) Any matter advocating or urging treason or forcible resistance to any law of the United States. Title 12, § 3.

(2) Any matter containing information respecting the national defense and which is intended to be used to the injury of the United States or to the advantage of any foreign nation. Title 1, § 1.

(3) Any matter containing information, intended to be communicated to the enemy, with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct of the war, or the plans or conduct of any naval or military operations, or with respect to any measures undertaken or intended for the fortification or defense of any place, or any other information relating to the public defense which might be useful to the enemy. Title 1, § 2.

(4) Any matter, when the United States is at war, containing false statements will-

fully intended to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and matter willfully intended to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, and matter willfully intended to obstruct the recruiting or enlistment service of the United States. Title 1, § 3.

The excluded publication is a magazine known as *The Masses*. By its own statement it is a radical and revolutionary publication, not revolutionary, however, in that it desires to overturn existing forms of government by force of arms, as it is opposed to war. It is revolutionary, not only in matters political, but in art and literature and religion as well. It is a monthly publication of about 50 pages, and has a circulation of from 20,000 to 25,000 copies each month. For a number of years it has passed freely through the mails to its subscribers throughout the United States.

The objectionable matter was contained in the August issue and consisted of certain articles. These were entitled: "A Question," "A Tribute," "Conscientious Objectors," "Friends of American Freedom." Besides these articles, there were four cartoons, which were also objected to. These were entitled: "Liberty Bell," "Conscription," "Making the World Safe for Capitalism," and "Congress and Big Business."

In the article entitled "A Question" the editor writes:

"I would like to know to-day how many men and women there are in America who admire the self-reliance and sacrifice of those who are resisting the conscription law on the ground that they believe it violates the sacred rights and liberties of man. How many of the American population are in accord with the American press when it speaks of the arrest of these men of genuine courage as a 'Round-up of Slackers'? Are there none to whom this [35] picture of the American republic adopting toward its citizens the attitude of a rider toward cattle is appalling? I recall the *Essays of Emerson*, the *Poems of Walt Whitman*, which sounded a call never heard before in the world's literature, for erect and insuppressible individuality, the courage of solitary faith and heroic assertion of self. It was America's contribution to the ideals of man. . . . I wonder if the number is few to whom this high resolve was the distinction of our American idealism, and who feel inclined to bow their heads to those who are going to jail under the whip of the state, because they will not do what they do not believe in doing. Perhaps there are enough of us, if we make ourselves heard in voice and letter, to modify this ritual of contempt in the daily press, and induce the

American government to undertake the imprisonment of heroic young men with a certain sorrowful dignity that will be new in the world."

The article idealizes those who resist the conscription law, and it represents them as heroic. In saying that the law violates sacred rights and is contrary to liberty, and that those who refuse to submit to it are heroes, it incites disobedience to the statute.

The poem entitled "A Tribute" represents as martyrs worthy of admiration two notorious persons who had just been convicted under an indictment charging them with conspiracy to induce persons not to register under the Conscription Act. It reads in part as follows:

"Emma Goldman and Alexander Berkman
Are in prison to-night,
But they have made themselves elemental
forces.

Like the water that climbs down the rocks,
Like the wind in the leaves,
Like the gentle night that holds us,
They are working on our destinies,
They are forging the love of the nations."

The statement that these two individuals have made themselves elemental forces akin to the rocks and trees and rivers, under ordinary circumstances, would be harmless; but coming at this particular time, and after their conviction, the inference being that their greatness grows out their offense and that they are worthy of admiration and honor, it is equivalent to saying that their unlawful conduct is worthy to be followed.

The article "Conscientious Objectors" refers to a number of letters written from English prisons by conscientious objectors. These letters are printed in the same issue of the magazine, and the article recommends those in this country who intend "to stick it out to the end" (resist conscription to the end) to read thoroughly the letters. The article declares:

"We believe that our protestors against government tyranny will be as steadfast as their English comrades. It is not by any means as certain that they will be as polite to their guards and tormentors, but we hope they will remember that these are acting under official compulsion and not as free men.

. . . There are some laws which the individual feels that he cannot obey, and which he will suffer any punishment, even that of death, rather than recognize as having authority over him. This fundamental stubbornness of the free soul, against which all the powers of the state are helpless, constitutes a conscientious objection, whatever its original sources may be in political or social opinion. It remains to be demonstrated that a political disapproval of this war can express itself in the same heroic firmness that

has in England upheld the Christian objectors to war as murder."

[36] The article, taken as a whole, may well be regarded as intended to encourage objectors to be as steadfast protestors against "government tyranny" as their English comrades. In other words, it is an encouragement to disobey the law.

The article "Friends of American Freedom" is devoted to Alexander Berkman and Emma Goldman, already commented upon in this opinion as having been convicted of a conspiracy to induce persons not to register. The article pays them "tribute of admiration for their courage and devotion." There is an allusion to the fact that Berkman and Goldman had advocated in their paper, *Mother Earth*, that those liable to the military draft, who do not believe in the war, should refuse to register. The natural effect of it is to encourage those who have objections to war not to register as the Conscription Act requires. Admiration of conspirators convicted of the offense of seeking to defeat the operation of the Conscription Act is equivalent to an approval of their crime and an encouragement to others to disobey the law in like manner.

In considering the cartoons, we may observe that political cartoons have long been used as a very effective means of political propaganda. They were so employed in France during the French Revolution and in England as early as the days of Walpole. In this country they were used during the Revolution, in the War of 1812, and in the Civil War. The brilliant cartoons of Nast, satirizing the Tweed Ring in the city of New York, were conceded at the time to have exerted a powerful influence in the destruction of that corrupt combination. A cartoon may be a leading article. It has been described as "a leading article transformed into a picture." It can express ideas as lucidly and clearly as printed words, and there is no escape from legal responsibility because pictures, rather than words, are used.

In the cartoon entitled "Liberty Bell," the Liberty Bell is presented in a broken form. The idea meant to be conveyed may be that there is no such thing as liberty left in the United States. But whatever it means, taken by itself, it would afford no ground for exclusion from the mails.

The cartoon entitled "Conscription" portrays a youth lying across the mouth of a cannon with his arms chained to the wheels of the gun carriage. "Democracy," in the form of a nude woman, is tied by her extended arms and her crossed feet to a wheel. And "Labor," crouched down on the gun carriage, a pitiable object, is fastened in like manner. A woman is on her knees on the earth at the side of the cannon in utter despair, with her

head bent back and her arms uplifted, while a child lies neglected at her side. The counsel for the complainant admits in his brief that this cartoon—"is a powerful argument against the Conscription Law. It says, in effect, that the youth of the land are by it forced into military service; that the law binds labor to military service as well; that it causes great agony and suffering to the womanhood of the country, and that the mothers of the country with children too small to be subject to the 'Draft' pray to God that the Draft Law may be repealed before their children come to military age, and that Democracy is trampled under foot by such a law. That is what this picture says."

[37] But that is not what it says to us. It seems to us to say: This law murders youth, enslaves labor to its misery, drives womanhood into utter despair and agony, and takes away from democracy its freedom. Its voice is not the voice of patriotism, and its language suggests disloyalty. If counsel wished the court to understand that in his opinion the effect of the cartoon would not be to interfere with enlistment, we are not able to agree with him. That it would interfere, and was intended to interfere, was evidently the opinion of the Postmaster General; and this court cannot say that he was not justified in his conclusion.

The cartoon "Making the World Safe for Capitalism" shows a Russian absorbed in studying a paper marked "Plans for a Genuine Democracy." On one side of him Japan and England appear in a threatening attitude, and on the other Mr. Root and Mr. Russell, members of the commission sent by the United States to Russia, appear in the guise of advisers. Mr. Root has in his hands a noose, labeled "Advice," with which it is intended to entrap or choke to death the Russian Democracy. The court cannot say that the Postmaster General was not warranted in concluding that this cartoon was intended to arouse the resentment of some of our citizens of foreign birth and prevent their enlistment.

In the cartoon "Congress and Big Business" Congress is represented by a disconsolate individual who is ignored by a number of overdeveloped men of Big Business gathered around a table inspecting a large paper spread over it and labeled "War Plans." Congress is quoted as saying: "Excuse me, gentlemen, where do I come in?" "Big Business" replies: "Run along now; we got through with you when you declared war for us." This cartoon is intended to stir up class hatred of the war and to arouse an unwillingness to serve in the military and naval forces of the United States. The clear import is, if the war was brought on by "Big Business," then let "Big Business" carry it on, and let

Labor stand aloof. The court cannot say that the Postmaster General was clearly wrong in concluding that it would interfere with enlistments.

In the case at bar, giving to the complainant the most favorable construction, the burden is upon it to overcome the presumption that the Postmaster General's conclusion is right, or that he has exceeded his power or exercised it wantonly or maliciously. See Judge Mayer's opinion in *Sanden v. Morgan*, 225 Fed. 266, 269 (1915). This the complainant should do by a preponderance of evidence. And this the complainant has not done.

It may be conceded that the language of the statute cannot have one meaning in an indictment and another when the question arises respecting the exclusion of matter from the mail as containing that which violates the provisions of section 3 of title 1. If the magazine is nonmailable under that section, it may be that the editor has committed a crime in publishing it, for which, upon conviction, he may be fined not more than \$10,000, or imprisoned not more than twenty years, or both. The District Judge thought no crime had been committed, and that the magazine was therefore mailable, because [38] the publication did not in so many words directly advise or counsel a violation of the act. He declared that:

"If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal. I am confident that, by such language, Congress had no such revolutionary purpose in view."

This court does not agree that such is the law. If the natural and reasonable effect of what is said is to encourage resistance to a law, and the words are used in an endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned, or the interest of the persons addressed in resistance is not suggested. That one may willfully obstruct the enlistment service, without advising in direct language against enlistments, and without stating that to refrain from enlistment is a duty or in one's interest, seems to us too plain for controversy. To obstruct the recruiting or enlistment service, within the meaning of the statute, it is not necessary that there should be a physical obstruction. Anything which impedes, hinders, retards, restrains, or puts an obstacle in the way of recruiting is sufficient. In granting the stay of the injunction until this case could be heard in this court upon the appeal Judge Hough declared that:

"It is at least arguable whether there can be any more direct incitement to action than to hold up to admiration those who do act. *Oratio obliqua* has always been preferred by rhetoricians to *oratio recta*; the Beatitudes have for some centuries been considered highly hortatory, though they do not contain the injunction, 'Go thou and do likewise.'"

With this statement we fully agree. Moreover, it is not necessary that an incitement to crime must be direct. At common law the "counseling" which constituted one an accessory before the fact might be indirect. See *Wharton's Criminal Law* (11th Ed.) § 266. Bishop lays down the rule thus:

"Every man is responsible criminally for what of wrong flows directly from his corrupt intentions. . . . If he awoke into action an indiscriminate power, he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible." 1 Bishop on Criminal Law, § 641.

And in *Reg. v. Sharpe*, 3 Cox's C. C. (Eng.) 288, it is laid down that:

"He who inflames people's minds and induces them by violent means, to accomplish an illegal object, is himself a rioter, though he take no part in the riot."

In conclusion, we are satisfied that the publication involved contains no matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, in violation of section 2 of title 12. The Postmaster General's exclusion of the publication from the mails is not put on the ground that it contained any such matter. It is not so clear that the publication is free from matter which involves an attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States. [39] The Postmaster General thought it contained matter objectionable on that ground, and a difference of opinion upon that phase of the matter is possible.

The question whether the publication contained matter intended willfully to obstruct the recruiting or enlistment service is less doubtful. Indeed, the court does not hesitate to say that, considering the natural and reasonable effect of the publication, it was intended willfully to obstruct recruiting; and even though we were not convinced that any such intent existed, and were in doubt concerning it, the case would be governed by the principle that the head of a department of the government in a doubtful case will not be overruled by the courts in a matter which involves his judgment and discretion, and which is within his jurisdiction.

The order granting the preliminary injunction is reversed.

WARD, J. (*concurring*).—I think the sole ground on which the order of the Postmaster General can be sustained is that some parts of the August number of *The Masses* were intended to obstruct, and do obstruct the recruiting or enlistment service of the United States. This involves a conclusion of fact to be drawn by him from the cartoons and text of this particular number. Advice to resist the law may be indirect as well as direct, and the conclusion of the Postmaster General in matters of fact, whether we agree with him or not, is final. I think it important, however, to say that not every writing, the indirect effect of which is to discourage recruiting or enlistment, is within the statute. In addition to the natural effect of the language on the reader, the intention to discourage is essential. Arguments in favor of immediate peace, or in favor of repealing the Conscription Act, do this indirectly. It is, notwithstanding, the constitutional right of every citizen to express such opinions, both orally and in writing, and Congress cannot be presumed to have intended by the Espionage Act to authorize the Postmaster General to exclude such articles, written honestly and without the intention of advising resistance to the law. His authority in the premises depends exclusively upon the statute, as was well stated by Mr. Justice Peckham in *American School of Magnetic School of Healing v. McAnnulty*, 187 U. S. 109, 23 S. Ct. 39, 47 U. S. (L. ed.) 90.

"Here it is contended that the Postmaster General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and, if no such law exist, then he cannot exclude or refuse to deliver them. Conceding, *arguendo*, that when a question of fact arises, which, if found in one way, would show a violation of the statutes in question in some particular, the decision of the Postmaster General that such violation had occurred, based upon some evidence to that effect, would be conclusive and final, and not the subject of review by any court, yet to that assumption must be added the statement that if the evidence before the Postmaster General, in any view of the facts, failed to show a violation of any federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because the facts being conceded, whether they amounted to a violation of the statutes, would be a legal question and not a question of fact."

NOTE.

Nature and Scope of War Power.

Generally.

The war power, as that term is used in the present discussion, is the legislative power which Congress possesses as an incident to the expressly granted power to declare war. A few cases as to the power of a state legislature in aid of the prosecution of war are, however, included. This note is confined to the war power as applied to citizens, the legislative power with respect to alien enemies being discussed in the note to *Daimler Co. v. Continental Tyre, etc. Co.* Ann. Cas. 1917C 170. The power to declare martial law and the powers of the military commander resulting from such a declaration are treated in the note to *State v. Brown*, Ann. Cas. 1914C 1; the powers of a military commander over the persons and property of civilians in time of public war are considered in the note to *Hartfield v. Graham*, Ann. Cas. 1917C 1; and the power to make military service compulsory is discussed in the note to *Rex v. Morn Hill Camp*, Ann. Cas. 1917C 809. See also *Selective Draft Law Cases*, reported in full, ante, this volume, at page 856.

"The Constitution vests in Congress plenary war powers. Congress can begin, carry on, and terminate wars, . . . without any express limit as to time, means or manner." *Tod v. Fairfield County Ct.* 15 Ohio St. 389.

"The war power resides in the nation's right of self-preservation,—the preservation not only of itself but of all its citizens." *U. S. v. Casey*, 247 Fed. 362. So in *Story v. Perkins*, 243 Fed. 997, it was said: "After the enumeration of the powers of Congress, among them, as we have seen, 'the power to raise and support armies,' in clause 18 of article 1, § 8, it provides the power 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof.' Here is the great reservoir of power to save the national existence."

In *McCormick v. Humphrey*, 27 Ind. 144, the court said: "Congress, under the Constitution, has the power 'to declare war,' and to provide for calling forth the militia 'to suppress insurrection.' The executive power of the government is vested in the President, by the Constitution, and he is made the commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States. When Congress declares war, by that declaration it puts in

force the laws of war, and the war powers of the government, which are not to be exercised, under the Constitution, in time of peace, now come into full force, by virtue of the Constitution, and are to be exerted by the President and Congress. After the declaration of war, every act done in carrying on the war, is an act done by virtue of the Constitution, which authorized the war to be commenced. Every measure of Congress, and every executive act performed by the President, intended and calculated to carry the war to a successful issue, are acts done under the Constitution; whether the act or the measure be for the raising of money to support armies, or a declaration of freedom to fill their ranks and weaken the enemy; whether it be the organization of military tribunals to try traitors, or the destruction of their property by the advancing army, without due process of law; and the validity of such acts must be determined by the Constitution. Having, by the Constitution, the power to declare war, it follows that, in the language of Chief Justice Marshall, 'Congress must possess the choice of means, and must be empowered to use any means which are, in fact, conducive to the exercise of a power granted by the Constitution.'

The war power was defined yet more broadly in *Merchants', etc. Bank v. Union Bank*, 25 La. 387, the court saying: "In the exercise of war powers the United States is not restrained by the limitations which the Constitution imposes on it as a sovereign. Its business as a warrior is to conquer, to restore peace, and to maintain the government; and it can use any means necessary to that end, regardless of all restraints except the law of nations." That statement, however, is apparently inconsistent with the dictum in *Ex p. Milligan*, 4 Wall. 4, 18 U. S. (L. ed.) 281, that "the Constitution of the United States is a law for rulers and people equally in war and in peace" to which, however, the court added that "the government within the Constitution has all the powers granted to it which are necessary to preserve its existence as has been happily proved by the result of the great effort to throw off its just authority."

The congressional war power may, without infringing on the reserved right of the states, extend to the most minute regulation of conduct. *U. S. v. Casey*, 247 Fed. 362. It is not subject to interference by a state government. *Tarble's Case*, 13 Wall. 397, 20 U. S. (L. ed.) 597, wherein the court said: "Congress has . . . the power 'to raise and support armies,' and the power 'to provide for the government and regulation of the land and naval forces.' The execution of these powers falls within the line of its duties; and its control over the subject is plenary and

exclusive. It can determine, without question from any state authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offenses, and prescribe their punishment. No interference with the execution of this power of the national government in the formation, organization, and government of its armies by any state officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service. Probably in every county and city in the several states there are one or more officers authorized by law to issue writs of habeas corpus on behalf of persons alleged to be illegally restrained of their liberty; and if soldiers could be taken from the army of the United States, and the validity of their enlistment inquired into by any one of these officers, such proceeding could be taken by all of them, and no movement could be made by the national troops without their commanders being subjected to constant annoyance and embarrassment from this source. The experience of the late rebellion has shown us that, in times of great popular excitement, there may be found in every state large numbers ready and anxious to embarrass the operations of the government, and easily persuaded to believe every step taken for the enforcement of its authority illegal and void. Power to issue writs of habeas corpus for the discharge of soldiers in the military service, in the hands of parties thus disposed, might be used, and often would be used, to the great detriment of the public service. In many exigencies the measures of the national government might in this way be entirely bereft of their efficacy and value. An appeal in such cases to this court, to correct the erroneous action of these officers, would afford no adequate remedy. Proceedings on habeas corpus are summary, and the delay incident to bringing the decision of a state officer, through the highest tribunal of the state, to this court for review, would necessarily occupy years, and in the meantime, where the soldier was discharged, the mischief would be accomplished. It is manifest that the powers of the national government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty."

Not only may the congressional power be exercised directly, but discretionary powers may be delegated to the executive or to state

officials. Selective Draft Law Cases, reported ante, this volume, at page 856. So in *U. S. v. Stephens*, 245 Fed. 957, it was said: "Large discretionary powers in carrying into execution the general scheme or plan defined by Congress properly were conferred upon the President as the chief executive and commander of the army with respect to the choice of means and other details. Legislative treatment of such matters with the requisite particularity and with reference to varying conditions and exigencies is impracticable, and committing them to the executive branch of government is not to be treated as a delegation of legislative power. There is nothing novel or repugnant to the Constitution in thus disposing of them."

Particular Measures.

The provision of the Espionage Law (Act June 15, 1917, title 12, § 2, Fed. St. Ann. Pamph. Supp. No. 11, p. 16) that any letter, book, newspaper or the like "advocating or urging treason, insurrection or forcible resistance to any law of the United States" is nonmailable, is sustained in the reported case as a valid exercise of the war power. See also *Jeffersonian Pub. Co. v. West*, 245 Fed. 585.

In *U. S. v. Pierce*, 245 Fed. 878, the provision of the Espionage Act (title 1, § 3, Fed. St. Ann. Pamph. Supp. No. 16, p. 10) penalizing the wilful obstruction of enlistment or recruiting was sustained, the court saying: "The act of Congress in question here is one obviously enacted and necessary for the preservation of our government and the enforcement of its rights. In my judgment to deny its constitutionality is to deny to the government of the United States the power of self-preservation by suppressing the publication and distribution of false statements made with the intent to destroy the morale and efficiency of our armies when engaged in lawful warfare, and prevent or interfere with their lawful organization and the lawful recruiting thereof. Such publications give aid and comfort to the enemy. If a jury on evidence should find that this pamphlet contains false statements calculated to discourage our armies and enlisted men, discourage compliance with our draft laws, and interfere with their enforcement, or impair the morale of our armies, and that it was the intent of the writer and distributor to bring about such results, can it be justified on the theory that our Constitution warrants and protects the making of such false statements disseminated for such a purpose? I think not. Freedom of speech and of the press does not give liberty to the individual to prevent or interfere with the preservation of our government, or the organization and

success of our armies, and this may not be done under the guise of advocating the principles of a political party or the principles of Socialism." In *U. S. v. Sugarman*, 245 Fed. 604, the provision in the same section with reference to attempts to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces was upheld.

In upholding the validity of the Selective Draft Law (Act May 18, 1917, Fed. St. Ann. Pamph. Supp. No. 11, p. 85) the court in *Selective Draft Law Cases*, reported ante, this volume, at page 856, sustained several convictions under the sixth section for aiding or encouraging violations of that act. See also *U. S. v. Sugar*, 243 Fed. 423; *Story v. Perkins*, 243 Fed. 997; *U. S. v. Sugarman*, 245 Fed. 604; *U. S. v. Stephens*, 245 Fed. 956; *Angelus v. Sullivan*, 246 Fed. 54. Compare *U. S. v. Baker*, 247 Fed. 124, wherein certain conduct was held not to amount to a violation of the act.

In *U. S. v. Casey*, 247 Fed. 362, a regulation made by the secretary of war under the thirteenth section of the Selective Draft Act (Fed. St. Ann. Pamph. Supp. No. 11, p. 92) forbidding the keeping of a house of ill fame within five miles of a military camp was held to be valid. The court said: "Does the act in question contemplate national self-preservation? To ascertain its purpose, other pertinent provisions may be considered. It provides by voluntary enlistment and conscription for the raising, organizing, and equipping of a great army to prosecute against a powerful enemy a war provoked by repeated wrongs inflicted on us as a nation. Good order, subordination, and efficiency are nowhere so necessary to national protection as in the army. To insure these qualities section 12 of the act declares that the President may make such regulations governing the prohibition of alcoholic liquors in or near military camps, and to the officers and enlisted men of the army, as he from time to time may deem necessary or advisable; that no person, natural or artificial, shall sell or supply or have in his possession any intoxicating or spirituous liquors at any military station, cantonment, camp, fort, post, officers' or enlisted men's club, in use at the time for military purposes under the statute, but that the secretary of war may prescribe regulations permitting the sale and use of intoxicants for medicinal purposes; and that it shall be unlawful and a punishable offense to sell any intoxicating liquors, including beer, ale or wine, to any officer or member of the military forces while in uniform, except as in the act provided. Section 13 authorizes, empowers, and directs the secretary of war during the present war to do everything by him deemed necessary to suppress and prevent the keeping and setting up of houses of ill

fame, brothels, and bawdyhouses within such distance as he may deem needful of any military camp, station, fort, post, cantonment, or training or mobilization place, and declares that any person, natural or artificial, receiving or permitting to be received for immoral purposes any person into any place, structure, or building used for the purpose of lewdness, assignation, or prostitution, within the distance so designated, or shall permit any such person to remain for immoral purposes in any of such places, so designated, or who shall violate the regulation promulgated by the secretary of war to carry out the object and purpose of such section, shall be guilty of a misdemeanor, and be punished by fine or imprisonment, or both. The statute was framed in recognition of the fact that the greatest efficiency attainable by an army depends upon the sobriety, healthfulness, and high moral tone of the soldiers composing it. Soldiers addicted to the use or under the influence of liquor are less orderly, less obedient, less competent to discharge their duties, and more prone to disease than when in their normal condition. If afflicted by any of the loathsome diseases which may be contracted in bawdyhouses, they are not only unfitted temporarily at least for the performance of duties, but in some instances, on account of the communicability of such diseases, become a menace to those with whom they are associated. The nation, for its safety, is entitled at all times to the best service of which its soldiers and all of its soldiers are capable. This praiseworthy statute also operates for economy and for the safety of our soldiers and is a pledge to their relatives and friends that they shall be so cared for as will not only best protect their country, but also themselves in times of peril, and that they will not be returned home, dissolute in habits, addicted to drink, or victims of foul infectious disease. Congress, in the legitimate exercise of the war powers vested in it by the Constitution, has declared that, inasmuch as the efficiency, good health, and sound morals of the army are conducive to the preservation of the nation, restrictions upon the sale of intoxicants, and the discontinuance of houses of ill fame, bawdyhouses, and brothels, as a means to that end, are necessary within given territorial limits during the existence of the present war, and its enactment is the supreme law of the land. In answer to the argument that the power to establish the ordinary regulations of police has been left to the individual states, and cannot be assumed by the national government, it is sufficient to say that the statute here assailed rests, not upon the police power, but upon the war power, conferred on Congress and recognized by the law of nations."

In a few recent cases state acts in aid of the prosecution of war have been sustained. Thus in *People v. Sisson*, 167 N. Y. S. 801, in sustaining a state law forbidding the sale of intoxicants near military camps, arsenals and the like, it was said: "Accustomed, as we have become, to the war powers of the federal government, we are not to overlook the unquestioned war powers still residing in the state. While the state cannot declare war, or in itself carry it on, it is bound to render loyal aid to the general government in the effective prosecution of the war. After raising the military and industrial personnel, it is still under a duty to safeguard them from evil influence, even when its citizens have been mustered into the federal military service. The state has also in good faith to co-operate in the national policies for war efficiency. In the corresponding English statute, industrial protection from the sale of intoxicants is put before the demands of the military service. By orders in council, an area may be set off which will be subject to regulation, excluding all but the government from such liquor traffic, and imposing other restrictions, if it appear expedient, 'on the ground that war material is being made, or loaded, or unloaded, or dealt with in transit, in the area, or that men belonging to his majesty's naval or military service are assembled in the area.' Stat. 5 & 6 Geo. V, c. 42, p. 79. To win this war, the industrial army in factory, mill, and shipyard may become as necessary as the forces in the field. Industrial masses, not having been under military training, however, are therefore in greater need of protection. The state shares with the general government in the duty to safeguard the men taken from their homes, mustered into the federal service, and assembled in military camps. But the number, which is now greater, gathered in war industries, are, for the present, dependent for their protection upon the power of the state alone."

In *Cook v. Burnquist*, 242 Fed. 321, there was involved an order of the Minnesota commission of public safety, appointed under an act providing as follows: "In the event of war existing between the United States and any foreign nation, such commission shall have power to do all acts and things non-inconsistent with the constitution or laws of the state of Minnesota or of the United States, which are necessary or proper for the public safety and for the protection of life and public property or private property of a character as in the judgment of the commission requires protection, and shall do and perform all acts and things necessary or proper so that the military, civil and industrial resources of the state may be most efficiently applied toward maintenance of the

defense of the state and nation and toward the successful prosecution of such war, and to that end it shall have all necessary power not herein specifically enumerated and in addition thereto the following specific powers," etc. The order in question required the closing of saloons at an hour earlier than that fixed by the statutes of the state. Sustaining the order, the court said: "That section contemplates several ends to be attained: First, the public safety is to be guarded. Protection is to be afforded to life and public property, and also to private property of such a character as in the judgment of the commission requires protection, and, further, the commission is ordered to do all acts and things necessary or proper so that the military, civil and industrial resources of the state may be most efficiently applied for the maintenance of the defense of the state and nation, and toward the successful prosecution of such war. No attempt has been made here to show that the acts which are sought to be accomplished by order No. 7 are not germane to the purposes set forth in section 3, namely, public safety and the protection of life and property, and the application of the resources of the state to accomplish certain ends. I take it that no attack can successfully be made along that line, because it goes without saying that the order here in question, if it were carried out, would have some relation at least, whether direct or indirect, to the ends sought to be attained; that is, public safety, and the protection of life and property, and the application of the resources of the state to the specific purposes. In fact, it can hardly be disputed that the relation would be direct, and the effect substantial. Nor do I think that the issuance of order No. 7 is without the purview of the provisions of chapter 261. In my judgment, said order is within special power No. 3 in section 3 of the act, and also within the powers granted in the first paragraph of section 3 of the act. The words 'noninconsistent with the laws of the state of Minnesota,' contained in section 3, should not be given a narrow construction in view of the broad purposes of the act and the great emergency it was intended to meet. The words above quoted should rather be held to mean not inconsistent with the broad purposes, the underlying principles, and the fundamental requirements of the laws of Minnesota. With such a construction placed upon section 3, the order No. 7 is well within the purview of the act."

In *State v. Hohm* (Minn.) 166 N. W. 181, the court upheld a state law penalizing speech or conduct designed to discourage enlistment in the military or naval service of the United States, saying: "State statutes do not offend against the constitutional provisions cited unless they trench upon the power of

the national government to raise troops, or interfere with or hinder the operation of the federal laws governing such matters. The statute here in question does neither; it merely prohibits advocating, within this state, that men should not enlist and should not aid in prosecuting the war against the public enemies. In enacting it as a police regulation, the legislature was well within its province. Neither do we think that the so-called Espionage Law of June 15, 1917, passed by Congress, abrogates or supersedes this statute. The citizens of the state are also citizens of the United States and owe a duty both to the state and to the United States. The state is a part of the nation and owes a duty to the nation to support, in full measure, the efforts of the national government to secure the safety and protect the rights of its citizens and to preserve, maintain, and enforce the sovereign rights of the nation against the public enemies, and to that end the state may require its citizens to refrain from any act which will interfere with or impede the national government in effectively prosecuting the war against such public enemies. It is the duty of all citizens of the state to aid the state in performing its duties as a part of the nation, and the fact that such citizens are also citizens of the United States and owe a direct duty to the nation does not absolve them from their duty to the state nor preclude the state from enforcing such duty."

BREWER ET AL.

v.

BROWNING ET AL.

Mississippi Supreme Court—July 2, 1917.

115 Miss. 358; 76 So. 267, 519.

Appeal and Error — Second Appeal — Review of Previous Holding.

While the supreme court will not ordinarily review its previous holding on a subsequent appeal, yet the so-called "law of the case" is not binding when clearly erroneous and leading to unjust results, especially where no rights have accrued in reliance upon the former decision.

Adoption — Inheritance by Adopted Child — What Law Governs.

Where a child was adopted in Kentucky, under whose laws it inherits land from its foster parent, and upon its decease in infancy without issue the land so inherited reverts to the next of kin of such foster parent, such

inheritance rules do not violate the constitution or public policy of Mississippi, and will be applied to lands there situated.

[See note at end of this case.]

Stare Decisis — Power to Overrule Previous Decision.

Under Const. 1890, § 144, vesting the judicial power of the state in the supreme court and such other courts as are provided for in the constitution, and section 146, providing that the supreme court shall have such jurisdiction as properly belongs to a court of appeals, there is no constitutional restriction on the power of the supreme court to overrule or change decisions which in its opinion are erroneous or wrongful.

Propriety of Overruling Previous Decision.

The supreme court will overrule decided cases which operate to effect injustice or lead to wrong results, though decided by the great judges of the past.

Appeal from Chancery Court, Sunflower county: THOMAS, Chancellor.

Action by Earl Brewer et al., plaintiffs, against Agnes Browning et al., defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the opinion. **REVERSED.**

Flowers, Brown, Chambers & Cooper for appellants.

D. M. Quinn, S. F. Davis and J. Holmes Baker for appellees.

[359] **ETHERIDGE, J.**—On the 15th day of July, 1901, Church W. Rule and his wife, Lula A. Rule, who were then living and having their domicile in Sunflower county, Miss., and then being without children, and being in the state of Kentucky, presumably on a visit there, on said date signed what is called in the record "articles of adoption." This adoption was signed jointly by Church W. Rule and his wife on the one part and the Louisville Baptist Orphans' Home, by its president, on the other part, by which Church W. Rule and his wife, Lula A. Rule, are said to have adopted a child, then about three years of age, and an inmate of said institution, named Lula May Browning. By said adoption the said Rule and wife obligated themselves to adopt the said infant, Lula May Browning, "and do hereby adopt said Lula May Browning, and covenant with said Louisville Baptist Orphans' Home that said Lula May Browning shall bear from this time forward the same legal relation to them as if she had been born unto them, and were their child, especially as to such property as would descend to her were she their child." After signing said articles of adoption, Church W. Rule and his wife took the said infant to their home in Sunflower coun-

ty, Miss., and there it occupied the relation of child to them, and was treated by them as their child, up to the time of their deaths, respectively.

It appears that the Louisville Baptist Orphans' Home was chartered and incorporated by an act of the General Assembly of Kentucky, approved January 28, 1870 [360] (Laws 1869-70, chapter 197), and amended by an act approved January 31, 1880 (Laws 1879-80, chapter 108), and that by virtue of its charter it was invested with all the rights of parents and natural guardians of any child committed to its care, and that it was also empowered to permit any suitable person to adopt any child in its custody and control as their own child upon proper covenants in writing being executed by such persons and its president, and acknowledged by such persons and its president, and acknowledged or proven in the clerk's office of Jefferson county, Ky., as deeds may be, and by the amendment of 1880 to this charter it was provided that by the articles of adoption, when executed and recorded, "such child shall become the heir at law of such person so adopting him or her, and be as capable of inheriting as though he or she were the child of said person," etc. It appears also that the supreme court of Kentucky has held this act of incorporation constitutional, and that when this contract was executed it amounted there to a complete adoption, and authorized the child adopted to inherit as if it were the natural child of its parents.

On August 9, 1898, Mrs. M. J. Rule, the mother of Church W. Rule, died in Sunflower county, Miss., leaving a considerable body of land which descended upon her death to her children, one of whom was Church W. Rule. Church W. Rule died February 7, 1903, leaving his wife and the adopted child, Lula May Browning, but no children born to himself and wife. In 1903 there was a suit filed in the chancery court of Sunflower county for a partition of the lands left by Mrs. Mary J. Rule, mother of Church W. Rule, among the heirs then surviving, and the widow of Church W. Rule and Lula May Browning Rule were made parties. In this suit in the chancery court the bill of complaint filed contained the [361] following provision with reference to the position or status of Lula May Browning Rule, to wit:

"The said minor, Lula May Browning Rule, was never adopted by any proceedings in court according to the laws of the state of Mississippi, but said Church W. Rule and his wife, Lula A. Rule, made their certain contract in writing with Louisville Baptist Orphans' Home bearing date of 15th of July, 1901, executed in triplicate and signed by the said Church W. Rule and Lula A. Rule and the said Louisville Baptist Orphans' Home. By

said contract it was agreed that the said Church W. Rule and his wife, Lula A. Rule, should adopt, and they did thereby adopt, said minor, whose name at that time was Lula May Browning, and that the said Lula May Browning should, from that time forth, bear the same relation to the said Church W. Rule and his wife, Lula A. Rule, as if she had been born unto them and were their child, especially as to such property as would descend to her if she were their child. Complainants file herewith a copy of this contract as a part of this bill, and mark the same 'Exhibit A.' Complainants allege that from that time up to the time of the death of the said Church W. Rule the said Church W. Rule and his said wife have had the care, custody, and control of the said minor, and the said child is now in the care and custody of said Lula A. Rule. Your complainants advise that by said articles of adoption, although there have been no proceedings in the court, the said child is entitled to have a child's part in the said estate of Church W. Rule, but complainant, Lula A. Rule, submits this question for decision of this court: 'The said Lula A. Rule is now the legally appointed guardian of the said Lula May Browning Rule. . . . It is asked that your honor may adjudicate whether the minor, Lula May Browning, has an interest in the said estate.' This bill of complaint being filed by Lula A. [362] Rule and others in cause No. 1100 of the chancery court docket of Sunflower county, Miss."

The prayer of the bill, among other things, asks that "your honor may adjudicate whether the said Lula May Browning Rule has an interest in the said estate." A guardian *ad litem* was appointed for the minors in the suit, including Lula May Browning Rule, and the answers of the guardian *ad litem* submitting the interests of the minors to the protection of the court and praying that the allegations of the bill be required to be substantiated by strictly legal proof. The Chancellor rendered a written opinion in which he held that Lula May Rule was in fact adopted by Church W. Rule and his wife, and as such adopted child inherited one-half of the estate and lands in Mississippi of Church W. Rule, and in the decree of partition set apart one of the four shares to Lula A. Rule and her adopted child, Lula May Rule, and from this decree there was no appeal prosecuted, and the right to an appeal has long since been barred by the statute of limitations. After this decree, and on the 29th day of November, 1905, the infant, Lula May Browning Rule, died. Mrs. Lula A. Rule, after the death of Church W. Rule, married one J. B. Fisher, and after such marriage Lula A. Rule Fisher, formerly the wife of Church W. Rule, died leaving her

husband, J. B. Fisher, who was one of the parties to the former appeal in this cause, but who since said appeal has disposed of his interests and claims to other appellants in this case. Subsequently to the death of Lula A. Rule Fisher, the brothers and sisters by natural blood of Lula May Browning Rule filed their bill in the chancery court, praying for a partition of the lands set apart to Lula A. Rule and Lula May Browning Rule by the cause No. 1100 jointly to be divided between the brothers and sisters of Lula May Browning Rule by the blood, and the appellants are original defendants in said suit. This bill for a partition [363] came on for hearing in the chancery court of Sunflower county, Miss., and the chancellor adjudged that the brothers and sisters of the blood of Lula May Browning Rule would inherit her interest in the said lands to the exclusion of Lula A. Rule Fisher and her heirs, and ordered a partition of the said property in accordance with the prayer of the bill, which order an interlocutory appeal was allowed to this court, and was decided by this court in the case of Fisher v. Browning, 107 Miss. 729, Ann. Cas. 1917C 466, 66 So. 132, in which opinion this court, as then constituted, adjudged that the decree of the chancellor in cause No. 1100 in Sunflower county adjudicated that Lula May Browning Rule inherited one-half of the estate of Church W. Rule, and that said judgment constituted *res adjudicata*, but decided that the chancellor was wrong in holding in that cause that Lula May Browning Rule was entitled to inherit from Church W. Rule as to lands under the laws of the state of Mississippi, and that the public policy of Mississippi with reference to inheritance of lands would be violated by adoption of a rule of comity as applied to adopted children in Kentucky, permitting them to inherit as heirs under the laws of this state. They also held that the property allotted to the said Lula May Browning Rule should go to the sisters and brothers of the blood to the exclusion of the adopting parent, Mrs. Lula A. Rule Fisher, and her heirs. The cause was remanded for further proceedings, and partition was made in accordance with the former decree reported to the court and confirmed, and final appeal is prosecuted here from that decree.

Several questions are presented now for consideration, among which the following may be stated: Is the opinion of this court on the former appeal conclusive on the court now under the doctrine of the law of the case? Second. If not, was Lula May Browning entitled to inherit from the adopted parents, Church W. Rule and [364] Lula A. Rule? Third. If she was, would the property inherited at the time of her death go to the brothers and sisters of the blood, or

would it go to the adopted mother and her heirs to the exclusion of the sisters and brothers of the blood?

As to the first ground, whether or not the former decision of this court constitutes the law of the case in such sense as this court on this appeal is bound to follow it is not free from difficulty because of the well-recognized rule that the court, ordinarily, after having laid down principles governing a case on one appeal, will not review its holdings on a subsequent appeal, but will ordinarily adhere to its former decision and not inquire into its correctness. We do not think, however, that this rule is so fixed and binding upon the court that it may not depart from its former decision on a subsequent appeal if the former decision in its judgment after mature consideration is erroneous and wrongful and would lead to unjust results. Where the facts are the same, and where there has been no change of conditions or situations as that a change of decision would work wrong and injustice, the court may, on the subsequent appeal, correct its former decision where it is manifestly wrong. In the present case there is no such change of condition as would inflict any hardship upon any party or person, and we are satisfied that the court reached the wrong conclusion in its former opinion. This court has, on more than one occasion, departed from its first announcement on subsequent appeal of the same case where there had been no change of conditions, or accrual of other rights that would be harmed or prejudiced by the other decision. In *Maxwell v. Harkleroad*, 77 Miss. 456, 27 So. 990, this court said:

"It is further, in justice to the learned chancellor below, to be said that the decree rendered by him was induced by the opinion (formerly delivered by the writer [365] hereof) of this court. It is not a duty merely, but a pleasure, to correct error at the earliest possible moment, and we are glad of the opportunity to do this in this case, while it is still pending undetermined."

See also 2 R. C. L. p. 226, section 188, where it is said:

"The better rule, and that more in accord with justice, is that, though ordinarily a question considered and determined in the appeal is deemed to be settled and not open to re-examination, on a second appeal it is not an inflexible rule, and if the prior decision is palpably erroneous, it is competent for the court to correct it on the second appeal."

See also *Missouri, etc. R. Co. v. Merrill*, 65 Kan. 436, 70 Pac. 358, 59 L.R.A. 711, 98 Am. St. Rep. 287, where Justice Smith, speaking for the court, says:

"Counsel for defendant in error . . . insists that the former decision must govern on the second appeal. This would come to us

with more force if we were not now considering the same case with the same parties before the court. If an erroneous decision has been made, it ought to be corrected speedily, especially when it can be done before the litigation in which the error has been committed has terminated finally."

See also *Ellison v. Georgia R. Co.* 87 Ga. 691, 13 S. E. 809 (where Bleckley, C. J., says: "The only treatment for a great and glaring error affecting the current administration of justice in all courts of original jurisdiction is to correct it. When an error of this magnitude, and which moves in so wide an orbit, competes with truth in the struggle for existence, the maxim for a supreme court, supreme in the majesty of duty as well as in the majesty of power, is not '*Stare decisis*,' but '*Fiat justitia ruat coelum*' [Let right be done, though the heavens should fall]"); *Messinger v. Anderson*, 225 U. S. 436, 32 S. Ct. 740, 56 U. S. (L. ed.) 1152 (where the supreme court of the United States said: "In the absence of statute, the phrase 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering [366] them in the same case merely expresses the practice of courts generally to refuse to reopen what has been decided—not a limit to their power"); *King v. West Virginia*, 216 U. S. 101, 30 S. Ct. 225, 54 U. S. (L. ed.) 401; *Remington v. Central Pac. R. Co.* 198 U. S. 100, 25 S. Ct. 577, 49 U. S. (L. ed.) 963.

The opinion of Cook, J., in *Johnson v. Success Brick Machinery Co.* 104 Miss. 217, 61 So. 178, 62 So. 4, is pressed on us as being conclusive on us on the law of the case as applied to this appeal. We think the language used in that opinion as to the binding effect of a decision on first appeal is too broad. We do not approve of that portion of the opinion which states:

"If the decision of the court upon the original appeal was made upon a record which, in all substantial particulars was the same as now before us, we must decide now as we decided then, however wrong we may believe the court was in the first instance. This is the law, and we do not question its wisdom; nor do we wish to evade rules in order to right a real or imaginary wrong."

We think courts are created and maintained and sworn to administer justice, and not to adhere strictly to arbitrary rules. When a rule of decision defeats justice or seriously impairs it, it should be departed from rather than followed. Rules are made to secure justice, not defeat it. We think the rule of "the law of the case" is a good rule of practice, and should be followed, except in rare cases where the decision is manifestly and palpably erroneous and to follow it would result in grave injustice being done.

The decree of the chancellor in cause 1100, being *res adjudicata*, established the *status* of adoption between parent and child under the laws of Kentucky, and it was by virtue of this *status* so established by our state courts that the child took the one-half interest in the property of the deceased adoptive father; and by virtue of the same *status* the adoptive mother took the child's interest in the property at its death. If the adjudication [367] of the *status* by the chancellor in cause 1100 is *res adjudicata*, as held by Justice Owens in the former decision of this court, then such *status* should not be followed in part and ignored in part. The relation and *status* established should be observed throughout with reference to the descent of the property involved.

As to the second proposition as to whether or not Lulu May Browning Rule, the adopted child, was entitled under the facts stated to inherit from the adoptive parent Church W. Rule, the former opinion held that to permit such inheritance would violate the public policy of this state, and while, under the law of Kentucky the adoption had the effect of conferring upon the adopted child full capacity to inherit lands or personal property in Kentucky as a natural child, still it was contrary to the public policy of Mississippi for such child to inherit lands in Mississippi, and that the rule of comity would not require the state to adopt the Kentucky law upon that subject, or recognize the *status* of parent and child created under the laws of Kentucky by reason of the adoption. The court on this subject says:

"We recognize that the weight of authority and trend of modern decisions is to the effect that every other state will recognize the *status* of the state creating it, and will give effect to it just as if that *status* were created under the law of the state where it is invoked, but provided always that the *status* and the rights flowing from it are by laws of the state which are in harmony and consistent with the laws and public policy of the state where it is invoked, and that therefore Mississippi will recognize the *status* of the child, created in Kentucky, as the adopted child of Church W. Rule, and will enforce all the rights of the child in that situation here, provided the rights flowing from that adoption in Kentucky and the laws of that state on the same subject are not inconsistent with or opposed to the laws or public policy of this state on the same subject. . . . We do not believe, however, that this child was capacitated by the adoption in Kentucky [368] to inherit lands in Mississippi, because the laws of Kentucky are inconsistent with and antagonistic to our Constitution and laws on the same subject, and

to the public policy of Mississippi on that subject, as such public policy is found in our statutes and Constitution, and for that reason we do not believe that Mississippi is bound to recognize this adoption by contract, as it was made in Kentucky, to be valid and binding in Mississippi as to confer upon the child the capacity to inherit lands in Mississippi."

If we understand the opinion in the former case, it holds that it would be inconsistent with the laws and Constitution of Mississippi for an adopted child to inherit lands under the statutes of Mississippi. The court seems to have been of the opinion that it was not possible for an adopted child, adopted under the laws of Mississippi, to inherit as an heir of the adopting parent. We are at loss to understand how the court reached this conclusion, in view of the previous decision of *Adams v. Adams*, reported in 102 Miss. 259, 59 So. 84 Ann. Cas. 1914D 235, where this court held that, where a petition was filed under the Code pertaining to the adoption of children, seeking the adoption of a minor, and a decree was entered providing that the custody of the minor be awarded to the adopting father, and that he be clothed with all the rights and bound by all the obligations with reference to said child as that of a parent, and that said child be clothed with all the rights and bound by all the obligations with reference to the adopting father and his estate, real and personal, at his death, as that of a daughter, and that the name of the child be changed to that of the adopting father, holding that such a decree under our laws creates a relationship of heir on the part of the adopted daughter. It is therefore not contrary of the Constitution, laws, and public policy of Mississippi for a person to adopt a child so as to make it an heir and capable of inheriting both real and personal property.

[369] In the case of *Finley v. Brown*, 122 Tenn. 316, 123 S. W. 359, 25 L.R.A. (N.S.) 1285, the Tennessee court in an able opinion holds that a child adopted in one state under the law of comity has a right to inherit real estate situated in another state even as to lands. In the report of the L.R.A. there is a case note in which the learned editor of this series says:

"As indicated in those notes, the decision of the . . . court in *Finley v. Brown*, giving effect to the foreign adoption for the purposes of inheriting real estate in Tennessee, is sustained by the weight of authority in this country."

See also as supporting this doctrine, *Warren v. Prescott*, 84 Me. 433, 24 Atl. 948, 30 Am. St. Rep. 370, 17 L.R.A. 435, 65 L.R.A. 186, 8 L.R.A. 747; *Hockaday v. Lynn*, 200 Mo. 456, 9 Ann. Cas. 775, 98 S. W. 585, 118 Am. St.

Rep. 672, 8 L.R.A.(N.S.) 117; Fosburg v. Rogers, 114 Mo. 122, 21 S. W. 82, 19 L.R.A. 201; Nugent v. Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L.R.A. 199; In re Johnson, 98 Cal. 531, 33 Pac. 460, 21 L.R.A. 380; Schiltz v. Roenitz, 86 Wis. 31, 56 N. W. 194, 39 Am. St. Rep. 873, 21 L.R.A. 483; Wright v. Wright, 99 Mich. 170, 58 N. W. 54, 23 L.R.A. 196; Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L.R.A. 665; Long v. Hess, 154 Ill. 482, 40 N. E. 335, 45 Am. St. Rep. 143, 27 L.R.A. 791; Murphy v. Portrum, 95 Tenn. 605, 32 S. W. 633, 30 L.R.A. 263; Gray v. Holmes, 57 Kan. 217, 47 Pac. 596, 33 L.R.A. 207; Hartwell v. Tefft, 19 R. I. 644, 35 Atl. 882, 34 L.R.A. 500; Humphries v. Davis, 100 Ind. 369.

In our view it would be unjust to both parent and child under the adoption made such by the law of one state in which they are given full right of parent and child to hold that the mere fact of moving to another state would upset and unsettle this relationship. It is of the upmost importance that the status of this character should be maintained so far as it is possible to do it without doing violence to the laws and institutions of the state wherein the parties have moved. It was undoubtedly the intention of Church W. Rule and his wife in adopting this child to give the child all the rights of a natural child and this intention should be carried out to the fullest extent permitted by the laws of this state. Under the Kentucky law the adopted child (adopted in the manner this one was), inherits from the adopting parent as a natural child and is for all legal intents and purposes the real child of the adopting parent, and under the laws of that state the adopting parents are the heirs of the adopted child in the case of the death of the child without issue and inherit from the child all property which it had derived from the [370] adopting parents or either of them. According to the construction of courts of Kentucky the identical contract here involved created the legal *status* of parent and child between Mr. and Mrs. Rule on the one part and Mary Browning on the other. If this is true in Kentucky, why is it not true also in Mississippi? We are unable to appreciate the idea that this state will not fully and completely recognize and enforce a *status* thus created in Kentucky. When we apply our laws to the Kentucky *status* we find no difficulty in defining the reciprocal rights of the parties to the articles of adoption. Lula May Browning inherits the property of her adopting father and mother, and why? Because she is their child in legal contemplation. When the child died intestate Mrs. Rule inherited her property, and why? Because Mrs. Rule in

legal contemplation is the mother of the deceased child. There is no possible way in which Lula May Browning could have inherited the property in controversy except by reason of her legal status of daughter to her deceased father, Church W. Rule. The law of Kentucky has defined the *status* in a similar case as follows: By the event of adoption the adopted child becomes the lawful child of the adopting parent in the same light as a child born in lawful wedlock. The estate of a natural child which he inherits from his parent is defeated by his death in infancy without issue, and the property then goes back to the kindred of that adopting parent. The adopted child, inheriting as though he were the child of his foster parent, takes subject to the same limitation, and if he dies in infancy and without issue the property under the *status* descends to the kindred of that parent from whom he receives it. Lanferman v. Vanzile, 150 Ky. 751, 150 S. W. 1008, Ann. Cas. 1914D 563. See also In re Jobson, 164 Cal. 312, 128 Pac. 938, 43 L.R.A.(N.S.) 1062. So, we see that Lula May Browning by the event of adoption becomes the legal child of Church W. Rule and wife, the adopting parents, in the same light as a child born in lawful wedlock; and when she dies in infancy without issue, under the inheritance [371] laws of this state the property descends to her foster mother who survives her. We see no conflict, real or imaginary, between our laws and the laws of Kentucky on this subject. Under our laws the adopting parent may adopt the child fully and completely, or it may adopt it and limit its rights by a decree of court. In other words, under our statutes the parent can either adopt partially or totally, conferring or withholding benefits at his option but if he confers upon the child full benefits as though it were a natural child, there is nothing to prevent his so doing, and there can be no inconsistency between our law and the law of Kentucky as applied to the present adoption. If we treat the adoption in Kentucky as if it had been done in the chancery court of Mississippi, we find there is no greater right conferred there than may be conferred here. This construction appeals to us as natural justice entirely consistent with sound judicial construction. In fact when judicial construction is out of harmony with natural justice, the judicial reasoning should withstand the most careful scrutiny and analysis before it should prevail. The principal of reciprocal relations between parent and child is recognized and enforced by the Kentucky law. A foster child inherits from the foster parent, and when the foster child, inheriting from one of the foster parents, dies without issue, the surviving foster parent takes the property which the foster

child received from the intestate foster parent because the surviving foster parent is in law the mother of the deceased.

In *Wagner v. Varner*, 50 Ia. 532, the court said that, upon the death of an adopted child intestate and without wife or descendant, may its heirs at law be sought in the family under which it was born or in the family of which it became a part by adoption? Has its relationship with its natural parents been disturbed by the act of adoption by which they relinquish all control over it and consent that it should become in law the child of others? So far as its rights of inheritance are concerned they probably extend to both families to the extent of entitling it to inherit [372] from both the adopting and natural parents. If the adopted child inherits property from the person on the theory that it is the legal child of such person, we are unable to see any reason why upon its death such property should not descend to the relationship of the child created by the adoption. It is more consistent with justice to hold that the property inherited by Lula May Browning Rule from Church W. Rule should go to that line of legal heirs through which it was derived. It seems to us that it best harmonizes with the public policy of the state to recognize to the full extent the rights conferred by adoption. Those who have no natural children should be encouraged to adopt some child who has no parents to take care of it and educate it, and as far as possible to make such adopted child the real child of the adopting parents. If the rule should be adopted in this state and adhered to that the property coming to the adopted child from the adopting parents should, on the death of the child, descend to strangers of the blood of the adopting parent, it would have a strong tendency to discourage the good work of the adopting parents in taking some, perhaps unfortunate, child and make it their very own, conferring upon it all the rights and privileges that could be conferred upon a child, and at the same time should the child unfortunately die, not to permit them to reinherit from the child that which they had, through motives of kindness and generosity, bestowed upon it.

Judge Freeman, the able annotator of the *American State Reports*, in a note to *Van Matre v. Sankey* [148 Ill. 536, 36 N. E. 628], 39 Am. St. Rep. 228, 229 [23 L.R.A. 665], in commenting upon decisions holding that the adopting parents could not inherit from the adopting child said:

"The vice of these decisions, in our judgment, lies in the fact that the courts making them gave too strict a construction to statutes of adoption, and were unwilling to concede that such statutes had any other object than to confer the benefit of heirship to the

adopting parent upon the child adopted. The purpose of these statutes we [373] conceive to extend further than this, and, in effect, to take the child from its parents by birth, and to give it to the parents by adoption, and to create, as between it and such parents, the reciprocal rights and relations of parent and child, and to give to the former both the incidental and the direct advantages of parentage; and we therefore think that, upon the death of such child intestate and leaving estate which, by statute, vests in its parents, that the word 'parents,' as thus used, should be deemed to designate the adopting parents, rather than the parents by birth; for, under the law, it is the former, rather than the latter, who occupy the relation of parent to the child at the time of its death."

Judge Elliott, speaking for the supreme court of Indiana, in *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788, uses this language:

It is, as we have seen, the legal *status* of the person respecting the subject that determines his legal rights. To again quote from Austin: "The law of persons is the law of *status* or conditions. . . . The rights and duties, capacities and incapacities, which constitute a *status* or condition, are commonly considerable in number and various in kind. . . . Such are the rights and duties, capacities and incapacities, of husband and wife, parent and child, guardian and ward." 2 Austin, Jurs. 709, 711. As the *status* of the surviving husband and adoptive father is that of father, his interest in the land which the deceased child held in virtue of the rights vested in it by adoption is that of a father, since it is of that property, as the subject, that the *status* of parent and child is predicated. This is a just as well as a logical result. It is not to be presumed that the legislature meant to violate logical rules by creating the legal relation of child without the corresponding one of parent, nor that they meant to thrust out the surviving husband and father for the benefit of a person that was a stranger to the ancestor who was the source of title."

[374] We, therefore, reach the conclusion that if Lula May Browning Rule, having inherited the property in this suit from her adopting father, Church W. Rule, and having died without issue, the property descends to that heir of Church W. Rule, to wit, his wife, who bore the relation of adopted mother to said Lula May Browning Rule. It follows that the complainants had no legal right to the property claimed in their bill, and were without right to file the suit for partition, and the case is reversed, bill of complaint dismissed, and judgment entered here for the appellants.

Reversed, and judgment here.

Cook, J., took no part in this decision.

SMITH, C. J. (*dissenting*).—Every question presented to us for decision by this record was expressly decided against appellants on the former appeal herein, and should not now be open to review, for it is a rule of general application, heretofore announced and acted upon over and over again by this court, that:

"The decision of an appellate court in a case is the law of that case on the points presented throughout all the subsequent proceedings in the case in both the trial and the appellate courts, and no question necessarily involved and decided on that appeal will be considered on a second appeal or writ of error in the same case, provided the facts and issues are substantially the same as those on which the first decision rested."

The *res judicata* and law of the case rules are very much akin, were formulated to accomplish the same object, and are each based "upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the state that there should be an end to litigation, '*interest reipublicae ut sit finis litum*;' the other, the hardship on the individual that he should be vexed twice for the same cause, '*Nemo [375] debet bis vexari pro eadem causa*.'" The first of these rules is followed in all jurisdictions where the common law prevails; the second is followed in the great majority of such jurisdictions, and in the language of the supreme court of the United States in *Great Western Tel. Co. v. Burham*, 162 U. S. 339, 16 S. Ct. 850, 40 U. S. (L. ed.) 991, is necessary to enable an appellate court to perform its duties satisfactorily and efficiently, which would be impossible of a question, once considered and decided by it, were to be litigated anew in the same case upon any and every subsequent appeal." One of the objects sought to be accomplished by the rule is to prevent exactly what has happened in this case, that is, the reversal of a former judgment solemnly rendered and thereafter acted upon as final solely because on the second appeal the personnel of the court has changed and the new judges differed with their predecessors as to the judgment which ought formerly to have been rendered. As was again said by the supreme court of the United States in *Roberts v. Cooper*, 20 How. 467, 15 U. S. (L. ed.) 969:

There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members."

Among the many cases in which the rule has been followed by this court are: *McDonald v. Green*, 9 Smedes & M. (Miss.) 138; *Green v. McDonald*, 13 Smedes & M. (Miss.) 445; *Smith v. Elder*, 14 Smedes & M. (Miss.) 100; *Bridgeforth v. Gray*, 39 Miss. 136;

Swan v. Smith, 58 Miss. 875; *Still v. Anderson*, 63 Miss. 545; *Nutt v. Knut*, 84 Miss. 465, 36 So. 689; *New York L. Ins. Co. v. McIntosh* (Miss.) 46 So. 401; *Johnson v. Success Brick Machinery Co.* 104 Miss. 217, 61 So. 178, 62 So. 4; *Supreme Lodge, etc. v. Hines*, 109 Miss. 500, 68 So. 485; *Cochran v. Latimer*, 111 Miss. 192, 71 So. 316.

In the majority opinion the existence of the rule is admitted, but it is said that:

[376] "We do not think, however, that this rule is so fixed and binding upon the court that it may not depart from its former decision on subsequent appeal if the former decision in its judgment, after mature consideration, is erroneous and wrongful and would lead to unjust results."

This statement is in direct conflict with all of the former announcements of this court upon this subject, and it is founded upon a total misconception of the purpose sought to be accomplished by the rule, which is not to prevent the reversal of former judgments unless such judgments are erroneous and mischievous, but to cut off any inquiry at all into the rightfulness or wrongfulness thereof. On the second appeal in *Swan v. Smith*, 58 Miss. 875, the correctness of the judgment rendered on the first appeal was called in question by the appellant, and in responding thereto this court said:

"Even if our former decision on this point was wrong, it must be accepted as the law of this case."

Similar and even more emphatic language was used in *Nutt v. Knut*, 84 Miss. 465, 36 So. 689; *New York L. Ins. Co. v. McIntosh* (Miss.) 46 So. 401; *Johnson v. Success Brick Machinery Co.* 104 Miss. 217, 61 So. 178, 62 So. 4.

It is said, however, in the majority opinion that:

"This court has on more than one occasion departed from its first announcement on subsequent appeal of the same case where there had been no change of conditions, or accrual of other rights that would be harmed or prejudiced by the other decision."

But the only case cited in support of this statement is *Maxwell v. Harkleroad*, 77 Miss. 456, 27 So. 990. The law of the case rule was not involved on the second appeal in that case, and it constitutes no sort of authority for the statement that this court has heretofore departed therefrom. In that case a bill in chancery was filed by Harkleroad, as guardian, against Maxwell, a [377] former chancery clerk "who had *ex officio* been the guardian of Harkleroad's estate, . . . to recover excessive commissions retained by Maxwell as compensation for his services" as such guardian. The trial court sustained a demurrer to this bill and on appeal to this court that decree was reversed, the court holding that on the allegations of the bill

complainants were entitled to recover. Afterwards, when the case came on to be heard in the trial court on its merits, the real facts upon which Maxwell predicated his claim to the commissions charged by him were then for the first time brought to the court's attention, from which it appeared that he was entitled to the commissions charged. The trial court having decided otherwise, its decree was again reversed on appeal, this court in so doing, among other things, saying:

"When the case was here before it was presented on demurrer, furnishing another of many illustrations of the unsatisfactory nature of such defense, when all the facts set up by answer would make clear the right decision. This guardian is entitled, as the facts now show, to the highest praise for exceptionally faithful and skillful management of this estate."

It clearly appears, therefore, that on the second appeal the case presented by the evidence was materially different from that presented by the allegations of the bill on the first, and no court, so far as I am aware, has ever held that the law of the case rule applies to such a situation. The simple truth of the matter is that the rule does not meet with the approval of the majority of the judges of this court as now constituted, and the opinion herein rendered by that majority, while professing not to do so, in fact repudiates the rule, overrules without giving any of them, save one, "even the cold courtesy of a passing glance," the long and unbroken line of decisions of this court announcing and following it, and aligns this court with those courts which determine whether a decision [378] rendered on a former appeal in the same case shall be adhered to solely by the rule of *stare decisis*, which rule "does not prevent a court from overruling a previous decision which shall appear to it to be plainly and palpably wrong, where this course can be taken without inflicting serious injury on any person, or where greater harm would result from following the erroneous decision than from reversing it." Black on Judicial Precedents, p. 199. I do not for a moment question the power of the court to overrule the cases establishing the law of the case rule, but I confidently assert that they ought not to be overruled if the principle of *stare decisis* is of any binding force, for he would be a bold man indeed who would assert that a rule is manifestly wrong which has met the approval of so many courts and is supported by so many long and unbroken lines of decisions as this rule has received and is supported, and who can say that more good will be accomplished by its rejection than by its retention.

Coming now to the former decision in this case, I shall attempt to show that, in so far

as it holds that Mrs. Rule did not inherit the land here in controversy upon the death of Lula May Rule, it is not only not manifestly wrong, and, unless it is, it should not be here departed from, even under the rule announced by the majority opinion, but, on the contrary, that it is manifestly right.

In the beginning I desire to concede that our former opinion was wrong in so far as it holds that Lula May Rule did not inherit the land in controversy on the death of her adoptive father, Church W. Rule, but the ground upon which I shall base this concession is consistent with and supports my further opinion that upon the death of Lula May Rule the land was inherited from her, not by Mrs. Rule, her adoptive mother, but by her brothers and sisters. The criticism in the majority opinion upon our former decision that Lula May Rule did [379] not inherit this land upon the death of Church W. Rule, her adoptive father, is based upon a total misconception of the ground upon which that decision was based. That criticism is as follows:

"The court seems to have been of the opinion that it was not possible for an adopted child, adopted under the laws of Mississippi, to inherit as an heir of the adopting parent. We are at loss to understand how the court reached this conclusion in view of the previous decision of *Adams v. Adams*, reported in 102 Miss. 259, 59 So. 84, Ann. Cas. 1914D 235, where this court held," etc.

On the former appeal we not only did not intimate that we then entertained such an opinion, but expressly pointed out more than once that a child adopted in Mississippi can inherit property from its adoptive parents, provided the right so to do is conferred by the decree of adoption. The ground upon which we then proceeded was clearly stated in the following language:

"We do not believe, however, that this child was capacitated by the adoption in Kentucky to inherit lands in Mississippi, because the laws of Kentucky are inconsistent with and antagonistic to our Constitution and laws on the same subject, and to the public policy of Mississippi on that subject, as such public policy is found in our statutes and Constitution, and for that reason we do not believe that Mississippi is bound to recognize this adoption by contract, as it was made in Kentucky, to be valid and binding in Mississippi as to confer upon the child the capacity to inherit lands in Mississippi. Its status as an adopted child of Mr. and Mrs. Rule may be recognized here without recognizing its capacity to inherit lands, which is a wholly different thing."

The opinion then proceeded to specifically point out wherein we thought that the Kentucky statute was inconsistent [380] with

and antagonistic to our Constitution and laws.

The right of inheritance is not a natural, but is a civil, right conferred by law, and in so far as real property is concerned it is universally held that it is determined solely by the law of the place where the property claimed to have been inherited is situated. This is but a branch of that broader universal rule that the title to real property must be determined by the *lex rei sitae*.

The right of one person to inherit land from another depends upon the relation in which such persons stands to that other, or, in other words, upon his *status* or condition, which *status* or condition must be determined by the law of the place where it was created (Smith v. Kelly, 23 Miss. 167, 55 Am. Dec. 87); and, second, upon whether a right of inheritance is conferred upon persons having such *status* by the law of the place where the land is situated. The *status* created in one state will be recognized in all other states, provided it is not such as is inconsistent with the laws and public policy of such other states, but such right of inheritance only will attach thereto in such other states to land there situated as would attach had such *status* been created by the laws thereof. 1 C. J. 1402; 1 R. C. L. 615; Ross v. Ross, 129 Mass. 246, 37 Am. Rep. 321; Finley v. Brown, 122 Tenn. 316, 123 S. W. 359, 25 L.R.A. (N.S.) 1285; Gray v. Holmes, 57 Kan. 217, 45 Pac. 596, 33 L.R.A. 207; Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L.R.A. 665, 39 Am. St. Rep. 196; McColpin v. McColpin (Tex.) 77 S. W. 238; Shick v. Howe, 137 Ia. 249, 114 N. W. 916, 14 L.R.A. (N.S.) 980; Melvin v. Martin, 18 R. I. 650, 30 Atl. 467; Smith v. Derr, 34 Pa. St. 126, 75 Am. Dec. 641; Lingen v. Lingen, 45 Ala. 410; Calhoun v. Bryant, 28 S. D. 266, 133 N. W. 206.

The *status* here claimed for Mrs. Rule and her adopted daughter, which *status* in fact unquestionably existed, [381] was that created by the adoption of Lula May Browning by the Rules in the state of Kentucky. The right to adopt the child of another is, in all common-law jurisdictions, created solely by statutes, which statutes are also the measure of the rights and obligations springing from such an adoption (Villier v. Watson, 168 Ky. 637, 182 S. W. 869), and the courts, under the most elementary principles, are without rightful power to add thereto or detract therefrom.

From these elementary rules, which have heretofore been uniformly acted upon by this court in dealing with the *status* created by the marital relations, the birth of children, etc., and which are equally binding in a case wherein the *status* is that created by the adoption of a child, it necessarily follows:

First, as is held by the great weight of authority, that Lula May Rule inherited the lands in controversy from her adoptive father, Church W. Rule, upon his death, provided the laws of this state permit children adopted under the laws thereof to inherit property from their adoptive parents; and, second, as is held by all of the courts that have dealt with the question, that Mrs. Rule did not inherit the land in controversy on the death of her adopted daughter, Lula May Rule, unless the laws of this state permit an adoptive parent to inherit property from an adopted child.

The statute which regulates the adoption of children in this state is section 542, Code 1906, as amended by chapter 185, Laws of 1910, and by it a child of another may be adopted by means of a proceeding in the chancery court, which, in its decree creating such an adoption, must specify the benefits which the adoptive parent proposes to confer upon the adopted child, to all of which such child shall be thereafter entitled, one of which benefits may be, as has heretofore been held by this court, the right to inherit property from the adoptive [382] parent. This statute, therefore, confers upon adopted children the right to inherit land from the adoptive parent, provided the decree of adoption so adjudges, from which it necessarily follows, under one of the rules hereinbefore set out, that a child adopted in another state in such manner as to give it there the right to inherit property from the adoptive father will be given such right here. In other words, section 542 of the Code provides for the inheriting of land by adopted children, and since Lula May Rule had that right under the laws of Kentucky by which her *status* as an adopted child was created, she will, under the rules hereinbefore announced, have the same right here, from which it, of course, follows that upon the death of her adoptive father she inherited a child's portion of the land of which he then died seised and possessed.

Coming now to the right of Mrs. Rule to inherit the land on the death of Lula May Rule, and, turning again to section 542 of the Code, it will be observed that no right of inheritance whatever is there conferred upon adoptive parents, the only right there conferred upon them being that they "shall have and exercise over such infant all such power and control as parents have over their own children," and, under well-settled and most elementary rules, this court has no rightful power to confer such a right upon them. In passing I will say that our statute in this respect does not stand alone among the statutes of the states, for practically all of them as originally drawn confer no such right upon adoptive parents, though some of

them now by amendment do so. Section 1649 of the Code confers no such right, for the parents and the children there dealt with are natural and not adoptive parents and children. Since no such right of inheritance is conferred by the laws of this state upon adoptive parents, it necessarily follows under the rules hereinbefore [383] set forth that adoptive parents who become such under the laws of another state have no such right here, even if the laws of such other state give them such a right. The majority opinion cites no authority to the contrary, and one, I confidently assert, can be found.

The ground upon which the majority opinion, in this connection proceeds is: First, under the laws of Kentucky Lula May Browning, because of her adoption by the Rules in that state, became their lawful child "in the same light as a child born in lawful wedlock;" and, second, by reason thereof, when she dies [died] in infancy without issue, under the inheritance laws of this state, the property descends [descended] to her foster mother who survives [survived] her." It is said in that opinion that:

"Lula May Browning inherits the property of her adopting father and mother, and why? Because she is their child in legal contemplation. When the child died intestate Mrs. Rule inherited her property, and why? Because Mrs. Rule in legal contemplations is the mother of the deceased child."

No statute of this state or decision of any court is referred to in support of the second of these propositions, and it is based, in so far as I can gather from the opinion, upon the attempt by the majority to administer what they call natural justice, losing sight altogether of the universal rule that the right of inheritance is purely legal, and unless conferred by law does not exist. It may be conceded that in Kentucky the adoption of Lula May Browning created reciprocal rights of inheritance between her and her adoptive parents, but since our statutes recognize no such right in an adoptive parent such a right created under the Kentucky statutes cannot be given effect to in this state, for, as hereinbefore pointed out, no right to inherit land attaches to a *status* created in a state other than that [384] in which the land is situated, unless such right would attach thereto had such *status* been created in the state wherein the land is situated.

It may be that an adoptive parent may have the right to inherit from a child adopted under a statute which provides that the reciprocal relations between the adopted child and its adoptive parents shall be, for all purposes, identical with the relations that would have existed between them had the child been born to such parents in lawful wedlock, as to which I am not here called upon to express

an opinion, for our statute contains no such provision, and no such relation is created by the adoption of a child under it. The contrary view was earnestly pressed upon and rejected by this court in *Beaver v. Crump*, 76 Miss. 34, 23 So. 432. In that case the appellants sought in the court below to establish their claim to an estate left by Seth A. Pool as his legal heirs, and to have the claim of the appellee thereto canceled as a cloud upon their title. The appellee made her answer a cross-bill, and claimed title to the property by inheritance from Pool, because of the fact that she was his adopted daughter, and prayed that if this claim should be rejected by the court, it would then decree the specific performance of a promise, made by Pool in the petition by which he procured from the court the decree of adoption, to devise to her the land in controversy. The decree of adoption, after reciting Pool's promise to devise the land, proceeds as follows:

"It is therefore considered, and so ordered by the courts, that the said petition be allowed, said adoption granted, and the name of said Alice Hulsey is hereby changed to Alice Hulsey Pool, and that she be entitled to all the benefits conferred and imposed by section 1496, Code of 1880, in that behalf made and approved."

[385] In support of their contention that under our statute the mere fact of adoption brings about the relation and *status* of parent and child, the brief of counsel for the appellee, after setting forth that "the law of adoption comes to us from the civil law, and to it we must go in order to give to our statute on the subject its proper construction," and citing the case of *Humphreys v. Davis*, so much relied on here in the majority opinion, proceeded as follows:

"By a careful examination of the authorities, fully collated in the two cases above given, it will be found that to adopt a minor means something—it brings about the relation and *status* of parent and child, with all of the obligations and liabilities, as well as all of the benefits, of such a relation. There cannot be a child without the correlative of a parent; where there is one, there is the other, with all that the relation means."

Had this argument prevailed with the court, the case would necessarily have been decided in the appellee's favor, but it did not prevail, and she lost. All the authorities hold, without conflict in so far as I am aware, that the adoption of a child does not vest any of the parties to the adoption with the right to inherit property from the others, unless the statute under which the proceeding is had so provides, either expressly or by necessary implication. The assumption here by the majority of the court that the Kentucky statute, under which this child was

adopted, made her for all purposes the child of the Rules to the same extent that she would have been had she been born to them in lawful wedlock, so that she on the one side, and her adoptive parents on the other, became vested with reciprocal rights of inheritance, has no foundation in fact, as the supreme court of Kentucky has more than once held. What that court in fact has decided as to the rights of inheritance growing out of the adoption of a child under the [386] statutes of that state is this: That the adopted child and its issue have the same right of inheriting property from the adoptive parents as they would have had had the child adopted been born to the adoptive parents in lawful wedlock, but that the adoptive parents have no right whatever of inheriting property from the adopted child. *Power v. Hafley*, 85 Ky. 671, 4 S. W. 683; *Atchison v. Atchison*, 89 Ky. 488, 12 S. W. 942; *Merritt v. Morton*, 143 Ky. 133, 136 S. W. 133, 33 L.R.A.(N.S.) 139; *Lanferman v. Vanzile*, 150 Ky. 751, 150 S. W. 1008, Ann. Cas. 1914D 563.

The case last cited, *Lanferman v. Vanzile*, is the one here relied on by the majority of the court, and its conception of what the case held is set forth in a quotation therefrom. This quotation, however, does not appear in the majority opinion in the form in which the language was used by the Kentucky court, and makes the court appear to have decided just the converse of what it in fact did. The first sentence of this quotation as it appears here in the majority opinion is only a part of a sentence quoted by the Kentucky court, and set forth in its opinion at page 752 of 150 Ky. at page 1009 of 150 S. W. Ann. Cas. 1914D 563, in the official report, from an opinion formerly delivered by it in the case of *Power v. Hafley*, *supra*, and refers to the adoption statute. As formulated by that court the sentence reads as follows:

"That it is the event of adoption that fixes, under the law authorizing the adoption, the legal status of the adopted child; and the child, by the event of adoption, becomes the legal child of the adopting parent, and stands, as to the property of the adopting parent, in the same light as a child born in lawful wedlock, save in so far as the exceptions in the statute authorizing the adoption declare otherwise."

As it appears here in the majority opinion, it reads:

[387] "By the event of adoption [the adopted child] becomes the lawful child of the adopting parent, and stands, as to the property of the adopting parent, in the same light as a child born in lawful wedlock."

The next two sentences of the quotation are taken from page 751 of 150 Ky. page 1008, of 150 S. W. Ann. Cas. 1914D 563, in

the official report of the case, and were used by the court in referring, not to the adoption statute, but to a section of the Kentucky statutes of descent and distribution, which places a limitation upon the estate which an infant receives from a parent by gift, devise, or inheritance, and which I shall presently specifically set out. In that case:

"Henry Lanferman and his first wife, Anna Lanferman, by a proceeding duly had, adopted, on June 12, 1891, Albert Uriage, who was then seventeen months old. His foster parents took him to their house, and reared and educated him as if he was their natural child, he being known as Albert Lanferman. They afterwards had three children of their own. The wife died intestate, and Henry Lanferman married a second time. He then died intestate, leaving property in the city of Covington. After the death of Henry Lanferman, the adopted child, Albert Lanferman, died unmarried and without issue, in infancy. A partition suit was instituted to divide the estate of Henry Lanferman among his three children. In this proceeding Clara Vanzile, the natural mother of the adopted child, Albert Lanferman, filed her petition, claiming that he took, at the death of his foster father, an undivided one-fourth of the estate, and that this one-fourth descended, at his death, to her. The three children of Henry Lanferman demurred to this pleading. The court overruled their demurrer, and, they failing to plead further, judgment was entered in favor of Mary Vanzile for one-fourth of the property. They appeal."

[388] The Kentucky statute (Ky. St. section 2071) under which the child had there been adopted provides for an adoption by petition to the circuit court which court shall declare "such person [the child adopted] heir at law of such petitioner and, as such, capable of inheriting as though such person were the child of such petitioner." The statute under which *Lula May Rule* was adopted provides that the child adopted "shall become the heir at law of such person so adopting him or her, and be as capable of inheriting as though he or she were the child of said person," so that everything there said is applicable here. The points made by counsel in the argument of the case do not appear from the report thereof, but it is said in the opinion of one of the justices who dissented from the majority on another proposition, that:

"It is not argued in the case at bar anywhere or by anybody that an adopting father has, by virtue of the statute, or by virtue of the relationship, assumed through the statute any right of inheritance from the adopted son such as a natural father would have. It is nowhere claimed that the adopting parent has any such right of inheritance as would a natural parent. It is not claimed any-

where that he is a 'parent' in the sense in which we commonly know that word. So far, therefore, it must be admitted by any reasoning mind that the one adopting is not the 'parent' of the adopted child in the sense that he takes under any statute or any law the right to inherit from the one whom he has adopted."

The majority opinion in that case proceeds on the assumption that this is true, and disposes of the question in the following language:

"It is also universally held, under similar statutes, that the person adopting a child does not thereby become capable of inheriting property from the child unless it is so provided in the statute."

[389] In the Kentucky statutes of descent and distribution appears a section which, as the Kentucky court has expressly held, deals not with the question of inheritance, but limits the estate of an infant in property received by it from a parent by gift, devise, or inheritance, and is as follows:

"If an infant dies without issue, having the title to real estate derived by gift, devise or descent from one of his parents, the whole shall descend to that parent and his or her kindred as hereinbefore directed, if there is any; and if none, then in like manner to the other parent and his or her kindred; but the kindred of one shall not be so excluded by the kindred of the other parent, if the latter is more remote than the grandfather, grandmother, uncles and aunts of the intestate and their descendants." Ky. St. section 1401.

The court, after holding that an adoptive parent has no right in inheritance in the property of an adopted child by virtue of the Kentucky adoption statutes, proceeded to determine what effect this statute limiting the estate received by an infant from its parent had upon the controversy then before it, stating that:

"The question here is simply. What is the proper construction of the statute [referring to the adoption statute?] Was it intended to put the adopted child on the same footing as the natural child, and does he take his inheritance subject to the same limitations, if he dies in infancy and without issue?"

The court, after giving its reasons therefor, answered these questions by holding that since the adoption statutes provide that the adopted child shall inherit property from its adoptive parent, as though it were the child of such adoptive parent, its estate in the property so inherited is subject to the same limitation as the estate received from its parent by a natural child, and concluded its opinion as follows:

[390] "The statute [referring to the one limiting the estate of an infant in property received from its parent] does not make the

Ann. Cas. 1918B.—65.

foster father the heir of the adopted child. The case does not turn on the question. Who is capable of inheriting from the adopted child? It turns on the question, What estate does the adopted child who dies in infancy and without issue take in the estate of his foster parent? The adopted child under the statute is 'capable of inheriting as though such person were the child of the petitioner.' He, therefore, takes under the statute the same estate as the natural child. The estate of the natural child which he inherits from his parent is defeated by his death in infancy without issue, and the property then goes back to the kindred of that parent. The adopted child, inheriting as though he were the child of his foster parent, takes subject to the same limitation, and when he dies in infancy and without issue, the property under the statute descends to the kindred of that parent from whom he received it."

How the majority of this court, in the case at bar, can understand that case to hold that an adoptive parent has the right in Kentucky to inherit property from the adopted child is beyond my comprehension; and that they will admit that the Kentucky statute, limiting the estate of an infant in property received from its parent by gift, devise, or inheritance, can have no operation in Mississippi I take for granted, in view of the two universal rules that title to real property must be determined by the law of the place where it is situated, and that statutes have no extraterritorial force. If the statute is to be applied here, it must also be applied as a limitation upon the estate of a natural child, born in Kentucky, in land situated in this state, received by it from one of its parents by gift, devise, or descent, a thing which I suspect this court would not do. The fact that the supreme court of Kentucky has expressly [391] decided that its adoption statutes confer no right of inheritance upon an adoptive father should close this inquiry; for no court has ever held, in so far as I am aware, that the construction placed upon a statute of a state by its own supreme court is not binding on the courts of every other state wherein rights claimed under such statute are called in question. 36 Cyc. 1104, and authorities there cited in note 4, among which is *McIntyre v. Ingraham*, 35 Miss. 25, in which this court said:

"No principle of law is of more universal acceptance, or stands upon sounder reason, than that the construction put by the proper courts upon the statutes of their own jurisdiction is conclusive of their force and effect, and will be so regarded by all foreign judicatures, when they may become the subject of consideration."

The estate which *Lula May Rule* took in the land inherited by her from her adoptive

father was that which she would have taken had she been born to him in lawful wedlock, which under the law of this state is a fee simple; consequently upon her death the land was inherited under section 1849 of our Code by her brothers and sisters, and should be awarded to them, regardless of whether this court thinks that so to do would be in accord with natural justice or not, for that question is not for its determination, but for the determination of the legislature.

The case of *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788, cited in the majority opinion, is of no value here for three reasons: First, that decision simply construed an Indiana statute, the phraseology of which is different from the Kentucky statute here under consideration, and, second, whether the construction put upon the Kentucky statute by the supreme court of that state is right or wrong, it should be accepted and acted upon here; and, third, the right of an adoptive parent [392] to inherit land situated in a state other than that under the laws of which the child was adopted was not there involved. But since that case is cited with approval in the majority opinion, it may not be out of place for me to give it some consideration.

The statute there under consideration (*Burns' Ann. St.* 1901, sections 837, 838) after providing the method by which children could be adopted, continued as follows:

"From and after the adoption of such child, it shall take the name in which it is adopted, and be entitled to and receive all the rights and interest in the estate of such adopted father or mother, by descent or otherwise, that such child would do if the natural heir of such adopted father or mother. . . . After the adoption of such child, such adopted father or mother shall occupy the same position toward such child that he or she would if the natural father or mother, and be liable for the maintenance, education, and every other way responsible as a natural father or mother."

It came before the supreme court of Indiana for construction in *Barnhizel v. Ferrell*, 47 Ind. 335, and the court then held that it conferred no right on an adoptive parent to inherit property from the adopted child. In *Krug v. Davis*, 87 Ind. 590, it was conceded by counsel, and assumed by the court, that the statute conferred no such right, but when that case came again to the court on a second appeal, as *Davis v. Krug*, 95 Ind. 1, the court held that the question was not considered and decided by it on the former appeal, and was therefore not within the law of the case rule; that the statute did confer such right of inheritance on an adoptive parent—and overruled *Barnhizel v. Ferrell*. Afterwards, the right of the same adoptive parent to inherit

from the same adopted child that was involved in *Krug v. Davis*, and *Davis v. Krug*, supra, came before the court in [393] *Humphries v. Davis* in which the overruling of *Barnhizel v. Ferrell* was approved, the court construing its statute in the light of the civil law, and, as was pointed out by the supreme court of Iowa in *Baker v. Clowser*, 158 Ia. 156, 138 N. W. 837, 43 L.R.A.(N.S.) 1056, basing its conclusion upon an erroneous premise. The reasoning of that court, from the status of an adopted child under the civil law, was repudiated by this court, as hereinbefore pointed out in *Beaver v. Crump*, 76 Miss. 34, 23 So. 432, and by the supreme court of Kentucky in *Villier v. Watson*, 168 Ky. 631, 182 S. W. 869. Among the numerous cases in which it has been held that an adoptive parent does not inherit property from the adopted child, unless the right so to do is expressly given by statute, are the following: *Baker v. Clowser*, 158 Ia. 156, 138 N. W. 837, 43 L.R.A.(N.S.) 1056; *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802; *Heidecamp v. Jersey City, etc. R. Co.* 69 N. J. L. 284, 55 Atl. 239, 101 Am. St. Rep. 707; *Hole v. Robbins*, 53 Wis. 514, 10 N. W. 617; *White v. Dotter*, 73 Ark. 130, 83 S. W. 1052; *Russell v. Jordan*, 58 Colo. 445, 147 Pac. 693, Ann. Cas. 1916C 760; *Lathrop v. Young*, 25 Ohio St. 451; *Upson v. Noble*, 35 Ohio St. 655; *Edwards v. Yearby*, 168 N. C. 663, 85 S. E. 19, L.R.A.1915E 462; *In re Daisey*, 15 W. N. C. (Pa.) 403; *Murphy v. Portrum*, 95 Tenn. 605, 32 S. W. 633, 30 L.R.A. 263.

The California case cited in the majority opinion is of no value here, for the reason, as pointed out in the California court's opinion, the statute of that state there under consideration is materially different from the statutes of other states. The statute (*Civ. Code*, sections 228, 229) there construed, as was said by that court, does "not in terms provide for the inheritance by the adopted child from the adopting parent or *vice versa*," but does provide that:

[394] "A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation. . . . The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it" and was construed by the court to mean that, when a child is adopted under it, the relations between it and its natural parents are for all legal purposes superseded, and it thereafter becomes for all such purposes the child of the adoptive parents. The Kentucky statute expressly gives the child a right to

inherit from its adoptive parents. Our statute provides that such right may be conferred upon it in the decree of adoption; but in neither of these statutes is a right in the adoptive parent to inherit from the child referred to, and therefore such a right cannot be held to be included therein without violating one of the most elementary rules of construction. "*Expressio unius est exclusio alterius.*" And, moreover, as hereinbefore pointed out, this court has held that under our statutes—and the Kentucky court has held under the Kentucky statutes—no such relation is created by the adoption of a child.

In conclusion I have only this further to say: That when this case was before us on the former appeal, we held, as has also the supreme court of Kentucky, that under the Kentucky statute under which Lula May Rule was adopted, her adoptive parents were given no right to inherit property from her, which holding, even if this court has the right to construe the Kentucky statute differently from what it has been construed by the Kentucky court, is supported by the decisions of all the courts which have construed statutes the phraseology of which is similar to that of the statute here under [395] consideration; and yet that decision is to be overruled because a majority of this court now say that it is manifestly wrong.

I am requested by my Brother Sykes to say that he concurs in the views herein expressed.

ON SUGGESTION OF ERROR.

(October 8, 1917.)

ETHRIDGE, J.—The suggestion of error filed in this case challenges the power of the court to change the decision on the first appeal, on the ground of want of power in the court under constitutional grant of jurisdiction to the court; second, if the court had such power, that its exercise would violate the rules of *res adjudicata*, "for which neither a principle can be stated nor an authority produced;" third, that to make such a decree is to overrule an unbroken line of decisions in this state, recognizing and enforcing the law of the case.

The Constitution, in giving jurisdiction to the supreme court, uses the following language:

"The supreme court shall have such jurisdiction as properly belongs to a court of appeals." Section 146 of the Constitution.

In section 144 the general grant of judicial power is in the following language:

"The judicial power of the state shall be vested in a supreme court and such other courts as are provided for in this Constitution."

It will be noted from these provisions that the entire judicial power of the state is vested in the supreme court and such other courts as are provided for in the Constitution. Section 146 has been construed to mean that the supreme court has only appellate jurisdiction, and that original jurisdiction cannot be conferred upon it. There is no limit of the appellate jurisdiction that [396] may be conferred upon it under the Constitution. All power belonging to an appellate court may be conferred upon the supreme court, and there is no limitation in the Constitution on the power of the court to overrule decisions, or change its decision when in the opinion of the court a former decision may be erroneous or wrongful. No authority cited in the suggestion of error or brief refers to any constitutional restriction, and the constitutional power of the court to make decisions of the kind challenged in the suggestion of error has not been decided or adjudged in any of the authorities cited. The decisions cited wholly fail to sustain this contention. The court necessarily has power to decide an appeal and enter a final judgment.

On the second proposition, that if the court possesses such power the decision would violate the rule of *res adjudicata*, "for which neither a principle can be stated nor authority produced," is likewise not well taken. We think we have produced decisions in the former opinion sustaining the power and right of the court to change the decision. Other authorities could be cited, and among the decisions which have accomplished the same result, without making the pronouncement in terms, is *Field v. Middlesex Banking Co.* 77 Miss. 180, 26 So. 365, which later came before the court on second appeal in 84 Miss. 646, 37 So. 139. On the first appeal Judge Woods, as the organ of the court, used some strong language and reversed the case. On the second appeal, a majority of the court reversed the lower court, which followed Judge Woods' opinion, and changed the effect of the decision on the first appeal. It is true that Judge Whitfield, one of the members of the court, undertook to show the same result could be accomplished without disturbing Judge Woods' opinion; but the court did change the pronouncement of the law as it had been adjudicated on the first appeal. In Judge Woods' opinion [397] he stated that the record consists of three large volumes, and it was manifest that the facts were fully presented on the first appeal, but on the second appeal a different conclusion was reached on the facts. In *State v. Louisville, etc. R. Co.* 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912C 1150, and in the same case in 104 Miss. 413, 61 So. 425, the court declared the law applicable to the case and reversed the chancery court, remanding the matter to be

proceeded with in accordance with the opinion therein pronounced. On the first remand the chancellor declined to follow the court, and in reversing him the second time in 104 Miss. 413, 61 So. 425, the law was again announced and reaffirmed as in the first opinion. Thereupon the chancellor entered a decision in conformity with the opinion of the supreme court. The case was thereupon appealed again to this court, and in 107 Miss. 597, 65 So. 881, the court changed its announcement of the law, and reversed the chancellor, and entered judgment dismissing the suit.

Numerous authorities have been cited in the suggestion of error, most of which were referred to in the dissenting opinion in the present case, and in none of them is the precise case here dealt with presented. The only case that seems to sustain the contention of the suggestion of error is *Stewart v. Stebbins*, 30 Miss. 66. That case, however, is distinguishable from this case, because the former decision was not in the same case. But the rights growing out of the suit had been adjudicated in the case of *Stebbins v. Niles*, 25 Miss. 267, and which had, therefore, been finally adjudicated, and constituted *res adjudicata*, properly speaking, and as distinguished from the law of the case. It is true that the court in the case reported in 30 Miss. 66, uses language that would support the contention; but the language used was not applicable to the facts of the case. In other words, it was broader than the case called for. The decision, applied [398] to the facts of the case on which it was decided, was perfectly proper; but the statement of the court in the opinion, "that it is immaterial in this respect whether the case was further proceeded with in the court below or not," was not before the court, and is not authority for the proposition here cited.

The names of great judges of the past, who have adorned this court, have been brought into honored review, in the suggestion of error, as great names in the judicial history of this state. We revere the memory of these judges, and have great respect and deference for their decisions. Able and eminent as these judges were, they were human and fallible, and, while we would not lightly depart from rules laid down by them, still we must, where they have decided cases which operate to effect injustice or lead to wrong results, apply the corrective as though we had rendered the same decisions. We do not intend to depart lightly from precedents. We expect to consider and adhere to them where they are sound in principle; but we refuse to crucify justice on the cross of precedent. We do not think the language used

in our opinion, "when judicial construction is out of harmony with natural justice the judicial reasoning should withstand the most careful scrutiny and analysis before it should prevail," and "courts are created, maintained, and sworn to administer justice and not to adhere strictly to arbitrary rules; when a rule or decision defeats justice or seriously impairs it, it should be departed from rather than followed," is such radical language as need frighten the members of the bar. There may be those who love consistency of utterance and of precedent more than they do the administration of justice, but in our opinion the courts were created solely for the purpose of administering justice. We recognize that precedents are valuable guides, and it is not our purpose to throw them aside entirely and to proceed and blaze a new trail from our personal sense of right and [399] justice. The decisions of the courts are not necessarily unchangeable, and it is the duty of the court to change a decision, if wrong in principle, and which leads to injustice and wrong.

The first appeal, in the present case, was from an interlocutory decree, and not from a final decree. Important as it is for the court to adhere to rulings made in settling the principles of litigation before final decree or judgment, it is more important that justice be done; and where the court reached the conclusion that a decision is manifestly wrong, and ought to be overruled, we see no reason to hold a litigant irrevocably bound to the court's mistake. If a mistake is made, it would be better to correct it at once, while injustice may be prevented. A litigant has no vested interest in a court's mistake, where the mistake is discovered before the final ending of the litigation.

We are satisfied with the pronouncement in our former opinion on the third proposition above laid down in the suggestion of error, without adding to it.

Suggestion of error is overruled.

Smith, C. J., and Sykes, J., dissenting.

NOTE.

It is held in the reported case that, even with respect to the descent of realty, the right of an adopted child to inherit will be determined in accordance with the law of the state where the adoption takes place. The right of inheritance within a state of a child adopted under the laws of another state is discussed in the notes to *Brown v. Finley*, 16 Ann. Cas. 778; *Anderson v. French*, Ann. Cas. 1916B 89; and *Hockaday v. Lynn*, 118 Am. St. Rep. 672.

BERRYMAN ET AL.

v.

CHILDS.

Nebraska Supreme Court—June 5, 1915.

98 Neb. 450; 153 N. W. 450.

Pleading — Reply — In Court Exercising Powers of Justice of Peace.

Since the only pleading required in the county court when exercising the jurisdiction of a justice of the peace is a bill of particulars, and the reply in the district court on appeal was to new matter in the answer and was not inconsistent with the petition, it should not have been stricken.

Frauds, Statute of — Memorandum — Printed Signature.

A printed and written contract between an owner of land and a broker or agent for the sale of land was signed by the owner by his own hand. The signature of the broker was printed. The broker acted upon the contract. In this, an action to recover a commission for the sale of the land described in the contract, the trial court excluded the paper as not being sufficient under section 2628, Rev. St. 1913, and refused an offer to show that the land was sold by virtue of the contract. Held, that the rulings were erroneous.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Rock county: DICKSON, Judge.

Action by James H. Berryman et al., plaintiffs, against W. L. Childs, defendant. Judgment for defendant. Plaintiffs appeal. The facts are stated in the opinion. REVERSED.

J. H. Berryman for appellants.

[451] LETTON, J.—Action by real estate brokers to recover a commission upon a sale of land made for plaintiff. The trial court directed a verdict for the defendant. From a judgment based thereon the plaintiffs appeal.

In the spring of 1911 defendant employed the plaintiffs to procure a purchaser for 172 acres of land in Rock county, and at that time signed the following contract:

"I, W. L. Childs, of Carnes, county of Rock, state of Nebraska, have this day given Berryman & Janney the exclusive sale or transfer of the real estate as described hereon, which is owned by me, at the agreed price \$53.00 per acre dollars. I hereby appoint and constitute said Berryman & Janney as my lawful agent, and authorize said Berryman & Janney to enter into written contract for me, on my behalf and in my name, for the sale of said

real estate. I agree to make a good satisfactory deed and to give a clear abstract of title to said real estate, showing the title to be fully vested in me. In consideration of the services of Berryman & Janney in making such sale, transfer, sending me a buyer, advertising, or being instrumental in any manner, whatever, in selling or transferring said property, I agree to pay said Berryman & Janney out of the first payment a commission of 1.00 one per acre dollars, payable at the office of said Berryman & Janney. Any change in the price or terms agreed to by me shall work no forfeiture in the commission due said agent in sale or transfer of said property. I hereby reserve the right to terminate this agency at any time after 30 days by giving 30 days' notice in writing to said agent. Receipt of a duplicate of this agreement is hereby acknowledged. W. L. Childs, Owner.

[452] "Said agency accepted on above conditions. Berryman & Janney."

A full description of the land was written on the back of the paper before signing. The paper is printed, but the words in italics are written.

In the answer the defendants admit that he listed the land described for sale with plaintiffs as his agents, and that the land was sold to one Parks as alleged. Other defenses were pleaded which are not relevant to the question presented in this court. Mr. Janney testified that Mr. Childs signed the contract after he had filled the blank spaces in the printed paper, and that the name "Berryman & Janney" appearing on the lower left hand corner of the exhibit was printed thereon by the order or instruction of the firm. The contract was offered in evidence. Defendant objected to its introduction for the reason that it was incompetent and shows upon its face that it was not signed by the broker or agent who is intended to be a party to said contract. The objection was sustained. Plaintiffs then attempted to prove that the land was sold by plaintiffs to Parks by virtue of this contract, and that no commission had been paid. This testimony was also excluded. A motion to direct a verdict for the defendant was then sustained, and a verdict and judgment rendered accordingly.

The district court struck out all of the reply except a general denial, on the ground that its allegations were not within the issues tried below. The pleadings in the county court are not in the record. Since a bill of particulars of plaintiff's claim is the only pleading required by statute in an action to recover less than \$200, and since the matter stricken in the reply is not inconsistent with the petition and responds to new matter in the answer, we think it should not have been stricken.

It is argued that, since the contract was executed, a recovery can be had even though it was not in writing. The rule in this state is that a broker who has sold land for another cannot recover either on the contract or upon a *quantum meruit* for the value of his services unless he [453] holds a written contract which satisfies the statute. *Nelson v. Webster*, 83 Neb. 169, 119 N. W. 256; *Clark v. Davies*, 88 Neb. 67, 129 N. W. 165.

We have not been favored with a brief by the appellee, but it seems apparent that the district court was of the opinion that the contract was not executed in accordance with section 2628, Rev. St. 1913: "Every contract for the sale of lands, between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent." Since the owner of the land signed the contract, the question presented is whether "the contract is . . . subscribed by . . . the broker or agent." We have held that the word "subscribed" in this section is not to be taken literally, but in its popular sense as being equivalent to the word "signed." *Myers v. Moore*, 78 Neb. 448, 110 N. W. 989. The name of the firm was printed under the order and direction of the plaintiffs. The courts construe such statutory requirements more or less strictly according to the nature of the instrument involved. In such documents as wills much more strictness is required than in instruments of less importance and effect.

In *Schneider v. Norris*, 2 M. & S. 286, an invoice was sent by the seller to the purchaser, headed: "London, October 24, 1812. Messrs. John Schneider & Co. bought of Thomas Norris & Co., agents, cotton yarn and piece goods. No. 3, Freeman's Court, Cornhill." A list of articles with the quantities and prices followed. The whole heading of the bill was printed, except the words "Messrs. John Schneider & Co." It was held that the printed name, under the facts, was sufficient to satisfy the statute of frauds and to bind Norris & Company, which was the intention when the bill was made out. *Saunderson v. Jackson*, 2 B. & P. (Eng.) 238, and *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343, are practically to the same effect. In *re Walker*, 110 Cal. 387, 42 Pac. 815, 52 Am. St. Rep. 104, 30 L.R.A. 460, and in *Cummings v. Landes*, 140 Ia. 80, 117 N. W. 22, the meaning of "signature" is [454] discussed, and it is shown that signatures were at first usually made by the mark or cross, and that writing is not absolutely essential if the party acts upon or intends to be bound by the mark,

stamp or printed name. Where a name was stamped upon a notice of objection in an election contest proceeding which the statute required "shall be signed by the person objecting," this was held sufficient. *Bennett v. Brumfitt*, 3 L. R. C. P. (Eng.) *28. In 29 Am. & Eng. Enc. of Law (2d ed.) 856, it is said: "A printed name upon a paper which is delivered under circumstances showing an intention to regard the printed name as the person's own will suffice, as will an entry in a book containing the owner's name at the top of the page." Where a statute provided that the summons in a civil action should be "subscribed by the plaintiff, or his attorney," the law was held to be complied with if the signature was printed or stamped. *Barnard v. Heydrick*, 49 Barb (N. Y.) 62; *Mezchen v. More*, 54 Wis. 214, 11 N. W. 534; *Herrick v. Morrill*, 37 Minn. 250, 33 N. W. 849, 5 Am. St. Rep. 841.

The plaintiffs having signed the contract with their printed name with intention to be bound by it, having assumed its obligations, and (assuming the fact to be according to their offer of proof) having discharged it according to its terms, are entitled to the benefit of it.

The validity of the contract was also attacked in the district court on account of the land being a homestead and the contract not being signed by Mrs. Childs. Of course, the contract neither affected Mrs. Childs interest in the premises nor the title to the land; but this does not interfere with the right of plaintiffs to recover a commission from Mr. Childs if they produced a buyer to whom Mr. and Mrs. Childs sold the land.

For the reasons stated, the judgment of the district court is

Reversed.

Rose, Fawcett and Hamer, JJ., not sitting.

NOTE.

Sufficiency of Printed Signature to Memorandum within Statute of Frauds.

The earlier cases discussing the sufficiency of a printed signature to a memorandum within the statute of frauds are reviewed in the note to *Equitable L. Assur. Soc. v. Meuth*, Ann. Cas. 1913B 661. The present note discusses the cases which have arisen since the publication of that note.

It has been held that a printed signature is sufficient to satisfy the statute of frauds where the paper is delivered under circumstances showing an intention on the part of the person to be charged to regard the printed name as his own. *Goldowitz v. Kupfer*, 80 Misc. 487, 141 N. Y. S. 531. And see the reported case. See also *Kilday v. Schanecupp*.

91 Conn. 29, 98 Atl. 335, L.R.A.1917A 151; *McCrea v. Bentley*, 154 N. Y. S. 174. *Compare* *Kaiser v. Jones*, 157 Ky. 670, 163 S. W. 741; *Riviera Realty Co. v. Henry*, 144 N. Y. S. 790.

In *Goldowitz v. Kupfer*, *supra*, the facts and the conclusions of the court thereon were stated as follows: "An order on a blank printed by defendant, with its name and address at the top, for the sale of the goods in question to the plaintiffs, giving the terms of sale, time of delivery, and price of each item of goods, was signed by one of the plaintiffs. At the foot of the order was a printed guaranty of the price, coupled with the privilege of canceling the order, signed, in print, with the name of defendant. An unsigned letter to plaintiffs' firm, with defendant's name and address on the letter head, acknowledging the entry of plaintiffs' order, was delivered to one of the plaintiffs. The defendant's president testified that the plaintiffs' order was placed upon its books as an order, but that its counsel later advised it that it was invalid. A printed signature will answer the requirements of the statute of frauds, and where a trader who is in the habit of delivering printed bills of parcels, to which his name is prefixed, delivers one containing the necessary particulars of the contract, it is sufficient. *Browne on Statute of Frauds* (5th ed.) 356."

In *Kilday v. Schancupp*, 91 Conn. 29, 98 Atl. 335, L.R.A.1917A 151, the court in holding that a signature in the body of the instrument was sufficient to answer the requirements of the statute of frauds, said *obiter*: "The authorities are equally decisive that the signature may be printed or written. . . . And we have held that a signature by a rubber stamp, made by an agent duly authorized, is a signature within the statute."

Likewise, in *McCrea v. Bentley*, 154 N. Y. S. 174, the court said by way of dictum: "While the statute requires that the memorandum be signed by the person to be charged, it does not require that the signature be in any definite form, and initials, marks, fictitious names, and even a rubber stamp have all been considered as a sufficient compliance with the statute. The test in every instance seems to be whether the party or his duly authorized agent has signed the memorandum in such manner as to authenticate the promise."

In *Kaiser v. Jones*, 157 Ky. 607, 163 S. W. 741, however, a memorandum of the sale of real estate was held to be insufficient where it consisted of a newspaper clipping ending with the printed signature of the auctioneer, who acted as the vendor's agent. It appeared that the newspaper clipping had been pasted on a sheet of paper, that some writing relative to the sale had been written on this paper below the auctioneer's signature, and that

the vendee signed her name at the end of the writing but the auctioneer did not. The court said: "The memorandum here in question was not signed by the vendor; but he contends it was signed by the auctioneer. As will be seen by reference to the memorandum, the only place where the name of the auctioneer appears is at the bottom of the printed clipping or newspaper advertisement of the sale, which clipping was pasted upon the paper on which appellee signed her name, and above that part of the writing to which she affixed her signature. In support of his contention that the name of the auctioneer printed on said clipping is a sufficient signature, appellant cites 20 Cyc. 275, where it is said that 'a printed or stamped signature may be a sufficient signature if adopted and intended as such,' which statement is supported by citation of several English cases. But, granting that a printed signature, if adopted and intended as such, might be sufficient, the printed signature of the auctioneer is appended to the advertisement of sale, not to that part of the writing which recites that appellee has become the purchaser of the property. Manifestly it could not have been adopted and intended as the signature of the auctioneer to that part of the memorandum which Mrs. Jones signed, else it would have been appended to that part of the paper. Moreover, Ky. St. § 468, provides that the signature must be subscribed at the end of a writing."

In *Riviera Realty Co. v. Henry*, 144 N. Y. S. 790, it appeared that an instrument purporting to be a lease had been executed by the *Riviera Realty Company*. The lease had the corporate name of the plaintiff as lessor printed at the end and this printed signature was followed by the signature of another person in writing. It was said that a lease subscribed in print, when followed by the written signature of another person would be good under the statute, if the writer had the authority to bind the person whose name appeared in print. It appearing that no such authority was shown, the court held the case open suggesting that at another trial the plaintiff might be able to prove authority on the part of the person whose name was subscribed to the lease.

It has been held that where a broker consummates a sale and the buyer's name is entered in the broker's books by the broker himself who delivers a copy of the memorandum to the buyer, an entry of this nature is a sufficient signature to bind the buyer, under the statute of frauds. *Dinuba Farmers' Union Packing Co. v. J. M. Anderson Grocer Co.* 193 Mo. App. 236, 182 S. W. 1036. In that case it appeared that a broker who had represented both the plaintiff and the defendant in the sale of 800 cases of raisins to the

defendant, had made a memorandum of the sale in the books of the brokerage company. The name of the company was printed on the heading of the memorandum, and that of the defendant as purchaser was typewritten therein. In holding that the signature was sufficient to satisfy the statute of frauds, the court said: "But it is said the memorandum is not even signed by the brokerage company. It is true no formal signature appears to be affixed thereto, but this is unimportant, in view of the fact that the name of the broker—that is, the Rosen-Reichardt Brokerage Company—is printed on the heading of the memorandum, and defendant's name is clearly written by the broker therein in typewriting as the purchaser. The signature required by the statute is not confined to the actual subscription of his name by the party to be charged, as is said by Mr. Benjamin on Sales (6th ed.), § 256. Indeed, the name of the party to be charged may be either in writing or in print, or by stamping the name upon the memorandum. Moreover, it may be in the body of the writing or at the beginning or at the end of it. 'But when the signature is not placed in the usual way at the foot of the written or printed paper, it becomes a question of intention, a question of fact to be determined by the other circumstances of the case, whether the name so written or printed in the body of the instrument was appropriated by the party to the recognition of the contract.'"

CITY OF NEW ORLEANS

v.

TOCA.

Louisiana Supreme Court—March 12, 1917.

141 La. 551; 75 So. 238.

Constitutional Law — Police Power — Regulation of Commerce.

The "liberty" guaranteed by Const. art. 2, providing that no person shall be deprived of life, liberty, or property without due process of law, includes the right to manufacture and offer for sale any article of commerce one pleases so long as the doing so does not come under the restrictive jurisdiction of the police power.

Food — Legislative Power of Regulation.

Whether there is danger of the public buying food injurious to health or different from that intended to be bought so as to authorize the exercise of the police power, and whether such danger sufficiently affects the public in-

terests to justify the intervention of the government, is a question for the legislative department, but the legislative action is subject to revision by the courts.

Constitutional Law — Presumption in Favor of Statute.

There is a presumption of validity in favor of a statute or ordinance; but such presumption, however strong, is not conclusive, though the legislative action will be sustained if possible under any reasonably supposable state of facts.

Food — Regulation of Ice Cream — Validity.

A municipal ordinance requiring ice cream to contain at least ten per cent of butter fat, and providing that any frozen product, with certain exceptions, containing milk or cream, whether designated as custard, etc., or by whatever name it is designated, shall be deemed ice cream, is invalid as applied to a frozen product offered for sale only as custard, and which is pure and wholesome, though not containing the required percentage of butter fat.

[See note at end of this case.]

Appeal from Recorder's Court of New Orleans: BURTIE, Recorder.

Prosecution against Albert Toca for violation of municipal ordinance. Defendant convicted and appeals. The facts are stated in the opinion. REVERSED.

Albert Guilbault for appellant.

I. D. Moore and W. L. Hughes for appellee.

[553] PROVOSTY, J.—The accused, Albert Toca, is charged with having violated the "ice cream" ordinance of the city of New Orleans by selling a frozen compound which he sells under the name of "Toca's Custard."

For 15 years previous to this prosecution he had been manufacturing this product and selling it both directly from factory to consumer and through peddlers on the street; but lately there was added to the "ice cream" ordinance of the city the following:

"Provided that any frozen product, except fruit ice cream, nut ice cream, frozen cream cheese, and frozen buttermilk, which shall contain milk, whole or skimmed, or cream, whether the same shall be designated as 'custard,' 'frozen custard,' 'frozen dainties,' or by whatever name such frozen product is designated, shall, for the purpose of this ordinance, be deemed to be 'ice cream,' and shall be made to conform to the requirements provided in this ordinance for 'ice cream.'"

As ice cream must under the ordinance contain at least 10 per cent of butter fat, the effect of this proviso which classifies custard as ice cream is to require Toca's Custard to contain that proportion of butter fat.

Its ingredients are rice, barley, hominy, sugar, eggs, milk, and flavoring; and it is made after a recipe for which the accused has obtained a patent from the United States government. Its characteristic features, both of which are accentuated in the patent, are its inexpensiveness and digestibility. Both of these would be destroyed by the addition of this quantity of fat—practically, the product would become a different one; hence the ordinance has the effect of suppressing the business.

"Permission to sell, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition." *Collins v. New Hampshire*, 171 U. S. 30, 18 S. Ct. 768, 43 U. S. (L. ed.) 60.

Accused contends that the ordinance is null, as depriving him of the "liberty" which is guaranteed to him by article 2 of the Constitution, reading:

[554] "No person shall be deprived of life, liberty or property, except by due process of law."

The liberty here guaranteed includes the right to manufacture and offer for sale any article of commerce one pleases, so long as the doing so does not come under the restrictive jurisdiction of the police power.

This jurisdiction, in so far as bearing upon the sale of an article of human food, is based upon the right, or duty, of the government to protect the public against being subjected to the danger of buying food injurious to health or different from that which is intended to be bought.

The question of whether this danger exists in any particular case, and sufficiently affects the public interest to justify the intervention of the government, is one for the legislative department of the government. But the legislative action is subject to revision by the courts when complaint is made; for the Constitution is the paramount law, and it would be such in name only if when transgressed authority did not reside somewhere for vindicating its supremacy; and this authority resides *ex necessitate* in the courts.

A statute or ordinance is not to be supposed to have been adopted without due deliberation; that is to say, without a full knowledge of all the facts and a careful weighing of the public interest on the one hand and private rights on the other. This gives rise to a presumption of validity in favor of the legislative action; and the strength of this presumption is added in fact by the respect which one of the departments of the government naturally entertains for the decisions of any one of the other departments. But this presumption, however strong, is not conclusive, as one might be led to suppose

from the enunciation of it found in many decisions. The contrary is attested by a large number of other decisions whose correctness is now questioned by no one. It, in last analysis, amounts simply to this, that [555] the legislative action will be sustained if the doing so is possible under any reasonably supposable state of facts.

What reasonably supposable state of facts, then, could justify the fixing of this butter fat standard for custard?

The consideration of danger to the public health may be eliminated at once. For the requirement of a certain proportion of butter fat does not make for greater purity or wholesomeness, but only greater richness or nutritiousness.

The sole consideration must be that of possible deception of the public; of the people being misled into buying a custard different from that which they think they are buying. On the point of whether or not the people of New Orleans have formed the notion, or become imbued with the idea, that custard is deficient in butter fat unless measuring in that respect up to a certain standard, there is no evidence in the record. There is evidence going to show that in New Orleans, as elsewhere, most of what is sold as ice cream is in reality frozen custard; but the effect of that evidence is merely to show that ice cream may in New Orleans be properly classed as ice cream; not that in New Orleans custard as such, not as ice cream, is understood to measure up to a certain standard in butter fat, so that those who buy it, as such, not as ice cream, will be misled unless it does so measure.

No doubt such a state of mind as this is possible or supposable; but it is equally possible or supposable, with respect to the other nutritious elements of custard—the sugar and the egg—so that if a standard of nutritiousness may be prescribed for the butter fat element, so may it, for like reason, be prescribed for the sugar and the egg elements. And if the elements of custard may be thus dictated, why not those of every other manufactured article of human food? And if those of articles of human food, why not those of [556] every manufactured article of commerce, for the public is as liable to form notions with regard to the constituents of one manufactured article as of another, and the manufacturer is no more privileged to deceive the public in the matter of one article than of another?

The situation would therefore seem to be that this butter fat standard, which destroys the business of accused, cannot be maintained, unless the right is to be recognized in the public authorities to fix in like manner a destructive standard for every manufactured article of commerce; an idea which, needless

to say, cannot be entertained for a single moment.

We are aware that the courts have gone so far as to sanction the legislating of oleomargarine (an admittedly wholesome article of food) from the market. *State v. Addington*, 77 Mo. 110; *Powell v. Com.* 114 Pa. St. 265, 7 Atl. 913, 60 Am. Rep. 350; *Powell v. Pennsylvania*, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 U. S. (L. ed.) 253. But these decisions, and others along the same line, will, we imagine, hardly now be followed in the broadness of their doctrine. While refusing a writ of error from this Addington decision Mr. Justice Miller expressed the opinion that the decision was in violation of the Constitution of Missouri. In *re Brosnahan*, 18 Fed. 62. Though he concurred in the *Powell* decision. Mr. Justice Field, however, dissented from the *Powell* decision, and Judge Dillon in *Mun. Corp.* par. 141, has this to say
decision:

"We cannot but express our regret that the Constitution of any of the states, or that of the United States, admits of a construction that it is competent for a state Legislature to suppress (instead of regulating) under fine and imprisonment the business of manufacturing and selling a harmless, and even wholesome, article, if the Legislature chooses to affirm, contrary to the fact, that the public health or public policy requires such suppression. The record of the conviction of *Powell* for selling without any deception a healthful and nutritious article of food makes one's blood tingle."

[557] The more conservative doctrine is that of *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34, where the prohibition of the sale of oleomargarine was held to be unconstitutional, and *People v. Biesecker*, 169 N. Y. 53, 61 N. E. 990, 57 L.R.A. 178, 88 Am. St. Rep. 534, where the same view was taken of a statute prohibiting the use of preservatives, however harmless.

Cases where known articles of commerce, such as linseed oil, vinegar, etc., have not been allowed to be sold in an adulterated state even though offered for sale under names indicative of the adulteration are, of course, not in point. There the known virtues or properties of the articles in their unadulterated state were sought to be made to serve as inducements for the purchase of the adulterated articles.

Nor are the cases of natural products upon which the people are in the habit of relying largely for their nourishments, such as milk and butter, in point. Custard, sold as such, not as ice cream, cannot reasonably be said to be relied upon largely by the people for their nourishment; no more so than a thousand other articles of commerce upon which,

we assume, the Legislature would not think of laying a hand.

A butter fat standard for ice cream has been sustained in two cases, which have been affirmed by the Supreme Court of the United States. *Com. v. Crowl*, 245 Pa. St. 554, 91 Atl. 922; *State v. Hutchinson Ice Cream Co.* 168 Ia. 1, 147 N. W. 195, L.R.A.1917B 198, 242 U. S. 153, Ann. Cas. 1917B 643, 37 S. Ct. 28, 61 U. S. (L. ed.) 217.

In the *Crowl* case the Supreme Court of Pennsylvania said:

"That ice cream is in general use is admitted; that it is largely composed of milk and cream is shown by the evidence in the case. Its name implies the use of cream in its composition, and all of the authorities to which the learned counsel for the appellant refer show that milk and cream are constituents in its composition. It enters so largely into the food supply of the public as to have become a proper subject of legislation, especially in view of the opportunities [558] which its manufacture affords to practice imposition. In the popular understanding it is largely composed of milk of which butter fat is an important constituent. If by the exercise of ingenuity and by the practice of unwarranted thrift a product can be put on the market having the name and appearance of ice cream, but lacking the chief element which gives it value as an article of food, a large opportunity would be afforded to dealers in that article to profit by deception, and it is the opportunity for such deceit of which the police power takes notice and seeks to take away."

Here the two facts, that the word "cream" carries with it a certain implication of butter fat richness by which the public might be misled, and that "ice cream" enters largely into the food supply of the public, are stressed.

In the *Hutchinson* case the Supreme Court of Iowa said:

"It is said by defendants that they are deprived of the right to sell their product if it contains a less per cent of butter fat than that prescribed by the statute, and that the sale of such is entirely prohibited. This, we think, is an assumption not warranted. They may sell it for what it really is."

Thus showing that it was the deceptive feature of the article as implying a certain standard of purity or nutritiousness that was the real basis of the decision.

In reviewing these cases the Supreme Court of the United States said:

"It is specially urged that the statutes are unconstitutional because they do not merely define the term 'ice cream,' but arbitrarily prohibit the sale of a large variety of wholesome compounds theretofore included under

the name 'ice cream.' The acts appear to us merely to prohibit the sale of such compounds as ice cream. Such is the construction given to the act by the Supreme Court of Iowa. *State v. Hutchinson Ice Cream Co.* 188 Ia. 1, 15, 147 N. W. 195, which is, of course, binding on us. We cannot assume, in the absence of a definite and authoritative ruling, that the Supreme Court of Pennsylvania would construe the law of that state otherwise. The conviction here under review was for selling the 'compound' as ice cream, so that we are not called upon to determine whether the state may, in the exercise of its police power, prohibit the sale even of a wholesome product, if the public welfare appear to require such action, and if, as here, interstate commerce is not involved."

[559] We fail entirely to find wherein the public welfare can require the establishment of any such standard for custard, whether frozen or on pie crust, any more than for any other article of food; and as we are not prepared to say that a standard of nutritiousness may be set for all articles of food offered for sale, we find ourselves constrained to hold that one cannot be set for custard.

In *Rigbers v. Atlanta*, 7 Ga. App. 411, 66 S. E. 991, the Court of Appeals of Georgia said of ice cream that it "is a luxury, rather than a necessity," and refused to allow a butter fat standard to be set for it under the general welfare clause.

But conceding that for ice cream, the use of which as an article of diet has come to be so widespread, a standard may be set, the same thing cannot be said of custard, which in its frozen state is not commonly offered for sale to the public as custard; and it is as custard, distinctly as such, that accused offers his product to the public. The eupeptic man may want his custard rich in fat, and correspondingly indigestible; the dispeptic may want his more of the kind that Toca offers. It is not for the law to step in and say to the latter, you shall not be allowed to buy and eat the light and digestible kind, but only the fat and indigestible.

The case is not that of there being nothing in a name, of a rose by any other name smelling as sweet; the question being one of deception vel non, there is everything in the name. The mixtures which were forbidden to be offered for sale as linseed oil and as vinegar, for instance, would never have been forbidden to be offered for sale under other names. There would have been no room for deception, and therefore no basis for constitutional repression. The cases in which the outlawing of oleomargarine offered for sale as such with no attempt at deception has been sanctioned stand, we must admit, more [560] or less in the way; but those decisions must be admitted to have reached the very extreme limit, and to

be justifiable only on the score of the peculiar resemblance of oleomargarine, a manufactured article, to butter, a natural product and one of the main articles of human food, and on the peculiar opportunities that the sale of oleomargarine offers for deception. And also may not such a thing be as that the strong popular prejudice existing at first against this supposedly fake butter had found some unconscious lodgment in the judicial mind, and furnished the last feather in the scale?

The judgment appealed from is therefore set aside, and the accused is ordered to be discharged without day.

Sommerville, J., dissents.

Rehearing denied May 14, 1917.

NOTE.

The reported case, conceding for the purposes of argument the validity of a municipal regulation requiring that ice cream shall contain ten per cent of butter fats, holds to be invalid a provision in such a regulation that frozen custards and the like shall be deemed to be ice cream and within the scope of the requirement. The validity of a state or municipal regulation of ice cream is discussed in the note to *Hutchinson Ice Cream Co. v. State*, Ann. Cas. 1917B 643.

REZAC

v.

ZIMA ET AL.

Kansas Supreme Court—December 11, 1915.

96 Kan. 752; 153 Pac. 500.

Insurance — Liability of Agent to Owner of Property — Failure to Procure Insurance.

In a petition in which it is substantially alleged that a broker or agent undertook to procure insurance on certain property of an owner in some responsible company and where the parties agreed on the total amount of insurance, the amount to be placed on each class of the property to be insured, and that the premium should be taken from a certain fund provided by the owner, but that the broker neglected to procure the insurance, and in reply to an inquiry of the owner had assured him that the insurance had been obtained, and the property is thereafter destroyed by fire, a cause of action against the broker is stated, and certainly sufficient as against an objection of the defendants to the introduction of any evidence.

[See note at end of this case.]

Same.

A broker or agent who undertakes to procure insurance for another is bound to exercise reasonable diligence to obtain it on the terms and conditions agreed upon and to give timely notice to his principal in case he is unable to procure it on the agreed terms and conditions, and if he fails to carry out his agreement and a loss results through his inattention, incapacity or fraud he will be liable to the extent and for the amount that would have been recoverable upon the insurance he had agreed to procure.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Pottawatomie county: HEIZER, Judge.

Action by Edward Rezac, plaintiff, against Frank Zima et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **REVERSED.**

W. F. Challis and *E. O. Brookens* for appellant.

R. F. Hayden, George P. Hayden, F. T. Woodburn, E. D. Woodburn and *A. E. Crane* for appellees.

[752] **JOHNSTON, C. J.**—This is an appeal from a ruling of the trial court sustaining defendants' objections to the introduction of evidence under the petition. Plaintiff alleged, substantially, that in June, 1912, defendant Zima solicited him to procure insurance, aggregating \$1150, upon plaintiff's barn, which he was then erecting, and its contents; that plaintiff [753] authorized and directed Zima to procure the insurance in some responsible company; that Zima informed plaintiff he would do so and would keep the policy at the bank of which he was cashier and charge the cost to plaintiff's account there; that later on the same day defendant Abel was sent out by Zima to look at the barn and contents and write the application, which Abel did; that afterwards plaintiff spoke to Zima about the policy and that Zima assured plaintiff that everything was all right. Plaintiff further alleged that on August 23, 1912, the barn and contents of the value of \$1050 were destroyed by fire; that he informed Zima of the loss, who promised to notify the insurance company and see that it was adjusted; that later, the loss not being adjusted, plaintiff inquired of Zima the cause of the delay and was several times assured everything was all right and would be hurried up; that at all the times Zima assured plaintiff the loss would be paid by the company he well knew no policy had been obtained or properly applied for and such statements were made to mislead plaintiff; that not until about a

month after the fire did defendant Zima inform plaintiff no policy had been applied for but that he had neglected to do so; that plaintiff had at all times relied upon Zima's promises; that Zima and Abel were each to share in the commissions and fees for obtaining the policy; and that because of defendants' wrongs, misrepresentations and gross neglect plaintiff was deprived of insurance, not having procured it elsewhere, to his damage in the sum of \$1100. The separate answer of Zima contained denials and an allegation that he had asked Abel to take out an application of insurance and to procure the signing of same by plaintiff, which he had done; that he had sent the application to an insurance company and had done all that he could to obtain insurance, but that there was a delay in the matter the nature of which is not stated. He further alleged that the plaintiff did not have any money in the bank to be applied on the insurance. Abel answered with a general denial and an allegation that at the instance of Zima he had taken an application of insurance to plaintiff, and that plaintiff stated that if Abel was to have any commission on the transaction that he would not sign the application; that Abel then assured plaintiff that he had no connection with it, [754] and that plaintiff then signed the application, which was the only connection defendant Abel had with the transaction. At the trial a jury were empaneled and the plaintiff proceeded to introduce his testimony, when defendants objected to the introduction of any evidence on the ground that the petition did not set forth a cause of action against the defendants or either of them. This motion was sustained and judgment for costs against the plaintiff was rendered. From these rulings plaintiff appeals.

On an objection to the introduction of evidence that a cause of action is not stated in the petition its averments are to be liberally construed. (*Weber v. Atchison*, etc. R. Co. 54 Kan. 389, 38 Pac. 569; *Howard v. Carter*, 71 Kan. 85, 80 Pac. 61; *Simmonds v. Richards*, 74 Kan. 311, 86 Pac. 452.) This action was not brought to recover upon a contract of insurance against the insurer, but is an action against the defendants for the failure to procure insurance on his property as they had undertaken to do, and for wrongfully representing that insurance had been procured when in fact it had not, as a result of which a considerable loss had been sustained. A broker or agent who undertakes to procure insurance for another is bound to exercise reasonable diligence to obtain insurance in accordance with his agreement and to notify his principal if he is unable to do so. According to the averments of the petition the defendants failed to perform this

duty, and, as has been alleged, Zima deliberately deceived the plaintiff by giving him assurance that the property had been insured when he knew that no insurance had been procured. If defendants had informed plaintiff of the omission or failure he could have obtained insurance elsewhere and have provided against loss. It does not appear that a particular insurer was named, but it was agreed that insurance should be obtained in a responsible company. If defendants had failed to exercise reasonable care in the selection of an insurer and had placed the insurance with a company that was insolvent or one not authorized to insure, and subsequently the property had been destroyed and the plaintiff had been unable to realize on the policy, the defendants would have been liable. (Latham Mercantile, etc. Co. v. Harrod, 71 Kan. 565, 81 Pac. 214; Harrod v. Latham Mercantile, etc. Co. 77 Kan. 466, 94 Pac. 11.) Brokers are equally liable where they undertake to procure [755] insurance and utterly neglect to obtain any insurance or fail to carry out material provisions of their agreement and a loss results. In such a case they are liable for as much as would have been covered by the insurance which they agreed to procure. (Milliken v. Woodward, 64 N. J. L. 444, 45 Atl. 796; Lindsay v. Pettigrew, 5 S. D. 500, 59 N. W. 726; Sawyer v. Mayhew, 51 Me. 398; Diamond v. Duncan (Tex.) 138 S. W. 429; Mallory v. Frye, 21 App. Cas. (D. C.) 105; Criswell v. Riley, 5 Ind. App. 496, 503, 30 N. E. 1101, 32 N. E. 814; Backus v. Ames, 79 Minn. 145, 81 N. W. 766; Kaw Brick Co. v. Hogsett, 73 Mo. App. 432; Note, 38 L.R.A. (N.S.) 631.)

There is a contention that a completed and enforceable agreement was not made by the defendants, in support of which *Mooney v. Merriam*, 77 Kan. 305, 94 Pac. 263, is cited. That case was determined upon the evidence submitted and not upon an objection to the introduction of any evidence. The arrangement between the parties there was held to be so indefinite that it did not constitute a binding contract. In that case no agreement was reached as to the selection of an insurer, as to the property to be insured, nor as to the amount of insurance to be taken. The owner was claiming damages because of the destruction of the buildings, implements, grain and live stock, and yet no agreement had been made either as to the extent of the property insured nor the amounts to be placed upon each kind of the owner's property. Here the agreement was that defendant Zima was to select a responsible insurer. The property to be insured was specifically agreed upon—to the extent of \$1150 in all. It was stipulated, too, that \$550 should be placed on the barn, \$100 on the hay therein, \$200 on horses

and \$300 on harnesses, saddles, tools and miscellaneous contents, including some lumber. It is not alleged how long the insurance was to run nor the amount of the premium to be paid, but there are well-known standards as to both of these which must be deemed to have been within the contemplation of the parties when their agreement was made. While the averments of the petition are not as full as they might or should have been, they appear to be sufficient as against the objections made by the defendants. [756] The terms and conditions were sufficiently specific and so well understood by the parties that an application was filled out by the defendants, but what ultimately became of it does not appear from the petition. The agreement is sufficiently definite and comprehensive to be upheld, especially as against the challenge that no evidence was admissible under the petition. It can not be held that defendants' agreement with plaintiff to procure insurance was void because of the double agency of the defendants as they did not undertake to place the insurance in any particular company. The defendants had agreed to select a company that was responsible, and such a stipulation has been held to be valid. (Latham Mercantile, etc. Co. v. Harrod, 71 Kan. 565, 81 Pac. 214.) It was alleged that plaintiff had an account in Zima's bank, and it was provided by the agreement that Zima was to take enough of plaintiff's funds to pay the premium when the insurance was procured; and so the agreement was definite and complete as to the selection of an insurer, as to the property to be included in the policy, as to the amount of insurance of each kind of property to be insured, and provision was made for the payment of the premium. It further appears that a written application was prepared by the defendants and they not only neglected to procure the insurance but wrongfully lulled the plaintiff to rest by representing to him that insurance had been obtained some time before the property was destroyed. As the case is presented here the agreement is an enforceable one and the defendants are responsible for the loss sustained through their neglect and wrong.

The judgment is reversed and the cause remanded for a new trial.

NOTE.

Liability of Insurance Agent to Owner of Property for Failure to Procure Insurance.

In General, 1038.
Failure to Consummate Policy Procured, 1040.
Measure of Damages, 1040.

In General.

This note is confined to a discussion of those cases only which deal with the liability of an insurance agent to the owner of property for his failure to procure insurance. As to the liability of an insurance agent to the insured for placing insurance in an insolvent company, see the note to *Beckman v. Edwards*, Ann. Cas. 1912B 40.

The responsibility of an agent to his principal for a failure to procure insurance goes no further than to require that the agent shall carry out the instructions given him and faithfully discharge the trust reposed in him. If he is instructed to procure specific insurance, he must do so and if there is a general undertaking to keep the property of the principal insured, the agent is liable if he neglects to renew the insurance on the property. *Fries-Breslin Co. v. Bergen*, 168 Fed. 360, *affirmed* 176 Fed. 76, 99 C. C. A. 384.

The cases are almost uniform in holding that an insurance agent or broker who undertakes to procure insurance is liable to the applicant for his failure to do so. *Manny v. Dunlap*, Woolw. 372, 3 West. Jur. 329, 17 Pittsb. Leg. J. 11, 16 Fed. Cas. No. 9,047; *Morris v. Summerl*, 2 Wash. C. C. 203, 17 Fed. Cas. No. 9,837; *Evan L. Reed Mfg. Co. v. Wurts*, 187 Ill. App. 378; *Everett v. O'Leary*, 90 Minn. 154, 95 N. W. 901; *Ela v. French*, 11 N. E. 356; *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726; *Gegare v. Fox River Land, etc. Co.* 152 Wis. 548, 140 N. W. 305. And see the reported case. See also *French v. Reed*, 6 Binn. (Pa.) 308. "An agent who takes his principal's money under an express agreement to procure insurance and unjustifiably fails to secure the same or make an effort in that direction, thereby assumes the risk and becomes liable, in case of loss, to pay as much of the same, as would have been covered by the insurance policy for which his principal had paid, provided the same had been procured as directed." *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726.

If an agent is in the habit of effecting insurance for his correspondent and is directed to procure such insurance, but neglects to do so, he will be answerable for the losses as insurer and is entitled to a premium as such. *Morris v. Summerl*, 2 Wash. C. C. 203, 17 Fed. Cas. No. 9,837. So an agent will be liable if he neglects to renew a policy which has expired if he is the agent of the insured to keep the premises insured. *Thomas v. Funkhouser*, 91 Ga. 478, 18 S. E. 312. And see *Diamond v. Duncan* (Tex.) 172 S. W. 1100, *affirmed* 138 S. W. 429, *rehearing denied* 177 S. W. 955.

"If an agent neglects to procure insurance or does not follow instructions when obli-

gated so to do, or if the policy obtained is void or materially defective through the agent's fault, or if the principal suffers damage by reason of any mistake or act of omission or commission of the agent which constitutes a breach of duty to his principal, he is liable to his principal for any loss he may have sustained thereby." *Evan L. Reed Mfg. Co. v. Wurts*, 187 Ill. App. 378. See to the same effect *Rudd Paper Box Co. v. Rice*, 20 Ont. W. Rep. 979, 3 Ont. W. N. 534, 3 Dominion L. Rep. 253.

In *Russell v. O'Conner*, 120 Minn. 66, 139 N. W. 184, it appeared that the defendant, an insurance agent, received instructions from the owner of property to procure insurance on a certain building of the details of which he had knowledge by virtue of prior insurance transactions between the parties, and that he undertook to insure the property by saying: "I will attend to that right away." It was held that he undertook to use reasonable diligence to get the property insured and take all steps necessary to authorize him to write the policy, and in the event of his being unable to protect the plaintiff's property by insurance then to notify the plaintiff of his inability so to do. And whether the defendant fulfilled his obligations as to the exercise of reasonable diligence to get the property insured, and as to notifying the plaintiff of his inability so to do were held to be questions of fact for the jury. See also *Gardner v. Hermann*, 116 Minn. 161, 133 N. W. 558.

Where one undertakes to effect insurance in accordance with instructions he impliedly undertakes to give notice to the owner in the event of his failure to procure such insurance. *Callander v. Oelrichs*, 5 Bing N. Cas. 58; 35 E. C. L. 29. And see *Gardner v. Hermann*, *supra*. The duty of the agent to give his principal notice of his inability to procure insurance does not arise until after the lapse of a reasonable time in which to make due efforts to place the insurance. *Backus v. Ames*, 79 Minn. 145, 81 N. W. 766.

Where insurance agents undertook to place a person's insurance and to keep it up to the sum of \$7,000, it was held in *Kaw Brick Co. v. Hogsett*, 73 Mo. App. 432, that the employment was a continuing one, the court saying: "It was a single engagement, not two contracts or agreements—the one to place and the other to maintain, as it seems to be treated by defendants' learned counsel. And when defendants entered upon the performance thereof, as they did in placing the insurance and subsequently taking out two other policies in lieu of two canceled, then they must be held for every act of negligence, or misfeasance attributable to their conduct which brought damage to the plaintiff." The court further said:

"It can hardly be denied that the testimony in this case tends to prove that defendants agreed with plaintiff not only to place said \$7,000 insurance on plaintiff's property, but as well to keep the same insured to that amount in good solvent companies. It was an employment for a definite service for an indefinite period of time. And if there was a contractual duty imposed on defendants to place and keep said insurance on plaintiff's property, then it is clear that this duty was negligently omitted and that plaintiff by reason thereof suffered loss. But for the defense it is contended that if there was such a promise it was unsupported by any valuable consideration and cannot therefore serve as the basis of an action for damages. Conceding that defendant's agreement to place and keep \$7,000 insurance on plaintiff's property was, at the time it was made, without consideration moving from the plaintiff, and yet plaintiff may recover if defendants, notwithstanding the absence of a consideration, entered upon and in part performed their agreement. Mechem in his work on agency (section 478), thus expresses the rule with reference to these gratuitous promises: 'If in such a case the agent refuses to enter upon and perform the service at all; if his default consists in the mere not doing of a thing which he had promised to perform, and it be not a case where the law imposes upon him the duty to perform it, the fact that the performance was to be gratuitous, that the promise to perform was entirely without consideration, will furnish a complete defense to a claim for damages on account of such default. This is upon the familiar ground that the nonperformance of a gratuitous executory contract constitutes no cause of action. But where on the other hand the agent has undertaken or entered upon the performance of the service although it be gratuitous, it then becomes his duty to conform to the instructions given. If he were not willing to do so, he should have declined to serve; but having assumed the performance of the service, the trust and confidence reposed furnish a sufficient consideration for the undertaking to obey instructions and a failure to do so will subject him to liability for the loss or damage occasioned thereby.'"

Where an agent exercises due diligence and good faith in his effort to procure insurance as he is directed, he will not be liable if the property is destroyed before he has time to place the insurance. *Arrott v. Walker*, 118 Pa. St. 249, 12 Atl. 280. And the question whether a delay in procuring insurance is unreasonable, is for the jury. *Rainer v. Schulte*, 133 Wis. 130, 113 N. W. 396.

An agent will of course be liable to the owner of property where he delivers to him

a paper purporting to be a policy issued by an insurance company which has no existence in fact. *Vann v. Downing*, 28 W. N. C. (Pa.) 259.

An agent will not be liable for his failure to procure insurance which would have been void if he had procured it in accordance with the directions of his principal. *Alsop v. Coit*, 12 Mass. 40.

Before an agent can be held liable for a failure to procure insurance, there must be a valid contract to insure and a breach thereof. A mere offer on the part of an agent to insure the owner's property will not mature into a complete and effectual contract until it is accepted by the person to whom it is made and notice of acceptance either actual or constructive is given to the agent. *Prescott v. Jones*, 69 N. H. 305, 41 Atl. 352. In that case it appeared that the defendants, as insurance agents, had insured the plaintiff's property in a certain insurance company until February 1, 1897; that on January 23, 1897, they notified the plaintiff that they would renew the policy and insure his property for a further term of one year from February 1, 1897, unless notified to the contrary by him. The plaintiff relied on this notice without communicating an acceptance of the offer, or in any way indicating a receipt of the notice. Thereafter and on the first day of March, 1897, the property in question was destroyed by fire, and it appeared that the defendants had failed to insure it. The court in denying the agents' liability under the circumstances said: "The defendants having designated in their offer what they would recognize as notice of its acceptance, namely, failure of the plaintiff to notify them to the contrary, they may properly be held to have waived the necessity of formally communicating to them the fact of its acceptance by him. But this did not render acceptance on his part any less necessary than it would have been if no particular form of acceptance had been prescribed, for it is well settled that 'a party cannot by the wording of his offer, turn the absence of communication of acceptance into an acceptance, and compel the recipient of his offer to refuse it at the peril of being held to have accepted it.' . . . 'A person is under no obligation to do or say anything concerning a proposition which he does not choose to accept. There must be actual acceptance or there is no contract.' . . . And to constitute acceptance, 'there must be words, written or spoken, or some other overt act.' *Bish. Cont.* § 329, and authorities cited. If, therefore, the defendants might and did make their offer in such a way as to dispense with the communication of its acceptance to them in a formal and direct manner they did not and could not so frame it as to render

the plaintiff liable as having accepted it merely because he did not communicate his intention not to accept it. And if the plaintiff was not bound by the offer until he accepted it, the defendants could not be, because 'it takes two to make a bargain,' and as contracts rest on mutual promises both parties are bound, or neither is bound. The inquiry as to the defendants' liability for the non-performance of their offer thus becomes restricted to the question, did the plaintiff accept the offer, so that it became by his action clothed with legal consideration and perfected with the requisite condition of mutuality? As, in morals, one who creates an expectation in another by a gratuitous promise is doubtless bound to make the expectation good, it is perhaps to be regretted that, upon the facts before us, we are constrained to answer the question in the negative. While a gratuitous undertaking is binding in honor, it does not create a legal responsibility. Whether wisely and equitably or not, the law requires a consideration for those promises which it will enforce; and as the plaintiff paid no premium for the policy which the defendants proposed to issue, nor bound himself to pay any, there was no legal consideration for their promise, and the law will not enforce it. Then, again, there was no mutuality between the parties. All the plaintiff did was merely to determine in his own mind that he would accept the offer—for there was nothing whatever to indicate it by way of speech or other appropriate act. Plainly, this did not create any rights in his favor as against the defendants. From the very nature of a contract this must be so; and it therefore seems superfluous to add that the universal doctrine is that an uncommunicated mental determination cannot create a binding contract."

Failure to Consummate Policy Procured.

The duty of an agent who undertakes to procure insurance is not wholly performed by his procuring duly executed policies from the company and delivering them to the insured. In order to relieve himself from liability, he must if charged by his contract with that duty pay over the premiums to the company, and on failure to do so he will be held liable to the insured for the loss occasioned thereby. *Antiseptic Bedding Co. v. Gurofsky*, 33 Ont. L. Rep. 319, 8 Ont. W. N. 92 (*modified* 7 Ont. W. N. 95).

In *Criswell v. Riley*, 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814, it appeared that the plaintiff applied to his broker for insurance which the latter undertook and agreed to procure, and pursuant to the undertaking and agreement he delivered to the plaintiff a certain duly executed policy, on the receipt

of which the plaintiff paid to the agent the full amount of the premium. The agent failed to transmit the premium to the insurance company or to any person authorized to receive the money for the company, such a payment being a condition precedent to the company's liability. Thereafter the property covered by the supposed insurance policy, was destroyed by fire and the plaintiff learning for the first time that the premium had not been paid over to the company brought suit against the agent for the loss sustained. This court in affirming a recovery said: "If the appellant was the agent of appellee in procuring for him the insurance, in the delivery of the policy, collecting the premium, and through his negligence failed to pay the premium received from the appellee, by reason of which the policy was forfeited or void, then the appellant was liable for the damages sustained by the fire by the appellee for the amount of the loss not exceeding the amount of the insurance, and the insurance company was exempt from liability. The evidence tends to establish . . . that the appellant was the agent of the appellee in the procurement of said insurance, the payment of the premium to the insurance company after having received the same from the appellee, and in attending to all matters connected therewith; that the appellant was in no sense the agent of the insurance company; that it was through his fault and negligence in not paying over the premium to said company that the policy of insurance he undertook and agreed to procure for the appellee could not be enforced against said insurance company, and that under the evidence in the case the appellant became liable to the appellee for the damages found by the court." See also *Marrian v. Robbins*, 102 App. Div. 214, 92 N. Y. S. 654.

But under a similar state of facts it was held in *Haight v. Kremer*, 9 Phila. (Pa.) 50, 29 Leg. Int. 30, that the agent was not liable to the insured who compromised with the insurer for less than the amount insured for, for the difference between the amount paid and the face of the policy. The court rested its decision on the ground that the payment of a certain sum by the company and its acceptance by the plaintiff operated as a waiver of the objection that the premium had not been paid, and a ratification of the policy as a valid contract of insurance.

Measure of Damages.

In an action against an agent to recover damages for a breach of contract to insure the principal's property, the measure of damages in case of the destruction of the property is the value thereof, up to the amount for which it was agreed that insurance should

be procured. *Morris v. Summerl*, 2 Wash. C. C. 203, 17 Fed. Cas. No. 9,837; *Alabama Red Cedar Co. v. Tennessee Valley Bank* (Ala.) 78 So. 980; *Criswell v. Riley*, 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814; *Everett v. O'Leary*, 90 Minn. 154, 95 N. W. 901; *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726. And see the reported case. See also *Emery v. Lord*, 29 App. Cas. (D. C.) 589. "If the defendant could not or did not procure the issuance of the insurance contemplated, and a loss by fire occurring, the measure of liability would be the amount the plaintiff would have been paid if valid insurance had been effected." *Alabama Red Cedar Co. v. Tennessee Valley Bank* (Ala.) 78 So. 980.

So it was held in *Morris v. Summerl*, 2 Wash. C. C. 203, 17 Fed. Cas. No. 9,837, that the amount of loss for which an underwriter who had subscribed the policy would have been answerable, was the only measure of damages against an insurance broker who was in the habit of looking after the plaintiff's insurance and who neglected to procure the insurance which he was directed to make. The agent, it was held, was entitled to set off the amount of the premium.

Where a person to whom books were consigned to be sold on commission, agreed among other things to insure the books against loss by fire at his own expense, it was held that his failure to procure the insurance rendered him liable to the consignor for their full value. *Ela v. French*, 11 N. H. 356, wherein the court said: "The loss to the plaintiff was the value of the books; and we must presume, in the absence of evidence, that if they had been insured, it would have been for their value."

GAFFEY ET AL.

v.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY.

New York Court of Appeals—June 5, 1917.

221 N. Y. 113; 116 N. E. 778.

Automobile Insurance — Loss — Contract for Settlement — Effect.

Plaintiffs' auto, insured by defendant for \$2,500, was burned, and plaintiffs filed claim for total loss, and defendant disputed it, and offered to settle it for \$2,000, or to ship the car for repairs, and plaintiffs elected to accept the proposition for repairs, stating that defendant must make the car as good as before the fire, and not delay too long, and defendant then wrote plaintiffs that it had made arrangements to ship the car and would at once proceed with the repairs, and that it estimated that it would take about four weeks for repairs. It is held that a settlement contract arose, terminating all rights under the policy contract, so that the only remedy thereafter was for breach of the new contract.

[See note at end of this case.]

Gaffey v. St. Paul Fire, etc. Ins. Co. 164 N. Y. App. Div. 381, reversed.

Appeal from Appellate Division of Supreme Court, Third Judicial Department.

Action by Agnes Gaffey et al., plaintiffs, against St. Paul Fire and Marine Insurance Company, defendant. Judgment for defendant at Trial Term of Supreme Court. Judgment reversed by Appellate Division of Supreme Court. Defendant appeals. The facts are stated in the opinion. REVERSED.

William J. Roche and *William H. Hollister, Jr.* for appellant.

H. D. Bailey and *Thomas F. Powers* for respondents.

[115] HOGAN, J.—May 1st, 1911, defendant issued to plaintiffs a policy of insurance upon an automobile delivery truck, wherein it insured plaintiffs to an amount not exceeding two thousand five hundred dollars, against loss or damage by fire. By the terms of the policy, the automobile insured (body, machinery and equipment) was by agreement of the parties valued at the sum for which the same was insured, namely, \$2,500.

The policy provided:

[116] "25. This Company shall be liable to pay hereunder such proportion of any ascertained loss or damages as the sum insured bears to the said valuation."

"12. In ascertaining the amount of any partial loss or damage, only the cost of repairing or, if necessary, replacing the parts damaged or destroyed, including the charges incidental thereto, shall be considered."

October 11th, 1911, the automobile became disabled on the highway between the city of Troy, the residence of plaintiffs, and Ballston Spa, Saratoga county. The truck was left on the roadway and on October 12th the fire occurred. This action was brought on the policy to recover for the loss resulting therefrom.

Upon a trial of the action the complaint was dismissed at the close of the case. Upon appeal from the judgment entered thereon the Appellate Division by a divided court reversed the judgment and granted a new trial. From such order and judgment the defendant appeals to this court.

The plaintiffs on October 23d filed a proof of loss, claiming the loss sustained by them at \$2,500. Under date of October 25th, 1911, defendant's general agents addressed a letter to the plaintiffs, which reads:

SAINT PAUL FIRE AND MARINE INSURANCE COMPANY.

NEW YORK, October 25, 1911.

Messrs. SAGE & GAFFEY,
800 River Street,
Troy, N. Y.

GENTLEMEN.—We have before us our inspector's report in reference to the damage to your automobile truck insured under policy No. 56492 and have to advise that as the car was damaged and taken apart to a considerable extent prior to the fire and the extensive damage done by the fire was in consequence of this, there are a number of items, therefore, that we are not responsible for; such as the damaged gears, crank case, chains, etc., and in view of these circumstances, we will settle this [117] claim on the basis of paying you \$2,000, or we will have the car shipped to New York for repairs.

Please let us hear from you at once as to which of these propositions you desire to accept.

Yours very truly,

WHITON & MERGES,

A. W. S.

General Agents,

By A. WHELFLEY.

On October 26th, 1911, plaintiffs replied to the letter as follows:

Troy, N. Y., Oct. 26th, 1911.

Messrs. WHITON & MERGES:

GENTS.—In reply to yours of the 25th will say that if you make the car as good as before the fire and not delay us too long that will be all right. As far as the missing parts are concerned, the only part taken after we discovered the fire were the chains. We have located them. The rest of the stuff we look to you for.

Yours truly,

SAGE & GAFFEY,

800-802 River St.,

Troy, N. Y.

November 2d, 1911, defendant's agents wrote the plaintiffs, stating in effect that they had made arrangements to have the truck shipped to New York and would at once proceed with the repairs. The letter further stated: "We estimate that it will take about four (4) weeks to repair it in" and requested the plaintiffs to forward by express at once any parts they might have which were not with the truck. The plaintiffs had knowledge of the whereabouts of the chains belonging to the truck, as stated by them in their letter of October 26th. Upon the trial one of the

plaintiffs testified that the chains were not sent as requested and gave as a reason therefor "that they were up there on the ground, I didn't send them down, I thought if they wanted them they could come after them."

[118] No further action was taken by plaintiffs after the letter of November 2d. The defendant wrote plaintiffs on November 10th, 1911, advising them that the repairs had been started, that they had not heard from them in reference to shipping the chains and asked them to ship them as defendant did not wish to delay the work.

Plaintiffs did not reply to any letters addressed to them by defendant after the 2d of November. They did not complain of the action of the defendant in moving the truck from Saratoga county to the city of New York for the purpose of making repairs thereon.

January 8th, 1912, defendant addressed a letter to the plaintiffs informing them that the truck which had been damaged by fire, giving the number of the same, had been fully repaired and made as good as before the fire according to correspondence and agreement in the letter of plaintiffs of October 26th, 1911; that upon receipt of advices from plaintiffs the defendant would, as agreed, attach to the car, free of expense any model of body which plaintiffs would suggest, not to exceed the cost of the body upon the car originally, concerning which they asked to be advised. The letter also tendered to plaintiffs the machine so repaired and offered to deliver the same to them at Troy or any other place they might name, free of expense, upon receipt of such information as to place of delivery. The plaintiffs made no reply to this letter, and subsequently commenced this action.

It is important to consider the relations existing between the parties prior to the commencement of this action. The plaintiffs on October 23d, 1911, filed proof of loss claiming to be entitled to the sum of \$2,500 for a total loss. They received from the defendant the letter of October 25th, referring to the inspector's report as to the damage, and were informed in substance that the defendant denied liability for at least a portion of the damage done, by reason of the fact that the car had been taken apart prior to the fire, and in view of the circumstances [119] the defendant offered to pay to the plaintiffs two thousand dollars or have the car shipped to New York for repairs, and asked plaintiffs which of the propositions they desired to accept. Upon receipt of that proposition the plaintiffs had the right: (1) To reject both propositions and seek a recovery as for a total loss for which they had filed proof of loss; had they done so, the defendant under the fourteenth clause of the policy would be entitled if so advised to have the amount of loss ascertained by appraisers; (2) accept the sum of

\$2,000 in cash; (3) allow defendant to have the car shipped to New York for repairs. Plaintiffs did not insist upon their rights under the policy. They did not agree to accept two thousand dollars in cash, but did elect to accept the proposition to have the car repaired. Their letter of October 26th to defendant was tantamount to saying: We accept your proposition to have the car shipped to New York for repairs, but you must make it as good as new and not delay us too long.

On November 2d plaintiffs had knowledge that defendant had arranged to ship the truck to New York, and on November 10th that the truck was there, and work thereon had been commenced. From that fact but one conclusion is deducible, namely, that defendant assumed the obligation "to make the car as good as it was before the fire, and not delay too long," and thus comply with the conditional acceptance by plaintiffs of the proposition in their letter of October 26th. The defendant did not give to plaintiffs any assurance as to the length of time necessary to make the repairs. It merely made an estimate of the time at about four weeks. Defendant was entitled to a reasonable time within which to make the repairs. Plaintiffs never made complaint that the work was unreasonably delayed or that the car was not as good as it was before the fire. They remained silent and permitted defendant to complete the repairs, and when defendant tendered the truck to them and offered to [120] deliver it to them free of expense they did not acknowledge the letter, but remained silent until upwards of five months, when they commenced this action to recover \$2,500 under the policy for a total loss of the car.

The election of plaintiffs to have the car repaired, and the undertaking of defendant to make the repairs within a reasonable time, created a contractual relation between the parties which terminated all rights of both parties under the policy contract. Such substituted contract deprived defendant of asserting any rights or option it had under the policy and deprived plaintiffs under the circumstances of this case of any right to assert a claim under the policy. The only remedy, if any, either party thereafter had was for breach of the new or substituted contract. (*Morrell v. Irving F. Ins. Co.* 33 N. Y. 429, 88 Am. Dec. 396; *Wynkoop v. Niagara F. Ins. Co.* 91 N. Y. 478, 43 Am. Rep. 686; *Heilmann v. Westchester F. Ins. Co.* 75 N. Y. 7.)

The order of the Appellate Division should be reversed, with costs to appellant in the Appellate Division and this court, and the judgment entered at Trial Term affirmed.

Chase, Collin, Pound and Crane, JJ., concur; Andrews, J., concurs in result; Hiscock, Ch. J., absent.

Order reversed, etc.

NOTE.

In the reported case it appeared that after the partial destruction by fire of an insured automobile the insurer offered to pay a certain sum or to repair the car. The insured accepted the latter proposition on condition that the car should be made as good as new and the repairs should not be unduly delayed. It is held that a new contract was thereby substituted for the insurance policy and that on a breach of the conditions of that contract the insured must sue thereon and could not sue on the policy. The subject of automobile insurance is fully discussed in the notes to *Wettengel v. U. S. Lloyds*, Ann. Cas. 1915A 626, and *Crowell v. Maryland Motor Car Ins. Co.* Ann. Cas. 1917D 50.

MAYDWELL

v.

MAYDWELL ET AL.

Tennessee Supreme Court—April 24, 1916.

135 Tenn. 1; 185 S. W. 712.

Trusts and Trustees — Removal of Trustee — Ill Feeling between Trustee and Beneficiary.

Where testator's will directed his widow as trustee to apply the income from a daughter's share of the estate to the best interest of the latter and for her comfort, maintenance, and support, and friction developed between mother and daughter resulting in litigation and bad feeling, the mother will be removed as trustee on the daughter's application, irrespective of the merits of the dispute.

[See note at end of this case.]

Grounds for Removal.

The chancery court has jurisdiction, under Shannon's Code, §§ 5414, 5422, to remove a trustee for the causes enumerated in the statute and "for other good cause" at suit of the beneficiary.

Inherent Power of Court to Remove.

A court of equity has inherent jurisdiction to remove a trustee, independent of statutory provisions, for good cause shown.

Appeal from Chancery Court, Shelby county: FENTRESS, Chancellor.

Action by Lizzie Maydwell et al., plaintiffs, against Sophie Maydwell, defendant. Judgment for defendant. The facts are stated in the opinion. REVERSED.

L. T. M. Canada for appellants.
Jackson & McRee for appellee.

[2] GREEN, J.—James Maydwell died in Memphis in 1892, the owner of a considerable estate. Two-ninths of this estate was devised in trust to his wife, Mrs. Sophie Maydwell, for the benefit of testator's daughter, Lizzie Maydwell, now Mrs. Lizzie Hunter. Mrs. Maydwell has acted as trustee for her daughter since the death of her husband. In this case Mrs. Hunter is seeking to have her mother removed as such trustee.

The proof shows that Mrs. Maydwell is a woman of excellent business judgment. She has managed the estate well, preserving it and improving it. Likewise, Mrs. Maydwell is a woman of integrity and intelligence.

[3] The proof further shows, however, that the relations existing between Mrs. Maydwell and her daughter are quite unfriendly and have been so for several years past. They have become involved in litigation three times about the management of the trust estate. This mutual animosity appears to be deep-seated and permanent.

The chancellor was of opinion that Mrs. Maydwell was a suitable person to manage this trust and declined to remove her. Under the circumstances of this case we think his honor was in error. We think Mrs. Maydwell should be removed.

We say this without any reflection upon the honesty or acumen of Mrs. Maydwell. It is beyond doubt that she has managed this estate well. She has been diligent in collecting its revenues and by judicious improvements has greatly enhanced its value. We think she is still capable of preserving the estate and managing it wisely notwithstanding her age.

Nevertheless the proof shows that the relations between Mrs. Maydwell and her daughter, Mrs. Hunter, are such that it would be inadvisable and prejudicial to the best interest of both and of the estate for Mrs. Maydwell to be continued as trustee.

We do not undertake to fix the blame for the state of feeling between the mother and daughter, nor do we regard the responsibility for this condition to be a matter of special importance in disposing of the question before us. Under the terms of James Maydwell's will the trustee for his daughter is directed to apply the income from the daughter's share of the [4] estate to the best interests of the latter and for her comfort, maintenance, and support.

To properly discharge such duties the trustee should be on friendly terms with the beneficiary. The trustee should have the confidence of the beneficiary so as to know the needs of the latter—to appreciate what expenditures should be made for the comfort, maintenance, and support of the latter. Moreover, the trustee should be favorably disposed to the beneficiary so that the discretion of the trustee may be employed for

the best interests of the beneficiary. Such a personal trust cannot be satisfactorily administered where the relations between the parties are hostile. Unless a new trustee is appointed, the antagonism between mother and daughter will result in wasting the estate in litigation, if we are to judge by the conduct of these parties in the past.

The chancery court has jurisdiction under the statutes of this State (Shannon's Code, sections 5414, 5422) to remove a trustee for the several causes enumerated in the statute, and "for other good cause," at the suit of the beneficiary.

A court of equity also has inherent jurisdiction to remove a trustee independent of statutory provisions for good cause shown. 39 Cyc. 265.

Under the great weight of authority a court of equity may remove a trustee where the relations between him and the *cestui que trust* are inharmonious and unfriendly. When the duties of the trustee are such as to necessitate personal contact and conference between [5] the trustee and the *cestui que trust*, and the relations existing between the parties have become so acrimonious as to render personal intercourse impossible, a change of trustee should be made. 39 Cyc. 263, and cases collected under note 72.

Speaking on this subject, the supreme court of the United States has said:

"The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be exercised whenever such a state of mutual ill feeling, growing out of his behavior, exists between the trustees . . . in question and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent the cotrustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out, or are greatly exaggerated." *May v. May*, 167 U. S. 310, 17 S. Ct. 824, 42 U. S. (L. ed.) 179.

So, for the reasons stated, we think Mrs. Maydwell should be removed as trustee. The case will be remanded, and proper orders made by the chancellor to effect this removal, and the trust turned over to a suitable person selected by the chancellor under proper orders safeguarding the estate.

NOTE.

Antagonism or Ill Feeling between Trustee and Beneficiary as Ground for Removal of Trustee.

General Rule, 1045.

Naked Trust, 1049.

Rule in Pennsylvania, 1049.

General Rule.

It may be laid down as a broad general rule that antagonism or ill feeling between trustee and beneficiary is a sufficient ground for the removal of the trustee when such ill feeling reaches such a point that personal intercourse between the parties is severed or when the lack of harmony becomes prejudicial to the best interests of the estate and of the beneficiary, for whose benefit the trust was created, and to the proper conduct of its business, even though there has been no misconduct or want of capacity on the part of the trustee.

England.—*Letterstedt v. Broers*, 9 App. Cas. 371, 386 et seq. 53 L. J. P. C. 44, 51 L. T. N. S. 169. See also *Uvedale v. Ettrick*, 2 Ch. Cas. 130.

Canada.—*Garesche v. Garesche*, 4 British Columbia 310.

United States.—*May v. May*, 167 U. S. 310, 17 S. Ct. 824, 42 U. S. (L. ed.) 179, affirming 5 App. Cas. (D. C.) 552, 41 L.R.A. 767.

Georgia.—*Parsons v. Jones*, 26 Ga. 644.

Illinois.—*Lorenz v. Weller*, 267 Ill. 230, 108 N. E. 306; *Wylie v. Bushnell*, 277 Ill. 484, 115 N. E. 618.

Iowa.—*Keating v. Keating*, 165 N. W. 74.

Kentucky.—*Berry v. Williamson*, 11 B. Mon. 245; *Clark v. Anderson*, 10 Bush 99.

Maryland.—*Polk v. Linthicum*, 100 Md. 615, 60 Atl. 455, 69 L.R.A. 920.

Massachusetts.—*Scott v. Rand*, 118 Mass. 215; *Wilson v. Wilson*, 145 Mass. 490, 14 N. E. 521, 1 Am. St. Rep. 477.

Missouri.—*Gartside v. Gartside*, 113 Mo. 348, 20 S. W. 669; *Gaston v. Hayden*, 98 Mo. App. 683, 73 S. W. 938; *Lowe v. Montgomery*, 117 Mo. App. 273, 92 S. W. 916. See also *Morrow v. Morrow*, 113 Mo. App. 444, 87 S. W. 590.

New Hampshire.—*Barker v. Barker*, 73 N. H. 353, 6 Ann. Cas. 596, 62 Atl. 166, 1 L.R.A. (N.S.) 802.

New York.—*Deraismes v. Dunham*, 22 Hun 86; *In re Morgan*, 63 Barb. 621; *Quackenboss v. Southwick*, 41 N. Y. 117; *Disbrow v. Disbrow*, 46 App. Div. 111, 61 N. Y. S. 614, affirmed in 167 N. Y. 606, 60 N. E. 1110; *Matter of Etgen*, 146 App. Div. 932, 132 N. Y. S. 308; *In re Chapman*, 2 N. Y. S. 248. See also *Trask v. Sturges*, 31 Misc. 195, 63 N. Y. S. 1084, affirmed 56 App. Div. 625, 69 N. Y. S. 1149, reversed on other grounds 170 N. Y. 482, 63 N. E. 534.

Tennessee.—See the reported case.

In each of the following cases the trustee was removed because of antagonism between him and the beneficiary: *Letterstedt v. Broers*, 9 App. Cas. (Eng.) 371, 386 et seq. 53 L. J. P. C. 44, 51 L. T. N. S. 169; *Garesche v. Garesche*, 4 British Columbia 310; *May v. May*, 167 U. S. 310, 17 S. Ct. 824, 42

U. S. (L. ed.) 179, affirming 5 App. Cas. (D. C.) 552, 41 L.R.A. 767; *Keating v. Keating* (Ia.) 165 N. Y. 74; *Polk v. Linthicum*, 100 Md. 615, 60 Atl. 455, 69 L.R.A. 920; *Scott v. Rand*, 118 Mass. 215; *Wilson v. Wilson*, 145 Mass. 490, 14 N. E. 521, 1 Am. St. Rep. 477; *Gartside v. Gartside*, 113 Mo. 348, 20 S. W. 669; *Gaston v. Hayden*, 98 Mo. App. 683, 73 S. W. 938; *Barker v. Barker*, 73 N. H. 353, 6 Ann. Cas. 596, 62 Atl. 166, 1 L.R.A. (N.S.) 802; *In re Morgan*, 63 Barb. (N. Y.) 621; *Deraismes v. Dunham*, 22 Hun (N. Y.) 86; *Quackenboss v. Southwick*, 41 N. Y. 117; *Disbrow v. Disbrow*, 46 App. Div. 111, 61 N. Y. S. 614, affirmed in 167 N. Y. 606, 60 N. E. 1110; *Matter of Etgen*, 146 App. Div. 932, 132 N. Y. S. 308; *In re Chapman*, 2 N. Y. S. 248. And see the reported case.

In *Keating v. Keating* (Ia.) 165 N. W. 74, it appeared that property was left in trust to one son to pay the proceeds thereof to another son for his support, with a provision that the trustee should convey the property, which consisted of real estate, to the beneficiary when, in the judgment of the trustee, he should be a careful and prudent man. Considerable friction arose between the two brothers as to whether the beneficiary was entitled to a conveyance of the property, which resulted in an action brought by the beneficiary to remove the trustee. The court said: "A rule has also been applied that where the duties of the trustee are such as to bring the parties into personal touch or intercourse with each other, and the relations between them have become so hostile and acrimonious that the trustee's continuance in office would be detrimental to the trust and destructive of the mutual confidence which ought to exist with respect to the business, the court is at liberty to remove the trustee, even though he be not charged with any dishonesty, and if necessary appoint another against whom no such objection exists. *May v. May*, 167 U. S. 321, 322, 17 S. Ct. 824, 42 U. S. (L. ed.) 179; 30 Cyc. p. 263. We think there can be no doubt that the defendant from an early date in the history of affairs leading up to this suit has assumed an attitude and asserted an authority amounting to a practical denial of the trust as we have interpreted it. The plaintiff was and always would be an unfit person to be intrusted with the legal title to the property seems to have been settled in defendant's own mind from the start, and that whatever benefit plaintiff should receive from the property should at most be limited to the income during life, leaving the legal title in himself to do with as he saw fit. It may be conceded that he has been and is perfectly sincere in his opinion or belief in this respect, but it is very evident that such convictions and such attitude disqualify

him for the duties of trustee of his brother's rights and interests almost if not quite as completely as if he were led by actual sinister motives—a situation which, if the trust were to be continued, would call for a change of trustees. These conclusions render it unnecessary to make further reference to the hostility which now marks the relations between these brothers except to say the friction and dissatisfaction which has been culminating through a series of years cannot have been otherwise than greatly aggravated by circumstances and incidents of the trial below concerning which specific mention need not now be made."

In *Gartside v. Gartside*, 113 Mo. 348, 20 S. W. 669, on a bill brought by certain beneficiaries to remove the defendant as the trustee of certain property left by his father, it was shown that great hostility existed between the trustee and certain of the beneficiaries, which interfered with the proper administration of the estate. The court ordered the removal of the trustee saying: "Hostility between the trustee and the cestui que trust is not of itself a sufficient ground of removal, unless it appears that the action of the former is probably controlled or might be controlled by it. . . . In our opinion the hostility of these parties and the situation and nature of the property and their relations to it made the continuance of defendant as trustee incompatible with the best interests of the beneficiaries, and he should be removed. The position is supported by authority and, it seems to us, upon principle too. *Perry on Trusts*, sec. 276, and cases cited."

In *Wilson v. Wilson*, 145 Mass. 490, 14 N. E. 521, 1 Am. St. Rep. 477, it appeared that a testatrix devised property to trustees, one of whom was her son, in trust, to pay such portion of the income to her husband as they should from time to time think proper during his life, and to dispose of the remainder on his death. The husband brought a petition for the removal of his son as one of the trustees under a statute providing for the removal of a trustee when removal should appear to be essential to the interests of the applicants. The court held that it was essential to the interests of the petitioner that the trustee should be removed owing to the fact that strong mutual hostility existed between him and the petitioner, since the trustee in view of that hostility could not be relied on to act fairly towards the beneficiary, saying: "We think it was within the province of the presiding justice to decide whether, upon all the evidence, the trustee should be removed. The relation between the father and son created by the will is one of extreme delicacy. The trustees have full power to determine what

allowance the father shall have, limited only by the duty of exercising a fair and reasonable discretion. Every one instinctively feels that a state of mutual hostility between the trustee and such a beneficiary, arising after the trust was created, caused in part by the fault of the trustee, unfits him, to a greater or less degree, for the fair execution of the trust. But from the nature of the case it would be very difficult, if not impossible to find distinct proof that, in exercising his discretion, the trustee was actuated or influenced by such hostility. And yet it may be apparent that, according to the laws which generally govern human action, he could not be relied upon to act fairly towards the beneficiary. We think that in a case like this where the duty of a trustee is so delicate, where the hostility has arisen since the trust was created, and is attributable in part to the fault of the trustee, where the existence of the hostility would naturally pervert his feelings and judgment, it is competent for a justice to remove a trustee without further proof of misconduct, upon the ground that the removal appears essential to the interests of the beneficiary. In *McPherson v. Cox*, 96 U. S. 404, 419 [24 U. S. (L. ed.) 746], Mr. Justice Miller states that, 'where a trustee is charged with an active trust, which gives him some discretionary power over the rights of the cestui que trust, and which brings him into constant personal intercourse with the latter, it may be conceded that the mere existence of strong mutual ill feeling between the parties will, under some circumstances, justify a change by the court.' In *Scott v. Rand*, 118 Mass. 215, it is said in the opinion, that the question of removing a trustee depends upon 'a careful consideration of all the circumstances, the existing relations, and to some extent the state of feeling between the parties. It is addressed to the reasonable discretion of the court.' And the trustee was removed, although he acted from honest motives, mainly upon the ground that, in a quarrel between the cestui que trust and her husband, he had taken the part of the husband, and thus created unfriendly relations with her."

In *Disbrow v. Disbrow*, 46 App. Div. 111, 61 N. Y. S. 614, the petitioner was one of the beneficiaries under a deed of trust, and it appearing that hostility and ill feeling had sprung up between the trustees under the deed and the petitioner, which interfered with the proper execution of the trust, the court removed the trustee, saying: "There is no doubt but that the supreme court has the power to remove, when a sufficient cause exists, trustees from the management of trust estates, and the exercise of this power does not necessarily depend upon

proof of actual mismanagement, misconduct or dishonesty of the trustees. Whenever the court can see that inharmonious or unfriendly relations exist between the trustees, or between them and the cestui que trust, and that by reason of such inharmonious and unfriendly relations material injury may and is likely to result to the trust estate, it will exercise the power which it has, and to prevent that injury it will remove one, or, if the interest of the estate requires it, all of the trustees."

In *May v. May*, 167 U. S. 310, 17 S. Ct. 824, 42 U. S. (L. ed.) 179, *affirming* 5 App. Cas. (D. C.) 552, it appeared that property was left in trust to the testator's wife and son, for certain purposes. On account of discordant relations between the son, his mother, and the other beneficiaries, owing to the son's arbitrary manner in conducting the business of the trust estate, it became impossible for his mother to hold any intercourse with him with reference to said business and she was obliged to employ a third person to represent her. By virtue of a clause in the will, she, together with the other beneficiaries under the will, passed a resolution removing the son and appointed another trustee, who demanded that the son should turn everything connected with the trust over to him. The son brought suit to enjoin the defendants and the new trustee from claiming any right or doing any act under that resolution. The son's removal as trustee was decreed, the court saying: "In the supreme court of the District of Columbia, Justice Hagner said: 'In the present case, the testimony clearly proves that between Mrs. May, the other trustee, and William May there exists so wide a breach that they can have no personal communication. The jealousy and unfriendliness existing before the testator's death on each side has widened into positive, distinct and most unnatural enmity. On William May's part, it has been undoubtedly increased by his mother's positive refusal to confer with him on the business of the estate, because, as she testifies, quarrels would always result from such conferences, which would be perilous to her health, and also by the terms in which she had expressed herself towards him in her pleadings and testimony in this cause and by her execution of the instrument intended to effect his removal; and, on the part of Mrs. May, that dislike has been intensified by the statements in William May's pleadings and his testimony, and perhaps more pointedly because of his introduction of the painful correspondence, many years old, between her husband and herself, and of Dr. May's letters to the plaintiff on the subject of his domestic troubles. She and all the beneficiaries having testified in painful terms that

they believe him to be untrustworthy, dishonest, dictatorial and disagreeable in manner, and incompetent as a business man. Under such circumstances, anything like free conference between the trustees, or concert of action, in the proper sense of the term, is impossible. If either is to act at all as trustee, each must pursue his or her independent way, with a certainty of differing as to the proper performance of many of the duties of the trust, if not as to all.' This unfortunate state of feelings between the trustee and sisters and brother must equally prevent that peaceable intercourse that beneficiaries should enjoy with the party charged with the management of their interests in this considerable estate. They are certainly entitled to confer in peace with the agent appointed to manage their affairs, and receive from him good tempered explanations, and give their suggestions as to what they consider the proper steps in the management of their business, without risk of unpleasant disputes, naturally liable to increase in violence at each successive difference. Such a state of affairs would ultimately become insufferable and most hurtful to the interests of all concerned."

In each of the following cases it did not appear that the relations between the trustee and beneficiary were such as to interfere with the beneficial administration of the trust, and the trustee was not removed: *Lorens v. Weller*, 267 Ill. 230, 108 N. E. 306; *Wylie v. Bushnell*, 277 Ill. 484, 115 N. E. 618; *Berry v. Williamson*, 11 B. Mon. (Ky.) 245; *Clark v. Anderson*, 10 Bush. (Ky.) 99; *Lowe v. Montgomery*, 117 Mo. App. 273, 92 S. W. 916.

In *Berry v. Williamson*, *supra*, the court said: "Although harmony and mutual confidence between the trustee and the beneficiaries are certainly desirable, they are not actually necessary for the purposes and intercourse of business. And when discordant feelings have arisen from discordant views as to the respective rights and duties of the parties, it may be expected that after a distinct definition of these rights and duties by the chancellor, the cause of discord will be removed, so far at least as may be necessary to the beneficial transaction of the business of the trust. And to that extent only is any importance to be attached to the personal relations or intercourse between the parties."

In *Wylie v. Bushnell*, 277 Ill. 484, 115 N. E. 618, it appeared that a testator died leaving certain property to Wylie in trust for certain purposes. After having acted in this capacity for some years friction arose over the way the trustee managed the estate and a bill was filed against him for his removal. One of the grounds urged for his removal was that by reason of his failure to discharge his

duties as executor and trustee, such ill feeling existed between him and some of the beneficiaries that he ought to be removed as trustee. The court said: "Counsel for defendants in error further insist that the decree of the court was justified because of the ill feeling existing between plaintiff in error and some of the defendants in error. 'Mere disagreements between the trustee and cestui que trust will not justify a removal, nor the fact that the trustee forbids social intercourse between his family and the beneficiaries.' (1 Perry on Trusts (6th ed.) sec. 276. See also *Anderson v. Kemper* [116 Ky. 339], 76 S. W. 122; *Polk v. Linthicum* [100 Md. 615], 60 Atl. 455; *In re Neafie*, 199 Pa. St. 307; 28 Am. & Eng. Enc. of Law (2d ed.) 980.) 'The power of removal of trustees appointed by deed or will ought to be exercised sparingly by the courts. There must be a clear necessity for interference to save trust property. Mere error, or even breach of trust, may not be sufficient. There must be such misconduct as to show want of capacity or of fidelity putting the trust in jeopardy.' (1 Perry on Trusts (6th ed.) sec. 276.) This court has held that it will not remove a trustee appointed by the testator himself even though the court might in the first instance not have appointed that person. (*Lorenz v. Weller*, 267 Ill. 230.)"

It has been held that a trustee should be removed on the ground of antagonism or ill feeling between him and his beneficiary when the hostility is shown to have been caused by the misconduct of the trustee. *Forster v. Davies*, 4 De G. F. & J. 133, 8 Jur. N. S. 65, 31 L. J. Ch. 276, 5 L. T. N. S. 532, 10 W. R. 180, 45 Eng. Rep. (Reprint) 1134; *Anderson v. Kemper*, 116 Ky. 339, 76 S. W. 122, 25 Ky. L. Rep. 538; *Lister v. Weeks*, 60 N. J. Eq. 215, 46 Atl. 558.

In *Lister v. Weeks*, *supra*, wherein considerable friction and ill feeling was engendered by the acts of the trustee in the management of the trust property which were detrimental to the trust, it was held that the trustee should be removed as the hostility had arisen out of his own misbehavior, the court saying: "The power of a court of equity to remove a trustee and to substitute another in his place is incidental to its paramount duty to see that trusts are properly executed, and may properly be exercised whenever such a state of mutual ill feeling growing out of his behavior, exists between the trustees, or between the trustee in question and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent the cotrustees or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either

not made out or are greatly exaggerated.' Of course, friction or hostility between trustee and beneficiaries is not of itself a reason for the removal of the trustee; but where that hostility has arisen out of the misbehavior of the trustee it may be. Trustees exist for the benefit of those to whom the creator of trust has given the trust estate."

In *Anderson v. Kemper*, 116 Ky. 339, 76 S. W. 126, it was held that where a grantor conveyed property in trust, the income to go to him for life and the remainder to his heirs, he could not afterwards terminate the trust without the consent of the beneficiaries, and the court refused to remove the trustees on account of the strained relations which existed between the trustees and the appellant as it did not interfere with the proper discharge of the trustees' duties and the appellant's own conduct had much to do with the ill feeling which had arisen. The court said: "Appellant complains at the treatment received at the hands of his trustees and charges that their relations are so strained that it is improper that they should be continued. So far as his treatment at the hands of his trustees is concerned, the record discloses that they have managed his estate with strict fidelity, and with unusual ability. It has increased in value and in earning capacity. It has been changed under the power of the deed from an unproductive estate to one that has yielded a support sufficient to have maintained appellant despite the fact that he has been unable to do anything towards his own support. This has entailed upon the trustees considerable labor, great vigilance, and on numerous occasions the advancement of their private means of accommodation of appellant's wants. In this way, as well as by reason of certain needed improvements made upon the property so as to make it productive, the income of the estate has been anticipated, and by the judgment of the court these excessive expenditures have been adjudged to appellee trustees as a charge against the income but subordinate to the support of the appellant. The relations between the trustees and appellant do not appear to be at all cordial. Yet it does not appear that the trustees have failed in any instance to provide appellant with every necessity that the estate would afford—even more. They have kept him strictly within his income—as they should have done—save when, for some reason, the income was abnormally reduced for the time being—as by the property being without tenants, etc. More than a punctual, scrupulous administration of the trust is not required. It does not matter so much what was the state of feeling between the parties, so long as it did not interfere with a just and proper discharge of the fiduciary duties. Appellant's

own conduct and misjudgment of the trustees is doubtless responsible for much that he feels towards them."

Naked Trust.

When the bare legal title to the property is in the trustee, the beneficiary having the actual possession and supervision of it, so that personal contact and conferences between the parties are rendered unnecessary for the proper execution of the trust, the trustee will not be removed on the ground of antagonism or ill feeling between him and his beneficiary. *McPherson v. Cox*, 96 U. S. 404, 24 U. S. (L. ed.) 746; *Nickels v. Philips*, 18 Fla. 732; *Parsons v. Jones*, 26 Ga. 644.

In *Parsons v. Jones*, supra, it appeared that the testator left property in trust for the benefit of his daughter during her life, the remainder to her children, naming his two sons as trustees. The property was turned over to the life tenant and she received the rents and profits therefrom. In the course of time antagonism and ill feeling developed between the trustees and the beneficiaries, and the latter sued to have the trustees removed. The court said: "That a jury should believe, before they removed a trustee, that the property was in danger of suffering a serious and irreparable injury by the continuance of said trustee in office.

. . . The court does not say that these trustees may not be removed at the suit of the life tenant alone; but it does say that before this can be done, there must be satisfactory proof of such conduct on the part of the defendants, as that the property itself is, therefrom, in danger of destruction or loss, or its full and free enjoyment by the life tenant withheld or hindered. Two causes for removal have been insisted upon. First, the hostile feelings existing between the complainants and defendants. The court instructs the jury that no misunderstanding between the parties, even though it amount to hostility, unless it lead the defendants to hostile acts, is sufficient cause for removal."

In *Nickels v. Philips*, 18 Fla. 732, it appeared that real property was conveyed to the defendant, in trust, for the use of the grantor's wife and daughter. The grantor, his wife and daughter were in possession of the property, and the trustee had not meddled with it or its rents and profits. The bill stated that friction had existed between the trustee and the beneficiaries for a long time and that all intercourse between them had ceased, and prayed that another trustee should be appointed. The court said: "The rules thus laid down by Judge Story are the result of all the adjudications touching the subject. All the 'causes' mentioned in the books for the removal of trustees are

such as are substantial and such as to require the interposition of the court in order to preserve the property for the benefit of the cestui que trust, and to secure its management for the best interests of the parties concerned. There is no allegation in the bill of any unfitness of the defendant or any want of care in the management of the property. Indeed the complainants have always since its purchase enjoyed it without any interference and unmolested by him. No fact is stated, showing that he has any disposition to annoy them in any manner or to do any act to affect the property to their injury or discomfort. He is a mere naked trustee holding the legal title for their benefit and convenience. The only charge against him is that he has denied to them social intercourse with himself and his family. While such a state of things is to be regretted, yet the uniform rule adopted by the courts is that unless the conduct, condition, or omission of the trustee are such as to endanger the property or disturb the enjoyment of it, or shall show a want of integrity, capacity or fidelity in the discharge of his duty as a trustee, the court will not interfere. The mere existence of a family feud, not resulting in any damage whatever, nor threatening to impair or in any wise affect the rights of the parties, is not a sufficient ground upon which to demand the intervention of the court to displace the trustee."

Rule in Pennsylvania.

Under a Pennsylvania statute passed in 1868, it has been held that a trustee may be removed on a petition showing the existence of hostile relations which prevent all intercourse between the trustee and the beneficiary and tend to interfere with the proper conduct of the business. *In re Neafie*, 199 Pa. St. 307, 49 Atl. 129, *overruling In re Nathan*, 191 Pa. St. 404, 43 Atl. 313, 44 W. N. C. 169; *In re Price*, 209 Pa. St. 210, 58 Atl. 280. See also *Marsden's Estate*, 166 Pa. St. 213, 31 Atl. 46; *In re Myer*, 205 Pa. St. 413, 54 Atl. 1093; *Hille's Estate*, 9 W. N. C. (Pa.) 421; *Syfert's Estate*, 9 Phila. 320, 30 Leg. Int. 36, 3 W. N. C. 565; *In re Martin*, 4 Pa. Dist. 219.

In the case of *In re Price*, supra, the petitioner asked for the removal of trustees, alleging inharmonious relations. The court dismissed the petition saying: "The Act of 1868 was intended to facilitate the exercise of the powers of the court over the removal of trustees and to enlarge the influence and authority in that respect of the cestui que trust. But it was not intended to subject the office of trustee and the discretion of the court to a mandatory whim of the cestui que trust. The court still retains the authority to re-

quire that a valid and sufficient cause shall be shown for the removal. This was the construction of the act adopted in *Stevenson's Appeal*, 68 Pa. St. 101, and after some departures, more apparent than real, as said by our brother *Mestrezat*, in *re Neafie*, 199 Pa. St. 307, finally settled in the case last named. . . . While inharmonious relations between trustee and cestui que trust, not altogether the fault of the former, will not generally be considered a sufficient cause for removal, yet where they have reached so acrimonious a condition as to make any personal intercourse impossible and to hinder the proper transaction of business between the parties, a due regard for the interests of the estate and the rights of the cestui que trust may require a change of trustee. If his management of the trust justly subjects him to criticism and to a lack of confidence by the cestui que trust, he should not be continued in control of the estate."

SAYERS

v.

MONTPELIER AND WELLS RIVER RAILROAD.

Vermont Supreme Court—May 15, 1916.

90 Vt. 201; 97 Atl. 660.

Public Service Commissions — Collateral Attack on Order.

Within certain limitations, one may attack an order of the public service commission abolishing a grade crossing, collaterally, notwithstanding he was a party and could have had an appeal.

Effect of Order — Liability of Corporation Obeying Order.

Under P. S. 4544, making it the duty of the public service commission to determine by whom its orders shall be executed, the defendant railroad, in carrying out the commission's plans for the elimination of grade crossings on its tracks and in constituting farm crossings for the use of plaintiff, was acting as the agent selected by the commission; and if the order was a valid exercise of the powers of the commission, it relieves the defendant from liability.

Judicial Review of Order of Commission — Power of Court of Equity.

A court of chancery, not acting as an appellate tribunal, will not interfere with the proceedings and determinations of inferior boards or tribunals of special jurisdiction, while acting within their powers or exercising a discretion conferred upon them by the

legislature, except in special cases presenting some acknowledged and well-defined ground of equity jurisdiction.

Same.

The primary interference of the courts with the administrative functions of a public service commission, being incompatible with the proper exercise of governmental powers, although such commissions are exercising special and limited powers, as to which nothing will be presumed in favor of their jurisdiction, within the proper limits of the authority conferred upon them by the legislature, their jurisdiction is exclusive, and can be reviewed only in the manner provided by the statute.

Same.

The courts have power to prevent an abuse of discretion by a public service commission, and to require that its powers be exercised according to law and in a manner not to injure property rights unjustly.

Same.

Whether the orders of a public service commission deprive a party of a statutory right, whether he has had a fair and adequate hearing or whether, for any reason, the orders are contrary to law, are all justiciable questions, and if they arise in circumstances calling for equitable relief, a court of chancery will afford a remedy.

Jurisdiction of Commission — Abolition of Grade Crossing — Incidental Powers.

Under P. S. 4611, giving the public service commission jurisdiction in all matters respecting highway grade crossings, and P. S. 4544, as amended by Acts 1908, No. 108, providing that on petition of the selectmen of a town, within which a public highway crosses a railroad, or the general manager or attorney of such railroad alleging that public safety requires an alteration in such crossing, and praying that the same may be ordered, the commission is required to determine what changes if any, shall be made and by whom, the primary object of the statute being to provide an effectual means to secure the elimination of dangerous highway crossings, the incidental power to change the location of an existing highway is expressly conferred upon the commission, but is to be exercised as a mere incident of the real purpose of the statute.

[See note at end of this case.]

Same.

The authority of the public service commission to change the location of highways goes no further than to order such changes as are necessary and fairly incident to the purpose of adapting railroads and public highways to each other in such a manner as best to promote the safety and convenience of the traveling public.

[See note at end of this case.]

Same.

The power of the public service commission to change the location of highways, by necessary implication, carries with it the power to discontinue the portion that occupied the old

location and to close the crossing to public travel.

[See note at end of this case.]

Same.

When the change in the location of a grade crossing deprives one of the benefits of a public highway, the public service commission has the right to order a farm crossing for the benefit of such individual, to the end that their power in that regard may be effectual, since whatever is reasonably necessary in order to abolish grade crossings, or fairly may be regarded as incidental thereto, is within the jurisdiction of the commission.

[See note at end of this case.]

Same.

P. S. 4549, as amended by Acts 1908, No. 108, § 3, expressly confers full authority upon the public service commission to condemn lands and award damages in a proceeding for the abolition of a grade crossing.

[See note at end of this case.]

Statutes — Amendment — Powers of Public Service Commission.

In amending the statute with a view to conferring full authority upon the public service commission to condemn lands and award damages, proceedings for the abolition of grade crossings, it was not necessary to change the section relating to general jurisdiction, since the provision that the commission shall determine what alterations, changes, or removals shall be made is broad enough to cover the location of new highways.

Public Service Commissions — Judicial Review.

Where the plaintiff, who was a party to proceedings before the public service commission for the abolition of grade crossings, acquiesced therein to the extent of accepting the commissioners' award of land damages and agreeing to accept the old highway crossing as a farm crossing for the exclusive use of his premises, primary jurisdiction over his petition to have the farm crossing changed is in the public service commission, and not a court of chancery, which has no power to eliminate grade crossings or locate highways.

Same.

Under Acts 1908, No. 108, § 4, providing that any person aggrieved by an order of the public service commission in proceedings for the abolition of grade crossings, who was a party to such proceedings, may appeal to the supreme court in the same manner as provided in P. S. § 4599, an appeal by the petitioner, if dissatisfied with the action of the commission on his petition to determine the location of a farm crossing and substituting an overpass, will preserve all his rights.

Appeal from Orange county: SLACK, Chancellor.

Action by J. M. Sayers, plaintiff, against Montpelier and Wells River Railroad, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

E. W. Smith for appellant.

H. O. Shurtleff for appellees.

[203] TAYLOR, J.—This proceeding grows out of the elimination of two grade crossings on the line of the Montpelier and Wells [204] River Railroad in the town of Newbury. Pursuant to the statute, defendant preferred its petition to the Public Service Commission praying that the crossings be eliminated; and such proceedings were had thereon that, on Oct. 7, 1912, the commission, having found that said crossings were among the most dangerous on the line of defendant's road and that public safety required that they be eliminated by the construction of a connecting section of public highway in the manner and locality indicated, made an order requiring the defendant to lay out and construct the connecting section of highway over the course and according to specifications detailed in the order. The commission also ordered the defendant to construct and, until further order, maintain a farm crossing at a point to be agreed upon with the plaintiff for the exclusive use of his land on the north side of the connecting section of highway; that all the work ordered be completed on or before May 1, 1913, and done to the satisfaction of the commission; that, upon the completion of the work ordered, the two highway crossings "shall forever thereafter be discontinued and abandoned as such, and the Montpelier and Wells River Railroad and its successors in the operation of said railroad shall forever thereafter fence and bar the same against public travel." The crossings to be eliminated were about fifty rods apart. The new road contemplated in the order was on the opposite side of the railroad from the old highway, but in the same general locality. After the work under this order was completed as it now is, and before plaintiff brought this bill, the commission made an order approving and accepting the work, opening the new highway for public travel and closing said highway crossing. Plaintiff was made a party to the proceedings before the commission and appeared therein but took no appeal from their orders.

In his bill of complaint, after reciting in detail the proceedings before and order of the Public Service Commission, plaintiff alleges that he is the owner of five dwelling houses and a water power located on the northerly side of defendant's railroad; that before the change effected by the order of the commission he had access to his premises by a public highway; that there is quite a large amount of travel to and from said premises; that to enjoy his premises it is necessary to have access to a highway; that the effect of said order and the action of the defendant

has been to cut him off entirely from access to any public [205] highway; that defendant has not complied with so much of said order as required it to construct and maintain a farm crossing for the exclusive use of his land, but neglects and refuses so to do; that defendant has never agreed with him as to the location of said farm crossing nor furnished an adequate crossing for his benefit; that there is a ledge cut across which defendant could construct an overhead bridge, which would accommodate him and obviate the necessity of his crossing the railroad at grade to reach his premises from the public highway. In an amendment to the bill plaintiff alleges that it has been of great damage to him not to have suitable access to a highway, which damage, he says, defendant ought to pay.

The prayer of the bill is that defendant may be compelled to build and maintain an overhead bridge in lieu of a crossing at grade, or to furnish other sufficient and adequate means of access to plaintiff's premises from the highway. There is also a prayer for general relief.

For answer the defendant admits that plaintiff is the owner of land situated as alleged in the bill, that it petitioned the Public Service Commission for the abolition of the grade crossings mentioned in the bill, that the commission ordered said crossings abolished, and that the effect of their abolition was to cut off the plaintiff's land from the public highway; but alleges that the commission ordered a farm crossing constructed so as to connect plaintiff's land with the public highway, that it agreed with plaintiff as to the location of said farm crossing, that it constructed said crossing agreeably to the order of the commission, that plaintiff took no appeal from said order, assisted in the construction of the crossing and made no complaint in that regard until after the order of the commission had been fully complied with.

The cause was first heard before the Chancellor on demurrer to the bill, which defendant incorporated in its answer. The demurrer having been overruled the answer was ordered brought forward and issue thereon joined, and the cause was referred to a special master. In addition to the facts conceded in the pleadings the master finds that plaintiff agreed with defendant that a farm crossing should be constructed at the point where the original highway crossed the railroad near the easterly end of plaintiff's property; that it was mutually understood that defendant should provide a crossing at grade at that point and [206] should also provide a way to reach the highway, a distance of about ten rods, but that the location of the connecting way was not agreed upon; that defendant constructed the crossing over the tracks in a satisfactory manner; that the connecting way

was constructed northerly of the old highway, turning nearly at right angles after crossing the track and extending for a distance of about ten rods alongside the railroad track and very close to it, in part at least upon defendant's right of way; that the way was so constructed and railed that it was very narrow, not exceeding 12 feet in width; that the way from the crossing was never accepted by the plaintiff nor by the selectmen of the town of Newbury, but that both plaintiff and the selectmen refuse to accept it as carrying out the order of the commission; that plaintiff has no other way to reach his premises; that the action of defendant in so constructing the connecting way has decreased the annual rental value of plaintiff's property \$125; that the value of plaintiff's premises will be greatly decreased and his water privilege rendered valueless, if plaintiff is confined to the present way and crossing, on account of the difficult approach thereto. In this connection the master finds that the crossing itself is sufficient and adequate, but that the crossing in connection with the connecting way is entirely inadequate for the purposes of plaintiff and the occupants of his land; that the most direct route from the crossing to the highway is along the line of the old highway; that, if that is not practicable under the circumstances, a way farther from the railroad track could have been constructed at about the same expense. He also finds that plaintiff was allowed and paid \$200 for land used in constructing the new highway, but that this land damage had nothing to do with the farm crossing and the connecting way.

The cause was heard on the pleadings and master's report, the chancellor dismissed the bill strictly *pro forma*, and the plaintiff comes here on appeal.

In his bill plaintiff does not attack the jurisdiction of the Public Service Commission to make the order respecting a farm crossing, but bases his claim for equitable relief upon the failure of the defendant to comply with the order in that regard. He attempts now to raise the question of the jurisdiction of the commission to close the old highway and deprive him of the privileges thereof, as well as the constitutionality of the statute creating the commission. We pass without deciding whether [207] these questions are properly here, not having been raised in the bill. As to the question of the constitutionality of the statute, it is enough to say that it was considered and the statute upheld in *Sabre v. Rutland R. Co.* 86 Vt. 347, 85 Atl. 693, Ann. Cas. 1915C 1269. It will be necessary to discuss the question of jurisdiction in connection with other matters presented in the bill.

Plaintiff states the real case made in his bill in the concluding paragraph of his brief, wherein he contends that defendant cannot

shut up the old highway without affording him suitable means of getting from the new highway to his property; and that chancery has jurisdiction to compel defendant to do what in law it ought to do, and to pay the damages occasioned by its misconduct.

In considering plaintiff's standing in equity we must take into account that he was a party to the proceedings before the Public Service Commission. It nowhere appears that he appealed to the commission for the relief sought in this bill, nor for any relief that was not granted. Neither does it appear that he objected to the plan adopted by the commission for the elimination of the crossings, nor to their approval of the manner in which their order was carried out by the defendant. He did not see fit to avail himself of the appeal from the action of the commission, which the statute secures to him, but stood by and saw the work being done under their orders carried to completion. In these circumstances will a court of equity interfere?

It should be observed that the order of the Public Service Commission is called in question collaterally in this proceeding. Within certain limitations, plaintiff is at liberty to attack the order collaterally, notwithstanding he was a party and could have had an appeal. *Bessette v. Goddard*, 87 Vt. 77, 88 Atl. 1; *Alexander v. Montpelier*, 81 Vt. 549, 71 Atl. 720. However, the true nature of the proceeding is best understood with the relation of the defendant to the order of the Commission in mind. The statute makes it the duty of the Commission to determine by whom its orders shall be executed. P. S. 4544. In all the matters complained of, the defendant was acting as the agent selected by the commission for carrying out its plans for the elimination of the crossings. It is sought to compel the defendant to undo in part what it has done under authority of the commission and to substitute a crossing and approach that the [208] commission has not seen fit to order, besides paying damages plaintiff claims to have suffered by reason of the work done under order of the commission. In these matters the defendant stands no differently than would the town of Newbury, or some individual, had either been selected to do the work required by the order; and if the order was a valid exercise of the powers of the Commission, it relieves defendant from liability. *Danner v. New York, etc. R. Co.* 73 Misc. 113, 130 N. Y. S. 723.

Defendant insists that the court of chancery is without jurisdiction. It is a well recognized general rule that a court of chancery, not acting as an appellate tribunal, will not interfere with the proceedings and determinations of inferior boards, or tribunals of special jurisdiction, while acting

within their powers or exercising a discretion conferred upon them by the Legislature, except in special cases presenting some acknowledged and well-defined ground of equity jurisdiction, as when necessary to prevent irreparable injury or a multiplicity of suits. *Ewing v. St. Louis*, 5 Wall. 413, 18 U. S. (L. ed.) 657; *Heffran v. Hutchins*, 160 Ill. 550, 43 N. E. 700, 52 Am. St. Rep. 353; *Mt. Carmel v. Shaw*, 155 Ill. 37, 39 N. E. 584, 27 L.R.A. 580, 46 Am. St. Rep. 311; *Methodist Protestant Church v. Baltimore*, 6 Gill. (Md.) 391, 48 Am. Dec. 540; *Harrisonburg v. Roller*, 97 Va. 582, 34 S. E. 523; *Mann v. Mercer County Ct.* 58 W. Va. 651, 52 S. E. 776; *Horton v. Nashville*, 4 Lea (Tenn.) 39, 40 Am. Rep. 1; *Kendall v. Frey*, 74 Wis. 26, 42 N. W. 466, 17 Am. St. Rep. 118; *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 14 L.R.A. 268, 30 Am. St. Rep. 214; 4 Pom. Eq. Jur. 2678; 10 R. C. L. 343.

The similarity in purpose and function of the Public Service Commission to the Interstate Commerce Commission makes the decisions of the Federal Supreme Court concerning the powers and jurisdiction of the latter especially helpful here. It was held in *Baltimore, etc. R. Co. v. U. S.* 215 U. S. 481, 54 U. S. (L. ed.) 292, 297, 30 S. Ct. 164, a petition for mandamus to redress grievance due to regulations adopted by the railroad company for the distribution of coal cars, that when the grievances complained of are within the administrative competency of the commission, they are not subject to be judicially enforced; at least, till that body, clothed by the statute with authority on the subject, has the opportunity to exert its administrative function. To the same effect is *Texas, [209] etc. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 U. S. (L. ed.) 553, 27 S. Ct. 350, 9 Ann. Cas. 1075. Again, in *Atchison, etc. R. Co. v. U. S.* 232 U. S. 199, 58 U. S. (L. ed.) 568, 34 S. Ct. 291, a proceeding attaching an order of the Interstate Commerce Commission relating to rates, it was said that the courts were not vested with power to make rates, that being a legislative function, and that "they cannot interfere with the rates fixed or practices established by the commission unless it is made plainly to appear that those ordered are void." Finally, it was held in *Pennsylvania Co. v. U. S.* 236 U. S. 351, 59 U. S. (L. ed.) 616, 623, 35 S. Ct. 370, that, if the order made by the commission does not contravene some constitutional limitation, and is within the statutory authority of that body, and not unsupported by the testimony, it cannot be set aside by the courts, as it is only the exercise of an authority which the law vests in the commission. Mr. Justice Hughes tersely sums up the whole matter in these words: "We do not sit as a board of review to substi-

tute our judgment for that of the Legislature, or of the commission lawfully constituted by it, as to matters within the province of either." *Minnesota Rate Cases*, 230 U. S. 352, 57 U. S. (L. ed.) 1511, 33 S. Ct. 729, 48 L.R.A.(N.S.) 1151, Ann. Cas. 1916A 18. See also *Interstate Commerce Commission v. Union Pac. R. Co.* 222 U. S. 541, 56 U. S. (L. ed.) 308, 311, 32 S. Ct. 108; *Interstate Commerce Commission v. Louisville, etc. R. Co.* 227 U. S. 88, 57 U. S. (L. ed.) 431, 33 S. Ct. 185; *Hocking Valley R. Co. v. Public Utilities Commission (Ohio)* 110 N. E. 952; *In re Hadley*, 178 Mass. 319, 59 N. E. 805; *In re Old Colony R. Co.* 163 Mass. 356, 40 N. E. 198.

Argument is unnecessary to support the conclusion that primary interference of the courts with the administrative functions of a commission, like our Public Service Commission, is incompatible with the proper exercise of governmental powers. If the valid orders of the commission were open to collateral attack at the option of any party aggrieved, it would give rise to confusion and result in delay,—in short, wholly defeat the purpose of the statute creating the commission. Though exercising special and limited powers, as to which nothing will be presumed in favor of their jurisdiction (*Bessette v. Goddard*, 87 Vt. 77, 88 Atl. 1; *Colonial Power, etc. Co. v. Creaser*, 87 Vt. 457, 89 Atl. 472), still, within the proper limits of the authority conferred upon them by the Legislature, their jurisdiction is exclusive and can be reviewed only in the manner [210] provided by the statute. Undoubtedly the courts have power to prevent an abuse of discretion by the commission and to require that their powers be exercised according to law and in a manner not to injure property rights unjustly. Whether their orders deprive a party of a constitutional or statutory right, whether he has been accorded a fair and adequate hearing, or whether for any reason their orders are contrary to law, are all justiciable questions; and, if they arise in circumstances calling for equitable relief, the court of chancery will afford a remedy. See *Interstate Commerce Commission v. Illinois Cent. R. Co.* 215 U. S. 452, 54 U. S. (L. ed.) 280, 30 S. Ct. 155; *Interstate Commerce Commission v. Union Pac. R. Co.* 222 U. S. 541, 56 U. S. (L. ed.) 308, 32 S. Ct. 108.

This brings us to the inquiry whether the matters here complained of were within the jurisdiction of the Public Service Commission. P. S. 4611 gives the commission jurisdiction in all matters respecting highway grade crossings. P. S. 4544, as amended by No. 108, Acts of 1908, provides that on petition of the selectman of a town within which a public highway crosses or is crossed by a railroad, or the general manager or attorney

of such railroad, alleging that public safety requires an alteration in such crossing, its approaches, the method of crossing, the location of the public highway, the closing of a public highway crossing and the substitution of another therefor not at grade, . . . and praying that the same may be ordered, the commission is required to determine what alteration, changes or removals, if any, shall be made and by whom. The primary object of this statute is to provide an effectual means to secure the elimination of dangerous highway crossings. As a means to that end the incidental power to change the location of an existing highway is expressly conferred upon the commission; but this power is to be exercised as a mere incident of the real purpose of the statute. *Bessette v. Goddard*, supra. In short, the authority of the commission to change the location of highways goes no further than to order such changes as are necessary and fairly incidental to the purpose of adapting railroads and public highways to each other in such a manner as best to promote the safety and convenience of the traveling public. See *Norwood v. New York, etc. R. Co.* 161 Mass. 259, 37 N. E. 199.

The power to change location of highways by necessary implication carries with it the power to discontinue the portion that occupied the old location and to close the crossing to public [211] travel. See *Davis v. Hampshire County Com'rs*, 153 Mass. 218, 26 N. E. 848, 11 L.R.A. 750; *Leighton v. Concord, etc. R. Co.* 72 N. H. 224, 55 Atl. 938. And, when, as in this case, the change in location deprives one of the benefits of a public highway, the commission undoubtedly have the right, in case of necessity and as an incident of their authority over grade crossing eliminations, to order a farm crossing for the benefit of such individual, to the end that their power in that regard may be effectual. This power springs from and is limited by the rule that whatever is reasonably necessary and proper to be done in order to abolish grade crossings, or fairly may be regarded as incidental thereto, is within the jurisdiction of the commission. *Bacon v. Boston, etc. R. Co.* 83 Vt. 421, 76 Atl. 128; *Bessette v. Goddard*, supra. It was held in a recent case in Massachusetts that this rule applies not only to the manner in which the work shall be done, but as well to the scheme or plan as a whole that the commission adopts to accomplish the elimination. *In re Waltham*, 206 Mass. 208, 92 N. E. 477. It fairly appears that the farm crossing and the connecting way were necessarily incidental to the general plan adopted by the commission for eliminating the crossings in question. The fact that their location was originally left to agreement of the parties interested is not relied upon as affecting the validity of the order. The commission still

had the power in case of disagreement, to fix the location on the further application of either party.

Plaintiff insisted before the master that the connecting way should have been so located and constructed that the selectmen of Newbury would accept it as a highway and secured a finding that the selectman refused to accept it as carrying out the order of the commission. The bill does not predicate the relief sought on that ground. However, it seems desirable to consider what control, if any, the selectmen have over the location of new highways that become necessary in the elimination of grade crossings. This question was involved in *Stimets v. Highgate*, 81 Vt. 231, 69 Atl. 878, an appeal from the award of damages by the selectmen of defendant town for land taken for a highway laid out by them under an order of the Railroad Commission for the purpose of eliminating highway crossings. It was then held that the statute under which the order was made gave no authority to the commission to order the highway laid over [212] a particular route; that their authority extended no further than to adjudge whether it was necessary to take land to eliminate the crossings, leaving the route to be determined by the selectmen. The decision was controlled by the fact that, as the law then stood, the selectmen alone had the authority to take the land when the town or an individual, and not the railroad, was ordered to construct the new highway. Attention was called to the fact that under P. S. 4549, if the railroad was selected to carry out the order, the commission had the authority to determine the necessity for the taking and appraise the damages. At the next session of the Legislature, and evidently because of this decision, the statutes relating to the subject were amended in several important particulars. P. S. 4549, relating to taking land for the new highway, was so amended as to confer full authority upon the commission to condemn the land and award damages. No. 108, Acts of 1908, sec. 3.

It is of the highest importance to the safety and convenience of the public, as well as the prompt and efficient administration of the law relating to grade crossing eliminations, that there should not be divided and possibly conflicting authority in the premises. The amendments of 1908 have removed the considerations which forced the Court to hold in *Stimets v. Highgate* that the authority to determine the location was left with the selectmen. In revising the statute with a view to conferring full authority upon the commission it was not necessary to change the section relating to general jurisdiction, as the provision that the commission shall determine what alterations, changes or re-

movals shall be made is certainly broad enough to cover the location of new highways.

When all the provisions relating to the subject are considered together there can be no doubt that the Legislature intended to secure unity of action and purpose by giving the Public Service Commission exclusive jurisdiction of the whole matter.

The farm crossing and connecting way involved in this case were a part of the single scheme for the elimination of the highway crossings. The commission had jurisdiction to determine the necessity for their elimination and the manner in which it could best be accomplished with a view to public safety and convenience. Plaintiff was a party to the proceedings before the commission and acquiesced therein to the extent of accepting the commissioners' award of land damages and agreeing [213] to accept the old highway crossing as a farm crossing for the exclusive use of his premises. He also understood that defendant was to construct a way from the crossing to reach the new highway, a distance of about ten rods. He owned the land over which the way must be built. In the final analysis, the only ground of complaint that plaintiff has is that the way was located without his approval. He insists that it should have been located on the line of the old highway, which would be the most direct route; but it fairly appears that such location is impracticable on account of grade. He has failed to show that he applied to and has been denied relief by the commission. He now asks the court of chancery to determine the location of the farm crossing, substituting an overpass for a crossing at grade, or that it order the defendant to build the connecting way somewhere else.

From what we have said it will be seen that plaintiff has mistaken his remedy. Primary jurisdiction over these matters is in the Public Service Commission. The court of chancery has no power to eliminate grade crossings or locate highways. The Legislature has seen fit to confer that authority upon the commission with a review by appeal to this Court. The commission had under consideration, or on plaintiff's motion could have considered, all the matters he now complains of. If dissatisfied with the action of the commission, an appeal to this Court, vested as it is with full equity powers over such appeals, would preserve all his rights. No. 108, Acts of 1908, sec. 4; P. S. 4599. See *Sabre v. Rutland R. Co.* 86 Vt. 347, 368, 85 Atl. 693, Ann. Cas. 1915C 1269.

Having failed to show that his legal remedy has been exhausted or has proved inadequate, plaintiff is without standing in the court of chancery.

Pro forma decree dismissing the bill affirmed and cause remanded.

NOTE.

It is held in the reported case that, under an act giving to a public service commission jurisdiction in the matter of grade crossings, the commission has power not only to eliminate a grade crossing but to make such other orders as are reasonably incident to the exercise of that power, such as the establishment of a farm crossing for a person whose access to his land is cut off by the abolition of the public crossing. While the order of the commission is held to be appealable, the court disavows any power to substitute its judgment for that of the commission as to the propriety or expediency of the order made. The jurisdiction of a public service commission to make regulations respecting grade crossings is considered in the note to *Sabre v. Rutland R. Co.* Ann. Cas. 1915C 1289.

IN RE ESTATE OF BRINCKWIRTH

v.

TROLL.

Missouri Supreme Court—December 21, 1915.

266 Mo. 473; 181 S. W. 408.

Executors and Administrators — Public Administrator — Revocation of Letters.

Rev. St. 1909, § 47, requiring that on discovery and probate of a will the letters of administration of the administrator theretofore appointed shall be revoked, applies as well to the public administrator as to others, although he has on due notice taken charge of the estate.

[See note at end of this case.]

Same.

It being the duty of the public administrator to be at all times in court and take notice of all proceedings, failure to give actual notice of a proceeding to revoke his letters on discovery of a will does not vitiate the order of revocation.

[See note at end of this case.]

Same.

On discovery and probate of a will, the powers of the public administrator to administer the estate cease ipso facto, and he is therefore entitled to no notice of a proceeding formally to vacate his authority.

[See note at end of this case.]

Priority of Right to Appointment.

Subject to Rev. St. 1909, § 15, declaring priority of persons entitled to administer estates, and section 19, prescribing when letters testamentary with will annexed shall issue, it is within the discretion of the court

to appoint the administrator, and the public administrator has no superior right to appointment as administrator with the will annexed.

[See note at end of this case.]

Revocation of Letters — Review.

Where the public administrator has no superior right to appointment as administrator with the will annexed, no appeal will be allowed from the discretionary order revoking his letters.

[See note at end of this case.]

Appeal from St. Louis Circuit Court:
BARTH, Judge.

Proceeding to vacate authority of Harry Troll, as public administrator, and appointing John G. Grone and Henry Griesedieck, Jr., administrators with will annexed of estate of Josephine Brinckwirth, deceased. From judgment rendered, public administrator appeals. The facts are stated in the opinion. **AFFIRMED.**

Marshall & Henderson for appellant.*Schnurmacher & Rassieur* for respondent.

[476] WOODSON, J.—The statement of the facts of this case is very brief and as well or better made by counsel for respondent than I can do, and for that reason I adopt it as my statement of the case, which is as follows:

This is an appeal from the judgment of the circuit court of the city of St. Louis, approving the action of the probate court of said city in vacating the authority of Harry Troll, then Public Administrator, and thereupon appointing John G. Grone and Henry Griesedieck, Jr., administrators, with the will annexed, of the estate of Josephine Brinckwirth, deceased.

Josephine Brinckwirth died March 29, 1911. She was a resident of the city of St. Louis at that time and left an estate which, it was admitted upon the trial, exceeds \$200,000 in value. She was a widow and her heirs at law were three minor children. John G. Grone, one of the respondents, is a brother of the deceased, and Henry Griesedieck, Jr., the other respondent (who died pending this appeal), was a brother-in-law of the deceased.

On March 30, 1911, Harry Troll, as Public Administrator of the city of St. Louis, filed notice that he took charge of the estate of said decedent, doing so on the supposition that she had died intestate.

On the next day, March 31, 1911, the will of Josephine Brinckwirth was presented for probate and was duly admitted to probate by the probate court of the city of St. Louis; and the will having been so admitted of probate, under section 47, Revised Statutes 1909, the court vacated the authority assumed by

the Public Administrator, and appointed Grone and Griesedieck as administrators, with the will annexed, and they duly qualified as such.

[477] Thereupon the Public Administrator took an appeal to the circuit court. In that court a trial *de novo* was had, with the result that the circuit court took the same action which had been taken by the probate court, and refused to set aside the appointment of Grone and Griesedieck. After an unavailing motion for new trial, the Public Administrator brought the case here by appeal.

Section 47 of the Administration Act, above referred to, reads as follows:

"If, after letters of administration are granted, a will of the deceased be found, and probate thereof granted, the letters shall be revoked, and letters testamentary, or of administration, with the will annexed, shall be granted."

I. There are but two legal propositions presented by this record for determination, and counsel for appellants present their side of the first in the following language:

"An order of the probate court is not necessary for the Public Administrator to take charge of an estate. When he files his notice his act is independent of the probate court. The filing of notice in the office of the clerk of the probate court is sufficient to vest him with administration and he is not required to set out or prove facts which give him a right to administer. His relation to the estate thereafter is the same as if he had taken charge under order of the probate court.

"The Public Administrator has authority to take charge of an estate under the Missouri statutes, and he continues in charge until superseded by one having a superior right to administer."

In support of their position the following authorities are cited: *Vermillion v. LeClare*, 89 Mo. App. 55, 1. c. 60; *Leeper v. Taylor*, 111 Mo. 312, 19 S. W. 955; *In re Hill*, 102 Mo. App. 1. c. 620, 77 S. W. 110; *Tittman v. Edwards*, [478] 27 Mo. App. 495; *American Car, etc. Co. v. Anderson*, 211 Fed. 301, 127 C. C. A. 587; *Richardson v. Busch*, 198 Mo. 174, 95 S. W. 894, 115 Am. St. Rep. 472.

These cases, with the exception of the Hill Case, substantially hold what is contended for by counsel for appellant; but notwithstanding the ruling there announced the mere fact that the Public Administrator took charge of the estate mentioned under section 305, Revised Statutes 1909, and undertook to administer it, certainly gave him no greater authority or more secure rights in that regard than he would have acquired had he been appointed by the probate court under section 9, Revised Statutes 1909.

Ann. Cas. 1918B.—67.

That being true, then in my opinion, the position of counsel for appellant is not inconsistent with, nor does it militate in the least against the contention of counsel for respondent regarding this proposition, which is stated in this language:

"If, after granting of letters of administration on the ground of intestacy, a will of the deceased be duly proved and admitted to probate, the letters of administration are thereby revoked; or at least must be revoked and the powers of the administrator cease."

This contention of counsel is precisely what section 47, Revised Statutes 1909, provides shall be done when the ordinary administrator is appointed, and subsequent thereto a will is discovered and duly admitted to probate.

This statute seems to be so clear in meaning that there can be no room for construction. However, similar statutes of other States have been before the courts of those States, which hold they mean just what they say. [*Thomas v. Morrisett*, 76 Ga. 384; *In re Davis*, 11 Mont. 196, 28 Pac. 645; *Dalrymple v. Gamble*, 66 Md. 298, 7 Atl. 683, 8 Atl. 468; 1 *Woerner's American Law of Administration*, sec. 268.]

And as previously stated, there is no rule or reason why this same statute should not also apply to a [479] public administrator who takes charge of an estate under said section 305. [*State v. Wilson*, 216 Mo. 215, 115 S. W. 549; *Little Tarkio Drainage Dist. No. 1 v. Richardson*, 237 Mo. 1. c. 64, 139 S. W. 576.]

This proposition is therefore ruled in favor of the respondent.

II. Counsel for appellant next insist that the order of the probate court revoking the authority of the Public Administrator to administer the estate was void because he was not notified of the court's intention to make the order.

This insistence is clearly untenable, for two reasons: first, because he was in court all the time, and had to take notice of all papers, documents, etc., filed in the case where actual notice is not expressly required by statute.

In this case the will was filed, proved and duly probated; and there is no statute which in express terms or by necessary implication required appellant to be notified of said contemplated order.

The second reason why appellant was not entitled to such notice is because he had no vested right, as such Public Administrator, which entitled him to a hearing. His appointment, as such administrator, or rather his assumption of authority under the statute to act as such, was conditional, which depended upon the subsequent discovery and probate of the will referred to in said section 47: and when that contingency happened his

right to further administer the estate under section 305 ceased *ipso facto*, and he could proceed no further therewith, for the obvious reason from that time on the estate had to be administered according to the terms of the will and not according to any statute, and before that could be done letters testamentary or of administration with the will annexed had to be issued by the probate court before anyone [480] could lawfully proceed further with the administration.

While the probate court, in such a case, if not prohibited by sections 15 and 19, Revised Statutes 1909, the first providing for the priority of persons entitled to administer upon estates, and the second prescribing when letters testamentary with the will annexed shall be granted, the probate court may in its sound discretion issue letters of administration with the will annexed to the public administrator, yet there is no law which commands or reason which suggests that such should be done as a rule. In individual cases, under certain circumstances, the court might very justly select him instead of anyone else connected with the estate or the parties interested therein. But by no means does that follow as a matter of law. In such cases as this, and in all cases arising under said section 47, the probate court is at liberty to exercise its wise and sound discretion as to whom it will grant letters of administration with the will annexed, limited, of course, by the provisions of sections 15 and 19, before mentioned.

While the probate court of the city of St. Louis, as a matter of form, or probably for the purpose of making its record fair upon its face, made the useless order revoking the authority of the appellant to proceed further with the administration of the estate after the probate of the will, yet it is perfectly clear that no such order of revocation was necessary, for the reason before stated, that when the will was probated, then by operation of said section 47, his authority to further act ceased *ipso facto*. This being unquestionably true, as it seems to us, then it would be idle talk and illogical to contend that the appellant was entitled to notice of the court's intention to make said formal order for the purpose of keeping its records fair.

[481] In discussing the same question the Supreme Court of Montana, in the case of *In re Davis*, supra, 1. c. 213, said:

"While the law required inquiry to be made as to whether decedent left a will, and makes the right to grant letters of general administration dependent on the fact that according to the proof obtainable decedent left no will [which is also the case in Missouri], it does not require that the court shall solemnly determine by judgment that decedent died intestate. For the statute leaves the question open

for the propounding of a will at any time, and the admission of a will to probate, *ipso facto*, supersedes and vacates the grant of letters of general administration."

And in the case of *Thomas v. Morrisett*, 76 Ga. 384, syl. 3, the Supreme Court of Georgia held that:

"No general administration upon an estate should have been granted in this State, where there was a will in existence which was afterwards proved and admitted to record; and if such administration has been granted in this State, and afterwards a will has been established, this would work a revocation, except as to such portions of the estate as had been fully administered prior to the production and probate of the will."

In the last case cited a general administration had been granted and afterwards a will was produced which had been admitted to probate in the State of Alabama. This raised the question of the validity of the order granting said administration. At page 388 of its opinion the court says:

"Conceding to this judgment in our courts the full faith and credit to which it is entitled by the law and usage of the courts of Alabama, we agree with the superior court that no general administration should have been granted on an estate when there was a will in existence, which was afterwards proved and admitted to record. This is a well settled principle, [482] recognized both by judicial decisions and text-writers. In *Fields v. Carlton*, decided at the last term of this court, 75 Ga. 554, we held that, where a will had been proved in this State, a grant of administration upon the estate was void, and to this effect was the decision of the Supreme Court of the United States in *Griffith v. Frazier*, 8 Cranch 9, and to these many others might be added, but it would be unnecessary labor, as there is not an authority which questions the point there ruled. Applied to an administration granted before a will, which was afterwards established, was discovered, the same principle would work its revocation, except as to such portions of the estate as had been fully administered prior to its production and probate."

The same ruling was announced by the Supreme Court of Maryland in the case of *Dalrymple v. Gamble*, 66 Md. 298, 8 Atl. 486. The facts in that case sufficiently appear in the first syllabus (7 Atl. 683), which reads as follows:

"Where, after the appointment in Maryland of an administrator upon the estate of a resident of California, a will, which named no executor, was established and probated in California, and a copy of it was filed in the orphans' court in Maryland, which had granted administration, held, that that court had

the power, in its discretion, to revoke the former letters of administration, and issue letters of administration *cum testamento annexo*, although the statute provides only for revocation of letters of administration by the issue of letters testamentary; and that such power was properly exercised without awaiting the result of a suit in equity brought by the heirs and next of kin, who claim that the devise made by the will was void, and did not operate upon the Maryland property, to determine the effect of the will."

Discussing the legal question presented, in its opinion, that court said:

[483] "The questions for our decision may be divided into two. The first is whether when this duly certified copy of the will, probated in California, was filed, the letters before granted to Augustine [Dalrymple] were properly revoked. . . . The answer to the first question depends upon sections 36 and 327 of article 93 of the Code. Section 36 is explicit in saying that if a will is filed, and the executor therein named shall apply within thirty days after the filing for letters testamentary, they shall be granted, and the granting of such letters shall operate as a revocation of letters of administration previously granted. Under those circumstances the orphans' court would have no discretion in the matter. But the law is silent as to what shall be done when there is no executor named, although a will is filed. This section 36 makes no distinction between a foreign and a domestic will, and we can see no reason why any distinction should be made; and when we take into consideration section 327, we think none should be made. The will in this case is a foreign will, and professes to dispose of all the personal property; but it appoints no executor, and it is not a case, therefore, where the orphans' court are compelled to revoke. But the whole policy of our testamentary system is to commit administration to the hands of those most interested in the property. Had a will like the one in this case been filed before any administration had been granted, the orphans' court would surely have granted letters c. t. a., but not the ordinary letters of administration. But the power of the orphans' court to revoke letters improvidently granted is unquestioned. We can see no reason why that court should not have the discretion to revoke letters previously granted, and grant new letters c. t. a., upon the discovery of a will. . . . The power to administer justice would be seriously impaired if that court possessed no power or discretion to revoke letters [484] that it had previously granted upon a mistaken state of facts."

While in the case of *Tapley v. McPike*, 50 Mo. 589, the question was whether or not

the statute of itself, upon the probate of the will, revoked the former appointment of the administrator, or whether an order of court was necessary for that purpose; yet there the general effect of the statute was recognized and enforced in the same manner as those referred to in the cases cited.

For the reasons stated this proposition is decided against the appellant.

And for the same reason it would be equally illogical to contend or hold that the appellant would be entitled to an appeal from such a useless or formal order.

I am, therefore, clearly of the opinion that the judgment of the circuit court should be affirmed; and it is so ordered. All concur; Bond, J., in paragraph one and the result.

Rehearing denied January 4, 1916.

NOTE.

Public Administrators.

Introductory, 1059.

Qualifications, 1060.

Necessity of Appointment, 1061.

Right to or Propriety of Appointment:

In General, 1063.

Priority of Right, 1067.

Collateral Attack on Appointment, 1070.

Powers and Duties, 1071.

Personal Liability, 1072.

Liability on Bond, 1072.

Liability of Municipality, 1074.

Compensation, 1075.

Termination of Authority, 1076.

Introductory.

The office of public administrator is of statutory origin, and has been created in a number of jurisdictions. 11 R. C. L. tit. *Executors and Administrators*, p. 452.

The office is of a quasi public nature and has been instituted for the purpose of administering such estates as would otherwise remain unadministered for want of a private administrator. *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Fowler v. Miller*, 119 Cal. 663, 51 Pac. 1078; *Los Angeles County v. Kellogg*, 146 Cal. 590, 80 Pac. 861; *In re Murphy*, Myr. Prob. (Cal.) 185; *Lowery v. Powell*, 109 Ga. 192, 34 S. E. 296; *Bailey v. McAlpin*, 121 Ga. 111, 48 S. E. 699; *Tumon v. Cromwell*, 2 Dem. (N. Y.) 650; *Sutton v. Public Administrator*, 4 Dem. (N. Y.) 33; *State v. Smith*, 145 N. C. 476, 59 S. E. 649. See also *Pina's Estate*, 112 Cal. 14, 44 Pac. 332.

In *Los Angeles County v. Kellogg*, supra, the court said: "The public administrator is a county officer (Pol. Code, sec. 4103; County

Government Act—Stats. 1897, p. 472) and 'must perform such duties as are prescribed in chapter XIII, title XI, part III of the Code of Civil Procedure.' (Pol. Code, sec. 4303.) Among other duties he 'must take charge of the estates of persons dying within his county, as follows:—1. Of the estates of decedents for which no administrators are appointed, and which, in consequence thereof, are being wasted, uncared for, or lost; 2. Of the estates of decedents who have no known heirs; 3. Of the estates ordered into his hands by the court; and, 4. Of the estates upon which letters of administration have been issued to him by the court. (Code Civ. Proc. sec. 1726.)' . . . The purpose of the law is to provide a public officer, acting under his oath of office and official bond, who shall be in a position at all times to administer estates where there is a failure of heirs or other persons competent to perform the service."

In *State v. Smith*, 145 N. C. 476, 59 S. E. 649, it was held that the office of public administrator is not a public office. The court said: "The duties performed by the public administrator are services performed under the public authority, as those of other administrators are performed, and for the public good, but they are not performed in the exercise of any standing laws considered as rules of action applicable to the public generally. The place does not carry with it the dignity or essential characteristics of a public office. It does not affect the public generally but is confined entirely to the settlement of such estates as are necessarily committed to its charge. It is, therefore, evident that a writ of quo warranto will not lie either to remove the incumbent or to inquire by what authority he performs the duties or receives the emoluments of the place."

Qualifications.

The public administrator must be a person reasonably competent to perform the duties devolving on him. In *re Bizzell*, 172 Cal. 486, 157 Pac. 237, wherein the court held that the incompetency of the public administrator was not shown by the evidence, saying: "In regard to the competency and fitness of Hathaway to perform the duties required of him in administering upon the estate, proof was offered. It was shown that Hathaway had held the office of public administrator of Ventura county for ten and a half months, that he had resided in California for many years, and in Ventura county for more than five years, that he had followed from time to time varied occupations, having been a newspaper man for twenty years, the city editor and news manager of a newspaper in Ventura, and in charge of the advertising department for

about four years, also secretary of the county fair association, secretary and manager of the Ventura County Mutual Insurance Company, a local fire insurance company with fifteen hundred members carrying about three millions of insurance, a soliciting agent for a life insurance company, and for five or six months a deputy in the county clerk's office. He had not served as administrator or executor of any estate prior to the time he became public administrator. The estate consisted of ten acres of land worth \$15,540, two lots in Los Angeles, one worth \$33,000, the other \$12,000, jewelry \$710, an automobile at \$500, and other personal property worth \$2,000. The rentals amounted to several thousand dollars a year. This was all the evidence bearing on the subject. There is nothing in this evidence tending to show that Hathaway was incompetent or unfit."

The public administrator is not disqualified by the fact that he has a claim against the estate. In *re Muersing*, 103 Cal. 585, 37 Pac. 520, wherein the court said: "The point relied upon by appellant for a reversal of the order is the alleged incompetency of Clough, the public administrator, to administer upon the estate by reason of the fact that he held a demand against the estate which would have to be paid during the course of administration. The fact upon which this objection was based, as disclosed by the evidence, was that the undertaking firm of Clough & Nordgren, in which the respondent, Clough, was a partner, had furnished the coffin and burial outfit for the deceased, for which they would have to be paid out of the estate. Appellant contends that by reason of this fact respondent is disqualified from administering the trust, and relies upon the provisions of section 1738 of the Code of Civil Procedure, as sustaining this contention. But that section has no application. It provides that 'the public administrator must not be interested in the expenditures of any kind made on account of any estate he administers, nor must he be associated in business or otherwise with anyone who is so interested.' It is apparent that this section does not undertake to state a rule of disqualification, but simply prescribes a very salutary rule of official conduct to govern the public administrator in the discharge of his duty, and prevent his trafficking to his advantage in the estate. It does not render incompetent as administrator one who, under the circumstances disclosed here, or otherwise, becomes a creditor of an estate before his appointment, but furnishes a ground upon which for a violation of its provisions the administrator would be subject to removal. There is nothing in this section, nor in the various other provisions of the code relating to estates of deceased per-

sons, which have been called to our attention, tending to sustain the theory that the mere fact of being a creditor of, or having a demand against, an estate disqualifies one from appointment as administrator. Section 1369 of the Code of Civil Procedure prescribes the grounds which render one incompetent to serve as administrator, of which this is not one; and the courts have no right to add to the disqualifications prescribed by the legislature."

Under a statutory authority to appoint some "discreet fit person" as public administrator, a corporation may be appointed. *Louisville, etc. R. Co. v. Herndon*, 126 Ky. 589, 104 S. W. 732, 31 Ky. L. Rep. 1059.

Necessity of Appointment.

A public administrator is not entitled by virtue of his office to administer an estate, but must procure an appointment and the issuance of letters of administration in each instance. *King v. Griffin*, 6 Ala. 387; *In re Hamilton*, 34 Cal. 464; *Davis v. Shuler*, 14 Fla. 438; *Wilson v. Dibble*, 16 Fla. 782; *O'Rourke v. Harper*, 35 Mont. 346, 89 Pac. 65. And see *Reynolds v. McMullen*, 55 Mich. 568, 22 N. W. 41, 54 Am. Rep. 386 (foreign public administrator).

In *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237, it appeared that an intestate died at Sacramento, California, without any known heirs. A short time thereafter, the public administrator of San Francisco petitioned for and received letters of administration. He alleged in his petition that the decedent was "late a resident of San Francisco county." It was held that his appointment was irregular but not contrary to law. The court said: "The first question is this: was Flower administrator upon this estate? It is insisted that he was administrator, upon two grounds: first, as public administrator by virtue of his office, and second, by reason of the grant to him of administration by the probate court. The first ground involves the rights and powers of public administrators, and will require some examination. In considering this point, it would seem safe to assume that all the provisions relating to the powers and duties of the public administrator, and inconsistent with the general probate law, are special provisions, and must be given their full force; leaving all the other provisions of the general probate system as much applicable to him, as to any other administrator. That he has official powers, and is an officer of the law, is plain from these special provisions. But, it is equally clear, that he has only such powers as are given him by law. The public administrator is required to give bond and take the official oath; and it would seem to

have been the intention of the statute to dispense with the bond and oath required of other administrators in each particular case. But the question arises, whether administration must be granted to the public administrator by the probate court, upon each particular estate. This question is one of more difficulty; and to ascertain the intention of the statute, it is necessary to construe all of its provisions together, so as to give force and effect to all, if possible. By the provisions of the fifty-second section, the public administrator is entitled to the grant of administration when there are no next of kin; and by section sixty-four, the provisions of which are general, he would be equally entitled to administration, although there were persons preferred before him, upon their failure to apply; and putting all these provisions together, it would seem clear, that he is entitled to administration upon all estates not otherwise administered. The provisions of the fourteenth chapter are somewhat ambiguous, and the meaning obscure. By section 304, when a stranger, or person without known heirs, dies in the house or on the premises of another person, such person shall give notice to the public administrator; and by section 305, he shall make an inventory of such estate, according to the law prescribing the duties of administration, subject to the control and direction of the probate court. In terms, the provisions are limited to cases where a stranger dies in the house or on the premises of another. The intention, however, would seem to be that the public administrator should at once take possession of the estate of all persons dying without known heirs; for the reason, that in such cases, there being no one interested to take care of the estate, there would be danger of immediate loss; and after taking such possession, he must proceed under the general law and the other provisions of that chapter. The effect is to give him temporary possession of the property, leaving him to obtain regular administration from the probate court. This view is sustained by the eighty-eighth section, which has reference to special administration, and by which the court is authorized to 'direct the public administrator to take charge of the estate.' The phrase, 'take charge of the estate,' is qualified by the scope of the section, and only means to give the public administrator the same powers over the particular estate, as he would have over the class of estates referred to in the fourteenth chapter."

In *Nelson v. Troll*, 173 Mo. App. 51, 156 S. W. 16, the court construed a statute giving the public administrator a right to administer without appointment, saying: "It is true the statute (sec. 302, R. S. 1909) in its fourth

subdivision authorizes the public administrator to take charge of an estate 'when money, property, papers or other estate are left in a situation exposed to loss or damage, and no other person administers the same,' and by section 305 he is authorized to enter upon the discharge of his duty under section 302 of the mere filing of a notice of the fact in the office of the clerk of the probate court without an order of the probate court touching the matter. [See *Leeper v. Taylor*, 111 Mo. 312, 19 S. W. 955.] But though such be true, it is obvious that the mere filing on an estate by the public administrator cannot operate ipso facto to revoke an order of non-administration made by the probate court on a full hearing under section 10, Revised Statutes, 1909. . . . Though the probate courts are inferior and of limited jurisdiction, it is well settled that their judgments given on such subjects as are within their jurisdiction are entitled to the same weight as that of any other court of record and are regarded as conclusive in all collateral proceedings as here. [See *Johnson v. Beazley*, 65 Mo. 250.] Though in the ordinary case, the rights of the public administrator would attach on the mere filing of his notice, we are unwilling to accede to the proposition that such fact alone would oust the plaintiff of his rights in the premises which were being exercised under the valid order of a court of competent jurisdiction. In this view, plaintiff was entitled to withhold and use all of the property under the order of the probate court, and the public administrator is without any right whatever in the premises." See also *Leeper v. Taylor*, 111 Mo. 312, 19 S. W. 955, wherein it was said: "Section 299, Revised Statutes, 1889, makes it the duty of the public administrator to take charge of the estate of deceased persons in the cases specified in the first seven subdivisions thereof. In those cases the public administrator, in taking charge of estates, acts independent of any order of the probate court. When he takes charge of an estate he occupies the position of a private administrator, and in suits brought by him he is not required to show facts which authorized him to take upon himself the burden of administration. *Wetzell v. Waters*, 18 Mo. 396. It has been held that the failure to give the notice required by section 302 will not render the whole administration void. *Adams v. Larrimore*, 51 Mo. 130." See to the same effect *Hollingsworth v. Jeffries*, 121 Mo. App. 660, 97 S. W. 632.

The public administrator has no vested right to administer a particular estate. *State v. Woody*, 20 Mont. 413, 51 Pac. 975, wherein it appeared that one Lancaster had held the office of public administrator. While

so acting the next of kin of a decedent nominated him as administrator of the estate. He made several unsuccessful attempts to obtain letters of administration and expended some of his own money for this purpose. Later his term of office expired and one Higgins, who was duly elected, succeeded him in office as public administrator. Higgins duly qualified and received the letters of administration of the decedent's estate. Lancaster sought to have the letters issued to Higgins revoked and to have himself appointed administrator. He contended, among other things, that because he had expended some money and had taken steps to obtain the letters of administration he had acquired a vested right to them. It was held, however, that his contention was untenable. The court said: "Relator bases his right to administer upon three distinct grounds: first, that his application while public administrator created a right which, upon the rehearing, became a vested right to administer, and to the fees pertaining thereto; second, that he was the nominee of the heirs at law of the decedent; and, lastly, that he is entitled, under section 2446, Code Civ. Proc., providing that letters must be granted to any applicant, though it appears there are other persons having better rights, when such persons fail to ask for letters. The first ground is without merit. By filing his petition, relator acquired no interest in the estate. Neither did he thereby acquire a right to fees to be thereafter earned. (In *re Pingree*, 100 Cal. 79, 34 Pac. 521. See also *Hamilton Bank v. Dudley*, 2 Pet. 492 [7 U. S. (L. ed.) 496], and *In re Dewar*, 10 Mont. 426, 25 Pac. 1026.) As to the expenses incurred by him in advancing certain sums for filing the petition and redeeming lands from tax sale, we have the relator's admission (by failure to deny) of reimbursement by the heirs. But, apart from this, we cannot subscribe to the doctrine that an applicant must be granted letters because of the fact he has paid out his own money in an unsuccessful attempt to obtain them. . . . The third ground is really included within the second. When relator ceased to occupy the office of public administrator, his application for letters to issue to him in that capacity was, of necessity, futile. It could not properly be granted, for he was no longer such officer. He was not entitled to administer upon the estate as against the incumbent of the office at the time of the grant of letters. 'It was his status at the time of the grant of administration, and not at the time of filing his petition, that determined his competency.' (In *re Pingree*, supra.) And, as we have seen, he was not the nominee of the heirs. The court therefore was right in refusing to consider the application as one made by him in

his private capacity. The appointment of public administrator Higgins is not of concern to relator. It is ordered that judgment be entered dismissing the application and writ of relator, with costs."

Right to or Propriety of Appointment.

IN GENERAL.

The public administrator will ordinarily be appointed to administer an estate only when, because of the absence or nonaction of the heirs, administration in the ordinary course cannot be had. *Union Mut. L. Ins. Co. v. Lewis*, 97 U. S. 682, 24 U. S. (L. ed.) 1114; *American Car, etc. Co. v. Anderson*, 211 Fed. 301, 127 C. C. A. 587; *In re Barton*, 52 Cal. 538; *In re McDonald*, 118 Cal. 277, 50 Pac. 399; *In re Von Buncen*, 120 Cal. 343, 52 Pac. 819; *Johnston v. Tatum*, 20 Ga. 775 (where no other person appears court may appoint clerk of court to act as administrator); *Bailey v. McAlpin*, 121 Ga. 111, 48 S. E. 699; *Cotterell v. Coen*, 246 Ill. 410, 92 N. E. 911; *Matter of Hutchings*, 154 Ill. App. 101; *Savage v. Luther*, 165 Ill. App. 1; *Hoffman v. Hunter*, 127 La. 673, 53 So. 903 (where estate is small and none of heirs apply for administration district attorney of parish where property is situated may administer); *Dagle's Succession*, 27 La. Ann. 524; *Miller's Succession*, 27 La. Ann. 574; *Townsend's Succession*, 36 La. Ann. 535; *Smith's Succession*, 40 La. Ann. 105, 3 So. 539; *Callahan v. Griswold*, 9 Mo. 784; *Wetzell v. Waters*, 18 Mo. 396; *Richardson v. Busch*, 198 Mo. 174, 95 S. W. 894, 115 Am. St. Rep. 472; *In re Landgraf*, 183 Mo. App. 251, 168 S. W. 268; *In re Page*, 107 N. Y. 266, 14 N. E. 193; *Ex p. Emigration Com'rs*, 1 Bradf. (N. Y.) 259; *Watts v. New York*, 4 Wend. (N. Y.) 168; *Welsh v. Manwaring*, 120 Wis. 377, 98 N. W. 214. See also *Williamson v. Furbush*, 31 Ark. 539 (when sheriff may be appointed administrator); *State v. Parish*, 25 La. Ann. 329; *Cooke v. Finley*, 29 Miss. 127; *State v. Judge*, 10 Mont. 401, 25 Pac. 1053.

In *Bailey v. McAlpin*, 121 Ga. 111, 48 S. E. 699, the court said: "The law in reference to county administrators was not intended to affect other provisions of the code. It was rather supplementary and intended to provide for an officer who should be bound to qualify when, because of the meager assets, inability to give bond, or want of resident heirs or of persons interested, the estate was likely to be unrepresented."

In *Lowery v. Powell*, 109 Ga. 192, 34 S. E. 296, it was said: "Our statute which authorizes administration to be vested in the clerk of the superior court confines the appointment to cases where estates are unrepresented and not likely to be represented."

In *Tymon v. Cromwell*, 2 Dem. (N. Y.) 650, the court said: "The object of the statutory provision creating the office of public administrator being to authorize some one to take possession of, and preserve from loss and waste, the property of strangers who have died leaving no relative in the county, that officer fails to acquire such power where there is such relative, unless the surrogate grant such order. The whole article of the statute is based upon the fact of the absence of such relative (§ 47); or upon the fact that, although there be such relative, yet that there are creditors or other relatives of the deceased, residing more than one hundred miles distant, who are interested in the distribution, and that the goods are in danger of waste or embezzlement (§ 49)."

In *Sutton v. Public Administrator*, 4 Dem. (N. Y.) 33, it was said: "Now, it is alleged that the deceased was an unmarried man, and left no next of kin or relatives in this country. Hence, the county treasurer, as public administrator, by virtue of the provisions of 2 R. S. 129, § 47, was authorized to take possession of the property, and proceed in reference thereto, as authorized and directed to do by the article of which that section is a part. That section provides that, where a person shall have died intestate, leaving assets in the county, amounting to over \$100 in value, upon which no letters of administration have been granted, and there is no widow or relative within the county entitled or competent to take such letters, the public administrator shall take charge thereof and proceed as provided in said article. All the conditions, therefore, exist which are requisite to invest the public administrator with power to act under the provisions of the R. S."

In *Union Mut. L. Ins. Co. v. Lewis*, 97 U. S. 682, 24 U. S. (L. ed.) 1114, it appeared that one Berton a resident of Milwaukee insured his life and thereafter died in Milwaukee. It further appeared that he never lived in Missouri. After his death the public administrator of St. Louis, Mo., brought an action against the insurance company to recover on the policy. It was held that he had no authority to act. The court said: "The bare statement of these facts, which are admitted or are clearly proven, is enough to show an absolute want of authority in Lewis to take charge of or administer the estate of Berton. His collection, by suit, of the amount, if any due from the company upon the policy sued on, or any administration by him, in his capacity as public administrator, of Berton's estate, would be acts of palpable usurpation. The notice filed by him in the clerk's office of the probate court was ineffective for any purpose, although it contained the false recital that Berton was 'late of the county of St. Louis.' Such a notice

was required only when he took charge of an estate upon which he could legally administer. No judgment rendered in this action, upon the merits, could protect the company against a future suit by the proper representatives of Berton's estate. This would not be the case if Lewis' claim to administer that estate had any sound foundation upon which to rest. It was not the purpose of the statute to authorize a suit by a public administrator in Missouri against a foreign corporation doing business there, upon a contract, not made or to be executed in that state, with a citizen of another state who neither resided nor died, nor left any estate, in Missouri. Without discussing the validity of any local statute framed for such purposes as are imputed, by this action, to the Missouri Statute of 1868, it is sufficient to say that the present case is not within that statute, according to any reasonable interpretation of its provisions."

In *American Car, etc. Co. v. Anderson*, 211 Fed. 301, 127 C. C. A. 587, it appeared that an employee was killed in an accident at St. Louis. About four months later the public administrator of St. Louis applied for letters of administration. In his petition he alleged that the decedent left no known heirs. He received the letters and published notice at four different times that he had taken charge of the estate. Thereafter he made a settlement with the employer. Almost a year after the death the mother of the employee and one of his brothers, who had arrived of age, petitioned the court to revoke the letters of administration issued to the public administrator. It further appeared that the mother, four brothers and a sister were residents of St. Louis. It was held, however, that while the public administrator could not ignore the known heirs of a deceased person he was entitled to letters of administration where it appeared that the decedent left no heirs and none were known to him. The court said: "The power of the public administrator to take charge of the estate probably existed under the second, fourth, and fifth grounds specified in section 302 of the Revised Statutes of Missouri of 1909. What is meant by 'when persons die intestate without any any known heirs?' If the person left heirs, they must be known by some one, although they may not be known to be heirs of the deceased. In other words, the existence of any human being unknown to everybody is not conceivable. Manifestly 'without any known heirs' means without any heirs known to the public, the probate court, or the public administrator. While the administrator cannot wilfully blind himself to the existence of heirs, if he in fact knows of none, he can take charge of the estate. He was equally en-

titled to take charge of the estate under the fourth ground that the estate was 'left in a situation exposed to loss or damage, and no other person' administered on the same. There was a short statute of limitations in Missouri, one year (section 5429). More than one-fourth of this time had elapsed when the public administrator took charge, and substantially half of it had expired before the settlement. The first effort made by the heirs to remove the public administrator was about December 10th, within about twelve days of the claim being wholly lost by the statute of limitations. Surely by this neglect, for whatever cause, of the heirs at law the claim was 'exposed to loss.'"

In *re Von Buncken*, 120 Cal. 343, 52 Pac. 819, it appeared that a testator named three legatees in his will but failed to name any executor or executors. It was held that the failure to name an executor was not a sufficient ground to entitle the public administrator to letters of administration.

In *Savage v. Luther*, 165 Ill. App. 1, it appeared that nine days after the death of an intestate several of her creditors petitioned the probate court for the appointment of a public administrator to take charge of the decedent's estate. The court appointed the public administrator. Sixteen days after the death, a nephew of the deceased, who was a resident of Illinois, petitioned the court to appoint him as administrator. The statute of Illinois relating to the administration of estates provided that the next of kin residing within the state had the right, within sixty days after an intestate's death, to petition for the appointment of an administrator. It was held that in view of the statute the probate court had no right to appoint the public administrator. The court said: "It is therefore clear that these creditors did not possess the right to nominate, and therefore the probate court should not have issued letters of administration to the public administrator upon the nomination of said creditors. We are also of opinion, when this entire section is read, that it was not the intention of the legislature to abandon the statutory policy which had prevailed in this state for over seventy-five years that the surviving husband or wife and the various relatives should have the preference to administer during the period of sixty days after the death of the intestate. The relatives of the deceased are interested in an economical administration of the estate, so that as much as possible may be saved for the distributees. The creditors have no interest except to realize enough to pay their claims. The public administrator obtains his commissions upon the amount which passes through his hands, and he has no personal interest in preserving the estate for the heirs

at law. . . . The public administrator has no right to enter into a controversy with the heirs at law of an intestate to prevent their securing their preference to administer or to nominate, nor should he be permitted to resort to any technicality to prevent a resident heir from obtaining administration or nominating an administrator during the sixty days succeeding the death of the intestate. It was not intended by the statute to give the public administrator a foothold from which to wrest the administration from the heirs at law. His only proper function is to accept administration when administration is necessary and the specified heirs and distributees have failed to exercise their preference to administer or to nominate within the time given them therefor."

To the same effect see *Matter of Hutchings*, 154 Ill. App. 101, wherein the court said: "Section 18 of the Administration Act gives preference in administering on estates to certain relatives in a certain fixed order, and after the relatives to the public administrator or any creditor who shall apply for the same. The act provides that: 'Preference and the right to nominate under this act must be exercised within sixty days from the death of the intestate, at the expiration of which time administration shall be granted to the public administrator.' Over a year had elapsed before the application was made to have the son appointed administrator, and the public administrator contends his right to administer had thereby become absolute. If the contention of appellant be sustained, the result would be that in every case where a will is set aside on a contest in equity or otherwise, the public administrator or a creditor would thereafter be the only person who might be appointed administrators, and the members of the family would be excluded. Section 48 provides that whenever administration is granted to the public administrator and it shall afterwards appear there is a widow or next of kin, it shall be the duty of the court to revoke the letters to the public administrator and grant letters to the widow, next of kin or a creditor as is entitled thereto, provided application is made by such person within six months after letters were granted to the public administrator. Section 38 makes provision where the letters of executors are revoked for the granting of 'administration with the will annexed or de bonis non, to the surviving husband or wife or next of kin.' Section 18 also provides that when the estate is solvent and without minor heirs and it is desired by the parties in interest to settle the estate without administration this law will not apply. From the reading of the entire act we hold that the word 'shall' in section 18 should be construed as 'may' when

a controversy arises between the heirs of the estate and the public administrator, and that the legislature never contemplated that the public administrator, in cases where wills are set aside on a contest more than sixty days after the death of the testator, should have an absolute right to administer on the estate as against the widow or heirs who desire to administer and are entitled to the estate."

In *Smith's Succession*, 40 La. Ann. 105, 3 So. 539, it appeared that an intestate left several heirs in Arkansas, where they were represented by an administrator. It further appeared that the decedent had no creditors in Louisiana, where he died. It was held that the public administrator in Louisiana was not entitled to letters of administration. The court said: "The purpose which the legislature intended to accomplish when it created the trust of public administrator, was to provide for a prompt and safe custody of the property composing vacant successions, which otherwise might be exposed to ruin and devastation. Hence it is that the law distinctly provides that it is only where the deceased has left no will appointing an executor, and where there are no heirs present or represented, that the public administrator can be put in charge of an unclaimed estate, and that, even where appointed, his functions cease on the recognition of the heirs. It has accordingly been held that where the heirs have taken possession the public administrator cannot interfere. 28 La. Ann. 573. It is clear to our minds that under this statute creating the office of public administrator, the contingencies under which the appointment claimed could have been conferred have not occurred, and that there is no error in the judgment complained of."

In *Watts v. New York*, 4 Wend. (N. Y.) 168, reversing *New York v. Watts*, 1 Paige (N. Y.) 347, it was held that the public administrator was not entitled to letters of administration where it appeared that the testator had executed an imperfect will.

In *Townsend's Succession*, 36 La. Ann. 535, it appeared that the executor named in the testatrix's will was imprisoned charged with the murder of the testatrix. The testatrix left no heirs or next of kin. Under these circumstances it was held that the public administrator was entitled to letters of administration. The court said: "In the present instance the law is positive, that, in all testate successions, where, for any cause, the executor cannot discharge the duties of his office, the court shall appoint the public administrator. It is very broad, but however comprehensive, it can only mean, for any good and sufficient cause, which must be a matter for special consideration and determination, in each case, as presented. The fact is that Sykes was in jail charged with a heinous

offense, the murder of the testatrix, awaiting a trial during which his life was to be in jeopardy. He was in duress, deprived of his liberty, necessarily laboring under great mental anguish and moral perturbation, averse to business matters, unable to act in person, or move about to watch over the interests intrusted to him, or to supervise the doings of special mandataries, if any; in a word, incapable of discharging the general functions expected, by law, from an executor. Under the exceptional and shocking features of this contention, the solution of which can serve as a precedent only in strictly analogous cases, rarely to occur, we think that the district court erred in sustaining the exceptions. It is, therefore, ordered and decreed that the judgment appealed from be reversed and that the exceptions filed to the application of the public administrator be overruled. It is further ordered and decreed that this case be remanded to the lower court for trial to be proceeded with according to law, the costs in both courts to be paid by Sykes individually."

In *Ex p. Emigration Com'rs*, 1 Bradf. (N. Y.) 259, it was held that the commissioners of emigration could administer the estate of an alien dying on his way to this country, but that their right of administration extended only as far as the minor children of the decedent were concerned, the court saying that if there were adult next of kin they were entitled to letters of administration and if they did not apply for letters the public administrator could do so. The court further said: "Public administrators have power to collect and take charge of the assets of intestates dying in the county or out of it, upon which no letters of administration have been granted, as well where the assets have come into the county after the death, as where they were left in the county at the time of the death. (2 R. S. 3d ed. p. 189, § 48.) And the public administrator of the city of New York, to whom and whose power the act under consideration probably alludes in particular, can administer whenever any person, coming from any place out of this state in a vessel bound to the port of New York, shall die intestate on his passage, and any of his effects shall arrive at the quarantine. (2 R. S. 3d ed. p. 181, § 4.) Until administration is granted, he has power to collect and take charge of such effects. But his power to collect and take charge will be superseded at any time, and his letters of administration will be superseded at any time within six months after granting the same, where letters of administration of such estate shall have been granted to any other person by any surrogate having jurisdiction."

In *Cotterell v. Coen*, 246 Ill. 410, 92 N. E. 911, the court said: "Under the facts in this

case the only service which the public administrator could perform would be to distribute the money coming into his hands among the heirs-at-law of Samuel Cotterell. The statute does not contemplate that administration shall be had for this purpose alone, unless some reason should be shown why administration is necessary to effect distribution. If, under such circumstances, the heirs are all qualified to act, or, being under disability, have some one legally qualified and responsible, under the law, to act for them, and there is no dissension among them as to the amount to be distributed or the manner of distribution, there is no occasion for administration. Only in case of disagreement among them would the court be warranted in issuing letters of administration, and then only on application of some one or more of the distributees. . . . Our administration act is only meant to apply in cases where administration is necessary, but under such facts as are disclosed here there can be no necessity for an administrator. 'The law does not make it indispensable that every estate should be administered merely for the sake of administration.'"

So in *Troll v. Landgraf*, 183 Mo. App. 251, 168 S. W. 268, it was said: "The situation was one entirely agreeable to those in interest, and there was no occasion whatsoever for the public administrator or anyone else to interfere. The office of public administrator is one created to provide a special bonded officer to act, under the conditions and circumstances specified in the statute, to the end of preserving the property of an estate. And manifestly it was not intended that such officer should have the power or authority to take into his possession property belonging to foreign testators or intestates, except under the conditions plainly set forth in the statute."

In *Richardson v. Busch*, 198 Mo. 174, 95 S. W. 894, 115 Am. St. Rep. 472, the court said: "Section 292 of our laws of administration declares it to be the duty of the public administrator 'to take into his charge and custody the estates of all deceased persons . . . in the following cases: . . . fourth, when money, property, papers or other estate are left in a situation exposed to loss or damage, and no other person administers on the same,' etc. The word 'papers' used in that clause refers to papers which constitute the assets or a part of the assets of the estate; in other words, papers in which there is a property value. The language is 'papers or other estate.' It was not the intention of the lawmakers to authorize the public administrator to take charge of anything that was not in the nature of property or assets. If the deceased left nothing in this state that could be applied to the payment of debts or

to distribution among his next of kin there is nothing here to administer."

In the case of *In re McDonald*, 118 Cal. 277, 50 Pac. 399, it appeared that a testator named his wife as executrix. She never probated or made any attempt to probate the will. Four years later she died and named her sister as executrix of her will. The public administrator concurrently with the executrix of the wife applied for letters of administration of the estate of the husband. It was held that because of the wife's failure, during her lifetime, to probate his will the public administrator was entitled to letters of administration. The court said: "It seems to us that the intention of the legislature is plainly manifest in the language used, and that the purpose was to make the provisions of section 1365 applicable in any case falling within the terms of section 1350. There was here a failure to apply for four years, followed by the death of the executrix named without any application made. If the question had arisen in the lifetime of the executrix—we will say after three years of neglect to appear and qualify or failure to apply—it may be that she could have satisfactorily explained her apparent laches and thus have defeated the counter application of the public administrator; a discretion might in such case rest with the court in deciding whether she had renounced her right to letters, subject to review for its abuse. (Code Civ. Proc. sec. 1301.) But here she did entirely 'fail to apply for letters,' and to say that the statute does not embrace such a case is to interpolate in the section a proviso making it to read 'or fail to apply for letters [during the lifetime of such executor or executors] letters . . . must be issued . . . as in cases of intestacy.' We must give effect to the statute as we find it; and, where the intent is given expression in plain and unambiguous language, the courts cannot add to or subtract from the act unless forced to do so in order to obviate impractical or absurd results. It is our conclusion that the court erred in assuming that it was within its discretion to grant letters to the respondent. The fact that she offered to waive the commissions to which she would be entitled, in the interest of the estate, which was small, might be properly considered if the power to appoint were discretionary with the court, but, as it is not, no such consideration was competent or material in determining the question. The order of the court should be reversed, with directions to grant the petition of the public administrator, and it is so recommended."

In some jurisdictions the public administrator cannot be appointed until a certain time after the death of the intestate. Thus in Kentucky the statute fixes the period of

time as three months. *Underwood v. Underwood*, 111 Ky. 966, 65 S. W. 130, 23 Ky. L. Rep. 1287; *Newman v. Flowers*, 134 Ky. 557, 121 S. W. 652; *Paslick v. Shay*, 148 Ky. 642, 147 S. W. 369; *Jackson v. Asher Coal Co.* 153 Ky. 547, 156 S. W. 136.

In *Jackson v. Asher Coal Co.* supra, it appeared that an intestate died as a result of personal injuries. The public administrator obtained letters of administration within two months of the death. Thereafter he brought suit to recover damages for the death of the intestate. It was held that the letters of administration were prematurely granted and therefore the public administrator had no authority to act. The court said: "Two questions are presented by the record. (1) Was the order of the county court referring the estate to Hurst as public administrator void, and (2) if so, could the question be raised by a demurrer? Of course, if Hurst was not administrator of Jackson he had no authority to institute or maintain the action, as his right to sue depended entirely on the fact that he was the administrator, and whether or not he was administrator depended entirely upon the jurisdiction of the Bell county court to appoint him. We had the identical question here presented before us in *Underwood v. Underwood*, 111 Ky. 966. In that case the jurisdiction of the county court to place the estate of a deceased person in the hands of a public administrator, under section 3905 of the Kentucky statutes before the expiration of three months from the death of the decedent administered on, was directly drawn in question, and the court said: 'We are of the opinion that the county courts are without jurisdiction to place estates in the hands of public administrators, except under the circumstances provided in section 3905. It is a jurisdictional fact to be shown that the decedent has been dead more than three months, and that no one else has applied for letters of administration. If the county court can place the estate of a deceased person in the hands of the public administrator under the circumstances in this case, then in every case the county court can, without consulting the distributees, kinmen, or creditors of the estate, place the estate in the hands of the public administrator immediately upon the death of the deceased, thus entailing in some instances great expense and loss to the estate.'"

PRIORITY OF RIGHT.

The priority of right to appointment as between a public administrator and a collateral relative or a nonresident heir, devisee or representative depends wholly on the terms of the local statute. See the following cases wherein the priority was determined:

California.—In re Nunan, Myr. Prob. 238 (discretionary with court to appoint public administrator or nominee of foreign executors); In re Carr, 25 Cal. 585 (where brother-in-law fails to qualify as administrator, and public administrator is thereafter appointed, one not otherwise competent has no right to ask that public administrator be removed); In re Doak, 46 Cal. 573 (public administrator may be preferred to creditor); In re Morgan, 53 Cal. 243 (public administrator preferred to married nieces); In re Kelly, 57 Cal. 81 (public administrator preferred to married daughter); In re Beech, 63 Cal. 458 (public administrator has preference over nominee of nonresident devisee); McKinnon's Estate, 64 Cal. 226, 30 Pac. 437 (public administrator has preference over creditor); Hyde's Estate, 64 Cal. 228, 30 Pac. 804 (public administrator has preference over creditor of intestate, or nominee of nonresident heir); Garber's Estate, 74 Cal. 338, 16 Pac. 233 (public administrator preferred to nominee of foreign executor); Allen's Estate, 78 Cal. 581, 21 Pac. 426 (public administrator has preference over nominee of widow, who has remarried); Dorris's Estate, 93 Cal. 611, 29 Pac. 244 (resident nominee of widow, although she is nonresident, has priority over public administrator); Bedell's Estate, 97 Cal. 339, 32 Pac. 323 (nominee of father and mother has preference over public administrator); In re Bergin, 100 Cal. 376, 34 Pac. 867 (resident devisee of nonresident decedent has preference over public administrator); In re McLaughlin, 103 Cal. 429, 37 Pac. 410 (guardian of heir preferred to public administrator); In re Donovan, 104 Cal. 623, 38 Pac. 456 (public administrator has preference over nonresident brother of decedent); In re Eggers, 114 Cal. 464, 46 Pac. 380 (public administrator preferred to relative who is not heir); In re Richardson, 120 Cal. 344, 52 Pac. 832 (public administrator has preference over nominee of nonresident executor); In re Weed, 120 Cal. 634, 53 Pac. 30 (public administrator has preference over nonresident niece); In re Healy, 122 Cal. 162, 54 Pac. 736 (public administrator has preference over nominee of nieces and nephews); In re Engle, 124 Cal. 292, 56 Pac. 1022 (assignee of devisee has priority over public administrator. See also In re Rankin, 164 Cal. 138, 127 Pac. 1034); In re Newman, 124 Cal. 688, 57 Pac. 686, 45 L.R.A. 780 (fact that decedent's wife has contracted bigamous marriage does not deprive her of administration in preference to public administrator); In re Coan, 132 Cal. 401, 64 Pac. 691 (resident son of nonresident decedent has preference over public administrator); In re Damke, 133 Cal. 433, 65 Pac. 888 (public administrator of county in which intestate resided at time of his death has priority over public administrator of another county). See also In re Graves, 8

Col. App. 254, 96 Pac. 792; In re Harrison, 135 Cal. 7, 66 Pac. 846 (though public administrator should have been appointed, appointment of nominee of foreign executor is not reversible error). *Compare* In re Richardson, 120 Cal. 344, 52 Pac. 832; In re Wakefield, 136 Cal. 110, 68 Pac. 499 (public administrator has preference over brothers); In re Brundage, 141 Cal. 538, 75 Pac. 175 (resident son of nonresident decedent has priority over public administrator, although latter is also assignee of daughter's interest); In re Munroe, 161 Cal. 10, Ann. Cas. 1913B 1161, 118 Pac. 242 (executrix nominated in will preferred to public administrator despite personal immorality); In re Wise (Cal.) 165 Pac. 531 (public administrator preferred to nominee of nonresident heir).

Illinois.—Rosenthal v. Prussing, 108 Ill. 128 (creditor has preference over public administrator); Branch v. Rankin, 108 Ill. 444 (foreign creditor may be preferred to public administrator); In re McWhirter, 235 Ill. 607, 85 N. E. 918 (public administrator has preference over nominee of nonresident next of kin). *Compare* Strong v. Dignan, 207 Ill. 385, 69 N. E. 909, 99 Am. St. Rep. 225 (decided under earlier statute); Krome v. Halbert, 263 Ill. 172, 104 N. E. 1066, 183 Ill. App. 551 (resident next of kin of nonresident decedent has priority over public administrator); Bundy v. Wilkins, 183 Ill. App. 560 (nephews and nieces have priority over public administrator).

Louisiana.—Taylor's Succession, 23 La. Ann. 22 (where foreign executor refuses to act, public administrator must be appointed); Henry's Succession, 31 La. Ann. 555 (attorney of heir has preference over public administrator); Dietrich's Succession, 32 La. Ann. 127 (nominee of absent or nonresident heirs has priority over public administrator); Bossu's Succession, 115 La. 13, 38 So. 878 (public administrator has preference over nominee of nonresident legatee).

Missouri.—Tittman v. Edwards, 27 Mo. App. 492 (though public administrator was entitled to letters where another administrator was appointed he should not be removed).

Montana.—In re Stewart, 18 Mont. 595, 46 Pac. 806 (nominee of nonresident widow has priority over public administrator); In re Craigie, 24 Mont. 37, 60 Pac. 495 (nominee of nonresident next of kin has preference over public administrator); In re Watson, 31 Mont. 438, 78 Pac. 702 (nominee of nonresident brothers and sisters has preference over public administrator); In re Koller, 40 Mont. 137, 105 Pac. 549 (nominee of nonresident mother has priority over public administrator).

New York.—Public Administrator v. Peters, 1 Bradf. 100 (public administrator has priority over relative who has no distributive right); Ferrie v. Public Administrator, 3

Bradf. 249 (public administrator has preference over nonresident heir or creditors); Public Administrator v. Watts, 1 Paige 357 (public administrator has preference over disqualified next of kin); Matter of Blank, 2 Redf. 443 (public administrator has preference over nominee of disqualified next of kin); In re Hanover, 3 Redf. 91 (public administrator has preference over foreign administrator); In re Patullo, 1 Tuck. 99 (niece has priority over public administrator); In re Goddard, 94 N. Y. 544 (when next of kin renounce their right to letters, public administrator has priority over their nominee); In re Hudson, 37 Misc. 539, 75 N. Y. S. 1053 (guardian of minor child of decedent has priority over public administrator); Matter of McMullen, 85 Misc. 661, 148 N. Y. S. 1092 (public administrator has priority over nonresident and alien next of kin); In re Ward, 1 Redf. (N. Y.) 254 (public administrator preferred over creditor); In re Root, 1 Redf. (N. Y.) 257 (public administrator preferred over nominee of heir).

In the case of In re Page, 107 N. Y. 266, 14 N. E. 193, it was held that though there are other persons having a priority to letters of administration the public administrator may commence proceedings to administer and continue to do so until the persons having the priority intervene.

In Matter of Hagan, 78 Misc. 322, 139 N. Y. S. 463, it appeared that the intestate was survived by her father, who was her only next of kin. He was appointed administrator but later died. Thereafter the widow of the deceased administrator sought to be appointed administratrix of the first decedent. A brother of the latter, a creditor, and also the public administrator, sought the appointment. It was held that as among the four persons named the public administrator was entitled to letters of administration.

In Dungan v. Superior Ct. 149 Cal. 98, 84 Pac. 767, 117 Am. St. Rep. 119, it appeared that one Jane Davis died in New York on September 19, 1904. On the same day the public administrator of Tulase county, California, filed an application for letters of administration of the estate of the decedent situated in California. The hearing on this application was continued from time to time until December 24, 1904, when the superior court of Tulase county entered an order by which letters of administration were issued to the petitioner. It further appeared that on September 23, 1904, the public administrator of Fresno county, California, filed a petition with the superior court of Fresno county, for his appointment as administrator of the estate within the state of California. His petition was granted on October 3, 1904. The controlling statute (Code Civil Procedure, § 1295) was as follows: "When the es-

tate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, . . . the superior court of that county in which application is first made for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate." In construing this statute the court held that the administrator of Tulase county was entitled to administer the estate, saying: "The only point made as to the construction of this plain and unambiguous statutory provision is as to the meaning of the words 'in which application is first made.' When is such an application 'made' within the meaning of this provision? In view of our statutory provisions upon the subject (Code Civ. Proc. secs. 1371-1379), we are satisfied that the filing of a proper petition with the clerk of a superior court constitutes the making of the application. An application must necessarily precede the hearing. The statute fully prescribes the manner and form for the making of such application. It cannot be oral, but 'must be in writing, signed by the applicant or his counsel, and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the case.' (Sec. 1371.) This plainly constituted the making of the application, in the opinion of the framers of the original code, in which both sections 1295 and 1371 were contained in their present form, for the headnote to section 1371 was 'Applications, How Made.' (See Barnes v. Jones, 51 Cal. 303, 306; Sharon v. Sharon, 75 Cal. 1, 16, 16 Pac. 345.) Thereupon the court to which the petition or application (which words are used synonymously in the statute) is presented must assume jurisdiction thereof, through its designated officer, the clerk of the court, by appointing a time 'for the hearing of the application' which has been made, and giving the prescribed notice. (Secs. 1372, 1373.) At the time appointed for the 'hearing of such application,' or at any time to which such hearing is continued, the court must hear the allegations and proofs. (Secs. 1372, 1375.) Obviously, in the light of these statutory provisions, what takes place at the hearing is not the making of an application, but is the hearing of the application that has, at a previous date, been made in the manner prescribed by statute. The question is simply one of the construction of a statute. It is true that the constitution confers jurisdiction in 'all matters of probate' upon the superior court, but this does not mean that all superior courts in the state shall have concurrent jurisdiction in every particular probate matter. The legislature undoubtedly has the right to prescribe by general laws the rules which shall obtain, in determining which of the many superior

courts shall exercise the constitutionally conferred jurisdiction in any particular estate. It follows from the above that Tulase county is the county in which application was first made for letters of administration, and that thereby, if any part of the estate of decedent was situate therein, the superior court of that county obtained exclusive jurisdiction of the settlement of said estate." See also *In re Davis*, 149 Cal. 485, 87 Pac. 17, involving the same proceeding.

In the case of *In re Graves*, 8 Cal. App. 254, 96 Pac. 792, it appeared that the decedent died in Riverside county, California. The public administrator of that county applied for and received letters of administration. Thereafter several heirs of the decedent contested the probate of the latter's will. The probate judge of Riverside county finding himself disqualified to act transferred the action to another county. The judge of the latter county appointed the public administrator of his county to take charge of the estate. It was held that the first appointee was entitled to the letters of administration. The court said: "The public administrator of one county is entitled to contest the right of another public administrator to administer upon an estate in the superior court of the county of which the applicant is the public administrator, and the conflicting claims of the applicants must be determined by ascertaining the residence of the deceased at the time of his death (*In re Damke*, 133 Cal. 437, 65 Pac. 888). It is the duty of the public administrator to take charge of the estates of persons dying within his county (sec. 1726). No burden is imposed upon him of administering estates which have been transferred to his county by reason of the disqualification of the judge of the superior court of an adjoining county."

In the case of *In re Hudson*, 37 Misc. 539, 75 N. Y. S. 1053, it was held that the guardian of a minor child of the decedent was entitled to letters of administration in preference to the public administrator. The court said: "The office of the public administrator was created for the purpose of providing a public official who should take charge of the estates where there was no next of kin entitled to act, on the theory that it would be better for such estates to have some competent public official act in preference to a creditor who would manifestly be interested to the extent of his claim only. . . . It is my judgment that all that the language of section 2669 meant to do was to give the public administrator a priority over creditors and other persons and that there was no intention in that section to differentiate between a person who was entitled to administer himself and one who could only do so through his guardian."

In *Sutton v. Public Administrator*, 4 Dem. (N. Y.) 33, the court said: "The mother of the intestate, being a nonresident alien, cannot, under our statutes, obtain letters of administration herself, and she cannot authorize anyone to do for her what she is precluded from doing. Were there none other, this would be a sufficient reason for declining to entertain the application. . . . It seems to me that, in this case, the county treasurer should proceed as public administrator, and thus the mother will, with least trouble, expense, and delay, be enabled to obtain what of right belongs to her."

The priority of right to administer as between a public administrator and a foreign consul is discussed in the notes to *Carpigani v. Hall*, Ann. Cas. 1913D 651, and *Servas's Estate*, Ann. Cas. 1916D 233.

Collateral Attack on Appointment.

The authority of a public administrator to take charge of an estate cannot be assailed collaterally. *Simmons v. Saul*, 138 U. S. 439, 11 S. Ct. 369, 34 U. S. (L. ed.) 1054; *American Car, etc. Co. v. Anderson*, 211 Fed. 301, 127 C. C. A. 587; *Russell v. Erwin*, 41 Ala. 292; *Landford v. Dunklin*, 71 Ala. 594; *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Cox v. Kansas City*, 86 Kan. 298, 120 Pac. 553; *Pierce v. Marra*, 153 Ky. 748, 156 S. W. 404 (sheriff acting as public administrator); *Wetzell v. Waters*, 18 Mo. 396; *Dunn v. German-American Bank*, 109 Mo. 90, 18 S. W. 1139; *Leeper v. Taylor*, 111 Mo. 312, 19 S. W. 955; *Vermillion v. Le Clare*, 89 Mo. App. 55; *Taylor v. Biddle*, 71 N. C. 1; *Hartley v. Glover*, 56 S. C. 69, 33 S. E. 796; *State v. Anderson*, 16 Lea (Tenn.) 321; *Hutcheson v. Priddy*, 12 Grat. (Va.) 85; *Jordan v. Chicago, etc. R. Co.* 125 Wis. 581, 4 Ann. Cas. 1113, 104 N. W. 803, 110 Am. St. Rep. 865, 1 L.R.A.(N.S.) 885. See also *Richardson v. Busch*, 198 Mo. 184, 95 S. W. 894, 115 Am. St. Rep. 472.

In *Hutcheson v. Priddy*, 12 Grat. (Va.) 85, it appeared that the probate court appointed the sheriff to act as administrator of the decedent's estate. The appointment was prematurely made three months not having expired from the time of the death of the intestate. It was held that while the appointment was irregularly made it was not void and could not be attacked collaterally. The court said: "Nor is the case altered by the act supposed to be proved in this cause, that the order committing the estate to the sheriff was made some few days before the expiration of three months from the death of the testator. If the order made thus prematurely were ipso facto void, it might be otherwise. I think however that it is voidable only and not void. The fourth section of the

act in effect reserves the right of administration to distributees exclusively for thirty days after the death of the decedent; yet if the court should chance to grant administration to a creditor or some other person before the expiration of the thirty days, it will scarcely be seriously contended that such a grant would be absolutely void; though it certainly would be erroneous and voidable. Whether in either case, the order for administration was made at a proper time or prematurely, is not such a question of jurisdiction as may be raised collaterally in another action or proceeding. The jurisdiction of a county court upon this subject is a general jurisdiction conferred by statute to grant probate of wills, and to hear and determine suits and controversies testamentary and concerning administrations. Code, ch. 122, § 23, p. 519; ch. 130, § 4, p. 541. It is a court of record, and its judgments or sentences cannot be questioned collaterally, if it have jurisdiction of cases ejusdem generis. Where it has jurisdiction over that class of cases, whether the court erred or not in determining that the facts were proved upon which the power to grant administration in the particular case depended, is not to be inquired into collaterally. It must be supposed to have inquired into and decided upon those facts at the time of making its order, and its decision if erroneous, would be voidable only and not void."

Powers and Duties.

A public administrator must exercise his powers in strict conformity to the statute granting the same. Los Angeles County v. Kellogg, 146 Cal. 590, 80 Pac. 861.

In *People v. Prendergast*, 167 App. Div. 140, 152 N. Y. S. 938, it was held by an evenly divided court that the public administrator of Bronx county had no implied power to appoint a stenographer to assist him in his office. In support of that view it was said: "Bronx county was created by chapter 548 of the Laws of 1912, which was amended by chapters 266, 823 and 825 of the Laws of 1913. Section 3 of said chapter 548, as amended by said chapter 825, authorized the surrogate of Bronx county to appoint 'a public administrator of the county of Bronx,' and provided that 'such public administrator shall have all the authority and powers within said county of Bronx as are now conferred by law upon the public administrator of the county of New York,' and that his salary should be \$4,000 per annum, and that he should in addition thereto 'receive and retain to himself the same allowance for his services and expenses incurred as are allowed to a county treasurer under section 2667 of the Code of Civil Procedure.' We

find no provision of law authorizing the public administrator to appoint a stenographer and typewriter, or to make any appointment to a public office or position. There was no provision in section 2667 of the Code of Civil Procedure referred to in the statute, with respect to an allowance to a county treasurer for services and expenses; but section 2668 as it then existed (now Code Civ. Proc. 2593, as amended by Laws of 1914, chap. 443) contained such a provision, and doubtless that is the section intended by the legislature. It provided that a county treasurer, when acting as a public administrator, 'must be allowed on the settlement of his accounts for his expenses as other administrators, and for his services double the commissions allowed them by law.' The general rule is that an administrator must personally perform, or at his own expense provide for the performance of, all clerical duties incident to the administration (*Matter of Binghamton Trust Co.* 87 App. Div. 26); but we are not now concerned with the question as to the allowance to the public administrator for expenses for clerical or other work. The question presented for decision is whether he had authority to appoint the relator to the position of stenographer and typewriter, and whether she is entitled to receive a salary from the city. No provision of law is cited by counsel for either party expressly authorizing the public administrator of the county of New York to appoint subordinates in his office. The only statutory provisions to which our attention has been drawn relating to the office of public administrator of the county of New York are those contained in chapter 230 of the Laws of 1898. Section 2 of that act requires any person appointed to the office of public administrator of the county of New York to execute a bond conditioned for the faithful discharge of his duties, and it provides for the discharge of the duties of the office by an assistant public administrator in the event of the sickness or other disability of the public administrator. The final sentence of the section vests the power of appointment and removal of the public administrator in the surrogates of the county, and it vests in the public administrator 'the appointment and the removal of his subordinates.' Doubtless the office of assistant public administrator was created by these provisions and the authority to appoint to that office was vested in the public administrator, and it may be that any necessary subordinate positions were created by implication, since the authority to appoint and remove subordinates is vested in the public administrator, and especially since by the provisions of section 3 of the act the public administrator is required to account to the city for all fees,

costs and other moneys received by him, and he is forbidden to receive to his own use any fees or emoluments in addition to his salary. It was of course competent for the legislature, notwithstanding the fact that the public administrator of Bronx county is authorized to receive fees in addition to salary, to provide for the appointment of a clerical force in his office at the public expense, as has been done in the case of the sheriff of the county of New York, who receives both salary and fees (see Laws of 1890, chap. 523, § 1, as amd. by Laws of 1913, chap. 373; *Id.* § 2); but if it had been so intended, I am of opinion that it would have been expressly so provided. The legislature did not, I think, intend to confer upon the public administrator of Bronx county authority to make appointments to offices or positions by the reference in the statute to the authority of the public administrator of the county of New York, and it is not so claimed by counsel for the respondent. That reference was intended, I think, merely to obviate the necessity of incorporating in the statute the general powers intended to be conferred upon the public administrator and the duties of the office."

After the administration of an estate by the public administrator if there is any balance left he may distribute it among the heirs or next of kin of the decedent. *Parker v. Kückens*, 7 Allen (Mass.) 509.

The public administrator must, besides faithfully administering the estates of decedents dying without heir or next of kin, account to the county treasurer for all funds received by him as such administrator. *Los Angeles County v. Kellogg*, 146 Cal. 590, 80 Pac. 861.

With respect to the power of a public administrator to contest a will, see the note to *Brauel v. Reuther*, reported ante, this volume, at page 533.

Personal Liability.

It has been held that the public administrator is personally liable for any injury he may cause to the property which he administers although he may act in good faith. *Mosby v. Mosby*, 9 Grat. (Va.) 584 (sheriff having been appointed administrator is responsible for his acts as well as the acts of his deputies in regard to the administration of the estate). In *Levin v. Russell*, 42 N. Y. 251, it appeared that one P. had executed and delivered to the plaintiff two promissory notes. Thereafter he gave to the plaintiff a chattel mortgage on numerous oil paintings and their frames as security for the payment of the notes. Subsequently P. became insane and died intestate in a lunatic asylum. He left no widow or next of kin.

The plaintiff, who placed P. in the asylum, took possession of the mortgaged property and continued in possession thereof until about two months after P.'s death. Later the defendant, the public administrator of the city of New York, took possession of the mortgaged property. The plaintiff demanded the same from the defendant, who refused to deliver it. The plaintiff then brought suit to recover the property and also damages for its wrongful detention. After the action was commenced the defendant was appointed administrator of P.'s estate. It was held that the defendant was not exempt from liability for the wrongful detention of the property on the ground that he acted as public administrator and in good faith. The court said: "The counsel for the appellant insists that the defendant having taken the property as public administrator of the city of New York in good faith, believing that it was the property of the intestate at the time of his death, no action will lie personally against him therefor, although the property was the plaintiff's, and not that of the intestate. In this the counsel is mistaken. Section 3 of the act (2d Statutes at Large, 123) prescribing the powers and duties of the public administrator, in this respect only authorizes him to take the goods of the intestate. Section 42, page 131, making the corporation of the city liable for the application of all moneys received by the public administrator, according to law, and for the due and faithful execution of all the duties of office, confers no power upon him to seize and detain the goods of others in which the deceased had no interest. It follows that, if the goods in question were, as claimed, the property of the plaintiff, the action for detaining them from him was well brought against the defendant personally."

Liability on Bond.

Though a public administrator is required to give a bond in each instance when he is appointed to administer an estate, the sureties on his general official bond are also liable for a breach of duty in respect to the administration. *State v. Watts*, 23 Ark. 304. And the failure to require a special bond does not relieve the sureties on the general bond. *Healey v. Superior Ct.* 127 Cal. 659, 60 Pac. 429. So in the case of *In re Craigie's Estate*, 24 Mont. 37, 60 Pac. 495, the court said: "Nor did the provision of section 825, *supra*, that, upon failure of the public administrator to give the bond required by the judge, his office should become vacant, create a vacancy upon the mere happening of that event. We do not believe that the legislature in enacting section 825 intended to provide that a public administrator, who is already under an official bond of \$10,000, and has otherwise quali-

fied, should, after entering upon the discharge of his duties, forthwith forfeit his office, upon omission to give an additional bond required by the judge as further security for the interest of an estate in his hands. Failure to give the bond was cause for declaring a vacancy in the office, and upon a judicial ascertainment and declaration of such omission the office would have become vacant. In our opinion, the neglect to furnish the additional bond did not of itself cause a vacancy in the office of public administrator."

In *State v. Anderson*, 16 Lea (Tenn.) 321, it appeared that one Anderson was elected to the office of public administrator after the incumbent had resigned. His election should have been for the unexpired term of his predecessor. However, by an oversight he was elected for the full term given by the state to a candidate. Thereafter he received letters of administration of certain estates and gave a bond with sureties. He administered the estates for some time, collected a considerable amount of money, squandered the same and then absconded. An action being brought against him and his sureties the latter contended that they were not liable because Anderson was not duly elected. It was held that the defense was untenable. The court said: "Would it not be a perversion of justice and subversion of sound principle to allow his possession of the office of administrator to be now contested and annulled by the sureties on his bond, after he has, by virtue of his office, received the administration from a court authorized to grant it, has obtained the assets, squandered them, fled the country, and is now called on to account? Public policy as well as sound principle alike forbid that such a rule should find a place in our jurisprudence. This view finds abundant support in the analogous cases where judges have been appointed in violation of the constitution, or courts held at times or places not authorized by law; yet, in favor of the public, their acts have always been held valid except on direct contest, and so should the action of the county court be held valid until annulled by the like direct proceeding. . . . Assuming as the result, beyond question, that Anderson was administrator of these estates, or is to be so treated on the facts of these records, the liability of the sureties is conclusively settled. The duties of the office are fixed and defined by law, and no one ever questioned that a leading duty is to receive and account for the assets of the intestate on whose estate the administration is had. . . . Here is an administrator, with grant of authority from the court, having, in this case, authority to grant letters authorizing him to administer the estate. All the debtors of such estates are to deal with him, and he is authorized to

collect debts due the deceased purporting to be represented by him. He has collected very large sums and squandered it. Shall all these payments be held void, and yet his letters of administration have never been contested by any one having a better right, as widow, next of kin, or creditor? Shall all this wrong be done to such debtors at the instance of sureties now, after his term of office has expired, and we hold them exempt, while the orphans whose money has been spent, or creditors who have honestly paid, shall be required to bear the consequences of his official delinquency? Such a holding would shock our sense of justice, and could never be justified, except where there was an imperative mandate of the legislature requiring it. None such exists, but reason, analogy and sound public policy all accord with the view we have taken of the questions presented in the records before us."

So where the sheriff is appointed as public administrator the sureties on his bond as sheriff are liable for his acts as public administrator. *Williams v. Collins*, 1 B. Mon. (Ky.) 58; *Scarce v. Page*, 12 B. Mon. (Ky.) 311. See also *Governor v. Gantt*, 1 Stew. (Ala.) 388.

The expiration of the term of a public administrator does not release the sureties on his bond from liability for his acts while completing the administration of an estate. *State v. Watts*, 23 Ark. 304; *In re Aveline*, 53 Cal. 259; *Dabney v. Smith*, 5 Leigh (Va.) 13; *Tyler v. Nelson*, 14 Grat. (Va.) 214; *Tunstall v. Withers*, 86 Va. 492, 11 S. E. 565.

In *Newman v. Flowers*, 134 Ky. 557, 121 S. W. 652, it appeared that one Burton was appointed public administrator and guardian and gave a bond. It further appeared that the clerk of the court in entering the order appointing Burton styled the latter as public administrator only. Thereafter Burton took charge as public administrator and guardian of the estate of an infant. He misappropriated part of the funds. A guardian was later appointed and he brought suit against Burton and his sureties to recover the amount misused. The sureties contended that they were not responsible for Burton's acts as public guardian, because, they claimed, they went on his bond as public administrator and not as public guardian. Their contention was held to be untenable. The court said: "It appears that the trouble arose in this case from the fact that the clerk of the court in entering the order of appointment of Burton and taking his official bond omitted to style him as guardian, and only referred to him as public administrator. This was evidently a mistake or oversight. The styling of him as public administrator and guardian was a matter of form. The purpose and intent of

the statute was to have a discreet and fit person designated to whom the settlement of deceased persons' estates and the estates of all minors should be confided for protection and settlement under the conditions and circumstances named in the statute. The official name by which he is designated is not in our opinion very material. In our opinion, it was as much the duty of Burton in his official capacity to receive and care for the estate of the infant Elsie Flowers when confided to him by the county court as it was to receive and disburse the estate of deceased persons, and appellants, his sureties, were bound for the faithful discharge of Burton's duties in respect to her estate, and they cannot now be heard to say that they had no intention of becoming bound for his acts as public guardian, for, when they signed the bond, they were presumed to have knowledge of the statutes above copied which compelled the county court to confide to him the estates of both deceased persons and infants, and they cannot escape on account of the oversight of the clerk of the court in failing to insert in the order and bond the word 'guardian.' The statute by its terms placed the word there."

In *Bailey v. McAlpin*, 121 Ga. 111, 48 S. E. 699, it appeared that one Tripp was appointed public administrator and gave a bond. He later applied for letters of administration of an estate. Pending his application for permanent letters the court appointed him temporary administrator of the estate. Later he resigned from his official position and a successor was appointed who requested Tripp to turn over to him the money that he had collected while acting as temporary administrator. On the latter's failure to comply with the request suit was brought against him and his sureties. It was held that the sureties were not liable as Tripp did not act in his official capacity in administering the estate. The court said: "The law in reference to county administrators was not intended to affect other provisions of the code. It was rather supplementary and intended to provide for an officer who should be bound to qualify when, because of the meager assets, inability to give bond, or want of resident heirs or of persons interested, the estate was likely to be unrepresented for what he has collected. But certain it is that he has undertaken an office which did not devolve upon him by virtue of his position as county administrator. His bondsmen are entitled to rely on the rule that their liability as sureties is one of strict law, and does not apply to cases like the present, where there was no notice, allegation, or finding that the estate of Kelley was one not likely to be represented. The motion to dismiss should therefore have been sustained."

In *O'Rourke v. Harper*, 35 Mont. 346, 89 Pac. 65, it appeared that one Wisner had been elected public administrator. His term of office was from January 1903 to January 1905. He gave a bond with sureties. He was re-elected at the expiration of his term of office. Again he gave a bond with other sureties. During his first term of office Wisner was appointed administrator of an estate, and received a considerable amount of money belonging thereto. During his second term of office he received nearly four thousand dollars belonging to the estate, and converted these sums of money to his own use. The conversion occurred during his second term of office. The plaintiff, a claim holder against the estate, brought an action against the sureties on the second bond. It was held that they were not liable. The court said: "It seems clear, therefore, that Wisner's authority to administer upon the Ford estate was derived solely from the grant of letters issued to him during his first term of office as public administrator. The fact that he afterwards succeeded himself as public administrator has nothing to do with this controversy, and may be treated as though it did not exist. It is equally clear, under the authorities, that Wisner continued to be administrator of the Ford estate after the expiration of his first term as public administrator. It naturally follows that the sureties on his second official bond are not liable for his acts or omissions as administrator of any estate of which he became the representative before they executed their undertaking."

Liability of Municipality.

Where a public administrator acts within the scope of his authority the municipality which he represents is liable for his wrongful acts. *Jones v. Harbaugh*, 93 Md. 269, 48 Atl. 827; *Douglass v. New York*, 56 How. Pr. (N. Y.) 178; *Glover v. New York*, 7 Hun (N. Y.) 232; *Matthews v. New York*, 1 Sandf. (N. Y.) 132.

In *Douglass v. New York*, supra, the court said: "The public administrator holds his office from the defendant (R. S. vol. 2, p. 118, sec. 1), and the defendant is made responsible for the application of all moneys received by the public administrator according to law, and for the due and faithful execution of all the duties of his office (*Idem*, p. 127, sec. 42). . . . But the defendant is not liable for everything done by a person holding the office of public administrator, although he professes to act as such. The defendants are liable for all money the public administrator shall receive according to law, and for the faithful execution of his office. . . .

For acts illegal or done outside of his office the defendants would not be liable."

In *Matthews v. The Mayor, 1 Sandf. (N. Y.) 132*, it appeared that the public administrator failed properly to execute his duties in that he instituted a groundless, vexatious and unnecessary suit. It further appeared that he was careless in proceeding with the suit, which caused a judgment of nonsuit to be rendered against him. It was held that the city of New York was liable in damages to the plaintiff for the negligence of the public administrator. The court said: "The mayor, aldermen and commonalty of the city of New York, in common council convened, from time to time, and as often as a vacancy in the office shall occur, may appoint a public administrator in the city of New York, who shall hold this office during the pleasure of the common council. (2 Rev. Stat. 118, § 1.) By the 42d section of the same statute, page 127, it is provided, 'that the mayor, aldermen and commonalty of the city of New York, shall, in all cases, be responsible for the application of all moneys received by the public administrator, according to law, and for the due and faithful execution of all the duties of his office. . . . The statute makes the defendants absolutely and unconditionally liable for the application of all moneys received by the public administrator according to law, and for the due and faithful execution of all the duties of his office. This would seem to be a direct and primary liability, and not a collateral and secondary one. The public administrator is the creature of the defendants, under the statute. They appoint him, and take from him a bond to them, with such sureties as shall be approved by them. The 44th section, . . . gives the defendants a general supervisory power over the public administrator; and looking at the whole scope and purview of the statute we think he stands in the light of an agent of the defendants, rather than that of the agent of the state. The defendants are, therefore, directly responsible to any person aggrieved by the acts or omissions of the public administrator, for the due and faithful execution of all the duties of his office. The obvious intent of the statute was to extend the liability of the city corporation, to every case where a party is prejudiced by the improper official acts of the public administrator, and to give the party injured a remedy against them, whenever a right of action has accrued against the public administrator, through any violation of the duties of his office."

In *Nash v. New York, 4 Sandf. (N. Y.) 1*, it appeared that the plaintiff, an attorney, had been engaged by the public administrator to prosecute a suit. He was also employed, by another public administrator, to

defend an action brought against the latter as public administrator. It was held that the municipality was liable for the plaintiff's services. The court said: "After a careful examination of the law, we have come to the conclusion that it would be difficult to find a more complete case of agency than this: The public administrator, first, is appointed by the common council, and is removable at their pleasure. Second. He gives a bond directly to them, for the faithful discharge of his duties. Third. The emoluments of the office are paid directly into the treasury and belong to the corporation. Fourth. The corporation, from time to time, as they may deem necessary, may make rules for his government. Now if the 24th section, and the 43d section were struck out altogether, we are inclined to think the corporation would be equally liable for the acts of their agent. He may sue and be sued as any other administrator. It may often become his duty to prosecute or defend suits. An omission or neglect to do so, might be a neglect or omission of duty, for which he or his bondsmen might be liable. It may be greatly for the benefit of his principal, the corporation, that he should do so. He thereby may preserve or secure a fund, out of which commissions are to accrue, and by which their treasury is increased. It would seem but reasonable, that the attorney thus employed to prosecute or defend these suits, should be entitled to recover his costs directly from the principal. If the corporation choose, they may limit the power of their agent by rules or regulations adopted in pursuance of the 44th section. By not making such regulations, they leave the matter to his discretion. They may require that no suit be prosecuted or defended, except by express authority given by them in each particular case, or except under the sanction of the corporation counsel. It does not appear that any such rules or regulations have been adopted, and it not appearing but that these suits were prosecuted and defended by the several public administrators in entire good faith, and in what they conceived to be an honest discharge of their duties, and for the interest of the corporation, we are of opinion that the verdict rendered before Mr. Justice Strong, was in all respects correct, and that the motion for a new trial must be denied with costs."

Compensation.

A public administrator is not entitled to compensation for services rendered after the expiration of his term. *Los Angeles County v. Kellogg, 146 Cal. 590, 80 Pac. 861*, wherein the court said: "The contrary view contended for by appellant would offer strong inducements for the public administrator,

who is a salaried officer, to delay the settlement of estates, by doing which he would draw a salary to the close of his term and full compensation after his term had ended for such estates as were not fully administered; and, besides, the county would be paying his successor the salary provided by law. Furthermore, it would be a temptation to the successor to favor this practice, as it would relieve him from the labor and responsibility of caring for partly administered estates, and besides would be a practice profitable to him when he passed out of office. Appellant insists that it was not only his right to continue his administration, after his term closed, but that it was his duty; and that it is but just and fair to compensate him, since he was but performing a duty imposed upon him. In a sense it is true that so long as his letters remained unrevoked, it was his right and duty to faithfully execute his trust, and, if there was no way by which he could have relieved himself of this trust, the equity of his claim for compensation, under an implied promise, might have some force. But it is not true that he had no means of relief. He knew at the November election whether he was to continue in office; he had two months in which to close the business and prepare to turn over his trust to his successor. He should have asked the court by appropriate petition to revoke his letters, resigning his appointment in estates remaining unadministered; he should have stated his accounts to the close of his term and asked to be relieved from further performance of the trust. It would have been the duty of the court to settle his accounts, accept his resignation, revoke his letters, and direct his successor to take charge of the estate. (See Code Civ. Proc. secs. 1726, 1735.) If for any reason the successor could not act, the court should have appointed a special administrator. With this means of being relieved, the outgoing officer still persists in continuing to administer or refuses to relinquish his trust to his successor, he cannot be heard to complain if his services are regarded as voluntary and he be denied the right to any compensation therefor, except such compensation as he had already received by way of salary."

Under the *Idaho* statute the county treasurer is ex-officio public administrator. It has been held that he is bound to account to the county for all fees received by him as administrator. In *re Rice*, 12 *Idaho* 305, 85 *Pac.* 1109.

Termination of Authority.

The expiration of the term of a public administrator does not ipso facto terminate his right to complete the administration of

estates placed in his charge during the term. In *re Alveline*, 53 *Cal.* 259; *Los Angeles County v. Kellogg*, 146 *Cal.* 590, 80 *Pac.* 361; In *re Craigie*, 24 *Mont.* 37, 60 *Pac.* 495; *Dabney v. Smith*, 5 *Leigh (Va.)* 13; *Tunstall v. Withers*, 86 *Va.* 892, 11 *S. E.* 565. See also *Boynton v. Heartt*, 158 *N. C.* 488, *Ann. Cas.* 1913D 616, 74 *S. E.* 470. Compare In *re Pingree*, 100 *Cal.* 78, 34 *Pac.* 521.

But it has been held that on the appointment of his successor the right of the latter attaches. *State v. Parker*, 30 *La. Ann.* 1182; *State v. Fickling*, 12 *Rich. L. (S. C.)* 9.

A public administrator may be removed as administrator of a particular estate. In *re Bagnola (Ia.)* 154 *N. W.* 461; *Proctor v. Wanamaker*, 1 *Barb. Ch. (N. Y.)* 302 (letters granted on false suggestion of service of citation). In *Varnell v. Loague*, 9 *Lea (Tenn.)* 158, a public administrator prematurely appointed was removed on application of the next of kin.

A direct discharge by the court is ordinarily necessary to terminate the authority of a public administrator. *Rogers v. Hoberlein*, 11 *Cal.* 120. And this is true though his appointment is irregular. *Landford v. Dunklin*, 71 *Ala.* 594.

The resignation of a public administrator does not finally discharge him, *Olson v. Rich*, 79 *Ky.* 244, unless it is accepted by the court, *Russell v. Erwin*, 41 *Ala.* 292.

In *Daly v. Mallory*, 123 *Ala.* 170, 26 *So.* 217, it appeared that one White had been appointed public administrator by the probate judge. Thereafter the judge's term expired but he was re-elected and resumed his office the day following the expiration of his first term. On resumption of his office the judge failed to reappoint White formally as public administrator. However, he continued to issue to White letters of administration and did so several times before the question was raised as to White's authority to act as public administrator. It was held that the judge's acts indicated that he treated White as the public administrator and that a formal order of reappointment was not necessary. The court said: "There can be no question but that on these facts White was in the ordinary sense of words continued in the office of general administrator by Judge Wood upon the latter's induction into office in November, 1886. It was Wood's duty to keep the office filled, to keep an incumbent in it. This duty he could perform on the commencement of his second term in at least two ways: He could either make a new appointment, thereby initiating a new term of office in the general administratorship, or he could affirmatively treat White as still holding the office, thereby not initiating a new term at all, but merely extending an existing term. He did not adopt the former

course; he made no new appointment either of White or other person. But he in point of fact adopted the latter: He allowed White to proceed with the administration of estates already in his hands without interim, let, break or hindrance, and he affirmatively recognized White's continuance in the office by committing to him as such officer the first estate requiring the service of a general administrator—and this within a few days of the commencement of his own term as judge of probate—and every other estate proper to go into the hands of the general administrator; and White by virtue alone of such continuance in office proceeded to administer all estates thus left in his hands or committed to him after the beginning of the judge's new term. It is obvious that the probate judge did everything that was possible for him to do in respect of continuing White in office, except that he did not enter a formal order or memorandum to that end or evidencing the fact on the minutes of his court. And the sole remaining inquiry is: was such order essential to an efficacious legal continuance of White in office? It is insisted such order was essential for that in section 789 of the Code it is made the duty of the judge of probate 'to keep minutes of all his official acts and proceedings; and, within three months thereafter, to record the same in well bound books.' Of course, on the assumption that affirmative action on the part of Judge Wood was necessary to continue White in office, such continuance in office is an official proceeding or act of the probate judge, and should be entered on the minutes and afterwards recorded. But it does not follow from the fact that the judge of probate failed to do his duty in this connection—failed to note and record the fact that White was continued in office—that White was not so continued—that the fact of continuance itself did not exist. The collective fact of such continuance clearly appearing from the absence of appointment of his successor, his continued administration in the probate court of estates which had already come to his hands and the affirmative acts of the probate judge in granting to him as general administrator letters upon a number of estates after the expiration of the term of office of the judge appointing him, is not, in our opinion, emasculated by the judge's mere failure of duty to make a record of the fact, which is as clearly shown by the averments of these complaints as if the record had been made." See also *State v. Kennedy*, 163 Mo. 510, 63 S. W. 678, wherein it appeared that a public administrator was continued in office without a formal re-appointment.

PEOPLE

v.

FALKOVITCH.

Illinois Supreme Court—October 23, 1917.

280 Ill. 321; 117 N. E. 398.

Homicide — Negligent Manslaughter — Reckless Driving of Automobile.

In a prosecution for involuntary manslaughter committed by reckless driving of an automobile, indictment is held to set forth sufficiently the specific acts relied on as constituting the crime.

Same.

An indictment for involuntary manslaughter committed by the reckless driving of an automobile, alleging that the act was done feloniously, unlawfully, and recklessly, is sufficient, although it does not charge that the killing was "wilful," as an act done feloniously is done with the deliberate purpose of committing a crime.

Same.

In a prosecution for involuntary manslaughter, it is not necessary that the indictment should describe the particular character or kind of motor vehicle with which the killing was accomplished, as accused is presumed to know the provisions of the statute defining the term "motor vehicle," and that a Ford automobile comes clearly within the statutory definition.

Liability of Automobile Driver for Negligent Homicide.

In a prosecution for involuntary manslaughter committed by reckless driving of an automobile, the evidence is held sufficient to show clearly the guilt of the defendant.

[See note at end of this case.]

Appeal and Error — Scope of Review — Necessity of Objection Below — Misconduct of Juror.

Where defendant and his attorney knew at the trial that the juror had a conversation with one of the witnesses, but did not call the attention of the trial court thereto until after the motion for a new trial was made, such matter will not be reviewed, especially where the affidavits presented warranted the court in finding that the conversation had no reference to the trial.

Remarks of Counsel — Necessity of Objection.

The question as to the alleged prejudicial remarks of the state's attorney being raised for the first time in the trial court on motion for new trial will not be reviewed.

[See 7 Ann. Cas. 229; Ann. Cas. 1916A 551; 9 Am. St. Rep. 570.]

Instructions — Prejudice for Error — Inaccuracy Cured by Other Instructions.

In a prosecution for involuntary manslaughter committed by reckless driving of an automobile, although the people's third in-

struction was erroneous in stating that a speed greater than those mentioned in the statute would be proof of negligence, when by statute they were only made prima facie evidence of negligence, defendant is not prejudiced, where other instructions charged that proof of negligence is not sufficient to warrant conviction, and that defendant's violation of law would not, of itself, justify a conviction.

Instruction Not Applicable to Evidence — Prejudicial Effect.

In a prosecution for involuntary manslaughter committed by reckless driving of automobile, where there is no claim and no evidence of any intent to kill, an instruction that intent may be proved by direct testimony, etc., although having no place in the case, cannot mislead the jury.

Error to Circuit Court, Rock Island county: *CHURCH, Judge.*

Criminal action. Jake Falkovitch convicted of involuntary manslaughter and brings error. The facts are stated in the opinion. **AFFIRMED.**

H. A. Weld and C. S. Roberts for plaintiff in error.

Edward J. Brundage, Floyd E. Thompson and Noah O. Bainum for defendant in error.

[322] *DUNCAN, J.*—Plaintiff in error was indicted and convicted of involuntary manslaughter at the January term, 1917, of the circuit court of Rock Island county, and was sentenced to an indeterminate term in the penitentiary.

The indictment is in four counts. Omitting the formal beginning, the first count charges "that Jake Falkovitch, late of said county, on the 28th day of September, in the year of our Lord one thousand nine hundred and sixteen, at and within the said county of Rock Island, in the State of Illinois aforesaid, in and upon one Edwin Schernau, in the peace of the people then and there being in the public highway there, unlawfully, feloniously, recklessly and negligently did make an assault, and a certain motor vehicle then and there unlawfully driven and operated by the said Jake Falkovitch upon and along the said public highway in and against the said Edwin Schernau feloniously, unlawfully, recklessly and negligently did force and drive, and did then and there unlawfully, feloniously, recklessly and negligently force and drive the left rear wheel of said motor vehicle in and upon and against the chest of him, the said Edwin Schernau, then and there being running in the said public highway, and him, the said Edwin Schernau, did thereby then and there give in and upon his chest divers mortal wounds, fractures and contusions, of which said mortal wounds,

fractures and contusions the said Edwin Schernau then and there languished a short time and on the same twenty-eighth day of September, in the year of our Lord one thousand nine hundred and sixteen, there died; and so the grand jurors aforesaid, upon their oaths aforesaid, do say and present that the said Jake Falkovitch him, the said Edwin Schernau, in manner and by the [323] means aforesaid, feloniously, unlawfully, recklessly and negligently did kill and slay, contrary to the form of the statute in such case made and provided and against the peace and dignity of the said People of the State of Illinois."

The other three counts are similar in wording and in character to the foregoing count, the principal difference being that in the last three counts the public highway is specifically alleged to be Seventh avenue in the city of Rock Island, with the further specific averment that plaintiff in error at the time of the killing was unlawfully driving and operating his motor vehicle at a rate of speed than is reasonable and proper, having regard for the traffic and the use of the way, and so as to endanger the lives or limbs of persons upon the said highway, and at a time when the said Edwin Schernau was crossing said highway and in full view of plaintiff in error, and without giving the deceased any warning of his approach, the rate of speed being stated as twenty-five miles an hour.

It is urged that the court erred in overruling the motion to quash the indictment for three grounds assigned by plaintiff in error: (1) That the lethal instrument was not defined with sufficient definiteness; (2) that it is not charged that the killing was willful; and (3) that it fails to set forth the specific acts relied upon as constituting the crime.

The indictment sufficiently and definitely charges the crime of manslaughter. Our statute defines manslaughter as "the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever." Involuntary manslaughter, by the provisions of the statute, "shall consist in the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner." There are no words or special provisions of our statute with reference to manslaughter, either in the definition of the crime itself or elsewhere in the statute, that require that the indictment [324] shall charge that the killing was both felonious and willful, although it is common practice to employ both words in drawing indictments for manslaughter. In Bishop's New Criminal Procedure (vol. 2, sec. 543)

it is stated: "‘Willfully,’ though common in the indictment for manslaughter, is believed not to be here necessary. In reason it is not." The word "feloniously" is stronger than the word "willfully." The doing of an act feloniously is the doing of it *malo animo*. An act done feloniously is done with the deliberate purpose of committing a crime, and an act done feloniously, unlawfully and recklessly, as charged in this indictment, must necessarily have been done willfully.

The term "motor vehicle" has been given a definite and fixed meaning by the statute in this State which plaintiff in error is definitely charged with violating. (Hurd's Stat. 1916, chap. 121.) Paragraph 269a of that chapter provides: "That whenever the term 'motor vehicle' is used in this act, it shall be construed to include automobiles, locomobiles, and all other vehicles propelled otherwise than by muscular power, except motor bicycles, traction engines and road rollers, the cars of electric and steam railways and other motor vehicles running only upon rails or tracks." Paragraph 269j of the same chapter provides: "No person shall drive a motor vehicle or motor bicycle upon any public highway in this State at a speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person." The statute further provides that if the rate of speed of any motor vehicle operated upon any public highway where the same passes through the closely built-up business portion of any city, town or village exceeds ten miles an hour, or if it exceeds fifteen miles an hour in the residence portion of such incorporated city, town or village, such rates of speed shall be *prima facie* evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and [325] proper, having regard to the traffic and use of the way, or so as to endanger the life or limb or injure the property of any person. The statute then provides a penalty for its violation in the sum of \$200.

Plaintiff in error is presumed to have known the provisions of this statute, and that a Ford automobile, which the evidence shows he was driving and with which the deceased was struck and killed by him, comes clearly within the statutory definition of the term "motor vehicle." It was not necessary for the indictment to describe the particular character or kind of the motor vehicle with which the killing was accomplished. The defendant was informed by the indictment of the particular time and place that the killing occurred, and was as well informed of the crime with which he was charged as if it had been definitely charged that the act was committed by the felonious,

unlawful and reckless driving of an automobile. Our Criminal Code provides that every indictment or accusation of a grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury. Other jurisdictions have sustained indictments for manslaughter which charged the crime to have been committed with a "motor vehicle, commonly called an automobile," or as done with "a certain automobile." (Schultz v. State, 89 Neb. 34, Ann. Cas. 1912C 495, 130 N. W. 972, 33 L.R.A.(N.S.) 403; State v. Watson, 216 Mo. 420, 115 S. W. 1011.) The term "gun" includes a variety of fire-arms. The rule is generally recognized that in describing the means of killing, if the nature of the instrument is given as a "gun" it is not necessary to state the kind of a gun. (Wharton on Homicide, —3d ed.—p. 852.) The indictment in this case sets forth the specific acts relied on with sufficient certainty and definiteness to fully apprise the defendant of the charge made against him, and the court did not err in overruling the motion to quash.

[326] It appears from the evidence in the case that Seventh avenue, in the city of Rock Island, is one of the busiest thoroughfares in the city. It connects that city with Moline and upon that avenue traffic comes into Rock Island from Davenport, Iowa. It is a sort of double street, with a series of ornamental boulevards down the center, except at the intersections, containing ornamental shrubbery, and is about one hundred feet in width. There is a street car track on either side of and next to the boulevard, occupying about nine feet of the street. The street is paved on both sides of the boulevard, with brick where the street car lines run and with asphalt between the street car lines and the outside curbs of the street, and the intersections are paved with asphalt. Forty-first street is paved with asphalt. The line of travel for vehicles is between the street car tracks and the outside curbs, being about seventeen feet wide, the distance from each outside curb to the curb of the boulevard next to it being twenty-six feet. Forty-first street runs north and south and crosses Seventh avenue at right angles and is sixty feet wide. The paved portion of Forty-first street, is thirty feet wide from curb to curb, but it is paved the full sixty feet in width at the intersection. The ornamental boulevard in Seventh avenue is sixteen-feet wide. The entire block on the south side of Seventh avenue from Forty-first to Forty-second streets is occupied by a public school building. At the intersection of Fortieth street and Seventh avenue,—just one block west of the intersec-

tion of Forty-first street and Seventh avenue, is a signboard which reads, "Public school—Speed limit ten miles an hour." Seventh avenue from Thirty-eighth street to Forty-sixth street is a combined business and residence district. On the north side of said avenue between those limits are a number of small retail stores, averaging one to each block between Thirty-eighth street and Forty-second street. With the exception of the block on which the school building is situated Seventh avenue is closely built up with stores and residence buildings, [327] all the residences being occupied at the time of the accident. On the morning of September 28, 1916, Edwin Schernau, a six-year-old boy who was being kept by his father at Bethany Home Orphanage, situated in said city northwesterly from the scene of the killing, was on his way to attend school at said public school building. He, with three other small children, was traveling east on the north side of Seventh avenue. As they approached Forty-first street, where it was necessary to cross the intersection with Seventh avenue to reach the school building, a funeral procession composed entirely of automobiles was passing westward on the north side of Seventh avenue and for some time had the crossing blocked. The three children with the Schernau boy seeing an opening in the procession ran across the street, but the Schernau boy, apparently afraid to venture across, waited on the north side of the avenue on the curb on the west side of Forty-first street. While thus waiting there came another break in the procession just at the intersection of said streets, and the boy started on a run across the intersection to the school building. The bell had rung for nine o'clock and the children were hurrying into the building. On the south side of Seventh avenue three motor vehicles were going east. One of them was a truck loaded with lumber and driven by Harry Bauer, who was accompanied by his brother, William. Another was a black taxicab. The third was a Ford touring car driven by plaintiff in error as a jitney, with three passengers in it. Plaintiff in error and the taxi driver both passed the truck about the middle of the block between Fortieth and Forty-first streets. Just as the Schernau boy was crossing the intersection plaintiff in error's car struck him, knocking him to the pavement and dragging him a distance of from twenty-five to thirty-five feet southeasterly to the curbing on the south side, at a point about ten or fifteen feet east of the rounded portion of the curb as it turned south at Forty-first street, the automobile describing the arc of a [328] circle as it swerved to the right. The front wheels of the car passed over the curb, which is about six inches high, and the left rear wheel of

the car carried the body clear up to and pinched it against the curb, according to one of the witnesses for the People. According to the plaintiff in error's own testimony the instant before he struck the boy he turned his car to the right and threw on the brakes, and the car skidded from the point where it hit the boy clear over to the point of the curb, and the front wheels ran up over the curb and about two feet beyond its north edge. The automobile, when stopped, was pointing north and south. According to the testimony for the People the boy was struck very close to the south rail of the street railway and the body dragged in front of the rear wheel to the pavement, one of the People's witnesses stating that he saw where the body was dragged on the pavement for a distance of about thirty-five feet. While plaintiff in error and his witnesses claimed that the car was running about eight or ten miles an hour and on a line about midway between the south rail of the railway and the south curb, yet the plaintiff in error stated on cross-examination, "When I hit him with the car he was running near the track." He also stated that his car did not drag the boy over three or four feet, yet he admitted that the boy was in front of his left rear wheel, near the south curb, when the car stopped. The evidence on behalf of the People, as testified by two of the witnesses, was that the jitney car was running "every bit of twenty miles an hour" or "not less than twenty miles an hour," while a third witness estimated it at twenty miles an hour. As it passed the truck loaded with lumber, and up to the point where the boy was struck, the two Bauers testified that their truck was running at a speed of thirteen miles an hour, as shown by their speedometer, and that the jitney and black taxicab were racing, the jitney trying to pass the taxicab.

[329] We think the evidence clearly shows the guilt of plaintiff in error. His testimony that he shut off the power of his car and that his car simply coasted up to Forty-first street from the middle of the block west of it, which is two hundred and ten feet wide, is not at all supported by the evidence. The physical fact that his car, with the rear wheels locked by the brakes and not turning but skidding from the moment the boy was struck, ran for a distance of from twenty-five to thirty-five feet and over and upon a curb six inches high, is entirely inconsistent with his contention and is proof that his car was moving at a very high rate of speed,—probably much greater than twenty miles an hour,—although the pavement that morning was wet and slippery on account of rain that had previously fallen. He admits that he was well acquainted with all of the surroundings at that point on the street; knew of the fact

that the school building was just ahead of him and that the school was in progress and school children were on their way to the building; knew all about the signboard at Fortieth street; saw the funeral procession as he was approaching Forty-first street; saw the boy from the middle of the block west of that street and until he was struck by the car, and saw him running across the intersection towards the school building. All these facts should have suggested caution on his part while moving up to that intersection, and he should have had his car moving at such a speed that he could easily have controlled it. The evidence demonstrates to a moral certainty that he was driving his car at a very high, reckless and dangerous rate of speed, in violation of the law, and that the boy's death was occasioned thereby.

Plaintiff in error sought to discredit one of the witnesses, James G. Blythe, by the testimony of himself and another witness, to the effect that Blythe, on the morning of the accident and afterwards, had stated, in substance, that plaintiff in error was not to blame for the death of the [330] child, and later on said in other conversations that plaintiff in error was a "damned Jew" and ought not to be running jitney busses, and that the Jews were no good and were "hurting us all in business." This testimony was denied *in toto* by Blythe, and the evidence shows that he was not in the jitney business but was in the advertising business. His testimony does not disclose any animosity toward plaintiff in error and was even less hurtful to plaintiff in error than that of the Bauer brothers. The positions of the People's witnesses on the morning of the accident were much more favorable for judging the speed of the automobile than those of plaintiff in error, as the People's witnesses all saw the automobile before it passed the truck of the Bauers and while it was passing it and them, and saw it all the time from the time it passed the truck until the boy was hit. The two witnesses for plaintiff in error were jitney drivers who were in the funeral procession and saw the car of the plaintiff in error as it approached Forty-first street from positions in the funeral procession east of Forty-first street and on the north side of Seventh avenue. One of them states positively that he did not see or notice plaintiff in error's car until it was within fifteen or twenty feet from the point where it struck the boy.

Affidavits were filed in support of the motion for new trial on the ground of the misconduct of one of the jurors, who was alleged in the affidavits to have talked privately with one of the principal witnesses for the prosecution just after that witness had testified, and that that juror had examined the

locality where the accident occurred and gained information in that way out of the presence of the accused. Counter-affidavits were filed by the juror and by two other persons, including said witness, from which the court was thoroughly warranted in finding that the conversation of the juror and the witness had no relation whatever to the trial, and that the juror merely passed the scene of the killing from his home to the court house as he went to and [331] from it during the progress of the trial, and that he did not make any view of the locality of the accident for the purpose of gaining any information in connection with the trial or otherwise. Besides, the fact that during the progress of the trial the juror had a conversation with one of the witnesses and that he was at the locality where the killing occurred was known to plaintiff in error and his attorney and was not brought to the attention of the court until after the motion for a new trial was made.

Plaintiff in error is also in the same position in regard to the alleged prejudicial remarks of the State's attorney during the argument of the case, in which he is alleged to have said to the jury, in substance, that if plaintiff in error was convicted he would do what he could to have the term of imprisonment cut down as short as possible. No objection was made to the remarks of the State's attorney at the time they were alleged to have been made, and the court's attention was never called to any such remarks except by affidavits on motion for a new trial. Such a question cannot be reviewed when raised for the first time in the trial court by affidavits in support of a motion for a new trial. As there was no objection made to the remarks and no ruling by the court there is no action of the court to be reviewed. *Mayes v. People*, 106 Ill. 306, 46 Am. Rep. 698; *People v. Spira*, 264 Ill. 243, 106 N. E. 241.

The People's third instruction is erroneous because it stated, in substance, that certain rates of speed greater than those mentioned in the statute would be proof of negligence. By the statute they are only made *prima facie* evidence of negligence. This instruction did not direct a verdict. While the instruction was erroneous we do not think plaintiff in error was prejudiced thereby. The instructions given for plaintiff in error plainly informed the jury that before they could find the defendant guilty they must not only find that the deceased was struck by the defendant's automobile and thereby killed, but they must also find (1) that at the time [332] the boy was killed the defendant was running his automobile at a rate of speed greater than allowed by law, and must further find from the evidence, beyond

a reasonable doubt, that he was negligently running his automobile in reckless disregard of human life, at a time and place where so running was likely to destroy life, and that his act in that respect was so wanton, reckless and grossly negligent as to amount to criminal negligence; (2) that the defendant must not only have been committing a violation of some law or ordinance with reference to the operation of automobiles, but such a violation of law as by its nature and consequences was apparently likely at that time and place to cause such an injury as Edwin Schernau suffered, and that it was committed by the defendant in utter and reckless disregard of such consequences, and that as a natural result of such unlawful act Schernau was killed; (3) that the fact, if it be a fact, that the defendant, at the time and place where the deceased, Edwin Schernau, received the injury which caused his death, was driving his automobile at a rate of speed greater than is allowed by law, and in consequence thereof the injury occurred, is not, of itself, sufficient to justify the finding that the defendant is guilty. The foregoing propositions were repeatedly given to the jury, who were then given a definition of criminal negligence in this language: "By the term 'criminal negligence,' as used in these instructions, is meant not simply such negligence as might be the foundation of a suit for damages by the person injured thereby, but something more than that. Negligence, to become criminal, must be reckless, wanton, and of such a character as shows an utter disregard of the safety of others under circumstances likely to cause injury." The jury were then instructed, as a closing part of such instruction defining criminal negligence, that unless they believed from the evidence, beyond a reasonable doubt, that the defendant was guilty of criminal negligence as defined in the instruction, and that the boy was killed as the direct [333] result of such criminal negligence, they should find the defendant not guilty. We do not think it is possible that the jury could have been misled by the erroneous instruction aforesaid, after a careful reading and consideration of all the instructions in the case.

It is true, as contended by plaintiff in error, that there was a technical error in the court's giving the People's sixth instruction, which told the jury, in substance, that the intent with which an act is done may be proved by direct and positive testimony, etc. The instruction simply had no place in this case, and it was not applicable in a case where involuntary manslaughter is charged. The jury, however, could not have been misled by it, because there was no claim and no evidence of any intent on the part of plaintiff in error to kill the deceased.

It was not necessary to prove intent to kill, to convict plaintiff in error of involuntary manslaughter. It is therefore immaterial whether the jury did or did not find that there was such an intent, and the instruction was simply inapplicable and could not figure in the question of guilt or innocence of the accused.

We have these propositions as to the giving of the People's erroneous third instruction: The jury were improperly told by that instruction that proof of greater rates of speed than those mentioned in the statute in passing on the public highway through a city or village is proof of negligence, but following that instruction the jury were further and emphatically told that proof of negligence is not sufficient to warrant the conviction of plaintiff in error. Under such instructions he could not have been convicted of simple negligence or for a simple violation of the statute, as argued by his counsel. We must add to this the further proposition that there can be no sort of question, in our judgment, that plaintiff in error, from the time he passed the truck upon which the Bauers were riding and up to the place where the boy was hit, was driving his car at a much greater rate of speed than fifteen miles an hour, and [334] was not only *prima facie* guilty of violating the law and guilty of ordinary negligence, but was, beyond all reasonable doubt, actually guilty of criminal negligence. There could have been no time or place found within the limits of said city that would have been more suggestive to a driver of an automobile of care and caution in driving than the time and place of this killing. All the surroundings at that place at that time were equally suggestive of caution. We do not think that plaintiff in error could reasonably expect another or different verdict than the one upon which he was sentenced, if the cause were re-tried.

There is no reversible error in the record, and the judgment is affirmed.

Judgment affirmed.

NOTE.

The reported case sustains a conviction of manslaughter of an automobile driver who ran into and killed a child while driving past a school building at a high and unlawful rate of speed. The criminal liability of the owner or driver for injuries inflicted by an automobile is discussed in the notes to *State v. Campbell*, 18 Ann. Cas. 236, and *Com. v. Horsfall*, Ann. Cas. 1914A 682. See also the note to *Westrup v. Com.* 124 Am. St. Rep. 316, for a general discussion of negligent homicide.

NEVEN

v.

NEVEN.

Nevada Supreme Court—May 6, 1915.

38 Nev. 541; 148 Pac. 354; 154 Pac. 78.

Trial — Continuance — Discretion of Court.

A motion for a continuance is addressed to the discretion of the court, and its ruling will not be reversed, except for most potent reasons.

Continuance in Divorce Case — Absence of Party.

Where defendant, in a suit for divorce, was present with his counsel in court on March 28th, when by his consent the case was set for trial April 4th, without then informing the court of necessity of his being absent so near before that date as to prevent his presence at the trial, and it did not appear that his absence before the trial, which prevented his presence at the trial, was due to a court proceeding, denial of continuance because of his absence, supported by a telegram merely announcing his inability to be present because of guardianship proceedings, is not an abuse of discretion.

[See note at end of this case.]

Party Bound to Appear in Two Proceedings — Absence as Ground for Continuance.

A party in two court proceedings in different places is bound by the first notice of trial, and the requirement of his presence at that trial affords a ground for a continuance of the other proceeding.

Absence of Witness — Diligence.

A party who is a material witness in his own behalf is not entitled to a continuance because of his absence, unless he shows that he had his testimony ready for use at the trial, but was prevented from attending the trial by some obstacle which, by the exercise of reasonable diligence, he could not overcome, and which he did not create by his own voluntary act.

Denial of Continuance — Review — Failure to Show Grounds.

Where the record fails to show that appellant, when he applied to the trial court for a continuance, brought to the attention of the court, by his affidavit or otherwise, the fact that he had been cited to appear in another court on the day of the trial, the action of the court in denying the continuance will not be disturbed.

Appeal from District Court, Washoe county: HAEWOOD, Judge.

Action by Laura A. Neven, plaintiff, against James H. Neven, defendant. Judg-

ment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Sweeney & Morehouse for appellant.
Dodge & Barry for respondent.

[542] McCARRAN, J.—This was an action for divorce, commenced in the district court of Washoe County by respondent. Judgment having been rendered for respondent, a decree of the court was rendered in her favor in accordance with the prayer of her complaint. Appeal is taken to this court from the order denying appellant's motion for a new trial.

One question only is presented to this court for determination, namely: Was it an abuse of discretion for the trial court to deny appellant's motion for a continuance of the trial of the case?

The record discloses that on the 21st day of March, 1914, the attorneys for the respective parties being in court, the trial of the case was, by consent of said attorneys, set for Thursday, the 26th day of March, 1914, at [543] 10 o'clock A.M. It further appears that on the 26th day of March, 1914, at the hour at which the case was set for trial, the plaintiff appeared in court, with her attorneys and witnesses, to proceed with the trial. The defendant, at that time, through his attorneys, presented the affidavit of a physician in furtherance of his motion for a continuance. The affidavit of the doctor was to the effect that appellant was in ill health and unable to be present at the trial.

Upon motion of counsel for the appellant, the case was continued, and on Saturday, the 28th day of March, 1914—calendar day in the district court—appellant and respondent and their respective attorneys being in court, the cause was, by and with the consent of all parties, set for trial for Saturday, the 4th day of April, 1914, at 10:30 o'clock A.M. of that day.

On Saturday, the 4th day of April, 1914, at the hour set for the commencement of the trial, the plaintiff appeared in person and with her attorneys and witnesses. The defendant was not present, and one of his attorneys presented a telegram from defendant in furtherance of a verbal motion for continuance. The telegram, admitted and filed in furtherance of the motion, is as follows:

Western Union Telegram

Received at 127 N. Center St., Reno, Nev.
Phone 436.

Always Open.

13SFX7. Filed 828AM.

Elko, Nev., Apl. 4, 1914.

Sweeney & Morehouse, Reno, Nevada.

Detained here unavoidably. Guardianship matter Le Roy Neven. J. H. Neven. 832AM.

The motion of appellant being resisted by respondent in the court below, the respondent herself took the stand and testified with reference to appellant going to Elko, as follows:

"Q. Do you know what he went to Elko for? A. Well, some matter pertaining to the estate of Roy Neven.

"Q. His nephew? A. Yes.

"Q. Was it going to be heard in court, or did he just go to consult with attorneys? A. Well, he talked with me [544] about it Thursday, and he said, 'Will you go up to Elko with me and have Judge Taber cross-question you?' I said, 'When?' He said, 'Tonight. You can come back Friday night.' I said, 'No. I wouldn't take any chances on coming back Saturday night, because,' I said, 'you know our affair comes up Saturday.' I said, 'Is it necessary for you to go tonight?' He said, 'No, it is not; but I will have to go some time soon.'

"Q. Did you impress upon him at that time the importance of his being back here at this time? A. Well, we talked about it. He knew for a certainty it would come up today, and he did not say when he went out of the house that he was going to Elko; just went in the bathroom, cleaned up and went out; didn't say anything about going to Elko to me.

"Q. Has he told you at any time that he would delay the trial of this case? A. Oh, yes; right from the start he said he would delay it as much as possible, and that if he had his way it never would come to trial."

The motion of appellant's attorney for continuance being denied, the court proceeded to the trial of the case.

At the conclusion of the plaintiff's case, the attorneys for appellant again renewed their motion for a continuance. In furtherance of their motion, one of the attorneys made a statement under oath to the effect that on Thursday, April 2, appellant informed him that he was going to Elko, concerning some matter in probate; that he then and there informed appellant that this cause was set for the morning of April 4, at 10:30 o'clock, and that he must return in time for this matter to be heard.

The motion for continuance was again denied, and, no evidence being offered on behalf of defendant, appellant herein, the court rendered judgment for the plaintiff.

Appellant later moved the court for a new trial, and, in furtherance of his motion, filed his affidavit setting forth the reason for his absence on the date of the trial of the cause. A portion of his affidavit is as follows:

"James H. Neven, being first duly sworn, deposes and says: That he is the defendant in the above-entitled [545] action; that on Thursday, the 2d day of April, 1914, defend-

ant had very important business to attend to in Elko, county of Elko, Nevada; that he took the train from Reno for Elko on the evening of Thursday, April 2d, with full intent and purpose of returning not later than Friday evening, April 3d; that he knew that the action above entitled as against him was set for trial at 10:30 o'clock A.M. of the 4th day of April, 1914. That he intended to go to Elko on April 2d and return to Reno on the evening of April 3d, so as to be ready for participating in the trial and defending himself in the aforesaid action on Saturday, April 4th, at 10:30 A.M. of that day. That upon his arrival in Elko he had certain conversations and business dealings with the attorneys of Le Roy Neven, whose estate during his minority was under control of affiant as guardian, and his business dealings with these people, to wit, the attorneys for Le Roy Neven, was to enable them to fix up the accounts necessary to be reported by affiant and obtain the discharge of affiant as guardian of the said Le Roy Neven. That he had no purpose, design, or intent in going to Elko, Nev., to interfere with the trial of this cause in the court on the 4th day of April but with good faith and with good intent he thought he would finish the business he had in Elko, Nev., and return on the evening of April 3d, so as to be ready for trial the morning of April 4th. That train No. 5 of the Southern Pacific Railroad Company from Elko, which is due in Reno at 8:50 A.M., April 4th, was 6 hours and 45 minutes late, rendering it impossible for defendant to appear in court and participate in defending said cause and having a hearing of said cause on the 4th day of April as aforesaid. That it was through no fault or neglect of this defendant that he was not present at the trial and would be prepared to defend the said action, but, by reason of the fact that train No. 5 was 6 hours and 45 minutes late, affiant did not arrive in Reno until after 3 o'clock P.M. of Saturday, April 4th. That realizing that he could not return by reason of the fact that the said train, over which he had [546] no control, was 6 hours and 45 minutes late, he (affiant sent a telegram to H. V. Morehouse, one of his counsel, stating that he was unable to be present and was unavoidably detained, hoping thereby that his counsel (the said H. V. Morehouse) would be enabled to obtain a continuance of this cause at least for the purpose of taking the testimony which would be offered by the defendant in person and by his witnesses."

It is needless for us to cite authority in support of a proposition that has become almost universally recognized: That a motion for continuance is addressed to the discretion of the court. The reason for this rule is manifest. The trial court is apprised of

all the circumstances concerning the case and the previous proceedings, and has before it the parties, from whose conduct and utterances it has opportunity to judge as to whether or not the motion is made in good faith, or as to whether or not deception and fraud are being perpetrated on the court with a view to delaying the proceedings. It is for these reasons that courts of review generally have taken a position that the action of a trial court, in granting or denying a motion for continuance, will not be reversed, except for the most potent reasons.

The rule has been laid down by some courts (and, in our judgment, advisedly so) that a greater degree of liberality should be accorded in matters of continuances in divorce cases than in any other civil actions; the reason for this being that the public, as well as the parties to the action, are interested in the result of the suit. However this may be, we concur in the expression of the Supreme Court of California, in the case of *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. 298, 16 L.R.A. 660, that a defendant must be held to the exercise of good faith and diligence, and cannot be heard to complain if the failure to present his defense results from an attempt to subordinate the business of the court to his own business engagements and convenience.

The statement of appellant, made in his affidavit, [547] makes no attempt to establish that appellant was required, either by court process or the pendency of court proceedings, or even by urgent or imminent business engagements, to be in Elko either on April 2, 3, or 4. The record fails to disclose that any proceedings were pending in any court in Elko, or elsewhere, in which appellant was directly or indirectly concerned. The most that can be said for the affidavit of appellant is that it attempts to set forth that he had very important business to attend to in Elko; that upon arrival in Elko he had certain conversations and business dealings with the attorneys of Le Roy Neven, whose estate, during his minority, was under the control of affiant as guardian; that his business dealings in this respect with these people, to wit, the attorneys for Leroy Neven, were to enable them to fix up the accounts necessary to be reported by affiant and obtain the discharge of affiant as guardian of said Le Roy Neven. Nothing in the affidavit indicates, even inferentially, that this business transaction with the attorneys of Le Roy Neven was a matter imminent, urgent, or pressing, or one which demanded or required the presence of appellant upon either the 2d, 3d, or 4th day of April, or, in fact, upon any other particular date. Nothing appears in the record which tends to contradict the testimony of Mrs. Neven, the respondent herein, wherein she states that she cautioned appellant, prior to

his departure for Elko, and said, "Is it necessary for you to go tonight?" to which he replied, "No, it is not; but I will have to go some time soon." Counsel for appellant, in their brief, urge that this business in Elko was a court proceeding, in which appellant was an interested party, but this is nowhere supported by the record, nor even by the affidavit of appellant.

The record discloses that appellant was present in court on the 28th day of March, with his attorney; that on that date, by his consent, the case was set for trial on April 4. If a visit to Elko was urgent or pressing, he should have brought such matter to the attention of the court, or at [548] least made some effort to have this case set at a date more convenient to him; and even though it was a court proceeding in Elko at which, by reason of his interest therein, he was required to be present, if those proceedings had been set prior to the 28th day of March, he must have been cognizant of that fact, and should have urged that matter at the setting of this case. If it was a court proceeding in Elko, in which his presence was urgent and the date of that proceeding was set after the 28th day of March, he was bound by the first notice of trial, and the requirement for his presence at the trial of this cause would have been reasonable ground for a continuance in the Elko proceeding. (*Finan v. Millmore*, 1 Mich. N. P. 172.)

It is unnecessary for us to dwell upon such rules and observations as have been made by either this or other courts upon the subject of the absence of witnesses as a ground for continuance in civil cases. Such rules and observations are not strictly applicable to the matter at bar. In this case the absent witness was the party defendant himself; and he is bound by a different rule from that which might be applicable if the absent witness were one in no wise interested in the suit, in that, as a general proposition, a stricter showing of good cause is required. (6 R. C. L. 551.)

"A party who is a material witness in his own behalf," says the Appellate Court of Illinois, "must have his testimony ready for use at the trial, unless prevented from so doing by some obstacle which by the exercise of reasonable diligence he cannot overcome, and the obstacle should not be one which he has created by his own voluntary act. If he allows considerations of business or pleasure, or even regard for his own health, to call him away at a time when his suit is liable to be called for trial and thereby he loses the benefit of his own testimony, he must, ordinarily, suffer the consequences." (*Schlesinger v. Nunan*, 26 Ill. App. 525.)

The expression of the Supreme Court of California in [549] the *Barnes* case, *supra*,

was again referred to approvingly in the case of Kasson's Estate, 141 Cal. 33, 74 Pac. 436, and is generally cited as a leading case upon the subject. (6 R. C. L. 551; Ann. Cas. 1914B 360.)

It must be observed that the telegraphic communication from the appellant to his attorney, filed in the district court in furtherance of the motion for continuance on the 4th day of April, made no mention of the delayed train as being the cause of the absence of appellant. The telegram was filed at Elko at twenty-eight minutes after 8 o'clock on the morning of the 4th day of April, and makes no intimation that appellant was or would be on the delayed train No. 5. It says: "Delayed here unavoidably. Guardianship matter Le Roy Neven."

If the lateness of train No. 5 had been the real cause of the absence or delay of appellant, it would have been a simple matter to make mention of that fact in the telegram. Moreover, in the motion for continuance, made by the attorneys for appellant on April 4, there was no mention of appellant being on this delayed train, or that he would arrive on the delayed train, or within any reasonable time. A showing to this effect, made properly and in good faith, might have been at least a reasonable ground to warrant the trial court in continuing the hearing until the arrival of the defendant. But in the record we find no assurance given that the defendant would be able to attend the trial at any designated time.

The affidavit of appellant, filed in furtherance of his motion for a new trial and made the basis of his appeal in this case, states that his object in sending this telegram was the hope that thereby his counsel would be enabled to obtain a continuance of this cause, at least for the purpose of taking the testimony, which would be offered by defendant in person and by his witnesses. In this respect, the record discloses that no witnesses were in attendance upon the trial, by subpoena or other process of the court, on behalf of appellant. If, however, witnesses on behalf of appellant had been present at the [550] time of trial, the absence of appellant would not have precluded his attorney from introducing such testimony, bearing upon the case, as might be adduced from those witnesses. The record discloses neither the presence of any witnesses on behalf of defendant, nor that any witnesses were placed upon the stand in his behalf, nor testimony of any kind or character offered, either in contradiction of the allegations of respondent's complaint or in support of appellant's cross-complaint. Moreover, the counsel for appellant who made his statement under oath in

furtherance of his motion for continuance, at the conclusion of respondent's case, made no intimation that any witnesses were present on behalf of appellant.

From the record as it is before us we find nothing that would support appellant's contention that it was an abuse of discretion for the trial court to deny the motion for continuance.

It follows that the order denying appellant's motion for a new trial should be affirmed.

It is so ordered.

ON PETITION FOR REHEARING.

MCCARRAN, J.—Counsel for appellant, in their petition for rehearing, make the following assertion:

"At the same time, the fact exists that Neven was cited into court at Elko County, to make an accounting for the guardianship of Le Roy Neven, his nephew."

If the statement of counsel for appellant here quoted were supported by the record before us to any extent whatever, then a rule might apply in favor of appellant different from that asserted in the former opinion of this court. The fact is, however, that this assertion is unsupported by anything in the record before us. The affidavit of appellant: filed in the court below in furtherance of his motion, makes no such declaration. In the statements [551] made by counsel for appellant before the trial court on the day of the trial, in explanation of the absence of appellant and in furtherance of the motion for a continuance, there is nothing indicating that appellant Neven had been "cited into court in Elko," or that appellant had been called there by any process issued out of any court. And it may be not out of place to observe here that, had any citation or process issued calling for the presence of the appellant Neven, it would have been a simple matter to have produced the same in the trial court either in furtherance of the motion for a continuance or as a part of the affidavit of appellant, and the same would thereby have become a part of the record before this court.

The testimony of the respondent, Mrs. Neven, in detailing a conversation between herself and appellant relative to his going to Elko, sets forth that on Thursday, April 2, when appellant invited her to go with him to Elko, she inquired of him: "Is it necessary for you to go tonight?" To which he, the appellant, answered: "No, it is not; but I will have to go some time soon."

Petition for rehearing should be denied.

It is so ordered.

NOTE.

Continuances in Divorce Cases.

The purpose of this note is to review the recent decisions with respect to the granting of continuances in divorce cases. The earlier cases are discussed in the note to Hyser v. Hyser, Ann. Cas. 1914B 356.

The rules as to the granting of a continuance are more liberal in a divorce case than in other cases for the reason that "in such cases the state has an interest." Clayton v. Clayton, 71 W. Va. 656, 77 S. E. 137.

"Large discretion is vested in trial courts with reference to a continuance." Rogers v. Rogers, 57 Colo. 132, 140 Pac. 193.

"It is the duty of the trial court in such cases wisely to exercise its discretion to the end that society and the public receive no detriment in proceedings affecting the institution of marriage." Dwire v. Dwire, 86 Vt. 474, 86 Atl. 164.

In Rogers v. Rogers, 57 Colo. 132, 140 Pac. 193, an application was made for a continuance on the ground of the absence of a witness, the defendant interposing an affidavit wherein he stated that he had been endeavoring to learn the whereabouts of the witness for two weeks previous to the time when the continuance was asked for. There was no reason assigned why he did not commence his efforts at an earlier date. In sustaining the denial of a continuance the court said: "The showing in support of such a motion must be upon affidavit from which it appears that the moving party has used due diligence to procure the attendance of the witness whose testimony it is claimed is material." So in Johnston v. Johnston (R. I.) 94 Atl. 257, the defendant asked for a continuance of a petition to vacate a decree of divorce for the purpose of securing the deposition of a witness then in California, which he claimed would show that the plaintiff was not a resident of Rhode Island at the time the suit for divorce was filed. The application was made after the petitioner had produced testimony in support of his petition. Denying the application the court said that diligence had not been exercised and that the application was made evidently for delay.

But in Clayton v. Clayton, 71 W. Va. 656, 77 S. E. 137, an application by the wife for suit money and for time to procure evidence in defense was held to have been improperly denied though it was not made until after the husband had completed the taking of depositions in support of his case. The court said: "A divorce by agreement of the parties, express or implied, is inhibited by law. Maintenance of the policy of the law enjoins allowance of opportunity to each party for full presentation of his side of the contro-

versy. Out of it arises power in the courts to compel the plaintiff to pay an impecunious defendant money with which to defray the cost of full defense. The law accords to the parties equal facilities for presenting their cases and the courts enforce the right thereto. Bish. Mar. Div. & Sep. sec. 976. Delay incidental to the enforcement thereof is, therefore, contemplated and authorized by law. Application of these principles discloses a clear right to a continuance, which the court could not properly disregard or deny."

In Potts v. Potts, 80 Wash. 302, 142 Pac. 449, the court refused a continuance on the ground of surprise the defendant urging that he was taken by surprise because of the plaintiff's statement that the ceremony of marriage was performed at a certain time, by a minister, with witnesses present. The court held that when the complaint was served on the defendant he was informed thereby, that the plaintiff would testify that the marriage had taken place at the time and place specified therein, and that it was incumbent on him, if he desired to know who performed the ceremony and the witnesses thereto, to propound interrogatories to the respondent regarding the ceremony and the witnesses.

In Dwire v. Dwire, 86 Vt. 474, 86 Atl. 164, the court said, with reference to a general continuance granted in the hope that a reconciliation of the spouses might take place: "This was in accordance with a course of procedure in divorce cases which in the discretion of the court has long obtained in this state when the circumstances of the case are such that the interests of the parties or of the public may seem to be better conserved thereby, which several interests must be regarded in the administration of the law. The continuance may be general, or it may be special and accompanied with an order for further proceedings, as for instance, the production of more evidence, or the testimony of the libelee, or some particular person not then at hand. In the latter case, it should seem that at the succeeding term, the court being of the same judges, the trial may proceed from where it left off when the continuance was ordered. See Foster v. Redfield, 50 Vt. 285. But when the continuance is general with no findings of fact placed upon record, as in the case at bar, it is tantamount to a refusal to proceed further with that hearing, or to make any decree on the evidence received therein. It leaves the case as if no hearing on the merits had been had, and any decree rendered at a subsequent term must be as the result of a trial de novo. This is the practical effect of such procedure with a general continuance in cases of this character, and acting in the interests of the public, as it stands related to, and affected by, the marital relations, we are not disposed

to give it an effect which will permit the granting of a divorce at a subsequent term without a hearing anew."

It is held in the reported case that a continuance should not be granted by reason of the absence of the defendant, where he, though claiming he was cited to appear in another court, submitted no proof to the trial court by affidavit or otherwise that he was under any process to appear in any court.

On report from Superior Court, Middlesex county: DANA, Judge.

Action by Frances S. H. Massaletti, plaintiff, against Mary Fitzroy, defendant. Verdict for defendant. Case reported to Supreme Judicial Court. The facts are stated in the opinion. Affirmed.

Sawyer, Hardy, Stone & Morrison and E. C. Stone for plaintiff.

Whipple, Sears & Ogden, Sherman L. Whipple and *Jas. M. Hoy* for defendant.

MASSALETTI

v.

FITZROY.

Massachusetts Supreme Judicial Court—October 29, 1917.

228 Mass. 487; 118 N. E. 168.

Automobiles — Liability of Owner — Injury to Guest.

Where a person invites another to ride gratis in his automobile, there is a gratuitous undertaking, not governed by rules as to liability of licensors.

[See note at end of this case.]

Negligence — Degrees of Negligence.

There is a distinction between the degrees of negligence, as being slight, ordinary, or gross.

Automobiles — Liability of Owner — Injury to Guest.

The rule that to charge a person, who invites another to ride in his automobile, in doing which the guest is injured, with liability, gross negligence must be shown, does not mean that the same negligence must appear in every case as would charge a gratuitous bailee with liability for loss of the goods, but each case must be determined upon its own facts.

[See note at end of this case.]

Same.

Since to charge a gratuitous bailee gross negligence must be shown, and since the measure of liability of one who undertakes to carry another gratis is the same as that of a gratuitous bailee, where a person invites another to ride in his automobile, in doing which the guest is injured, she cannot recover, in the absence of showing of gross negligence.

[See note at end of this case.]

Negligence — Degrees of Negligence — Gratuitous Undertaking.

Justice requires that, to make out liability in case of a gratuitous undertaking, plaintiff ought to prove a materially greater degree of negligence than where defendant is to be paid for doing the same thing.

[488] LORING, J.—While staying with the defendant as her guest the plaintiff at the defendant's invitation went out with the [489] defendant in her motor car. The car was driven by a chauffeur furnished by the owner of the garage where it was kept. Through the negligence of the chauffeur the machine was overturned and fell on the plaintiff, causing the injuries here complained of. The jury found that while driving the machine the chauffeur acted as the defendant's servant, and this finding was warranted by the evidence. They also found that the accident was caused by the negligence of the chauffeur. Upon the jury making these findings the judge directed the jury to return a verdict for the defendant and reported the case to this court.

"At the trial the plaintiff did not claim that the jury could find from the evidence gross negligence on the part of the defendant." There was no question of negligence on the part of any one but the defendant's chauffeur and the plaintiff has not contended that there was. We therefore construe her concession to be a concession that she did not make out a case of gross negligence on the part of the chauffeur.

It was decided in *West v. Poor*, 196 Mass. 183, 81 N. E. 183, 124 Am. St. Rep. 541, 11 L.R.A.(N.S.) 936, that a defendant who invites a plaintiff to ride gratis in his carriage is liable to the same extent that a gratuitous bailee is liable. In *West v. Poor* a milkman on returning to his wagon after delivering some milk found in it the plaintiff and some other children. He did not order them out of the wagon but drove on. When the defendant stopped to make the next delivery the plaintiff with the defendant's assistance undertook to get out of the wagon, and while she was in the act of getting out the horse started, the plaintiff was thrown to the ground and suffered the injuries complained of in that action. That case was disposed of by this court in these words "He [the defendant] did nothing and said nothing to invite them, and the nearest analogy that occurs to us is that of a self invited guest in whose presence the host acquiesces and whose

enjoyment he seeks to promote, or that of a gratuitous bailee. In the former case the degree of care required is that of licensor and licensee, (*Plummer v. Dill*, 156 Mass. 426; *Hart v. Cole*, 156 Mass. 475), which, as has often been said requires only that the licensor shall not set traps for the licensee and shall refrain from reckless, wilful or wanton misconduct tending to injure him. *Massell v. Boston Elevated R. Co.* 191 Mass. 491. In the latter case, in order to render the bailee liable, it must appear that he has been guilty [490] of culpable negligence. *Whitney v. Lee*, 8 Metc. (Mass.) 91; *Nolton v. Western R. Corp.* 15 N. Y. 444." The liability "of a gratuitous bailee" was described by Chief Justice Shaw in the case of *Whitney v. Lee*, cited above in these words: Subject to these remarks upon the application of these distinctions [as to different degrees of negligence], we think it well settled, that a bailee for safe keeping, without reward, is not responsible for the article deposited, without proof that the loss was occasioned by bad faith, or gross negligence. This rule was settled, on great consideration, and after full deliberation, in *Foster v. Essex Bank*, 17 Mass. 479; and this supersedes the necessity of any full review of the authorities."

The plaintiff in effect asks us to overrule *West v. Poor* so far as the second ground goes on which that case was decided. In that connection she has relied upon *Patnode v. Foote*, 153 App. Div. 494, 138 N. Y. S. 221; *Pigeon v. Lane*, 80 Conn. 237, 11 Ann. Cas. 371, 67 Atl. 886, and *Beard v. Klusmeier*, 158 Ky. 153, Ann. Cas. 1915D 342, 164 S. W. 319, 50 L.R.A. (N.S.) 1100. In addition to these cases relied upon by the plaintiff, there are cases to the same effect not cited by her which ought to be considered in connection with them. We take them up in their order. The first of these cases in point of time is *Mayberry v. Sivey*, 18 Kan. 291. That case was decided on the authority of this statement of Wharton in his text-book on negligence: "A person who undertakes to do service for another is liable to such other person for want of due care and attention in the performance of the service, even though there is no consideration for such undertaking. The confidence accepted is an adequate consideration to support the duty." But Mr. Wharton is of opinion that in the common law of England there are no degrees of negligence. This conclusion is based on Mr. Wharton's contention that the opinion of Chief Justice Holt in *Coggs v. Bernard*, 2 Ld. Raym. (Eng.) 909, so far as it made a distinction between gross and ordinary negligence was based on a misapprehension as to the rule of the civil law. See Whart. on Negl. (2d ed.) §§ 482-510. Whether different de-

degrees of negligence are known to the common law is a question to be considered by itself and taken up later on. The next case in point of time and the most important of all these cases in *Pigeon v. Lane*, 80 Conn. 237, 11 Ann. Cas. 371, 67 Atl. 886. In that case the defendants had sent a sleigh in charge of their servant, Rinski by name, to bring their employees to their work and there was evidence that the plaintiff was injured by Rinski's negligence. The presiding [491] judge instructed the jury that it was immaterial whether the defendants were bound to send the sleigh to bring the plaintiff to his work or had sent the sleigh gratuitously; that in either case Rinski was the fellow servant of the plaintiff and the defendants were not liable. The Supreme Court of Errors of Connecticut decided that if the defendants sent Rinski gratuitously he was not the plaintiff's fellow servant and for that reason the appeal was well taken. After that point had been decided this was added (at page 241): "Although, if the plaintiff was injured while riding upon the sleigh as a mere licensee, the defendants could be held liable only for their active negligence in causing the injury—which would include their own or their servant Rinski's negligent acts by which the danger of riding upon the conveyance was increased, or a new danger created, while the plaintiff was riding under such license. (*Pomponio v. New York, etc. R. Co.* 66 Conn. 528, 538),—the allegation that the injury was caused by the careless, negligent and improper driving of the conveyance by the defendants' servant, in such a manner that it collided with the bridge, is a sufficient averment to permit proof of that negligence which would render the defendants liable as licensors." *Pomponio v. New York, etc. R. Co.* 66 Conn. 528, 34 Atl. 491, 50 Am. St. Rep. 124, 32 L.R.A. 530 (on the authority of which this statement in *Pigeon v. Lane* is founded) was a case where on the findings made the plaintiff was crossing the defendant's track for his own convenience at a place planked as a crossing but where neither the plaintiff nor the public had a right to cross, and was injured by the negligence of the defendant in the operation of one of its trains. It was held that while the plaintiff, being on the defendant's premises for his own convenience, was a licensee and therefore took the defendant's premises as he found them (in the absence of a trap), the defendant was liable for injuries suffered by the plaintiff by reason of active negligence in the operation of its trains. *Pomponio v. New York, etc. R. Co.* was decided on the authority of *Corrigan v. Union Sugar Refinery*, 98 Mass. 577, 96 Am. Dec. 685. That was a case in which the plaintiff was proceeding as a licensee along an alleyway on the premises of the defendant and was injured by the negligence of the de-

fendant's servants in throwing down beer barrels into the alleyway. In *Pomponio v. New York, etc. R. Co. ubi* [492] *supra*, the court quotes a reference of this court in *Stevens v. Nichols*, 155 Mass. 472, 475, 29 N. E. 1150, 15 L.R.A. 459, to the doctrine of *Corrigan v. Union Sugar Refinery*, which was in these words: "The licenser has, however, no right to create a new danger while the license continues. *Oliver v. Worcester*, 102 Mass. 489, 502; *Corrigan v. Union Sugar Refinery*, 98 Mass. 577; *Corby v. Hill*, 4 C. B. (N. S.) 556 [93 E. C. L. 556]. So a railroad company which allows the public habitually to use a private crossing of its tracks cannot use active force against a person or vehicle crossing under a license, express or implied." It is not necessary to consider whether this reference in *Stevens v. Nichols* to the doctrine of *Corrigan v. Union Sugar Refinery* is or is not a sufficiently careful statement of that doctrine to determine the reason on which it is founded or the limitations to which it is subject. The rule of *Corrigan v. Union Sugar Refinery* is a rule as to the liability of a licensor to a licensee. But where a defendant invites a plaintiff to ride *gratis* in his carriage the question is not a question of the measure of liability of a licensor to a licensee. It is the question of the measure of the liability assumed in case of a gratuitous undertaking. For this reason the doctrine of *Pomponio v. New York, etc. R. Co.* and of *Corrigan v. Union Sugar Refinery* (the case on which *Pomponio v. New York, etc. R. Co.* was decided) is not applicable in the case at bar where the defendant invited the plaintiff to ride *gratis* in her carriage.

The next case in point of time is *Patnode v. Foote*, 153 App. Div. 494, 138 N. Y. S. 221. In that case it was said that no decision upon the point had been found in New York but that the case of *Pigeon v. Lane* in Connecticut "Impresses us as stating the true rule." Without further discussion the court followed the opinion in *Pigeon v. Lane*. The next case, *Adams v. Tozer*, 163 App. Div. 751, 149 N. Y. S. 163, was decided on the authority of *Patnode v. Foote* and of *Grimshaw v. Lake Shore, etc. R. Co.* 205 N. Y. 371, Ann. Cas. 1913E 571, 98 N. E. 962, 40 L.R.A. (N.S.) 563. The latter was a case where the plaintiff, being by license of the Wabash Railroad Company on an engine of that company, was injured in a collision at a grade crossing of the rails of the Wabash and of the defendant railroad company caused by the negligence of those operating the defendant's engine. It was held that the defendant owed the plaintiff the duty of exercising due care not to injure him since he was lawfully on the Wabash [493] engine and that it was immaterial that he was lawfully there by license and not by compensa-

tion paid by him to the Wabash Railroad Company. In other words the point decided in *Grimshaw v. Lake Shore, etc. R. Co. ubi supra*, is that decided in *Boutlier v. Malden*, 226 Mass. 479, 116 N. E. 251. It has no bearing upon the liability of a defendant who invites a plaintiff to ride *gratis* in his carriage. There is another case in New York (referred to in one of the cases to be considered later on) namely, *Birch v. New York*, 190 N. Y. 397, 83 N. E. 51, 18 L.R.A. (N.S.) 595. The point decided in that case was that a licensee entering on the wharf of a licensor takes the property as he finds it. In making that decision the court said *obiter* that the owner of land is liable to one entering upon it as licensee for active negligence on its part; that is to say, it was liable in a case like *Corrigan v. Union Sugar Refinery*. The next case in point of time is *Lochhead v. Jensen*, 42 Utah, 99, 129 Pac. 347. In that case a verdict was set aside on the ground that the plaintiff was allowed at the trial to recover for an injury not alleged in the complaint. After setting aside the verdict on that ground the court (at page 104) said with respect to a new trial: that there was nothing in the defendant's contention "that 'the ride in the automobile was the mutual enjoyment of all three' occupants, and since the plaintiff did not show that the deceased protested against the manner of its operation it must be presumed that he acquiesced therein; and therefore the negligence, if any, of the defendant must be imputed to the deceased." There was nothing else in the case which bears or might be thought to bear upon the question which we have under consideration. The next case in point of time is *Beard v. Klusmeier*, 153 Ky. 153, Ann. Cas. 1915D 342, 164 S. W. 319, 50 L.R.A. (N.S.) 1100. That case was decided without discussion on the authority of *Lochhead v. Jensen* and *Patnode v. Foote*. The next is *Fitzjarrell v. Boyd*, 123 Md. 497, 91 Atl. 547. That case was decided on the authority of *Huddy on Automobiles*, § 113; *Patnode v. Foote*, *Beard v. Klusmeier*, *Pigeon v. Lane*, *Birch v. New York*, *Mayberry v. Sivey* and *Lochhead v. Jensen*. After citing these authorities the court said at page 506: "The rule announced in these cases, we think, is the true and correct rule, and is controlling on this appeal." There was no further discussion of the principles involved or of other decisions.

It is apparent from this review of the decisions in conflict with *West v. Poor* that the question whether they are or are not correct [494] depends upon the question whether degrees of negligence are known to the common law and whether the rule of *Corrigan v. Union Sugar Refinery* governs the liability of a defendant who invites a plaintiff to ride *gratis* in his carriage. Apart from the ques-

tion whether degrees in negligence are a thing known to the common law (which was in reality what was decided in the negative in *Mayberry v. Sivey*, 18 Kan. 291) we are of opinion that these cases are not well decided and that they should not be followed.

Mr. Wharton is not alone in the conclusion reached by him that no such a thing as different degrees in negligence is known to the common law. It was said by Lord Cranworth (then Baron Rolfe) in *Wilson v. Brett*, 11 M. & W. (Eng.) 113, 115, 116, that: "I said I could see no difference between negligence and gross negligence—that it was the same thing, with the addition of a vituperative epithet." In *Beal v. South Devon Ry.*, 3 H. & C. (Eng.) 337, 341, Crompton, J., in delivering the judgment of the Exchequer Chamber said that it was a mistake to say that there was no difference between ordinary and gross negligence "because a strict line of demarcation cannot be drawn between them." And in *Grill v. General Iron Screw Collier Co.*, L. R. 1 C. P. (Eng.) 600, both Willes, J., and Montague Smith, J., expressed their dissatisfaction with the term gross negligence. Willes, J., went so far as to say, at page 612: "No information, however, has been given us as to the meaning to be attached to gross negligence in this case; and I quite agree with the dictum of Lord Cranworth in *Wilson v. Brett* that gross negligence is ordinary negligence with a vituperative epithet,—a view held by the Exchequer Chamber: *Beal v. South Devon R. Co.* [3 H. & C. (Eng.) 337]. Confusion has arisen from regarding negligence as a positive instead of a negative word." But it is probable that an end was put in England to these objections to the term gross negligence by the decision of the Privy Council in *Giblin v. McMullen*, L. R. 2 P. C. 317, the judgments of which, while not binding on the High Court, are "entitled to very great weight indeed." *Dulieu v. White* [1901] 2 K. B. 669, at page 677. That was a case in its dramatic as well as in its legal aspects like *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168, and it was largely upon the authority of the decision in *Foster v. Essex Bank* that *Giblin v. McMullen* was decided. In delivering the judgment [495] of the Privy Council in *Giblin v. McMullen*, Lord Chelmsford said at pages 336, 337: "From the time of Lord Holt's celebrated judgment in *Coggs v. Bernard*, in which he classified and distinguished the different degrees of negligence for which the different kinds of bailees are answerable, the negligence which must be established against a gratuitous bailee has been called 'gross negligence.'" After referring to Lord Cranworth's observation in *Wilson v. Brett* and to the fact that "this critical observation has been since approved of by other eminent judges," he said:

"Of course, if intended as a definition, the expression 'gross negligence' wholly fails of its object. But as there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the term may be usefully retained as descriptive of that difference. . . . No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a bailee must exercise corresponds with the degree of negligence for which he is responsible, and there would be the same difficulty in defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility. In truth, this difficulty is inherent in the nature of the subject, and though degrees of care are not definable, they are with some approach to certainty distinguishable." *Giblin v. McMullen*, ubi supra, established the rule laid down by Chief Justice Holt in *Coggs v. Bernard*, 2 Ld. Raym. 909, 913, that to charge a defendant in case of gratuitous bailment the plaintiff must prove gross negligence, and that rule has been applied in the only cases of gratuitous undertakings which have arisen in England since then. In *Moffatt v. Bateman*, L. R. 3 P. C. 115, the question to be decided in the case at bar was before the court. It was held by the Privy Council that, in case of an invitation to ride *gratis* in the defendant's carriage, to make out liability the plaintiff had to prove gross negligence. And in *Coughlin v. Gillison*, [1899] 1 Q. B. 145, it was decided that, in the case of a gratuitous lending of an engine for the sole benefit of the borrower, the borrower to make out liability had to prove a gross neglect on the part of the lender. In all three of these cases the decision was that the plaintiff took nothing because he had failed to make out gross negligence.

In *Philadelphia, etc. R. Co. v. Derby*, 14 How. 468, 485, [496] 486, 14 U. S. (L. ed.) 502, Grier, J., said: "It is true a distinction has been taken, in some cases, between simple negligence, and great or gross negligence; and it is said, that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference (if it be capable of definition), as the verdict has found this to be a case of gross negligence. When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.'" In *The New World v. King*, 16 How. 469, 474, 14 U. S. (L. ed.)

1019, Curtis, J. (after pointing out that the appellee was lawfully upon the steamboat of the plaintiff) said that it was not necessary to decide whether "precisely the same obligations in all respects" attached in that case as in case of an ordinary passenger paying fare. He then referred to the statement of Grier, J., in *Philadelphia, etc. R. Co. v. Derby*, 14 How. 468, 14 U. S. (L. ed.) 502, which we have just quoted, and he added: "We desire to be understood to reaffirm that doctrine." In addition he said: "The theory that there are three degrees of negligence, described by the terms slight, or ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice;" he then refers among other cases to *Wilson v. Brett*, 11 M. & W. (Eng.) 113, and adds: "Some of the ablest commentators on the Roman law, and on the civil code of France, have wholly repudiated this theory of three decrees of diligence." See also in this connection *Milwaukee, etc. R. Co. v. Arms*, 91 U. S. 489, 493-495, 23 U. S. (L. ed.) 374; *Indianapolis, etc. R. Co. v. Horst*, 93 U. S. 291, 295, 296, 23 U. S. (L. ed.) 898; *Northern Pac. R. Co. v. Adams*, 192 U. S. 440, 24 S. Ct. 408, 48 U. S. (L. ed.) 513. But in the case of *New York Cent. R. Co. v. Lockwood*, 17 Wall. 357, 382, 383, 21 U. S. (L. ed.) 634, Bradley, J., said: "We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very [497] little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply 'negligence.' And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfillment of various contracts, we think they go too far: since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these

distinctions by enacting that 'every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it.' Toullier, in his commentary on the code, regards this as a happy thought, and a return to the law of nature. But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice."

The last word of importance upon this point to be found in the decisions of the Supreme Court of the United States is in *Preston v. Prather*, 137 U. S. 604, 11 S. Ct. 162, 34 U. S. (L. ed.) 788. In that case the rule in *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168, was repudiated. In that case Field J., said (pages 608, 609): "No one taking upon himself a duty for another without consideration is bound, either in law or morals, to do more than a man of that character would do generally for himself under like conditions. The exercise of reasonable care is in all such cases the dictate of good faith. . . . But what will constitute such reasonable care will vary with the nature, value and situation of the property, the general protection afforded by the police of the community against violence and crime, and the bearing of surrounding circumstances upon its security. . . . The general doctrine, as stated by text writers and in judicial decisions, is that gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping. But gross negligence in such cases [498] is nothing more than a failure to bestow the care which the property in its situation demands; the commission of the reasonable care required is the negligence which creates the liability; and whether this existed is a question of fact for the jury to determine, or by the court where a jury is waived. See the *New World v. King*, 16 How. 469, 474, 475, [14 U. S. (L. ed.) 1019]; *New York Cent. R. Co. v. Lockwood*, 17 Wall. 357, 383 [21 U. S. (L. ed.) 627]; *Milwaukee, etc. R. Co. v. Arms*, 91 U. S. 489, 494 [23 U. S. (L. ed.) 374]."

In this Commonwealth the judges seem to have had little if any difficulty in recognizing degrees of negligence in case of gratuitous bailments but to have had Lord Cranworth's difficulty (or rather the difficulty which those who followed Lord Cranworth put in articulate form) in other cases. The remarks to which we referred but did not set forth when we quoted the opinion of Chief Justice Shaw in *Whitney v. Lee*, 8 Met. (Mass.) 91, 93, were these: "The law has endeavored to make a distinction in the degrees of care and diligence to which different bailees are bound: distinguishing between gross negligence, ordinary negligence, and slight negligence; though it is often difficult to mark the line

where the one ends and the other begins. And it must be often left to the jury, upon the nature of the subject matter, and the particular circumstances of each case, with suitable remarks by the judge, to say whether the particular case is within the one or the other." In the later case of *Chandler v. Worcester Mutual F. Ins. Co.* 3 Cush. (Mass.) 328, Chief Justice Shaw was more pronounced in his views as to degrees of negligence. That was a case in which the defendant set up in defence to a claim on a fire insurance policy the fact that the fire had taken place through the gross neglect of the insured. After deciding that to make out the defence relied upon the insurance company had to "show a culpable recklessness and indifference to the rights of others," Chief Justice Shaw added at page 331: "The terms 'slight negligence,' 'want of ordinary care,' and 'gross negligence,' are useful in their way, but they are not precise and exact enough, without a statement of the facts designated by them, to enable a court to judge of the rights of the parties thereby affected. The proper business of jurisprudence seems to be, to take a series of facts and circumstances, conceded or proved, and to declare what are the rights of the parties arising out of them." In *Smith v. Westfield First Nat. Bank*, 99 Mass. 605, 97 Am. Dec. 59 (a case of gratuitous bailment), Wells, J., ends the opinion at page 612 [499] in these words: "But the court are of opinion that the whole testimony did not furnish such evidence as would warrant a jury in finding that there was gross negligence on the part of the bank, and that the loss of the bonds resulted from such negligence. *Giblin v. McMullen*, L. R. 2 P. C. (Eng.) 317. The exceptions must therefore be sustained upon that ground." *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548, was a case in which the defendant (the owner of the premises in question then leased to the plaintiff's husband) had undertaken to repair them *gratis*. The presiding judge told the jury that the defendant was liable if the premises were "not put in safe repair, by reason of the want of ordinary skill or care in the workmanship or selection of materials on the part of the defendant." The defendant contended in support of an exception taken to this part of the charge "that upon a gratuitous undertaking of this nature the defendant could only be held responsible for bad faith or for gross negligence." His contention was not sustained and his exceptions were overruled. Ames, J., in delivering the opinion of the court said at pages 479, 480: "It appears to us that this is one of the cases in which there is no practical difference between gross negligence and the want of ordinary care and skill; and that the omission of what Baron Rolfe calls a mere vituperative

epithet is not a valid objection to the judge's charge. The true question for the jury was, whether the defendant had discharged the duty which he had assumed, with that due regard to the rights of the other party which might reasonably have been expected of him under all the circumstances." After referring to the case of *The New World v. King*, 16 How. 469 [14 U. S. (L. ed.) 1019], he added, "The law furnishes no definition of gross negligence as distinguished from want of reasonable and ordinary care, which can be of any practical utility. The question of reasonable care must always depend on the special circumstances of each case, and is almost of necessity a question of fact rather than of law. The degrees of negligence, so often spoken of in text books, do not admit of such precision and exactness of definition as to be of any practical advantage in the administration of justice, without a detail of the facts which they are intended to designate. *The New World v. King*, 16 How. 469 [14 U. S. (L. ed.) 1019]; *Chandler v. Worcester Mutual F. Ins. Co.* 3 Cush. (Mass.) 328; *Wilson v. Brett*, 11 M. & W. (Eng.) 113; *Grill v. General Iron Screw Colliery Co. L. R. 1 C. P. (Eng.) 600*." The same learned judge in delivering the opinion of this [500] court in the later case of *Jenkins v. Bacon*, 111 Mass. 373, 15 Am. Rep. 33 (a case of gratuitous bailment), said at page 376: "According to the well settled rule, the bailee who acts without compensation can only be held responsible for bad faith, or gross negligence, if the deposit should be lost or injured while in his custody. *Whitney v. Lee*, 8 Metc. (Mass.) 91; *Foster v. Essex Bank*, 17 Mass. 479." In *Smith v. Postal Tel. Cable Co.* 174 Mass. 576, at page 578, 55 N. E. 380, 75 Am. St. Rep. 374, 47 L.R.A. 323, Holmes, C.J., said: "If the rule is to be adhered to that there can be no recovery for sickness due to the purely internal operation of fright caused by a negligent act, it cannot be avoided by calling the negligence gross and alleging that the defendant ought to have known that the result complained of would follow his act. Negligence with reference to a given consequence means that the consequence ought to have been foreseen, and although the distinction between gross negligence and negligence is known to the law, still, having regard to the grounds for the above-mentioned rule, to allow it to be avoided by such an allegation would be to do away with it."

Apart from the opinions expressed in these common law cases, the question whether in the administration of justice it is possible or practicable to draw a distinction between ordinary and gross negligence has been put to rest in this Commonwealth by decisions under statutes which have made a distinction be-

tween the two. It was provided as early as 1840 (St. 1840, c. 80) and has been continued in a number of statutes enacted since then (for a collection of these statutes see *Hudson v. Lynn*, etc. R. Co. 185 Mass. 510, 71 N. E. 66; *Brooks v. Fitchburg*, etc. St. R. Co. 200 Mass. 8, 86 N. E. 289, that various persons and corporations should be liable to a penalty if the death of a person was caused through the gross negligence of their servants.¹ And by St. 1871, c. 352, now R. L. c. 111, § 268, it was provided that a railroad corporation should be liable for an accident at a grade crossing where the statutory signals have not been given unless "the person injured or the person who had charge of his person or property was, at the time of the collision, guilty of gross or wilful negligence . . . and that such gross or wilful negligence . . . contributed to the injury." Both sets of statutes made a distinction between gross and ordinary negligence. Although judges of this court have had the [501] same difficulty in determining the meaning of gross negligence under these statutes that they had as to the meaning of that term at common law (see *Knowlton, J.*, in *Phelps v. New England R. Co.* 172 Mass. 98, 100, 51 N. E. 522, and *Hammond, J.*, in *Evensen v. Lexington*, etc. St. R. Co. 187 Mass. 77, 79, 72 N. E. 355), yet it is settled that the term gross negligence in these statutes means a materially greater want of care than in case of ordinary negligence. The distinction between the two has been recognized in numberless cases, but the meaning of gross negligence as distinguished from a want of ordinary care has been defined (in the way stated above) in the following cases under the death statutes: *Galbraith v. West End St. R. Co.* 165 Mass. 572, 43 N. E. 501; *Morey v. Gloucester St. Ry. Co.* 171 Mass. 165, 50 N. E. 530; *Phelps v. New England R. Co.* 172 Mass. 98, 51 N. E. 522; *Evensen v. Lexington*, etc. St. R. Co. 187 Mass. 77, 72 N. E. 355; *Brennan v. Standard Oil Co.* 187 Mass. 376, 73 N. E. 472; *Dolphin v. Worcester Consol. St. R. Co.* 189 Mass. 270, 75 N. E. 635; *Spooner v. Old Colony St. R. Co.* 190 Mass. 132, 76 N. E. 660; *Pearlstein v. New York*, etc. R. Co. 192 Mass. 20, 77 N. E. 1024; *Manning v. Conway*, 192 Mass. 122, 78 N. E. 401; *Lanci v. Boston El. R. Co.* 197 Mass. 32, 83 N. E. 1; *Dimauro v. Linwood St. R. Co.* 200 Mass. 147, 85 N. E. 894; *Devine v. New York*, etc. R. Co. 205 Mass. 416, 91 N. E. 522; *Renaud v. New York*, etc. R. Co. 206 Mass. 557, 92 N. E. 710; *Adams v. Boston El. R. Co.* 214 Mass. 1, 100 N. E. 1012. And it has been defined in the same way in three cases arising under the statutes as to the failure to give signals at grade crossings in R. L. c. 111, § 268; *Copley v. New Haven*, etc.

Co. 136 Mass. 6; *Debbins v. Old Colony R. Co.* 154 Mass. 402, 28 N. E. 279; *Emery v. Boston*, etc. R. Co. 173 Mass. 136, 53 N. E. 278. In further explanation of the meaning of gross negligence under these statutes it is settled that it is something less than the wilful, wanton and reckless conduct which makes a defendant liable to a trespasser. *Banks v. Braman*, 188 Mass. 367, 74 N. E. 594. Note to *Fitzmaurice v. New York*, etc. R. Co. 192 Mass. 159, 162, 7 Ann. Cas. 586. 78 N. E. 418, 116 Am. St. Rep. 236. 6 L.R.A. (N.S.) 1146; *Lanci v. Boston El. R. Co.* 197 Mass. 32, 83 N. E. 1.

Whether Mr. Wharton and the commentators referred to by Mr. Justice Curtis in *The New World v. King*, *ubi supra*, are right or wrong as to the existence of degrees of negligence in the civil law, it is plain that in this Commonwealth that distinction exists. And it is not necessary in deciding that question [502] to go outside of the law which is administered here. The distinction was first put forward in England in 1703 in *Coggs v. Bernard*, 2 Ld. Raym. 909. It was adopted in this Commonwealth in *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168, in 1821, and the rule adopted in that case was (in the words of Chief Justice Shaw in *Whitney v. Lee*, 8 Metc. (Mass.) 91) "settled, on great consideration, and after full deliberation . . . and this supersedes the necessity of any full review of the authorities." The decision in *Foster v. Essex Bank* (involving the distinction between gross and ordinary negligence) was affirmed by this court in *Whitney v. Lee*, *supra*; *Smith v. Westfield First Nat. Bank*, 99 Mass. 605, 97 Am. Dec. 59, and *Jenkins v. Bacon*, 111 Mass. 373. And, in spite of *Preston v. Prather*, 137 U. S. 604, 11 S. Ct. 162, 34 U. S. (L. ed.) 788) that is the rule adopted generally in other jurisdictions. *Giblin v. McMullen*, L. R. 2 P. C. (Eng.) 317. *Hibernia Bldg. Assoc. v. McGrath*, 154 Pa. St. 296, 26 Atl. 377, 35 Am. St. Rep. 828; *Storer v. Gowen*, 18 Me. 174; *Michigan Cent. R. Co. v. Carrow*, 73 Ill. 348, 24 Am. Rep. 248; *Illinois Cent. R. Co. v. Tronstine*, 64 Miss. 834, 2 So. 255. The doubt as to the existence of the distinction raised by the opinion of Ames, J., in *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548, must be taken (even without regard to the subsequent opinion of the same learned judge in *Jenkins v. Bacon*) to have been a doubt which on a review of all the common law authorities no longer exists in this Commonwealth. In addition that doubt has been put at rest so far as this Commonwealth is concerned by the decisions of this court under statutes which made the distinction between gross and ordinary negligence. No one familiar with the jurisprudence of Massa-

¹ The word "gross" was stricken out of the street railways by St. 1907, c. 392.

present statute in the case of railroads and

chusetts could question to-day the existence in this Commonwealth of the distinction between gross and ordinary negligence.

In spite of the decisions in *Giblin v. McMullen*, L. R. 2 P. C. 317; *Moffatt v. Bateman*, L. R. 3 P. C. 115, and *Coughlin v. Gillison* [1899] 1 Q. B. 145, a doubt arises as to the measure of liability in England in case where a person enters upon a gratuitous undertaking. That doubt arises from the terms used by Chief Justice Holt in stating the liability of a bailee in case of the sixth sort of bailment discussed by him in his opinion in *Coggs v. Bernard*, 2 Ld. Raym. 909, 913, and those used by Collins, M. R., in delivering the judgment of the court of appeals in *Harris v. Perry* [1903] 2 K. B. 219, 226. In delivering judgment in *Coggs v. Bernard*, Lord Holt first laid it down (see page 913) that, [503] in case of a gratuitous bailment of goods for the sole benefit of the bailee, the bailee "is not answerable, if they are stolen without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect." This was the first sort of bailment considered by Chief Justice Holt in *Coggs v. Bernard*. When the Chief Justice came to the sixth sort of bailment considered by him in that judgment, namely, an undertaking to transport goods where the bailee was to have no reward for his pains he said (pages 918, 919): "Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3, 100, it is called *mandatum*. . . . It is what we call in English acting by commission. And if a man acts by commission for another *gratis*, and in the executing his commission behaves himself negligently, he is answerable. . . . This undertaking obliges the undertaker to a diligent management." *Harris v. Perry*, *ubi supra*, was a case in which an inspector of work being done in the construction of an underground railway at the time of the accident was riding *gratis* for his own convenience at the invitation of one of the defendant's officers on the engine of a construction train in place of using a plank walk constructed by the defendant to enable inspectors to oversee the work. While so riding he was injured by the negligence of the defendant's agents. In delivering the judgment of the Court of Appeal in that case, Collins, M. R., after stating that there was evidence of a trap and so liability even if the plaintiff was a licensee, said: "At all events, I think it was competent for the jury to find, as they must be taken to have found, a failure of that ordinary care which is due from a person who undertakes the carriage of another gratuitously. . . . There is an obvious difference

between the measure of confidence reposed and responsibility accepted in the case of a person who merely received permission to traverse the premises of another, and in the case where a person or his property is received into the custody of another for transportation; see in the case of goods, *Southcote's Case*, cited in *Coggs v. Bernard*, and the notes thereto." It would appear on the first reading of these two judgments that both the learned judges intended to make a distinction between the care which has to be exercised in case of a gratuitous bailment [504] and that which has to be exercised in case of a gratuitous undertaking of transportation. But upon a full consideration of the matter it cannot be taken that either of them intended to make that distinction.

Coggs v. Bernard was before the court on a motion in arrest of judgment after a verdict for the plaintiff. The motion in arrest of judgment was based on the ground and solely on the ground that it was not alleged in the declaration that the defendant was to be paid for his pains. All that was before the court was the proposition that a defendant could be liable in case of a gratuitous transportation. No question was raised as to the measure of the defendant's liability in a case of a gratuitous transportation if there was liability in such a case. The Chief Justice disposed of the contention that a gratuitous undertaking to transport was a *nudum pactum* by pointing out the distinction between the case where a defendant fails to enter upon a gratuitous undertaking and the case where having entered upon it he is negligent in carrying it out. The fact that in stating that there was liability in a case where the defendant had entered upon a gratuitous undertaking Chief Justice Holt was not careful to state with accuracy the measure of that liability cannot be taken to be decisive. That question was not up for decision at that time.

The same is true of that part of the judgment of Collins, M. R., in *Harris v. Perry* quoted above. The contention in *Harris v. Perry* to which Collins, M. R., was addressing himself was that the plaintiff in that case was a licensee and that since he was a licensee he could not recover at all. In addressing himself to that contention Collins, M. R., said (first) there was evidence of a trap, and (secondly) that apart from that there was evidence on which the jury could find that there was a failure of care on the part of the defendant. To be sure he spoke of a lack of ordinary care in place of gross negligence. When one takes into account the fact that gross negligence is a term with which the English judges have quarrelled continually, it is perhaps natural that Collins, M. R., did not go out of his way to speak of gross negligence and did speak of "ordinary care." Moreover

it is to be noticed that what Collins, M. R., said was: "a failure of that ordinary care which is due from a person who undertakes the carriage of another gratuitously."

[505] But upon the question of the true interpretation of these two judgments there is more to be said. In his note to *Coggs v. Bernard*, Mr. Smith has this to say at pages 98, 103, 104, 1 Smith's Lead. Cas. (1st Eng. ed.): "6. *Mandatum*. . . . The sixth and last class of bailments is (according to Lord Holt) *mandatum*, or a delivery of goods to somebody who is to carry them, or do something about the *gratis*. And this might have been classed under the same head with *depositum*. For as the *keeping*, *carrying*, and *working upon* goods for hire are all included, both by Lord Holt and Sir W. Jones, under the same head, there seems no good reason why the *keeping*, *carrying*, and *working upon* them *gratuitously* should not have been so likewise. Certain it is, that the liabilities of the *depository* and of the *mandatory* are precisely the same; both (in the absence, at least, of a contract in special terms) are bound to *slight diligence*, and to slight diligence only, and liable for nothing short of *gross negligence*, the reason in each case being the same, namely, that neither is to receive any reward for his services. Accordingly, whenever the extent of a mandatory's liability is discussed we find the cases respecting that of depositaries cited, and relied upon, and so *vice versa*. The cases of *Beauchamp v. Powley*, 1 M. & Rob. 38, *Shiells v. Blackburne*, 1 H. Bl. 158, and *Dartnall v. Howard*, 4 B. & C. 345, 10 E. C. L. 351, the facts of which are respectively stated at the commencement of this note, were decisions on the responsibility of *mandataries*, and from those, as well as from the general principle, it appears that such bailees are liable for *gross negligence*, and for that only." It is to be observed in connection with Mr. Smith's statement ("accordingly, whenever the extent of a mandatory's liability is discussed we find the cases respecting that of depositaries cited and relied upon") that *Harris v. Perry*, a case of a gratuitous *mandatum*, was decided on the authority of *Southcote's Case*, 4 Coke 83 b, a case of a gratuitous *depositum*. And that is true of *West v. Poor*, 196 Mass. 183, 81 N. E. 960, 124 Am. St. Rep. 541, 11 L.R.A. (N.S.) 936, also; that case (a case of a gratuitous *mandatum*) was decided on the authority of *Whitney v. Lee*, 8 Metc. (Mass.) 91, which was the case of a gratuitous *depositum*. There is more to be said with respect to the proper interpretation of Lord Holt's judgment in *Coggs v. Bernard* concerning a distinction between a gratuitous bailment and an undertaking of gratuitous transportation. That is that the third and fourth editions of Smith's Leading Cases were edited by [506] Mr. (afterwards Mr. Justice)

Keating and by Mr. (after Mr. Justice) Willes and that the seventh, eighth and ninth editions of Smith's Leading Cases were edited (with Mr. Arbuthnot) by Lord (then Mr.) Collins, who, when Master of the Rolls delivered the judgment in *Harris v. Perry*. The statement of Mr. Smith quoted above (that there is no distinction between the measure of the liability in case of a gratuitous bailment and that in a case of gratuitous transportation) has been left untouched by these three learned editors of that learned work. The fact that this statement was left untouched by Lord Collins would seem to be decisive of the question now under consideration so far as Lord Collins's judgment in *Harris v. Perry*, is concerned. There were some additions made in these editions to Mr. Smith's statement but these additions did not even modify much less change the statement of Mr. Smith which we have set forth above. These additions may be found at page 104 in the third English edition, page 184 in the fourth English edition, page 247 in the seventh English edition, page 261 in the eighth English edition, and page 397 in the ninth American edition which is a reprint (with additional notes) of the ninth English edition. A ruling at *nisi prius* upon the question now before us was recently made in *Karavias v. Gallinocos*, 143 L. T. N. S. 237. In that case the jury found that the defendant was not guilty of gross but was guilty of ordinary negligence. Mr. Justice Avory (who made the ruling) stated that the question "in the state of the authorities [was] a fit question to be taken to the Court of Appeal." but, since judgment was entered for the plaintiff in *Harris v. Perry*, *ubi supra*, on a finding that the defendant in that case was guilty of ordinary negligence, he felt bound to enter judgment for the plaintiff on the findings made in *Karavias v. Gallinocos*.

It would seem that in England the liability of a gratuitous bailee and the liability of one who undertakes a gratuitous transportation is the same. And to this one thing more must be added, namely: However much the English judges have quarrelled with the meaning of the words *gross negligence*, it is the fact that when pushed to a decision the judges of England have invariably held that to make out liability in case of a gratuitous undertaking (no matter what the nature of the gratuitous undertaking was) *gross negligence* has to be made out. *Giblin v. McMullen*, L. R. 2 P. C. [507] 317, *Moffatt v. Bateman*, L. R. 3 P. C. 115, and *Coughlin v. Gillison* [1899] 1 Q. B. 145.

In holding that, to charge a defendant with liability in case of a gratuitous undertaking to transport a person, the plaintiff must prove *gross negligence* because that is the measure of liability in case of the gratui-

tous undertaking to keep or carry goods, it is not to be understood that gross negligence in the two cases is the same thing. In all cases (no matter whether the case is one of ordinary or of gross negligence) the consequences likely to result is a fact to be taken into consideration in determining what ought to be done by the defendant to fulfil the measure of his liability. For example: It might be held that the omission to do a certain thing in the transportation of goods was not negligence and that by reason of the seriousness of the consequences likely to result the omission to do the same thing in case of the transportation of a person would be negligence; and so in case of gross in place of ordinary negligence. For this general principle see, for example, *Hartford v. New York, etc. R. Co.* 184 Mass. 365, 68 N. E. 835; *Mullins v. New York, etc. R. Co.* 201 Mass. 38, 87 N. E. 476; *Martin v. Boston, etc. St. R. Co.* 205 Mass. 16, 91 N. E. 159.

This brings us to the consideration of *Davis v. Central Cong. Soc. etc.* 129 Mass. 367, 37 Am. Rep. 368, a case upon which the plaintiff has placed great reliance. In that case it was decided that the defendant society was liable to the plaintiff, who had been invited to attend a conference held in the defendant society's church at which the plaintiff was not a delegate, for injuries suffered by the plaintiff through a dangerous condition in the path leading to the church upon the jury finding that the defendant was negligent in the matter. That case has usually been cited when the doctrine that a charity is not liable for torts under the decision in *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 520, has been set up in defence. It has never been affirmed as a decision upon the duty owed by a defendant who invites a plaintiff to enter upon his (the defendant's) land solely for his (the plaintiff's) purposes unless it can be held to have been affirmed or approved on that point by what was said by Barker, J., in *Chapin v. Holyoke Y. M. C. A.* 165 Mass. 280, 281, 42 N. E. 1130. Of the decision in *Davis v. Central Cong. Soc. etc.* it is to be observed that it [508] was decided at a time when the distinction between a person going on the premises of the defendant for business to be transacted with the defendant and persons going upon those premises for business of their own (*Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463, and *Hart v. Cole*, 156 Mass. 475, 31 N. E. 644, 16 L.R.A. 557) had not been established. Were the case to arise to-day it might be contended that since the plaintiff in *Davis v. Central Cong. Soc. etc.* went on the defendant's premises for her own purposes she was in no better position than the plaintiffs in *Plummer v. Dill* and *Hart v. Cole*. It is hard to see a distinction

between the rights of a plaintiff expressly invited to attend a church conference to which she was not a delegate and a plaintiff impliedly invited to attend a funeral or a wake. But however that may be the decision in *Davis v. Central Cong. etc. Soc.* has no bearing on the question now before us. Whether one invited to come on to the defendant's premises for his (the invitee's) purposes alone takes them as he finds them or can hold the defendant for negligence in case the premises are in a dangerous condition, is a question of the obligation assumed by one inviting another to come upon his land; while the extent of the obligation assumed by inviting one to travel *gratis* in the invitor's carriage is a question of the liability of one who enters upon a gratuitous undertaking whether it be a gratuitous undertaking to keep, carry or lend.

As matter of authority *West v. Poor*, 196 Mass. 183, 81 N. E. 960, 124 Am. St. Rep. 541, 11 L.R.A. (N.S.) 936, ought not to be overruled. It must be taken to be established in this Commonwealth that to charge a gratuitous bailee the plaintiff must make out gross negligence on his part. *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *Whitney v. Lee*, 8 Metc. (Mass.) 91. *Smith v. Westfield First National Bank*, 99 Mass. 605, 97 Am. Dec. 59; *Jenkins v. Bacon*, 111 Mass. 373, 15 Am. Rep. 33. The measure of liability of one who undertakes to carry *gratis* is the same as that of one who undertakes to keep *gratis*. To this is to be added the fact that in every case in England in which the question of the measure of liability of a person who enters upon any gratuitous undertaking has arisen the same conclusion has been reached. *Giblin v. McMullen*, L. R. 2 P. C. 317. *Moffatt v. Bateman*, L. R. 3 P. C. 115; *Coughlin v. Gillison* [1899] 1 Q. B. 145. From an examination of the cases, apart from *Gill v. Middleton*, in which a contrary conclusion has been reached, it is apparent that they depend upon the decision in *Corrigan v. Union Sugar Refinery* [509] 98 Mass. 577, 96 Am. Dec. 685, or upon the proposition that degrees in negligence are not known to the common law. We are of the opinion in the first place (for reason already stated) that the principle of *Corrigan v. Union Sugar Refinery* does not bear upon the measure of liability of one who invites another to travel *gratis* in his carriage; and in the second place that in this Commonwealth at any rate degrees of negligence are known to the law. *Gill v. Middleton* was decided on the authority of cases in England and in the Supreme Court of the United States since repudiated in *Giblin v. McMullen*, L. R. 2 P. C. 317, and in *New York Cent. R. Co. v. Lockwood*, 17 Wall. 357, 382, 383, 21 U. S. (L. ed.) 627. In *Gill v. Middleton* the proposi-

tion was stated that "The law furnishes no definition of gross negligence as distinguished from want of reasonable and ordinary care, which can be of any practical utility." That proposition is not law in this Commonwealth to-day. In addition the decision in *Gill v. Middleton* is in conflict with that in *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168, and the subsequent cases affirming that decision and with *West v. Poor*. We are of opinion that *Gill v. Middleton* and the cases following it¹ are not law in this respect and that they should be overruled in so far as they conflict with those cases. A word of explanation should be added with respect to what was said of *Gill v. Middleton* in the case of *Thomas v. Lane*, 221 Mass. 447, 109 N. E. 363, L.R.A.1916F 1077; *Gill v. Middleton* involved (*inter alia*) these two propositions, namely: (First) that a defendant who undertakes to do an act *gratis* for the benefit of the plaintiff is liable if guilty of the requisite negligence and (second) that since "the law furnishes no definition of gross negligence as distinguished from want of reasonable and ordinary care, which can be of any practical utility" the defendant is liable in such a case if the plaintiff proves that he was guilty of ordinary negligence. In *Thomas v. Lane*, 221 Mass. 447, 109 N. E. 363, L.R.A.1916F 1077, an attack was made upon the first of these two propositions. It was held that that attack had to fail. There was no occasion at that time to consider or rather to reconsider the second of these two propositions and that proposition was not then passed upon. So far as the first of these [510] two propositions is concerned *Gill v. Middleton* is law, as was stated in *Thomas v. Lane*, 221 Mass. 447, 449, 109 N. E. 363, L.R.A.1916F 1077, but so far as the second proposition is concerned that case is now overruled.

Approaching the question apart from authority we are led to the same conclusion. Justice requires that the one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay. There is an inherent difficulty in stating the difference between the measure of duty which is assumed in the two cases. But justice requires that to make out liability in case of a gratuitous undertaking the plaintiff ought to prove a materially greater degree of

negligence than he has to prove where the defendant is to be paid for doing the same thing. It is a distinction which seventy-five years' practice in this Commonwealth has shown is not too indefinite a one to be drawn by the judge and acted upon by the jury.

We are of opinion that the decision in *West v. Poor* should be affirmed and followed in the case at bar.

In the view which we have taken it has not been necessary to consider the doctrine of *Southcote v. Stanley*, 1 H. & N. (Eng.) 247, as to which see *Plummer v. Dill*, 156 Mass. 426, 427, 31 N. E. 128, 32 Am. St. Rep. 463; *Hart v. Cole*, 156 Mass. 475, 477, 31 N. E. 644, 16 L.R.A. 557.

The plaintiff has sought to bring this case within *Loftus v. Pelletier*, 223 Mass. 63, 111 N. E. 712, by suggesting that the jury could have found that the defendant gave the invitation to get the plaintiff's society at the time in question. In *Loftus v. Pelletier* the plaintiff had a right to be transported by reason of the fact that she had paid for such transportation by her services as a nurse. The transportation in the case at bar was gratuitous.

The entry must be
Judgment on the verdict.

NOTE.

The reported case discusses at considerable length the matter of degrees of negligence, and, overruling previous decisions, holds that there is a practical distinction between "gross negligence" and "the want of reasonable and ordinary care." Applying that ruling it is held that the owner of an automobile is not liable for personal injuries to a person riding gratuitously as an invited guest unless the injuries result from the "gross negligence" of the owner or his servant. The liability of the owner of an automobile for an injury to a person riding as a guest is discussed in the note to *Beard v. Klusmeier*, Ann. Cas. 1915D 342. As to the jurisdictions wherein the doctrine of comparative negligence is recognized, see the notes to *Chicago, etc. R. Co. v. Hamler*, 3 Ann. Cas. 42; *Belle Alliance Co. v. Texas, etc. R. Co.* 19 Ann. Cas. 1143; and *Bolin v. Chicago, etc. R. Co.* 81 Am. St. Rep. 928.

¹ The rule of *Gill v. Middleton* was applied in *Riley v. Lissner*, 160 Mass. 330, 35 N. E. 1130; *Buldra v. Henin*, 212 Mass. 275, 98 N. E. 863; *McLeod v. Rawson*, 215 Mass. 257, 102 N. E. 429, and it was referred to as law

in *Dix v. Old Colony St. R. Co.* 202 Mass. 518, 523, 89 N. E. 109, 24 L.R.A. (N.S.) 567, and in *Stewart v. Cushing*, 204 Mass. 154, 157, 90 N. E. 545.

PEOPLE

v.

STEEPLECHASE PARK COMPANY
ET AL.

New York Court of Appeals—July 11, 1916.

218 N. Y. 459; 113 N. E. 521.

Public Lands — Grant of Land under Navigable Waters — Restrictions in Grant.

Where a grant of public lands under navigable waters contains an express restriction against interference or obstruction with the free and unrestricted rights of public access and use, the grantee cannot maintain obstructions and devices in the maintenance of an amusement park which interfere with such public use.

Power of State to Make Grant.

The commissioners of the land office, under Public Lands Law (Consol. Laws, c. 46), § 75, and Const. art. 5, §§ 5, 6, have authority to make unqualified, unrestricted grants of lands under water between high and low water marks.

[See note at end of this case.]

Limitations on Unrestricted Grant.

A grant of public lands under navigable water containing no restrictions is held to be an unqualified grant of the fee therein, and not subject to any easement in favor of the public.

Same.

Where the state through its land commissioners unqualifiedly granted to defendant lands under navigable water between high and low water marks, the exclusive use and right of possession vested in the grantee, and the use of such lands as an amusement park does not affect the validity of the grant.

Same.

Fences, barriers, platforms, pavilions, and other structures of a private amusement park, constructed by the grantee on lands under navigable water between high and low water mark, although an interference with the public use of, and access to, such lands cannot be enjoined, where the grant of such lands from the state was unqualified.

People v. Steeplechase Park Co. 165 N. Y. App. Div. 231, modified.

Appeal from Appellate Division of Supreme Court, Second Judicial Department.

Action by People of State of New York, plaintiff, against Steeplechase Park Company et al., defendants. Judgment for plaintiff at Special Term of Supreme Court. Judgment affirmed by Appellate Division of Supreme Court. Defendants appeal. **MODIFIED.**

[460] The defendants, or one or more of them, are in possession of certain real property at Coney Island, in the county of Kings, extending from an avenue known as Surf avenue, southerly to high-water mark of the Atlantic ocean, a distance of about 845 feet on the westerly side thereof, and about 757 feet on the easterly side thereof. Said real property is about 633 feet wide and extends approximately from the westerly boundary of West Nineteenth street on the west to the easterly boundary of West Sixteenth street on the east. On this real property an amusement park is maintained.

The defendant Huber is found to be the owner of the fee of 291.71 feet in width of said real property along the westerly side thereof extending from high-water mark to Surf avenue. The defendant Steeplechase Company is found to be the owner of the fee of 148.63 feet in width of the real property adjoining on the east the said real property owned by the defendant Huber and which real property extends from high-water mark to Surf avenue.

The defendants Tilyou and Hogg are the owners of the fee of a part of said real property adjoining on the east [461] the parcel owned by the Steeplechase Company which part so owned by them is 131.11 feet wide and extends from high-water mark to said Surf avenue.

It does not appear who is the owner of the fee of the remaining about 56 feet in width of said real property making up the 633 feet in width referred to as extending from said high-water mark to Surf avenue. The land between high-water mark and low-water mark fronting the lands owned as aforesaid is 122 feet wide at the westerly end thereof—125 feet wide measured from the middle of said park—and 133 feet wide measured from the easterly side of said park. It does not appear that the state has ever granted the lands under water south of and opposite that part of the real property owned by the defendants Tilyou and Hogg, or that part of the real property described as adjoining their lands on the east.

The defendant Huber, on the 7th day of May, 1897, made application to the commissioners of the land office of this state for a grant of land under water adjacent to the property found to be owned by her in fee. On October 4, 1897, a grant was made to her of which the following is a copy:

"The People of the State of New York, by the Grace of God Free and Independent. To All to Whom These Presents Shall Come, Greeting:

"Know Ye, That, pursuant to a resolution of the Commissioners of our Land Office, dated the thirtieth day of September, 1897, we have

given and granted, and by these presents do give and grant unto Emilie Huber, her heirs and assigns, the land under water, and between high and low water mark, described as follows, to wit:

"All that certain piece or parcel of land under waters of the Atlantic Ocean, in front of and adjacent to upland of said Emilie Huber at Coney Island in the city of Brooklyn in our county of Kings described as follows, to wit:

[462] "Beginning at a point on the mean high water line of the Atlantic Ocean, where the same is intersected by the division line between old lot number twenty-eight and old lot number thirty-one of the Common Lands of the Town of Gravesend, said division line between the westerly line of the upland of Emilie Huber, and said point of intersection being located eight hundred and sixty-seven and thirty-three one-hundredths feet southerly from the southerly line of Surf Avenue, measured along said division line; running thence on a line parallel with West Nineteenth street south twenty-nine minutes, thirty seconds east fifteen hundred feet; thence north eighty-nine degrees, thirty minutes and thirty seconds east two hundred ninety-seven and seventy one-hundredths feet; thence on a line parallel with West Nineteenth street, north twenty-nine minutes, thirty seconds west fifteen hundred feet to mean high water line; thence along said mean high water line south eighty-nine degrees, thirty minutes thirty seconds west two hundred ninety-seven and seventy one-hundredths feet to the place of beginning, containing ten and one-fourth acres.

"In Testimony Whereof, We have caused these our Letters be made Patent, and the Great Seal of our said State to be hereunto affixed.

"Witness, FRANK S. BLACK,

Governor of our said State, at our City of Albany, the fourth day of

"[SEAL] October, in the year of our Lord one thousand eight hundred and ninety-seven.

"FRANK S. BLACK,

"Passed the Secretary's Office the 4th day of October, 1897.

"ANDREW DAVIDSON,

"Deputy Secretary of State."

Paul Weidmann, the predecessor in title of the defendant Steeplechase Company, on the 2d day of February, [463] 1898, obtained a grant from the commissioners of the land office, the material part of which is as follows: "The People of the State of New York, by the Grace of God Free and Independent. To All to Whom These Presents Shall Come, Greeting:

"Know Ye, That we have given and granted and by these presents do give and grant unto Paul Wiedmann, his heirs and assigns, the

land under water and between high and low water mark described as follows to wit:

. . . Containing five and one-eighth acres.

"Subject, however, to the restriction that the said party of the second part shall not erect or cause to be erected any fences or obstructions of any kind on the land under water as above described that will in any way obstruct or prevent any person or persons from having free and unmolested rights to cross and recross the said land under water between high and low water line as they now exist or as they may exist to the south of the said present high or low water line, but this restriction shall not apply to any of the lands under water which shall at any time be reclaimed by natural causes and building erected thereon."

In the year 1905 and thereafter the defendant Steeplechase Company erected upon said foreshore and have since there maintained obstructions of many kinds which interfered with and prevented the use of the foreshore by the public. The court found as a fact that the obstructions, naming them, are purportures and nuisances *per se*.

It is also found as a fact that for upwards of one hundred years last past the plaintiffs have had and now have the right to use the foreshore adjacent to Steeplechase Park at all times for the purpose of bathing, boating and fishing and the right of passage over such foreshore as incidental thereto. This action is brought to prevent the defendants from interfering with the plaintiffs in their right of passage over and use of such foreshore.

[464] Judgment was obtained in the action by which it is ordered and adjudged: "That the defendants are enjoined from maintaining the following structures, namely, the fences or barriers at either side of Steeplechase Park, the luncheon pavilion and the platform connecting the same with the pier, the roller coaster and marine horse railway, in so far that these structures or any of them project beyond the present high water line as shown on Plaintiff's Exhibit 12.

"It is Further Ordered and Adjudged:

That said defendants make suitable means of free passage and maintain the same under the pier; that the pipe under said pier be raised to a height of at least seven feet above the beach between high and low water line; that said defendants provide convenient means for passing over or around the landward end of the westerly jetty for foot passengers or vehicles, which passage must be left open for all persons freely to travel over; that the said defendants also make and maintain a suitable and convenient means for passage under Tilyou's Walk by persons on foot and for vehicles at all states of the tide.

"It is Further Ordered and Adjudged: That said defendants forthwith and within thirty days after service upon them or their

attorneys of a copy of this judgment, remove the following structures, namely: the easterly boundary fence, the fences upon the westerly jetty, the luncheon pavilion, the platform connecting the same with the pier, the roller coaster and marine horse railway, in so far as these structures, or any of them, project beyond the present high water line as shown on Plaintiff's Exhibit 12; and within said thirty days make a free passage under the pier, raise the pipe underneath it to a height of at least seven feet above the beach between high and low-water line, provide convenient means for passing over the westerly jetty or round the landward end for foot passengers or vehicles and provide suitable and convenient means for passage underneath Tillyou's [465] Walk by persons on foot and for vehicles at all states of the tide."

An appeal was taken from said judgment by the defendants, other than the defendant Hogg, to the Appellate Division of the Supreme Court, where the judgment was unanimously affirmed, and this appeal is taken from such judgment of affirmance.

The defendants Emilie Huber and George C. Tillyou have died since the commencement of this action and the executor of the will of each has been substituted in the action in place of such defendants severally. The interest of each has been referred to in this statement and will be referred to in the opinion as if the original parties had not died.

C. Walter Randall, Samuel S. Whitehouse and Frank Oberneir for Joseph Huber, as executor of Emilie Huber, appellant.

Andrew F. Van Thun, Jr. for Steeplechase Company et al., appellants.

Egburt E. Woodbury and Robert P. Beyer for respondent.

[467] CHASE, J.—So far as the judgment recovered relates to obstructions upon land below high-water mark other than land which is included within the description in the patent to Emilie Huber of 1897, it is fully sustained by the findings of fact included in the record, and by the law as stated by this court in many reported cases. Among such cases are *Brookhaven v. Smith*, 188 N. Y. 74, 11 Ann. Cas. 1, 8 N. E. 665, 9 L.R.A. (N.S.) 326; *Barnes v. Midland R. Terminal Co.* 193 N. Y. 378, 85 N. E. 1093, 127 Am. St. Rep. 962; *Barnes v. Midland R. Terminal Co.* 218 N. Y. 91, 112 N. E. 926.

The defendants are not entitled to maintain the obstructions erected by them below high-water mark adjacent and seaward from the Huber uplands because of any littoral rights in the owner of such upland. (See authorities last cited.) Their right, if any, to maintain such obstructions adjacent to said upland rests wholly upon the grant to Mrs.

Huber of 1897. It is necessary, therefore, to consider the *language* of the grant, the *intention* of the commissioners of the land office in making the grant, their *power* and *authority* to make the grant and the power and authority of the state to *authorize* a grant conveying every interest of the state, *jus privatum* and *jus publicum*, in lands below high-water mark. The cases last cited have no special bearing upon the questions relating to the Huber grant. The Huber grant is in the simplest form, absolute in terms, and by [468] express words gives and grants all of the land adjacent to the applicant's upland from high-water mark southward for fifteen hundred feet.

It is provided by statute that all letters patent shall be in such form as the commissioners of the land office direct. (Public Lands Law, § 5.)

The intention of the commissioners of the land office in executing the grant to Mrs. Huber is quite conclusively shown by the proceedings before them upon her application for the grant. In her application for the grant, made pursuant to the statute, she not only stated in general terms her desire to purchase the lands therein specifically described, but she expressly stated that "it is the intention of the undersigned (Mrs. Huber) to apply for an absolute title in fee simple to said lands under water." It appears from the minutes of the land board that her application was referred to the state engineer and surveyor, a member of the board, and that he reported adversely to her application. The matter was then, upon motion, laid upon the table, and at a subsequent meeting, after a report from the comptroller as to the value of the property in which he stated "that said land, containing 10½ acres, is appraised at \$580.00 for restricted, and at \$871.25 for all beneficial enjoyment; and that the appraiser's report, and his bill and receipt for \$8.05 for expenses incurred in making the appraisal, are enclosed herewith. In my opinion \$30.00 in addition to above costs of appraisal should be charged for appraising said land,"—a motion was adopted by a vote of two to one (the state engineer and surveyor voting no) that letters patent issue to Mrs. Huber on presentation of the treasurer's receipt in accordance with the appraisal. Mrs. Huber then paid \$909.30, made up of \$871.25, the appraisal for "all beneficial enjoyment," \$30 costs of appraisal, and \$8.05, expenses incurred in making the appraisal, and the grant was executed and delivered.

It appears, therefore, that the commissioners of the land [469] office intended to give Mrs. Huber an unrestricted fee of the lands included in the grant. If it had been their intention to reserve to the public a right of passage over the lands included in the grant,

they would have provided therefor as they did in the grant to Paul Weidmann a few weeks later.

The pier which constitutes one of the obstructions of which the plaintiff complains was built by the permission of the secretary of war of the Federal government, which permission is dated November 10, 1913, and also by permission of the department of docks and ferries of the city of New York, which permission is dated December 18, 1903.

By chapter 67 of the Laws of 1786 the commissioners of the land office, then composed of the governor, lieutenant-governor, speaker of the assembly, secretary of state, attorney-general, treasurer and auditor, were given authority "to grant such and so much of the lands under water of navigable rivers, as they shall deem necessary to promote the commerce of this state. Provided always that no such grant shall be made in pursuance of this act to any person whatever other than the proprietor or proprietors of the adjacent lands." That statutory authority was practically re-enacted in the Revised Laws of 1813 (Vol. 1, page 292, chap. 74) and in the Revised Statutes of 1830 (Part 1, chap. 9, title 5, articles 1 and 4). Many other statutes were passed relating to the commissioners of the land office and their duties, and also authorizing grants to particular persons, municipal and other corporations, ever enlarging the power and authority of the commissioners to act for the state in granting lands under water as stated, and otherwise.

By the Constitution of 1846, article 5, section 5, the lieutenant-governor, speaker of the assembly, secretary of state, comptroller, treasurer, attorney-general and state engineer and surveyor were made commissioners of the land office and the powers and duties of the board [470] were stated as follows: "The powers and duties of the respective boards, and of the several officers in this article mentioned, shall be such as are now or hereafter may be prescribed by law." (Constitution, art. 5, § 6). These provisions were included without change in the Constitution of 1894. The commissioners of the land office are, therefore, constitutional officers having by the paramount law of the land constituting the direct voice of the people, such powers and duties as are prescribed by the legislature.

After the Constitution of 1846 the legislature, by chapter 283 of the Laws of 1850, provided: "The commissioners of the land office shall have power to grant in perpetuity or otherwise, so much of the lands under the waters of navigable rivers or lakes, as they shall deem necessary to promote the commerce of this state, or proper for the purpose of beneficial enjoyment of the same by the adjacent owner, but no such grant shall be made to any person other than the proprietor of the adjacent lands." (Section 1.)

By section 2 the powers conferred on the commissioners of the land office were extended "to lands under water, and between high and low-water mark in and adjacent to and surrounding Long Island. . . ."

The present statute is section 75 of the Public Lands Law (Cons. Laws, ch. 46), and it is substantially the same so far as now under consideration as it existed prior to 1897. (See Laws of 1894, chapter 317, sec. 70.) It provides: "This section authorizes grants of land under water

"1. Of navigable rivers and lakes.

"2. . . .

"3. . . .

"4. . . .

"5. Adjacent to and surrounding Long Island. . . .

"The commissioners of the land office may grant in perpetuity or otherwise, to the owners of the lands adjacent to [471] the lands under water specified in this section, to promote the commerce of this state or for the purpose of beneficial enjoyment thereof by such owners, or for agricultural purposes, so much of said lands under water as they deem necessary for that purpose. No such grant shall be made to any person other than the proprietor of the adjacent lands, and any such grant made to any other person shall be void. . . ."

From the first grant, made under the act of 1786 on December 29, 1786, to Esra Reed of lands under the waters of the Hudson river adjacent to his farm at Hudson, down to the present time, thousands of grants have been made, some with, and some without restrictions, some absolute, and some conditional. Upon the faith of the title of lands so conveyed in fee there are now docks, wharves, and buildings devoted to commerce, and also lands filled in, built upon and beneficially enjoyed worth millions of dollars. Titles founded upon such grants are to be found in every city, village and township bordering upon public waters.

In 1892 the attorney-general, replying to a communication of the land board relating to the form of a grant then under consideration, said, in substance, that a grant for beneficial enjoyment imports a fee, and that a provision should not be placed in the grant reserving to the people the privilege of entering upon and using the lands granted until the same shall be actually appropriated and applied to the purposes of commerce or for beneficial enjoyment. (Reports of Attorney-General of the State of New York, 1892, page 83.)

In 1891 the attorney-general, in response to a communication asking for the meaning of the phrases "purposes of commerce" and "beneficial enjoyment," said: "By the amendment of section 67 Revised Statutes supra in 1850 (Chapter 283) which conferred power upon the land board to make such grants for

beneficial enjoyment, the legislature assumed that grants for purposes of commerce [472] were of limited character and subject to legislative control. On the other hand a grant for 'beneficial enjoyment' to a grantee, his heirs and assigns, imports a fee and I think the legislature by said amendment of 1850 when it authorized the land board to make grants for beneficial enjoyment, intended a fee should be conveyed where the land granted was not necessary for purposes of commerce. (See Resolution adopted by Land Office March 6th, 1872.)" (Reports of Attorney-General of the State of New York, 1891, page 273.)

After the legislation mentioned and the approved practice of the commissioners of the land office in granting lands under water in fee for beneficial enjoyment had continued for many years, the Constitution of 1894 was adopted by the people and the statutes conferring power on the commissioners of the land office have been more than once re-enacted. The power of the commissioners of the land office to grant lands under water in fee seems to have been given by the Constitution and the statutes.

Notwithstanding the grant to Mrs. Huber, the Trial Term and the Appellate Division of the Supreme Court have each held not only that the grant does not operate to deprive the public of the right to pass over the lands granted but that the structures erected upon the lands included in the grant are purpures and nuisances.

So much has been written in this court in regard to the title to lands under water including the foreshore, that we will refer to some of the conclusions that have been reached in other cases without going independently and at length into a statement of the history and present status of such lands.

"From the earliest times in England the law has vested the title to, and the control over, the navigable waters therein, in the crown and Parliament. A distinction was taken between the mere ownership of the soil under water and the control over it for public purposes. The ownership of the soil, analogous to the ownership [473] of dry land, was regarded as *jus privatum*, and was vested in the crown. But the right to use and control both the land and water was deemed a *jus publicum*, and was vested in Parliament. The crown could convey the soil under water so as to give private rights therein, but the dominion and control over the waters, in the interest of commerce and navigation, for the benefit of all the subjects of the kingdom, could be exercised only by Parliament." (Com. v. Alger, 7 Cush. (Mass.) 53; People v. New York, etc. Ferry Co. 68 N. Y. 71.)

In this country the state has succeeded to all the rights of both crown and Parliament

in the navigable waters and the soil under them, and here the *jus privatum* and the *jus publicum* are both vested in the state.

In England Parliament had complete and absolute control over all the navigable waters within the kingdom. It could regulate navigation upon them, could authorize exclusive rights and privileges of navigation and fishing, could authorize weirs, causeways and dams for private use to be constructed in them, and could interrupt and absolutely destroy navigation in them. (Rex v. Montague, 4 B. & C. 598, 10 E. C. L. 413; Williams v. Wilcox, 8 Ad. & El. 314, 35 E. C. L. 396; People v. New York, etc. Ferry Co. supra.) So in this country each state (subject to limitations to be found in the Federal Constitution) has the absolute control of all the navigable waters within its limits. As said by the chancellor in Lansing v. Smith, 4 Wend. (N. Y.) 9, 20, 21 Am. Dec. 89, the state through its legislature "may exercise all the powers which previous to the Revolution could have been exercised either by the king alone, or by him in conjunction with his Parliament; subject only to those restrictions which have been imposed by the Constitution of this State or of the United States."

In Stevens v. Paterson, etc. R. Co. 34 N. J. L. 532, 3 Am. Rep. 269, Beasley, Ch. J., said (p. 548) that "a legislative permission to appropriate to individual use a part of the *jus publicum*, does not, *per se*, deprive [474] the public of a right to resume the privilege granted, unless it appears that it was the intention to vest such privilege irrevocably in the licensee;" that (p. 550) "The principle seems universally conceded that, unless in certain particulars protected by the Federal Constitution, the public right in navigable rivers can to any extent be modified or absolutely destroyed by statute." In Langdon v. New York, 93 N. Y. 156, Earl, J., said: "These powers result from its sovereignty and the absolute control which, in consequence thereof, it has over the public domain within its limits. The right to grant the navigable waters is as absolute and uncontrollable (except as restrained by constitutional checks) as its right to grant the dry land which it owns. It holds all the public domain as absolute owner, and is in no sense a trustee thereof, except as it is organized and possesses all its property, functions and powers for the benefit of the people."

The right of the public to use the foreshore in England is very restricted. In Blundell v. Catterall, 5 B. & Ald. 268, 7 E. C. L. 91, it was held not to include the right of bathing. The court in that case, speaking by Holroyd, J., say (pp. 301, 302): "The public common law rights, too, with respect to the sea, etc., independently of usage, are rights upon the water, not upon the land, of passage and

fishing on the sea, and on the sea shore, when covered with water; and though, as incident thereto, the public must have the means of getting to and upon the water for those purposes, yet it will appear that it is by and from such places only as necessity or usage have appropriated to those purposes, and not a general right of lading, unlading, landing or embarking where they please upon the sea shore, or the land adjoining thereto, except in case of peril or necessity."

The case last cited was one to recover for trespasses against a person who wheeled bathing boxes over land above high-water mark down to the seashore and over [475] the foreshore, which was leased to the plaintiff, and it was held in that case that the lessee of the foreshore had a right to treat every bather, every nurse-maid with a perambulator, every boy riding a donkey, and every preacher as a trespasser. (See "The Public and the Foreshore," *The Law Times*, London, volume 139, page 381, September 4, 1915.)

In this country the right of the public to use the foreshore when not granted in fee is much more liberal, as will be seen by the decision in *Barnes v. Midland R. Terminal Co.* (*supra*).

In *Lansing v. Smith*, 4 Wend. (N. Y.) 9, 21 Am. Dec. 89, the court, in construing the constitutionality of an act authorizing the construction of the Albany basin, and also considering the rights of the people in the lands there under water which formerly belonged to the English sovereign, speaking by the chancellor say:

"The people of this state, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the king by his prerogative. Through the medium of their legislature they may exercise all the powers which previous to the revolution could have been exercised either by the king alone, or by him in conjunction with his parliament; subject only to those restrictions which have been imposed by the Constitution of this state or of the United States. . . . But there can be no doubt of the right of parliament in England or the legislature of this state, to make such grants, when they do not interfere with vested rights of particular individuals. The right to navigate the public waters of the state and to fish therein, and the right to use the public highways, are all *public* rights belonging to the people at large. They are not the *private* unalienable rights of each individual. Hence the legislature as the representative of the public may restrict and regulate the exercise of those rights in such manner as may be deemed most beneficial to the public at large; provided they do not [476] interfere with vested rights which have been granted to individuals." (p. 21.)

In *People v. New York, etc. Ferry Co.* 68 N. Y. 71, 77, 78, the court say: "The title to

lands under the tide waters in this country which before the revolution was vested in the king, became, upon the separation of the colonies, vested in the States within which they were situated. The people of the state in their right of sovereignty succeeded to the royal title and through the legislature may exercise the same powers, which, previous to the revolution, could have been exercised by the king alone, or by him in conjunction with parliament: . . . The State, in place of the crown, holds the title as trustee of a public trust, but the legislature may, as the representative of the people, grant the soil, or confer an exclusive privilege in tide waters, or authorize a use inconsistent with the public right, subject to the paramount control of Congress, through laws passed, in pursuance of the power to regulate commerce, given by the Federal Constitution."

In *Abbott v. Curran*, 98 N. Y. 665, 668 mem. which was a proceeding to compel a purchaser on foreclosure sale to complete his purchase, it was objected to the title that the lands had been originally under water and that the grant from the state was for commercial purposes only and for the benefit of commerce. It appeared that the lands in question had been entirely severed by streets from the water front. It was held that the "Language in the grant did not impose either a condition precedent or subsequent, or *any restriction upon the absolute title*."

In *Towle v. Remsen*, 70 N. Y. 303, 308, the court say: "The land under water originally belonged to the crown of Great Britain, and passed by the Revolution to the state of New York. The portion between high and low water mark, known as the tideway, was granted to the city by the early charters (*Dongan Charter*, §§ 3 and 14; *Montgomerie Charter*, § 37) and the corporation have an absolute fee in the same. (*Nott v. Thayer*, 2 Bosw. 61.) [477] It necessarily follows that the city had a perfect right . . . to make the grant of their portion of the land in fee simple absolute."

In *Knickerbocker Ice Co. v. Shultz*, 116 N. Y. 382, 387, 22 N. E. 564, the court say: "Through the medium of the legislature, the state may exercise all the powers which previous to the Revolution could have been exercised either by the King alone or by him in conjunction with his parliament, subject only to those restrictions which have been imposed by the Constitution of this state or of the United States."

In *People v. Delaware, etc. Co.* 213 N. Y. 194, 199, 107 N. E. 506, the court say: "The title to the bed of navigable streams and the control of navigable waters are vested in the state, subject to the limitations found in the Federal Constitution. (*Langdon v. New York*, 93 N. Y. 129.) The state, except for such limitations, has power to grant the title

to lands under water, unconditionally or conditionally, or it may grant special rights therein, or it may restrict the boundaries of navigable waters by defining the same."

In *Matter of Long Sault Development Co.* 212 N. Y. 1, 8, Ann. Cas. 1915D 56, 105 N. E. 849, the court say: "The power of the legislature to grant land under navigable waters to private persons or corporations for beneficial enjoyment has been exercised too long and has been affirmed by this court too often to be open to serious question at this late day. (Citing authorities.) The contemplated use, however, must be reasonable and one which can fairly be said to be for the public benefit or not injurious to the public. 'For every purpose which may be useful, convenient or necessary to the public, the state has the unquestionable right to make grants in fee or conditionally for the beneficial use of the grantee, or to promote commerce according to their terms. The extensive grant to the city of New York of the lands under water below the shore line around Manhattan Island clearly comes within this principle, since [478] it was a grant to a municipality, constituting a political division of the state, for the promotion of the commercial prosperity of the city, and, consequently, of the people of the state. So, also, grants to railroads for rights of way and other facilities for the transaction of their business, made under the authority of the state, have been held valid upon the same principle, as well as to corporations and private persons engaged in commerce or navigation for their necessary or reasonable use. Grants to the owners of the adjoining uplands, either for beneficial enjoyment or for commercial purposes, have long been authorized and recognized as one of the uses to which the state may lawfully apply such lands.'"

There are many other decisions of our courts to the same effect but a reference to more of them would unduly extend this opinion. The *Illinois Cent. R. Co. v. Illinois* (146 U. S. 387, 13 S. Ct. 110, 38 U. S. (L. ed.) 1018) case and the *Coxe v. State* (144 N. Y. 396, 39 N. E. 400) case do not hold that the state cannot grant lands under water in fee for the purposes of commerce and beneficial enjoyment. The rule in the *Illinois* case, as stated by this court in *Saunders v. New York, Cent. etc. R. Co.* 144 N. Y. 75, 85, 38 N. E. 992, 43 Am. St. Rep. 729, 26 L.R.A. 378, is, "That the ownership, dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the public interests, and subject to the paramount right of Congress to control their navigation so far

Ann. Cas. 1918B.—70.

as necessary for the regulation of commerce with foreign nations and among the states, and that the same rule was applicable to land under the waters of the great lakes."

Whatever we may think of the wisdom of making the Huber grant, the propriety or validity of the grant is not attacked in this action. Although the action is brought in the name of the People it is not brought to review the [479] action of the commissioners of the land nor to set aside or amend the grant. It is, as stated, an action for an injunction.

Even prior to the time when the commissioners of the land office were expressly authorized to grant lands under water for beneficial enjoyment a patent for lands under water could not be invalidated in a collateral action by proof that it was granted for other purposes than to promote the commerce of this state, as that it was granted to a turnpike corporation. (*People v. Mauran*, 5 Denio 389.) The validity of a patent can only be assailed in a direct proceeding to review the action of the commissioners or by an action in equity to set aside the patent. (*E. G. Blakslee Mfg. Co. v. E. G. Blakslee's Sons Iron-Works*, 129 N. Y. 155, 160, 29 N. E. 2; *New York Cent. etc. R. Co. v. Aldridge*, 135 N. Y. 83, 92, 32 N. E. 50, 17 L.R.A. 516.

Every construction upon, or other occupation of land formerly below high-water mark either for commerce or other purpose necessarily interferes in some degree with the public right of passage on the shore and in the sea. Such slight interference is inevitable if the public interests are to be conserved.

During all our history the legislature and the courts have recognized that the public interest may require or at least justify a limited restriction of the boundaries of navigable waters. The public interest may require the building of docks and piers to facilitate approach to the channel of such navigable waters. The beneficial enjoyment of land adjoining the channel of public waters may require or at least justify the conveyance of lands below high water on which to erect buildings. As in England the crown and Parliament can without limitation convey land under public waters, so in this state land under water below high-water mark can be conveyed by the legislature, or in accordance with constitutional and legislative direction. Where the state has conveyed lands without restriction intending to grant a fee therein [480] for beneficial enjoyment, the title of the grantee except as against the rights of riparian or littoral owners, is absolute, and unless the grant is attacked for some reason recognized as a ground for attack by the courts or the use thereof is prevented by the Federal government, there is no authority for an injunction against its legitimate use.

The appellants have raised many questions relating to the findings of fact and to the sufficiency of the evidence to sustain such findings. The unanimous affirmance of such findings of fact prevents our examination of the record to determine whether there is any evidence or sufficient evidence to sustain them. Other questions have been raised with reference to the sufficiency of the findings to sustain the judgment. Except as indicated by this opinion we are of the opinion that the findings are sufficient to justify the judgment and it is unnecessary to consider the findings for the purpose of showing their sufficiency to sustain the conclusions of law, so far as they are approved.

The judgment, so far as it affects the lands granted to Mrs. Huber in 1897, is reversed, and complaint dismissed, and except as to said lands granted to Mrs. Huber the judgment is affirmed. Costs are allowed to the defendant Huber in this court and in the Appellate Division payable by the respondent.

WILLARD BARTLETT, Ch. J. (*concurring in result*).—Although the validity of the Huber grant is not expressly assailed by the complaint in this action, its validity is at issue by reason of the fact that it is set up in the answer as justifying the occupation of the premises in question. The trial judge did not hold that the grant was void but construed it as subject to the public right of passage along the foreshore. The Appellate Division, however, has declared that it "was clearly beyond the power of the commissioners of the land office to convey an unqualified [481] fee of such foreshore for private purposes;" and cites in support of this proposition *Matter of Long Sault Development Co.* 212 N. Y. 1, Ann. Cas. 1915D 56, 105 N. E. 849, and *Coxe v. State*, 144 N. Y. 396, 405, 407, 39 N. E. 400.

The Long Sault case is only remotely applicable, as it involved no question as to rights in the foreshore. The Coxe case, however, is strictly pertinent. This court there said: "The title of the state to the seacoast and the shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign right, and it has been frequently said that a trust is engrafted upon this title for the benefit of the public of which the state is powerless to divest itself." Nevertheless, Judge O'Brien proceeded to say in the same opinion: "Grants to the owners of the adjoining uplands, either for beneficial enjoyment or for commercial purposes, have long been authorized and recognized as one of the uses to which the state may lawfully apply such lands"—but not for mere speculative purposes.

The Huber grant is unqualified in form. I think it conveyed an exclusive right to the

possession of the premises therein described, if the commissioners of the land office possessed the power to make a grant of this character.

The Public Lands Law assumes to confer such power upon them in express terms. (Pub. Lands Law, § 75.) They are a constitutional body, with such powers and duties as now are or hereafter may be prescribed by law. (Const. art. V, §§ 5, 6.)

The cases in which it has been held that the public right to pass along the foreshore was not destroyed by the grant have been cases in which the right was reserved expressly or by necessary or fair implication, oftentimes arising out of the surrounding circumstances. There is no such feature here. There is no substantial interference with navigation. Access to the foreshore [482] or land between high and low-water mark is obstructed to some extent, but when the state parts with the title to the foreshore it parts with the right to control its occupation. If the grant of lands under water for beneficial enjoyment (or, in other words, in fee simple) was so vast in extent as to amount practically to an alienation of the state's governmental functions along the ocean shore of Long Island, it would, I think, be invalid under the doctrine of *Illinois Central R. Co. v. Illinois*, 146 U. S. 387, 13 S. Ct. 110, 36 U. S. (L. ed.) 1018, where the grant exceeded 1,000 acres, embracing the whole outer harbor of Chicago. For example, I should not be willing to construe the statute as authorizing the commissioners of the land office to shut off the public from the entire south shore of Long Island by granting the strand to the upland owners for beneficial enjoyment as a series of amusement parks. But the exclusive grant of a few hundred feet for enjoyment in a manner which does not interfere with navigation, appears to be sanctioned by the letter and spirit of the law, whatever we may think of the wisdom of exercising the power. The question, it seems to me, is largely one of degree. An interesting feature developed by a studious examination of the numerous cases involving grants of land under navigable waters is the extent to which great cities have been built up under such grants. In *U. S. v. Mission Rock Co.* 189 U. S. 391, 406, 23 S. Ct. 606, 47 U. S. (L. ed.) 865, it was said: "A large and valuable part of the city of San Francisco, extending from the present water front to, in some places, Montgomery street, was at the time of and subsequent to the admission of California into the Union a part of the submerged lands of the bay, but has since been filled in by many hundred grantors under the city and state, who have erected buildings and improvements thereon at costs running into many millions of dollars. All of this was done in aid of commerce, in the upbuild-

ing of a great city upon the bay, and with the encouragement and consent of the general government." [493] The water front of the city of New York has been similarly developed by extending it over submerged lands for the promotion of the commercial prosperity of the port. (*Coxe v. State*, supra.)

While the immediate purpose of the Huber grant appears to have been to promote, not commerce, but recreation for private gain, it can hardly be asserted that such a use of shore property to a limited extent is detrimental to the public interest in any such sense as to affect the validity of the grant.

For these reasons I concur in the conclusion reached by Judge Chase, that the judgment should be reversed so far as it affects the defendant Huber.

Hiscock and Collin, JJ., concur with Chase, J., and Willard Bartlett, Ch. J.; Hogan, Cardozo and Seabury, JJ., dissent from the modification of the judgment on the ground that there should be read into the Huber patent an implied reservation of public rights.

Judgment accordingly.

NOTE.

Power of State to Grant Title to Land under Navigable Water.

Introductory, 1107.

Majority Rule:

Rule Stated, 1107.

Illustrations of Rule, 1109.

Limitations of Rule, 1111.

Minority Rule, 1114.

Rule in California, 1114.

Rule in Illinois, 1116.

Rule in Maryland, 1117.

Introductory.

"Under the common law of England the crown in its sovereign capacity held the title to the beds of navigable or tide waters, including the shore or the space between high and low water marks, in trust for the people of the realm who had rights of navigation, commerce, fishing, bathing and other easements allowed by law in the waters. This rule of the common law was applicable in the English colonies of America. After the Revolution resulting in the independence of the American states, title to the beds of all waters, navigable in fact, whether tide or fresh, was held by the states in which they were located, in trust for all the people of the states respectively. When the Constitution of the United States became operative, the several states continued to hold the title to the beds of all waters within their respective borders that were navigable in fact without

reference to the tides of the sea, not for purposes of disposition to individual ownerships, but such title was held in trust for all the people of the states respectively, for the uses afforded by the waters as allowed by the express or implied provisions of law, subject to the rights surrendered by the states under the Federal Constitution. The rights of the people of the states in the navigable waters and the lands thereunder, including the shore or space between ordinary high and low water marks, relate to navigation, commerce, fishing, bathing and other easements allowed by law. These rights are designed to promote the general welfare and are subject to lawful regulation of the states, and such regulation is subordinate to the powers of Congress as to interstate commerce, navigation, post roads, etc., and to the constitutional guarantees of private property rights." *Broward v. Mabry*, 58 Fla. 398, 50 So. 826.

Accordingly a state cannot make a grant of the exclusive control of a navigable stream. See the note to *Matter of Long Sault Development Co.* Ann. Cas. 1915D 56.

There is some conflict in the decisions as to the power of a state to grant title to land under navigable waters. But the conflict is more apparent than real, since those decisions which deny the power of the state, base their rulings on the ground that the title of the state is in trust for the benefit of the people and that to convey the soil under the waters would be a violation of the trust, while the decisions affirming the power of the state to grant title to lands under navigable waters also recognize the trust character of the state's title and hold that the grant of the lands does not free it of that trust.

As to the acquisition of the title to land under water by possession adverse to the state, see the note to *Jersey City v. Hall*, Ann. Cas. 1912A 696. As to the right to take sand, gravel or the like from the bed of a navigable stream, see the note to *State v. Akers*, Ann. Cas. 1916B 543, *affirmed* in Ann. Cas. 1918B 586.

Majority Rule.

RULE STATED.

A majority of the cases recognize the power of a state to grant the title to lands under navigable waters subject to the paramount right of the people to the use of the waters for commerce and navigation, and to the control by the federal government for those purposes.

United States.—*Pollard v. Hagan*, 3 How. 212, 11 U. S. (L. ed.) 565; *Weber v. State Harbor Com'rs*, 18 Wall. 57, 21 U. S. (L. ed.) 798; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 S. Ct. 110, 36 U. S. (L. ed.)

1018, *affirming* 33 Fed. 730; Richardson v. U. S. 100 Fed. 714. See also Hardin v. Jordan, 140 U. S. 371, 11 S. Ct. 808, 35 U. S. (L. ed.) 428; Shively v. Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 U. S. (L. ed.) 331, *affirming* 22 Ore. 410, 30 Pac. 154; Turner v. People's Ferry Co. 21 Fed. 90.

Alabama.—State v. Alabama Power Co. 176 Ala. 620, 58 So. 463.

Arkansas.—See State v. Southern Sand, etc. Co. 113 Ark. 149, 167 S. W. 854.

Florida.—Rivas v. Solary, 18 Fla. 122; State v. Black River Phosphate Co. 32 Fla. 82, 13 So. 640, 21 L.R.A. 189; Broward v. Mabry, 58 Fla. 398, 50 So. 826; Merrill-Stevens Co. v. Durkee, 62 Fla. 549, 57 So. 428; Panama Ice, etc. Co. v. Atlanta, etc. R. Co. 71 Fla. 419, 71 So. 608.

Georgia.—Jones v. Oemler, 110 Ga. 202, 35 S. E. 375.

Louisiana.—In re Caddo Levee Dist. 120 La. 400, 45 So. 370; State v. Bayou Johnson Oyster Co. 130 La. 604, 58 So. 405.

Michigan.—See Sterling v. Jackson, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405.

New Jersey.—Arnold v. Mundy, 6 N. J. L. 1, 10 Am. Dec. 356; Gough v. Bell, 21 N. J. L. 156; Stevens v. Paterson, etc. R. Co. 34 N. J. L. 532, 3 Am. Rep. 269; Wooley v. Campbell, 37 N. J. L. 163; Polhemus v. Bateman, 60 N. J. L. 163, 37 Atl. 1015; Woodcliff Land Imp. Co. v. New Jersey Shore Line R. Co. 72 N. J. L. 137, 60 Atl. 44. Pennsylvania R. Co. v. New York, etc. R. Co. 23 N. J. Eq. 157. See also Atty-Gen. v. Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526; American Dock, etc. Co. v. Trustees for Support of Public Schools, 39 N. J. Eq. 409; McCarter v. Lehigh Valley R. Co. 78 N. J. Eq. 346, 79 Atl. 93; State v. Jersey City, 25 N. J. L. 525.

New York.—Lansing v. Smith, 4 Wend. 9, 21 Am. Dec. 89; People v. Thompson, 30 Hun 457; Gould v. Hudson River R. Co. 6 N. Y. 522; People v. Tibbetts, 19 N. Y. 523; People v. New York, etc. Ferry Co. 68 N. Y. 71; Langdon v. New York, 93 N. Y. 129, 144; Rumsey v. New York, etc. R. Co. 130 N. Y. 88, 28 N. E. 763; Saunders v. New York Cent. etc. R. Co. 144 N. Y. 75, 38 N. E. 992, 43 Am. St. Rep. 729, 26 L.R.A. 378; De Lancey v. Hawkins, 163 N. Y. 587, 57 N. E. 1108, *affirming* 23 App. Div. 8, 49 N. Y. S. 469; Matter of Long Sault Development Co. 212 N. Y. 1, Ann. Cas. 1915D 56, 105 N. E. 849, *affirming* 158 App. Div. 398, 143 N. Y. S. 454; People v. Delaware, etc. Co. 213 N. Y. 194, 107 N. E. 506, *modifying* 154 App. Div. 909, 139 N. Y. S. 392; Lally v. New York Cent. etc. R. Co. 61 Misc. 199, 113 N. Y. S. 177; People v. American Sugar Refining Co. 86 Misc. 78, 148 N. Y. S. 160; Oelsner v. Nassau Light, etc. Co. 134 App. Div. 281, 118 N. Y. S. 960; Geneva v. Henson, 140 App. Div. 49, 124 N. Y. S. 588, *affirmed* 202 N. Y.

545, 95 N. E. 1125. And see the reported case. See also Williams v. Utica, 217 N. Y. 162, 111 N. E. 468, *affirming* 159 App. Div. 160, 145 N. Y. S. 346; Fulton Light, etc. Co. v. New York, 62 Misc. 189, 116 N. Y. S. 1000; Dooley v. Proctor, etc. Mfg. Co. 77 Misc. 398, 137 N. Y. S. 737; People v. Woodruff, 54 App. Div. 1, 8 N. Y. Ann. Cas. 124, 66 N. Y. S. 209, *appeal dismissed* 166 N. Y. 597, 59 N. E. 1129.

North Carolina.—Shepard's Point Land Co. v. Atlantic Hotel, 132 N. C. 517, 44 S. E. 39, 61 L.R.A. 937. See also Ward v. Willis, 51 N. C. 185, 72 Am. Dec. 570; Hodges v. Williams, 95 N. C. 331, 59 Am. Rep. 242.

Ohio.—Hogg v. Beerman, 41 Ohio St. 81, 52 Am. Rep. 71.

Oregon.—Hinman v. Warren, 6 Ore. 408; Parker v. Taylor, 7 Ore. 435; Bowlby v. Shively, 22 Ore. 410, 30 Pac. 154, *affirmed* 152 U. S. 1, 14 S. Ct. 548, 38 U. S. (L. ed.) 331; Astoria Exch. Co. v. Shively, 27 Ore. 104, 39 Pac. 398, 40 Pac. 92; Taylor Sands Fishing Co. v. State Land Board, 56 Ore. 157, 108 Pac. 126; Pacific Elevator Co. v. Portland, 65 Ore. 349, 133 Pac. 72, 46 L.R.A. (N.S.) 363; Eagle Cliff Fishing Co. v. McGowan, 70 Ore. 1, 137 Pac. 766. See also Muckle v. Good, 45 Ore. 230, 77 Pac. 743.

Rhode Island.—Providence v. Comstock, 27 R. I. 537, 65 Atl. 307.

Texas.—Galveston v. Menard, 23 Tex. 349; Baylor v. Tilleback, 20 Tex. Civ. App. 490, 49 S. W. 720. See also De Meritt v. Robinson, 102 Tex. 358, 116 S. W. 796 (question not decided); Welder v. State, 196 S. W. 868 (question not decided).

Washington.—Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539, 12 L.R.A. 632; Morse v. O'Connell, 7 Wash. 117, 34 Pac. 126; Grays Harbor Boom Co. v. Lowndale, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267; Palmer v. Peterson, 56 Wash. 74, 105 Pac. 179. See also Sullivan v. Callvert, 27 Wash. 600, 68 Pac. 303; Brace, etc. Mill Co. v. State, 49 Wash. 326, 95 Pac. 278; Bilger v. State, 63 Wash. 457, 116 Pac. 19.

Thus in Hogg v. Beerman, 41 Ohio St. 81, 52 Am. Rep. 71, the court said: "An absolute sovereign, holding both ownership and jurisdiction of land and water, may vest in a private grantee such portions of either, as the grantor may determine. A sovereign whose powers are limited by constitutional provisions may do the like, so far as the grant does not contravene any constitutional provision or limitation. So long as navigable waters are left free to the public, for unembarrassed passages to and fro, we know of no reason why the United States, or any state, holding ownership and jurisdiction of land and water, may not vest in a private grantee such a body of land, marsh and water as 'East Harbor.' History is full of instances

of the exercise of such power by governments, and instances in which the courts have protected such a grantee against intrusion are not rare. The ocean, with its gulfs and bays, belong to no nation. Jurisdiction is allowed to such a distance from shore as the protection of that shore requires. This distance was fixed as a marine league at a time when no gun could force a ball farther. But over inland waters the nations in which they lie may hold, both as sovereigns and proprietors. A proprietor may convey all his rights to a grantee unless forbidden by some law to which he is subject. No one not possessed of some right in the thing granted should be heard in objection. Where the grantor is the government, the thing granted government property held by absolute title, and no use of the thing granted to which the public is entitled is taken away, we see no reason for denying to the grantee the ownership of the thing granted."

So in *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 S. Ct. 110, 36 U. S. (L. ed.) 1018, it was said: "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard v. Hagan*, 3 How. 212 [11 U. S. (L. ed.) 565]; *Weber v. State Harbor Com'rs*, 18 Wall. 57 [21 U. S. (L. ed.) 798]. The same doctrine is in this country held to be applicable to lands covered by fresh water in the great lakes over which is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes."

In *State v. Alabama Power Co.* 176 Ala. 620, 58 So. 462, the court used the following language: "In Alabama the legal title to the beds and waters of navigable ways is

lodged in the state in trust for public purposes; subordinate, however, to the supreme right of navigation which is lodged in the United States as trustee for all the people of all the states. . . . Subject to the state limitation in favor of the supreme right of navigation reposed in the United States, this state may even grant the fee in the trust properties to which reference has been made; provided the grant is not inconsistent with public interests to which the navigable water ways are permanently, originally, dedicated."

In *Galveston v. Menard*, 23 Tex. 349, the court said: "From the very nature of the property, which the government possesses in its navigable waters, and bays, and bay-shores, it can be ordinarily best appropriated, by devoting it to public use; and not by granting away any exclusive right to it to any one. Because every man can use it, and derive advantage from it, and no injury is done to each other in its enjoyment. It often happens, however, that the public use and enjoyment of this species of property may be promoted and increased, by allowing portions of it to become private property as for wharves, docks and the like, in harbors and ports. If the government could not exercise this right in severing this common property, and appropriating portions of it to private use, it would not only curtail the ordinary powers, which every nation has for self-development, but it would pre-suppose a deficiency, in the sovereignty power, to control or dispose of what belongs to it. At common law, the right to such property was vested in the crown, as a royal prerogative. The modern doctrine of the courts of England is, that it is vested in the king, as trustee for the public, and that he cannot, since the time of magna charta, make a valid grant of it. (*Blundell v. Catterall*, 5 B. & Ald. 268; 7 E. C. L. 91.) There is no question, but that parliament may grant it. (*Lowe v. Govett* [3 B. & Ad. 863] 23 E. C. L. 203; *Angell on Tide Waters*, 88.) The legislatures of the several states may grant it, if not previously appropriated by grant, prescription, or otherwise; provided, the exercise of an exclusive right, thus granted, does not infringe upon the rights of the government of the United States, in its power to 'regulate commerce with foreign nations, and among the several states.'"

ILLUSTRATIONS OF RULE.

It has been held that a state has the power to grant the title to tide and shore lands. *Corrigan v. Brown*, 169 Fed. 477; *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 30 So. 645, 86 Am. St. Rep. 143, 64 L.R.A. 333,

affirmed 187 U. S. 479, 23 S. Ct. 170, 47 U. S. (L. ed.) 266; *Wilson v. Shively*, 11 Ore. 215, 4 Pac. 324; *Washougal, etc. Transp. Co. v. Dalles, etc. Nav. Co.* 27 Wash. 490, 65 Pac. 74. Thus in *Mobile Transp. Co. v. Mobile*, *supra*, the court said: "The shores of tide water in all the states are held in fee by the states subject only to the reservation and stipulation that such streams should forever be and remain public highways with the right in Congress to regulate commerce thereon. . . . And it cannot be doubted that the state may convey the fee in such shore, subject of course, to the paramount rights of the United States respecting navigation, and particularly so when the conveyance is in furtherance of public interests."

In *Chisolm v. Caines*, 67 Fed. 285, a grant of title to marsh lands was sustained, the court saying: "It would seem that there is a great distinction between the shores of the great ocean, the beds of harbors, the channels of rivers and highways of commerce, and these mud shoals cast up by the currents on the sides of harbors and streams. The former must always be kept open for public use, commerce, trade and pleasure. The latter can be separated from any public use, and can be vested in individuals or corporations, at the will of the sovereign power. They are not aids to, but obstructions to, navigation, and can be utilized for the public good in any way the sovereign may decide. And, when it can be done without detriment to the lands and waters remaining, they can always be disposed of, and vested absolutely in private persons."

A few cases uphold the power of the state to make a grant of the shore and lands under the water to the owner of the adjacent land. *People v. Colgate*, 67 N. Y. 512; *People v. Saxton*, 15 App. Div. 263, 44 N. Y. S. 211; *Delancey v. Hawkins*, 23 App. Div. 8, 49 N. Y. S. 469, *affirmed* 163 N. Y. 587, 57 N. E. 1108.

In *Palmer v. Peterson*, 56 Wash. 74, 105 Pac. 179, the facts were stated by the court as follows: "The plaintiffs are the owners of certain tide lands of the second class, in Kitsap county, which form an arm of Puget Sound and are covered and uncovered by the flow and ebb of the tide. The lands are suitable for the cultivation of oysters, and were conveyed by the state to the predecessor in interest of the plaintiffs, under the provisions of the acts relating to the purchase and sale of oyster lands, Laws 1895, pp. 36-39. The state deed is absolute in form, aside from a provision for a reversion in case the lands are abandoned or used for any purpose other than the cultivation of oysters. The present action was instituted to restrain the defendant, his agents, servants, and employees from entering upon or passing over the tide lands

in question, either upon foot or by boat, or other water craft, and for damages. From a judgment in favor of the plaintiffs according to the prayer for their complaint, this appeal is prosecuted." Holding the grant to be valid the court said: "It is . . . contended that inasmuch as the tide lands in controversy are covered by water to a depth of seven or eight feet at high tide, such waters are navigable, and the appellant has a lawful right to pass over the same, notwithstanding the title of the respondents. This contention cannot be sustained. The state deed is absolute in form, and carries with it the right to the exclusive possession and enjoyment of the lands granted, if such a grant was within the competency of the state, and that such a grant was within the competency of the state cannot, at this late day, be controverted. . . . The conveyance by the state of tide lands covered and uncovered by the flow and ebb of the tide is not a substantial impairment of the interest of the public in the navigable waters of the state, and does not interfere with the paramount right of Congress to regulate commerce with foreign nations and among the several states."

The right of the state to grant the title to lands under navigable waters for the purpose of having them reclaimed has been sustained in a number of instances. *U. S. v. Mission Rock Co.* 189 U. S. 391, 23 S. Ct. 606, 47 U. S. (L. ed.) 865, *affirming* 109 Fed. 763, 48 C. C. A. 641; *Pacific Gas Imp. Co. v. Ellert*, 64 Fed. 421; *Sterling v. Jackson*, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405; *Parker v. Taylor*, 7 Ore. 435. See also *Hardin v. Jordan*, 140 U. S. 371, 11 S. Ct. 808, 35 U. S. (L. ed.) 428; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 S. Ct. 110, 36 U. S. (L. ed.) 1018; *People v. Mauran*, 5 Denio (N. Y.) 389; *Rhode Island Motor Co. v. Providence (R. I.)* 55 Atl. 696.

A state has the power to grant the title of lands under the waters of a harbor to a municipality. The grant will be construed as devolving the title of the state, as trustee, on the city. *Pacific Gas Imp. Co. v. Ellert*, 64 Fed. 421; *Mobile v. Sullivan Timber Co.* 129 Fed. 298, 63 C. C. A. 412, *affirmed* 187 U. S. 479, 23 S. Ct. 170, 47 U. S. (L. ed.) 266. See also *Coxe v. State*, 144 N. Y. 396, 39 N. E. 400.

Thus in *Mobile v. Sullivan Timber Co.* *supra*, the court said: "Our determination with regard to the title of the city must be controlled by the latest and most authoritative decision upon the subject. This is found in the case of *Mobile Transp. Co. v. Mobile* (decided by the Supreme Court of the United States January 5, 1903) 187 U. S. 479, 23 S. Ct. 170, 47 U. S. (L. ed.) 266. There it is conclusively settled that the state of Ala-

bama, when admitted to the union, became entitled to the soil under the navigable waters below high-water mark within the limits of the state, not previously granted. It is further held in the same case that the legislation of the state conveying to the city of Mobile the shore and soil under Mobile river is not unconstitutional, as impairing the vested rights of owners of grants bordering on Mobile river, for the reason that such grants do not relate to land bordering on tidal streams; and further that, as the state held the lands below high-water mark as trustee for the public, it had the right to devolve the trust upon the city of Mobile. In short, this case adjudicates the title of the lands in controversy under the acts and resolutions of Congress, the ordinances of Alabama, and the acts of the general assembly of the state hereinbefore enumerated. It is difficult, in view of this decision, to understand how any controversy can be maintained as to the title of the city. Many decisions of the supreme court of Alabama are reviewed in the learned opinion of Justice Brown. His conclusions are, as stated, that the title to all lands under tidal waters in Alabama below high-water mark are in the state, and subject to such disposition as that made by the state in this case in behalf of the city of Mobile. He continues: "The status of real estate within a particular jurisdiction is not so much one of contract as of policy, which may be changed at any time by the legislature, provided no vested rights are disturbed. Of course, if riparian proprietors have acquired the title to the property below high-water mark by a grant or prior possession good against the state, they could only be dispossessed by proceedings in eminent domain. The Act of 1867 declared no more than that the rights possessed by the state in the shore and soil under Mobile river were granted to the city. We see nothing objectionable in this act. What the state held, it held as trustee for the public, and it had a right to devolve this trust upon the city of Mobile. What it had not, it could not grant, and the rights of the riparian proprietors were neither enlarged nor restricted by the act." "Upon the whole," the learned justice concludes, "we are of opinion that there is no defect upon the face of the title of the city which the transportation company was entitled to prevail itself of."

LIMITATIONS OF RULE.

A limitation of the doctrine that a state may grant the title to lands under navigable waters was indicated in the case of *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 S. Ct. 110, 36 U. S. (L. ed.) 1018. It appeared therein that the state of Illinois

granted in fee to a railroad company an area of about one thousand acres of submerged lands in Chicago harbor, the act of grant providing that the railroad company should not have the power to convey the lands and that the grant did not authorize obstructions in the harbor or the impairment of navigation. Holding the grant to be invalid the court said: "That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under the tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands

and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. . . . The harbor of Chicago is of immense value to the people of the state of Illinois in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the state of control over its beds and waters and place the same in the hands of a private corporation created for a different purpose, one limited to the transportation of passengers and freight between distant points and the city, is a proposition that cannot be defended. . . . It is hardly conceivable that the legislature can divest the state of the control and management of this harbor and vest it absolutely in a private corporation. Surely an act of the legislature transferring the title to its submerged lands and power claimed by the railroad company to a foreign state or nation would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held. So would a similar transfer to a corporation of another state. It would not be listened to that the control and management of the harbor of that great city—a subject of concern to the whole people of the state—should thus be placed elsewhere than in the state itself. All the objections which can be urged to such attempted transfer may be urged to a transfer to a private corporation like the railroad company in this case."

So in *State v. Gerbing*, 56 Fla. 603, 47 So. 353, 22 L.R.A.(N.S.) 337, it was said: "The rights of the people of the state in the navigable waters and the lands thereunder including the shores or space between ordinary high and low water marks, in the state, are designated for the public welfare, and the state may regulate such rights and the uses of the waters and the lands thereunder for the benefit of the whole people of the state as circumstances may demand, subject of course to the powers of the Congress in the

premises. . . . For the purpose of aiding navigation or commerce or encouraging new industries and the development of natural or artificial resources, the state may grant reasonable and limited rights and privileges to individuals to erect wharves, etc., over shallow waters to reach navigable portions of the waters, or to fill in shallow waters adjacent to navigable waters and erect structures thereon for purposes of commerce incidental to navigation on the waters; or the state may grant reasonable and limited privileges for planting and propagating oysters or shell fish on land covered by waters of navigable streams; but such privileges should not unreasonably impair the rights of the whole people of the state in the use of the waters or the lands thereunder for the purposes implied by law. *State v. Black River Phosphate Co.* 32 Fla. 82, 13 So. 640. The title to lands under navigable waters including the shores or space between ordinary high and low water marks, is held by the state by virtue of its sovereignty in trust for the people of the state for navigation and other useful purposes afforded by the waters over such lands, and the trustees of the internal improvement fund of the state are not authorized to convey the title to lands of this character. The trust with which these lands are held by the state is governmental and cannot be wholly alienated. For the purpose of enhancing and improving the rights and interests of the whole people, the state may by appropriate means grant to individuals, the title to limited portions of the lands, or give limited privileges therein, but not so as to divert them from their proper uses, or so as to relieve the state of the control and regulation of the uses afforded by the lands and waters. *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 S. Ct. 110 [36 U. S. (L. ed.) 1018]."

A state has no power to convey the title to lands under navigable waters by a grant which virtually turns over to the grantee the entire control of the navigation of the waters conveying the land granted. See *Matter of Long Sault Development Co.* Ann. Cas. 1915D 56 and note. Nor can a state make a grant of lands under water for purely speculative purposes. *Coxe v. State*, 144 N. Y. 396, 39 N. E. 400; *People v. American Sugar Refining Co.* 98 Misc. 703, 163 N. Y. S. 456.

In *U. S. v. O'Brien*, 170 Fed. 509, it appeared that a state made a sale of shore lands surrounding an island which constituted an Indian reservation. The state constitution contained a clause whereby the state disclaimed all right and title to all lands held by Indians. Holding the sale to be invalid the court said: "It is my opinion that the whole of the Squaxon Island was lawfully reserved for the use of the Indians, and that

by the treaty referred to in the bill of complaint, and the laws of the United States, it has always been unlawful for white men to reside upon or occupy any part of said island. The Indians, for whose use the island was reserved, used and occupied the entire island, including the beach and shore, at the date of the enabling act and the adoption of our state constitution, and by the terms of the enabling act, and the compact between the people of this state and the United States government, contained in the constitution, this state entirely disclaimed 'all right and title . . . to all lands . . . owned or held by any Indian or Indian tribes.' This disclaimer applies not only to lands owned by the Indians, whether patented or unpatented, but also to all lands held—that is to say, occupied and used—by individual Indians or tribes. It is my opinion that the proposed sale of a rim encircling this island reservation is not only an injustice to the Indians, but an unwarranted exercise of power by officers of the state government, and that the defendants have acquired no rights whatever by virtue of the contracts under which they claim."

In *City Land Co. v. Dabney*, 70 Ore. 529, 139 Pac. 721, it appeared that the state land board conveyed a tract of land to a grantee on the representation that it was tide land. The land conveyed lay within the harbor lines and craft passed daily over the water covering the lands. A suit was brought by a riparian owner to set aside the deed, and it was held that the suit could be maintained. The court said: "It is true that upon the admission of the state into the Union it was vested with the title to the lands under navigable waters, subject, however, at all times to the right of navigation and fishery. To all intents and purposes the title of the state was burdened with a trust, so to speak, in favor of those two occupations. It would have no right or authority so to dispose of the subjacent lands in a manner calculated to prejudice or impede the exercise of those rights. It was never intended by any of the legislation concerning the alienation of state lands that the state should sell the beds of the navigable streams in a way to interfere with their navigability. The testimony clearly demonstrates that in real truth the land in dispute is nothing more than an inequality in the bed of the river, and that for the most part it is directly in the official route of navigation as established by the general government. The officers of the state composing the state land board were imposed upon by the representation that it constituted tide land, and were led into the error of conveying property in a manner and for a purpose which would act as a direct and permanent impediment to naviga-

tion. This the state could not do without violating the trust under which it holds the title to such property, and its grantees could take nothing by such a deed."

In *Coxe v. State*, 144 N. Y. 396, 39 N. E. 400, it appeared that the state by an act of the legislature gave a corporation the power to reclaim and drain any portion of the wet or overflowed lands and tide water marshes on Staten Island and Long Island, except those included within the corporate limits of a city, and granted the title to the lands which the corporation located for the purpose of reclaiming them. Holding the grant to be invalid the court said: "There is nothing in the enactments to indicate that the grant was for any public purpose and none has been suggested; and if it could be upheld, it is obvious that such a result would establish the principle that a majority in the legislature is competent to convey to a private corporation, for private purposes, the land under all the tide waters within the jurisdiction of the state. . . . The title of the state to the seacoast and the shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign, right, and it has been frequently said that a trust is engrafted upon this title for the benefit of the public of which the state is powerless to divest itself. . . . Such a grant, therefore, can never constitute a contract between this state and the grantee which is beyond the power of revocation by a subsequent legislature. For every purpose which may be useful, convenient or necessary to the public, the state has the unquestionable right to make grants in fee or conditionally for the beneficial use of the grantee, or to promote commerce according to their terms. . . . But it was never supposed that the state could grant away any of this portion of its domain for mere speculative purposes, or that it could traffic in it like an individual who owned property which he had the right to sell at such price and for such purposes as his immediate wants and interests seemed to require. It is quite conceivable, however, that such grants have been made under such circumstances and for such purposes that, when recalled or revoked, there may arise, in favor of the grantee and against the state, an obligation to restore the consideration paid, or to make good losses incurred in consequence of improvements or expenditures upon the faith of the grant, which the state is bound to discharge in honor and good faith. . . . The act so far as it is attempted to confer upon the company the right of property in the lands and the dominion over the waters designated on the maps, and the power to inclose such parts of the same as it elected to take with dykes and

other obstructions to navigation, was obnoxious to that provision of the Federal Constitution which confers upon Congress the exclusive power to regulate foreign and interstate commerce."

Minority Rule.

The power of the state to grant the title to lands under navigable waters has been denied in a number of cases on the ground that the title of the state is in the nature of a trust for the benefit of the people. *Bradshaw v. Duluth Imperial Mill Co.* 52 Minn. 59, 53 N. W. 1066; *State v. West Tennessee Land Co.* 127 Tenn. 575, Ann. Cas. 1914B 1043, 158 S. W. 746; *Home v. Richards*, 4 Call (Va.) 441, 2 Am. Dec. 574; *Norfolk City v. Cooke*, 27 Grat. (Va.) 430; *Mead v. Haynes*, 3 Rand. (Va.) 33; *Priewe v. Wisconsin State Land, etc. Co.* 103 Wis. 537, 79 N. W. 780, 74 Am. St. Rep. 904; *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905. See also *Goodwin v. Thompson*, 15 Lea (Tenn.) 209, 54 Am. Rep. 410; *Pewaukee v. Savoy*, 103 Wis. 271, 79 N. W. 436, 74 Am. St. Rep. 859, 50 L.R.A. 836.

Thus in *Bradshaw v. Duluth Imperial Mill Co.* supra, the court said: "It is the settled law with us that the rights of the state in navigable waters and their beds are sovereign, and not proprietary, and are held in trust for the public as a highway, and are incapable of alienation."

And in *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905, it was said: "The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, up to the line of ordinary high-water mark, within the boundaries of the state, became vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds, and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law. . . . Whatever concession the state may make without violating the essentials of the trust, it has been held, can properly be made to riparian proprietors. Under that, by long established judicial policy, which has become a rule of property, a qualified title to submerged lands of rivers navigable in fact has been conceded to the owners of the shores. Otherwise the title to lands under all public waters is in the state, and it is powerless to change it. It cannot transfer such title by grant or otherwise nor can title thereto be obtained by adverse possession, at least unless such adverse possession shall continue for the term of forty years. Hence we must presume from the evidence that the title to

the land in dispute is where the evidence tends to show it is. We should say in passing that the term 'qualified title' as above used refers to that interest in the beds of navigable streams which has passed to private ownership according to the uniform holdings of this court—a full title subject to the public rights which were incident to the lands forming such beds at the time of the creation of the trust above mentioned. No private ownership has been conceded which displaces or materially affects such public rights. As to them the state has not abdicated and cannot abdicate its trust."

Rule in California.

It is provided by the constitution of California (§ 3, art. 15) that "all tide lands within two miles of any incorporated city or town in this state, and fronting on the waters of any harbor, estuary, bay, or inlet used for purposes of navigation, shall be withheld from grant or sale to private persons, partnerships or corporations." See *Koyer v. Miner*, 172 Cal. 448, 156 Pac. 1023.

In construing the term "tide lands" it has been said: "For the consideration of the question stated, 'tide lands' as thus used in the constitution will be construed more broadly than in the ordinary signification of lands covered and uncovered by the daily efflux and reflux of the tide. It will be construed to embrace land properly described as submerged lands." *San Pedro, etc. R. Co. v. Hamilton*, 161 Cal. 610, 119 Pac. 1073, 37 L.R.A.(N.S.) 686. See to the same effect *People v. Kerber*, 152 Cal. 731, 93 Pac. 878, 125 Am. St. Rep. 93.

A grant of tide lands within two miles of an incorporated city or town is of course invalid. *People v. Kerber*, 152 Cal. 731, 93 Pac. 878, 125 Am. St. Rep. 93; *San Pedro, etc. R. Co. v. Hamilton*, 161 Cal. 610, 119 Pac. 1073, 37 L.R.A.(N.S.) 686; *People v. California Fish Co.* 166 Cal. 576, 138 Pac. 79; *People v. Southern Pac. R. Co.* 166 Cal. 627, 138 Pac. 103; *Patton v. Los Angeles*, 169 Cal. 521, 147 Pac. 141; *People v. Banning*, 169 Cal. 542, 147 Pac. 274.

But a grant of tide lands and lands entirely covered by waters made to a city in trust and imposing on it the duty of using the lands granted for the purpose of improving a harbor is not in violation of the constitution. *Oakland v. Oakland Water Front Co.* 118 Cal. 160, 50 Pac. 277; *Dalton, etc. Co. v. Oakland*, 168 Cal. 463, 143 Pac. 721; *Long Beach v. Lisenby* (Cal.) 166 Pac. 333. And in *Santa Cruz v. Southern Pac. R. Co.* 163 Cal. 538, 126 Pac. 362, citing *People v. California Fish Co.* 166 Cal. 576, 138 Pac. 79, it was said that "when in preparing such tide land for the purpose of

navigation, the state finds it necessary to make a seawall and fill in the land between it and the open water and thereby or in some other way for the same purposes excludes some part of such land from use for purposes of navigation, the public use for navigation as to that part becomes divested or abandoned and it becomes proprietary land, which the state can dispose of to private use."

The state has the power to grant the title to tide lands within the limits named, subject however to the rights of the public for the purpose of navigation and fishery. *Messenger v. Kingsbury*, 158 Cal. 611, 112 Pac. 65; *Forestier v. Johnson*, 164 Cal. 24, 127 Pac. 156; *People v. Southern Pac. R. Co.* 166 Cal. 615, 138 Pac. 94; *People v. Southern Pac. R. Co.* 166 Cal. 627, 138 Pac. 103. See also *Santa Cruz v. Southern Pac. R. Co.* 163 Cal. 538, 126 Pac. 362.

In *Bolsa Land Co. v. Burdick*, 151 Cal. 254, 90 Pac. 532, 12 L.R.A.(N.S.) 275, it was held that the state could convey to a private person the title to tide lands and lands covered by tides and was not called on to preserve the navigability of the waters covering the lands for the mere purpose of enabling the public to shoot wild game thereon.

In *People v. California Fish Co.* 166 Cal. 576, 138 Pac. 79, the right of the state to grant the title to lands under tide waters was summarized as follows: "1. The tide lands are, and from the beginning of our government have been, dedicated to public use for purposes of navigation and fishery. 2. The title to these lands is, by the people, vested in the state in trust for said public uses. The administration and execution of this trust is committed by the constitution to the legislative department, subject to certain expressed reservations and restrictions. 3. The powers of the state as trustee are not expressed. They are commensurate with the duties of the trust. Every trustee has the implied power to do everything necessary to the execution and administration of the trust. 4. As the state has the powers necessary to the execution and administration of the trust, it follows that it may dispose of these lands in the administration of the trust in such manner as the interests of navigation may require. One of the duties of the trust is to adapt the land to the use for navigation in the best manner. If, in so adapting the tide lands for this use, it is found necessary or advisable, in aid of the use, to cut off portions of it from access to navigable water, so that they become unavailable for navigation, the state has the power to exclude such portions from the public use, and, to that extent, revoke the original dedication. 5. When this has been

done in the regular administration of the trust, the land thus excluded from use for navigation may become proprietary land, not subject to the public use, and it may then be alienated irrevocably by the state for private use to private individuals. 6. When the state, in the exercise of its discretion as trustee, has decided that portions of the tide land should be thus excluded from navigation and sold to private use, its determination is conclusive upon the courts; but statutes purporting to authorize an abandonment of such public use will be carefully scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed or necessarily implied. It will not be implied if any other inference is reasonably possible. And if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation. 7. The provisions of the political code authorizing the sale of the swamp and tide lands show clearly how they were enacted without any consideration of the interest or necessities of navigation over tide lands, that they are not intended as an exercise of the power of administering the public trust upon which the state holds the tide land, that they were not enacted in pursuance of a legislative determination that such lands were not necessary for navigation, or as a decision that the interests of navigation required that they be excluded from the public use, or in the interest of navigation. If they had been so intended, they would authorize the alienation of practically all the tide lands without any provision for the protection of the public use and would result in its utter destruction. They can be given some effect if construed to authorize the sale of such land subject to the public easements, the purchaser to be without authority to interfere with such use, or with the further administration thereof by or on behalf of the state. They are reasonably susceptible of that interpretation; hence they will be so construed. The holder of a patent from the state under these laws will have the naked title to the soil. 8. Section 2 of article XV of the state constitution deprives the legislature of power to dispose of the tide lands fronting upon navigable water so as to entitle the grantee to destroy or interfere with the public easement for navigation. It also to that extent repeals all laws which theretofore may have purported to authorize such alienation. No payment of purchase money to the state for any of the tide land in question was made until after the adoption of the constitution in 1879. Hence it is all subject to the restriction just

stated. Therefore, regardless of the question of the true construction of the political code provisions purporting to authorize the sale of tide lands, the patents under which the several defendants claim tide lands are subject to the constitutional restriction and do not deprive the state of its power as sovereign trustee to adapt and improve these lands for navigation as it may see fit. This provision, however, does not deprive the legislature of power to improve the water-front and irrevocably alienate such tide land as may thereby be rendered inaccessible and useless for navigation. 9. If any part of the tide land in controversy was open to sale when the sales thereof were made, the proper judgment would be that the defendants claiming under such patents own the soil, subject to the easement of the public for the public uses of navigation and commerce, and to the right of the state, as administrator and controller of these public uses and the public trust therefor to enter upon and possess the same for the preservation and advancement of the public uses and to make such changes and improvements as may be deemed advisable for those purposes. It is to be understood, of course, that if the state has sold tide lands subject to the public easement, prior to making improvements thereon for navigation, as it may do, it cannot, upon putting in force a plan for the subsequent improvement thereof, retake the absolute title without compensation. The purchaser will continue to hold the servient estate, after as well as before the improvement, and if at any time the public easement and use is lawfully and permanently abandoned, the purchaser will then have the absolute and complete estate in the land. And before any such improvement is made by the state, he may use the property as he sees fit, subject to the power of the state to abate any nuisance he may create thereon, and to remove any purpresture he may erect thereon. . . . One of the patents in another of the series of cases (*People v. Banning*, 166 Cal. 630, 138 Pac. 100), being tide land location No. 57, includes within its lines a part of the channel leading up to the old Wilmington wharf and embracing land which is and always has been submerged. As we are considering here the main questions involved in all the cases, it is proper to say that the tide land laws do not authorize a sale of land below low tide in any case. So far as such patent, or any other of the patents, embrace such land, they convey no title whatever, the officers who executed them being without power under these statutes to sell or convey lands of that character."

Prior to the adoption of the article of the constitution hereinbefore quoted it was held

that the state could make a grant of lands covered by navigable waters subject to the rights of the public to navigation and fishery. *Eldridge v. Cowell*, 4 Cal. 80; *Ward v. Mulford*, 32 Cal. 365. See also *Taylor v. Underhill*, 40 Cal. 473; *Upham v. Hosking*, 62 Cal. 250; *Northern R. Co. v. Jordan*, 87 Cal. 23, 25 Pac. 273.

Rule in Illinois.

In Illinois it has been said with respect to lands under navigable waters within the boundaries of the state that "the state has no power to barter and sell the lands as the United States sells its public lands, but the state holds the title in trust, in its sovereign capacity, for the people of the entire state." *Illinois Cent. R. Co. v. Chicago*, 173 Ill. 471, 50 N. E. 1104, 53 L.R.A. 408, *affirmed* 176 U. S. 646, 20 S. Ct. 509, 44 U. S. (L. ed.) 622.

But it has been said that the state may appropriate the submerged lands for any purposes within the trust for which they were held. *Bliss v. Ward*, 198 Ill. 104, 64 N. E. 705. And a grant of the submerged lands under the waters of Lake Michigan to the commissioners of Lincoln Park has been upheld. *People v. Kirk*, 162 Ill. 138, 45 N. E. 830, 53 Am. St. Rep. 277; *Lincoln Park Com'rs v. Fahrney*, 250 Ill. 256, 95 N. E. 194.

In the case first cited, in discussing the power of the state to convey reclaimed lands which were originally covered by the waters of Lake Michigan, the court said: "Was the legislature clothed with the power to convey reclaimed lands which were originally covered by the waters of Lake Michigan? . . . But it is said, if the legislature has the power to dispose of the submerged lands in question under the pretense of constructing a boulevard two hundred feet wide, why could it not give away any indefinite quantity of the submerged lands of the lake? It is not claimed here that the legislature has the power to dispose of submerged lands of the lake in any case where the disposition would materially interfere with the navigation of the lake for the purposes of commerce and the right of fishery, and it may be conceded that such power is governmental and does not exist. Indeed, the first section of the act in question in direct terms prohibits an extension of the boulevard in such a manner as to interfere with the navigation of the lake for the purpose of commerce. Upon looking into the evidence it will be found that the waters of the lake west of the driveway as constructed were not adapted to navigation and were not used to any great extent for that purpose. The learned judge before whom this case was tried, in speaking of the evidence on this branch of the case,

said: 'It is true that in some cases tugs, small craft for carrying passengers in a small way to and from the government breakwater and to other points near this drive along the lake, small sailing yachts and boats for pleasure, have, from time to time, passed over these waters, and that a very considerable portion of these waters were, before being filled, deep enough to be navigated by small vessels actually engaged in trade and commerce between the port of Chicago and other ports on the lake; but it is also a further fact, shown by the evidence, that all such small vessels are a very insignificant proportion of the whole number of vessels engaged in trade and commerce to and from the port of Chicago, and that these small vessels never have passed over these waters, because, in going to and from the harbor of Chicago, these waters are outside of the usual course, and are considered dangerous by sailors on the lake. Only a very small portion of all the vessels arriving and departing from Chicago ever come within the government breakwater off this shore, and when they do they invariably pass quite near the breakwater, which is about fifteen hundred feet easterly from the easterly line of said proposed drive, in order to avoid the shoal water.' From the foregoing it is apparent that the construction of the boulevard authorized by the act will not materially interfere with or obstruct the navigation of the lake."

Rule in Maryland.

In Maryland the rule that the state has the power to grant the title to lands under navigable waters subject to the right of the public to use the waters for navigation in fishing was recognized by the early cases. *Baltimore v. McKim*, 3 Bland 453; *Wilson v. Inloes*, 11 Gill & J. 352; *Browne v. Kennedy*, 5 Har. & J. 195, 9 Am. Dec. 503; *Chapman v. Hoskins*, 2 Md. Ch. 485.

In *Day v. Day*, 22 Md. 530, it was held that a statute prohibiting the issue of any patent of land covered by navigable waters should be so construed as to apply to all land below high water mark.

STATE BOARD OF MEDICAL EXAMINERS

v.

TERRILL.

Utah Supreme Court—November 24, 1916.

48 Utah 647; 161 Pac. 451.

Physicians and Surgeons — What Constitutes Practice of Medicine — Massage Treatment.

The evidence is held to show that defendant practiced medicine without a license, as he undertook to examine, diagnose, and prescribe for all ailments, as well as to do general massaging.

[See note at end of this case.]

Same.

A decree, enjoining defendant from diagnosing, treating, operating on, prescribing, or advising for any person afflicted with any mental or physical ailment or condition, from which he expects to or does receive a pecuniary compensation, or from practicing medicine within the state until he shall have received a certificate permitting him to practice medicine, does not prevent him from doing the business of an ordinary masseur, since it is in the words of Laws 1911, c. 93, prohibiting practicing medicine without a license.

[See note at end of this case.]

Same.

Laws 1911, c. 93, prohibiting practicing medicine without a license, does not concern systems of treatments, but merely prohibits anyone from treating diseases who has not the requisite qualifications.

[See note at end of this case.]

Appeal from District Court, Davis county: HARRIS, Judge.

Action by Board of Medical Examiners of State of Utah, plaintiff, against G. W. Terrill, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

George Halverson for appellant.

A. R. Barnes, E. V. Higgins and G. A. Iverson for respondent.

[648] STRAUP, C. J.—The defendant is enjoined from practicing medicine without a license, and appeals.

He held himself out as a "scientific manipulator." He claims no knowledge of medicine, nor of anatomy, physiology, or hygiene, nor of any of the subjects enumerated in the statute (Laws Utah 1911, c. 93), knowledge of which one, to take an examination and obtain a license, must possess, and concerning which one must hold a degree or diploma

from a legally chartered medical school requiring such subjects. The defendant, however, claims to be merely a masseur, and the right only to give massage treatments by rubbing and manipulating to relax the muscles of his patients and to accelerate the flow of blood, what popularly is known as ordinary massaging. If that were all the defendant did, it might well be conceded that he did not practice medicine within the meaning of the statute (Laws Utah 1911, c. 93), and hence needed no license, and ought not to have been restrained.

But the record shows that he undertook to do, and did, much more. He advertised as a "scientific manipulator," maintained an office, and there received patients suffering from all kinds of ailments; and, in response to calls, visited and treated them at their homes. As testified to, he, for compensation, manipulated the muscles of the abdomen of one suffering from appendicitis, and similarly manipulated others suffering from ulcers or cancer of the stomach; the body of a girl, who, as testified to, "had every indication of typhoid fever," and by such manipulation claimed to have reduced the patient's temperature from 103 to 98 degrees, and told the parents that "if they wanted to, to give the girl a little castor oil and after that citrate of magnesia," and manipulated others for rheumatism. By the same process he treated a little boy suffering from tuberculosis, or other disease, of the hip. The boy's limb, by a regular physician, had been placed in a frame and cast to relieve the strain from the hip. This the defendant removed, and gave the boy treatment by manipulation, which, as testified to, so improved the boy that he was soon able to walk and to [649] operate an automobile. By manipulation he also treated a baby, who, as testified to, "the doctor said," had leakage of the heart and bowel complications. He was called to visit, and treated, a woman who was sick and unconscious. He restored consciousness by rubbing and manipulating the woman's back, sides and stomach. The wife of a dentist was treated by a regular physician for tonsillitis. She grew worse, so was the testimony. Then the attending physician diagnosed the case as tuberculosis of the throat, but later said that he was mistaken in that. She suffered from severe pains back of the ear and in the spine. The attending physician advised consultation with a specialist. Without the knowledge or consent of the physician, and in his absence, the defendant was called in. As testified to, "he inquired as to her feelings and how long she had been sick and where she was suffering pain, and then pulled off his coat and began to manipulate in the region of her neck and spine for fifteen or twenty minutes. She felt

relieved. The next morning, when the attending physician arrived, he found her feeling and looking better. The morning after that she was so much better that the attending physician said that it was not necessary for him to call any more. The defendant told the husband that he had better give his wife some juniper root, which was done. Upon the defendant giving the woman several other treatments, her fever disappeared, and she was free from pain. When the defendant visited her, she was confined in bed for two weeks. Now she was able to get up and walk about. She continued her treatments at her house and at the defendant's office. The defendant, with his hands and fingers, simply manipulated the neck and back and the spine." Another patient, suffering from a sprained and swollen ankle, went to the defendant's office for treatment. Upon exhibiting the foot the defendant told him to remove his shoe and roll up his pant leg. After examining the foot, the defendant told him that he had a broken arch. He rubbed it, bathed it with some sort of oil or liniment out of a bottle, and then bandaged it. Other instances were testified to where persons suffering from ailments visited the defendant at his office, or he at their homes, and gave them treatments.

[650] The doing of these things clearly was practicing medicine within the meaning of the statute. Laws Utah 1911, c. 93, p. 135; State v. Yee Foo Lun, 45 Utah 531, 147 Pac. 488; Board of Medical Examiners v. Freenor, 47 Utah 430, Ann. Cas. 1917E 1156, 154 Pac. 941; State v. Erickson, 47 Utah 452, 154 Pac. 948. There can be no doubt of that, and so the court found. But it is claimed the decree is too broad, in that it, as is urged, prohibits the defendant from doing merely ordinary massaging. The decree is that the defendant be—"restrained, prohibited and enjoined from diagnosing, treating, operating upon, prescribing or advising for any person or persons within the state of Utah afflicted with any mental or physical ailment or afflicted with any abnormal, mental or physical condition, from which person or persons he expects to or has received or does thereafter receive a pecuniary compensation, or from practicing medicine within the state of Utah, until said defendant shall have received a certificate from the board of medical examiners of the state of Utah permitting him to practice medicine within said state."

Comparing the statute with the decree, it is seen that the decree but follows the language of the statute, and forbids the defendant from doing what the statute itself forbids. If the statute forbids mere massage without a license, then also does the decree. If the statute does not, then the decree does not.

As already indicated, we think mere "massaging," as that term popularly is understood, is not, within the meaning of the statute, "diagnosing, treating, operating upon or prescribing or advising for any physical or mental ailment or abnormal condition of another." *People v. Hettiger*, 150 Ill. App. 448; *People v. Gordon*, 194 Ill. 560, 62 N. E. 858, 88 Am. St. Rep. 165. Thus, ordinary massaging is not within the terms of the decree, and hence the defendant is not forbidden doing that. Mere massaging is no more forbidden than mere nursing. It is easy enough for a nurse, or a masseur, to keep within his sphere and not encroach upon the law by assuming or undertaking to diagnose, treat, operate upon, prescribe, or advise for ailments. But the trouble with the defendant is this: To the public he held himself out as "a scientific manipulator," and as willing and ready to receive [651] and treat patients suffering from all sorts of ailments, but when summoned into court declares himself to be but a humble masseur, giving only massage treatments and nothing more. Let him be to the public what he claims to be in court, and let him refrain from diagnosing, treating, prescribing, and advising for ailments of others and confine himself to merely "massaging" as that term popularly is understood. Certainly one may employ a trained nurse, who, for compensation, and without a license, may accept such employment, and, without offending may, in attendance upon a patient, render such service as ordinarily is rendered by a trained nurse; but she may not diagnose, treat, prescribe, or advise for ailments in the sense that one holding a certificate or license to practice medicine may do. That also is true of a masseur. But the defendant, though merely a masseur, claimed the right to do, without a license, all that one holding a license is permitted to do. Though a mere masseur, professing no knowledge of the human system, or of diseases to which it is subject, the defendant, nevertheless, undertook and claimed the right to treat about all kinds of diseases. Without any knowledge of anatomy, or surgery, he undertook to treat a broken or fractured bone of the foot; without any knowledge of pediatrics, he undertook to treat children for leakage of the heart and abdominal affections; without any knowledge of laryngology he undertook to treat tonsillitis, or throat affections; without any knowledge of anatomy, surgery, bacteriology, pathology, or histology, or of other scientific

subjects, undertook to treat a boy for hip disease and patients for appendicitis and rheumatism. If a practice of that kind is to be permitted, then may we as well go back to the days when surgery was performed by the barber and the healing art administered by the Indian powwow.

The object of the statute is to protect the sick and suffering and the community against the unlearned and incompetent who hold themselves out as being possessed of peculiar skill in the treatment of diseases, but who are ignorant of the human system and of the diseases to which it is subject. As we said in the *Freenor Case* we may well again say here, that the [652] law is not concerned with the question whether one system of treatment is as good as or better than another, or what particular treatment should be administered, or what system employed. But "it is concerned with the question that, before any one shall undertake, no matter by what system, to diagnose, treat, operate upon, or prescribe or advise for, any physical or mental ailment or condition of another for a fee or other consideration, he shall possess the learning and skill required by the statute, and produce a degree or diploma from a college meeting the requirements enumerated in the statute, and successfully pass an examination before the board, showing his competency. When he does that, then he may practice whatever system he may consider the most efficacious, or do that in a given case which he thinks will produce the best result. Until he does that he cannot practice at all."

We are therefore of the opinion that the judgment should be affirmed, with costs. Such is the order.

Frick and McCarty, JJ., concur.

NOTE.

It is held in the reported case that while massage treatment does not of itself constitute the practice of medicine, yet if a masseur holds himself out to the public as competent to diagnose and cure disease and administers massage treatment in pursuance of that pretension he thereby engages in the practice of medicine. Massage treatment of disease is discussed in the notes to *Germany v. State*, Ann. Cas. 1913C 477, and *Com. v. Zimmerman*, Ann. Cas. 1916A 858. See also the recent case of *Board of Medical Examiners v. Freenor*, Ann. Cas. 1917E 1156.

GREAT WESTERN RAILWAY COMPANY

v.

HELPS.

England—House of Lords—November 30, 1917.

[1918] A. C. 141.

Workmen's Compensation Acts — Average Weekly Earnings — Tips of Railroad Porter.

In computing the average weekly earnings of a railroad porter for the purpose of awarding compensation under the workmen's compensation act the tips received by him as an incident of his service are to be included as a part of his earnings.

[See note at end of this case.]

[141] Appeal from an order of the Court of Appeal affirming an award of the judge of the Bath County Court under the Workmen's Compensation Act, 1906.

[142] The respondent was employed by the appellants, the Great Western Railway Company, as a passenger porter at their station at Bath. On September 23, 1916, he sustained injuries by accident arising out of and in the course of his employment. His average weekly wages amounted to 1l. 5s. 10d. In addition he received gratuities or "tips" from passengers on the railway amounting on the average to 12s. a week. The respondent claimed that the amount which he received in tips should be taken into account in arriving at his average weekly earnings for the purpose of compensation under the Act; that his average weekly earnings in the employment were accordingly 1l. 17s. 10d., and that the compensation to which he was entitled during period of total incapacity should be calculated at the rate of 18s. 11d., i. e. 50 per cent of 1l. 17s. 10d. a week. The appellants contended that the average weekly earnings of the respondent in their employment amounted to 1l. 5s. 10d. and no more, and they admitted liability to pay the respondent 50 per cent of that sum, namely 12s. 11d.

On January 5, 1917, the respondent filed a request for arbitration for the purpose of having this question determined.

The facts found by the learned county court judge were as follows: Up to January 1, 1913, there was a rule by which the porters of the Great Western Railway Company were bound forbidding them to take tips. That rule was rescinded on that date and the following rule was substituted for it: "No servant of the company is allowed to solicit gratuities from passengers or other

persons." The taking of tips by porters on the Great Western Railway had been going on practically unrestricted for years and the giving and receiving of tips had been open and notorious, and the learned judge found as a fact that this practice had been sanctioned by the company. The amount of wages which a man in any particular grade received was not affected by the tips he might obtain from travellers. There were three different classes of station on the line: first class, second class, and third class—Paddington was a first-class station and Bath a second-class station—and the man's wages depended, not upon the amount of tips he received, but upon the station at which he was located. The bigger the station the more wages he received and the more tips, but tips were not taken into consideration when a man was put at one or other of the stations. Upon these facts [143] the learned county court judge held that this case was covered by *Penn v. Spiers* [1908] 1 K. B. 766, 14 Ann. Cas. 335, and that the tips received by the respondent were earned in his employment, and he awarded him compensation on this basis. This award was affirmed by the Court of Appeals (Lord Cozens-Hardy, M.R., Banks, L. J., and Warrington, L. J.

Schiller, K. C., and Cotes-Predy, for appellants.

Holman Gregory, K. C., and Wethered for respondent.

L. B. Page, solicitor for appellants.

Church, Adams, Prior & Balmer, for Arthur E. Withy, Bath, solicitors for respondent.

[144] LORD DUNEDIN.—My Lords, this is an exceedingly clear case. The facts are simple. The respondent was a passenger porter at a station at Bath, and in his usual avocation as a porter he was in the habit of getting tips from passengers; he was injured in the course of his employment by an accident arising out of his employment, and it is not denied that he is entitled to compensation; but the controversy between the parties is whether, in estimating this compensation, there is to be taken into account, not only the weekly wage which he gets from the company, but also such sum as represents his average takings in this matter of tips.

My Lords, it was only a few weeks ago that I had occasion in this House, in the case of the *Woodilee Coal Co. v. McNeill* [1918] A. C. 43, to point out that compensation which is directed to be paid by the employer to a workman who is injured by accident arising out of and in the course of his employment under s. 1 of the Workmen's Compensation Act has its natural meaning—that is to say, something that is to be paid which makes up for the loss that the man has sustained. It

is quite true that the full measure of the compensation is afterwards cut down by several rules, because the compensation which is directed to be paid under the first section is not compensation in general, but is compensation in accordance with the First Schedule, and when we go to the First Schedule we find certain things which, so to speak, cut down the compensation. But when we go to the First Schedule we find a set of rules there for the computation which has [145] the phrases "earnings," and "average weekly earnings," and it is upon a computation based upon earnings and average weekly earnings that a sum is arrived at. The whole point, therefore, is, do these tips fall within the statutory expression of "earnings?" If you were to ask a person in ordinary common parlance what this porter earned, the answer would be: "Well, I will tell you what he gets; he gets so much wages from his employers, and he gets on an average so much in tips."

My Lords, it has been sought in the argument addressed for the appellants to limit the meaning of "earnings" to what the workman gets by what I may call direct contract from his employers. The simple answer is that the statute does not say so; it uses the general term "earnings" instead of the term "wages" or the expression "what he gets from his employer," and as a matter of fact the employer, in a case where there is a known practice of giving tips, obviously gets the man for rather less direct wages than he would if there was not that other source of remuneration to the man when he is in his post. More than that, in this case the employer is absolutely party and privy to the whole arrangement. The learned arbitrator found as a fact "That the giving and receiving of these tips has been open and notorious. I find as a fact that they have been sanctioned by the employers." Now that fact found by the arbitrator could only be challenged on one of two grounds—either if it was founded upon some erroneous legal proposition which underlay it, or if it was a fact which had no evidence in the case to support it. It is quite obvious that neither of those objections can be stated in this case against the finding, and therefore the finding rules. The result is that these tips are part of the man's ordinary earnings.

My Lords, I entirely go with the decision of the Court of Appeal in the case of *Penn v. Spiers* [1908] 1 K. B. 766, 770, 14 Ann. Cas. 335, which was decided in 1908, and I would especially also commend the very careful limitation that is laid down in that case by the Master of the Rolls where he says: "To avoid misconception, we desire to state that nothing in this judgment extends to 'tips' or gratuities (a) which are illicit;

Ann. Cas. 1918B.—71.

(b) which involve or encourage a neglect or breach of duty on the part of the recipient to his employer; or (c) which are casual and [146] sporadic and trivial in amount." There is here, as I have already pointed out, a direct finding which shows that (c) is excluded in this case.

As regards the subsequent case of *Skailes* [1911] 1 K. B. 360, not only do I find that the majority of the Court adhered to the judgment in *Penn* [1908] 1 K. B. 766, 770, 14 Ann. Cas. 335, but the dissentient member of the Court, Fletcher Moulton L. J., dissents not because he does not agree with *Penn* [1908] 1 K. B. 766, 770, 14 Ann. Cas. 335,—indeed he was a party to that judgment himself—but because, the question there being upon s. 13, what was the true meaning of "remuneration," he held that "remuneration" and "earnings" were not synonymous terms, whereas the other learned judges held that they were.

My Lords, I think the appeal should be dismissed.

LORD ATKINSON.—My Lords, I concur, and I have nothing to add.

LORD PARKER OF WADDINGTON.—My Lords, I concur.

LORD SUMNER.—My Lords, I concur.

LORD PARMOOR.—My Lords, I think that the true effect of Mr. Schiller's argument would be to limit earnings to the amount which an employee is entitled to claim under or in consequence of his contract of service. I use those two words because Mr. Schiller used them. I think that this construction of the Workmen's Compensation Act is not accurate, and that the word "earnings" is not so limited in its meaning. If it is not so limited, then the question arises whether notorious tips, such as are received by a railway porter, should be taken into account. It was within the competence of the arbitrator to find that the tips in question were earned by the applicant in his employment, and that appears to me to be a finding which settles the matter in this case.

The history of these tips points in the same direction. It is quite accurately stated by the Master of the Rolls in his judgment in these words: "At one time, and for a good many years, the Great Western Railway Company had a rule which said that no gratuity is allowed to be taken from passengers or other persons by any servant of the company. It was found that that rule was [147] habitually disregarded; it was a mere waste of paper; and in 1913 new rules were passed. The old one was abolished, and there is this one now: that no servant of the

company is allowed to solicit gratuities from passengers or other persons."

My Lords, I should like to associate myself with the caution expressed by the noble and learned Lord on the woolsack, that the decision in this case is applicable to tips which are notorious and well known, and not to tips which are casual and sporadic and trivial in amount.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

NOTE.

Tips as Part of Earnings or Wages.

In *Penn v. Spiers* [1908] 1 K. B. 766, 14 Ann. Cas. 335, it was held that the tips of a waiter were to be included in computing his average weekly earnings for the purpose of an award under the workmen's compensation act. That decision is approved, and the doctrine applied to the tips of a porter, in the reported case, which affirms 86 L. J. K. B. 1006, [1917] W. C. & Ins. Rep. 199, 33 Times L. Rep. 366, 61 Sol. J. 490. To the same effect, see *Knott v. Tingle*, 4 B. W. C. C. 55.

The same result was reached in what is apparently the only American case passing on the point. *Sloat v. Rochester Taxicab Co.* 177 App. Div. 57, 163 N. Y. S. 904, wherein, referring to the tips of a taxicab driver, the court said: "The employee could not have received the tips if the employer had not put him in the way of getting them, and we may well conclude that the tips were an advantage received from the employer similar in effect to board, lodging, or rent furnished in addition to the money wages paid. Many times a guest at a hotel, a passenger upon a sleeper, or a person receiving service from the employee of another, is glad to recompense a pleasing manner or an extra service by a reasonable tip; but according to the present custom tips are not usually the voluntary act of the person who gives them. The employee, with the knowledge and consent of the employer, furnishes a service which compels the payment of a tip, and if the tip is not paid the service is so grudgingly and unsatisfactorily given that the person served is willing to pay it the next time. The person rendering the service considers that the tip is his as matter of right and involves no particular favor; an extra large tip may be appreciated, but the ordinary tip is considered a payment of money actually due. The usual tips have come to be considered a part of the cost of the entertainment at a hotel or upon a sleeper or public conveyance, and it is real-

ized both by the person paying and receiving them that it is a part of the wages, which the employer compels the person served to pay. In effect, therefore, the employer, and not the employee alone, is benefited by the tip usually paid. It is common knowledge that porters on sleeping cars are employed at inadequate wages, and that the employer and employee recognize that the great part of the service rendered by the employee is to be paid by the patrons of the company. The same is true as to waiters in the restaurants and the attendants at the hat stands, the bell boys, and others serving patrons at hotels. The tip is so usual and the amount so uniform that the employer and employee realize about how much in addition to the tips it will be necessary for the employer to pay the employee to give him reasonable compensation. The whole theory of tipping, as at present understood in the usual practice, is a payment made in order to get reasonable service, and is an exaction made or permitted by the employer, so that his patrons shall help him pay the wages which is fairly due from him to his employee. The custom and the manner in which the payment of tips is enforced and practiced leads inevitably to the conclusion that in substance the tips received are a part of the wages of the employee, and are advantages received by the employee from the employer as a part recompense for services rendered. The court should treat these tips in the same manner in which the employer and employee treat them, as a part of the compensation to be received by the employee for the services rendered the employer, a part of the wages, a part of the average annual earnings of the employee."

AETNA LIFE INSURANCE COMPANY

v.

TAYLOR.

Arkansas Supreme Court—March 19, 1917.

128 Ark. 155; 193 S. W. 540.

Actions — Review — Special Administrator.

An action the cause of which survives may on death of plaintiff at once be revived in the name of a special administrator; there being no general administrator or executor.

Accident Insurance — Cause of Death — Burden of Proof.

It being shown in an action on a policy insuring against death from external, violent,

and accidental means that death came from external and violent means, and this in connection with the presumption against suicide, making a *prima facie* case, instructing that plaintiff did not have to prove death did not result from suicide is not error.

[See note at end of this case.]

Attorneys — Allowance of Fees — Amount.

An attorney's fee of \$1,000 allowed plaintiff recovering \$8,000 on an accident policy is reasonable.

Appeal from Circuit Court, Jefferson county: SOBRELLS, Judge.

Action by Dan Taylor, plaintiff, against Aetna Life Insurance Company, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

[156] This is an action by an administrator to recover on a policy of accident insurance.

The plaintiff alleges that the Aetna Life Insurance Company insured Edgar P. Sears in the sum of \$5,000 against death resulting directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental means. That the policy itself and the accumulations from renewals amounted to \$8,000, and that Ella S. Sears, the wife of the insured, was the beneficiary.

[157] That on the evening of November 25, 1914, during the life of the policy, Edgar P. Sears received a pistol wound in the head at the hands of an unknown person which resulted in his immediate death.

In its answer, defendant denied that the death of the insured was accidental within the meaning of the policy. It avers that by the terms of the policy it did not agree to insure Sears against death from his own intentional act. The answer further alleges that Sears committed suicide by shooting himself, and that no person other than himself was responsible in any manner for his death. The material facts are as follows:

Edgar P. Sears had carried an accident policy with the defendant company for sixteen years prior to his death. The policy which was in force at the time of his death insured him against disability or death resulting, directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental means, suicide (sane or insane) not included. The policy was for \$5,000 and contained a clause for an increase of the amount of the policy by consecutive renewals until the accumulations should amount to 50 per cent of the principal sum.

The insured was found dead in the city of Pine Bluffs on the morning of the 26th of November, 1914. His death was the result of a gunshot wound through his head, which,

the physicians who examined his body testified, caused immediate death. The bullet went into his head about an inch in front and above the right eye and came out about one inch and a half above and behind the left ear. There were no powder marks or burns of any nature on his body; his flesh was not charred, nor was his hair singed. Sears was a good sized man, weighing about two hundred pounds. His body was found near a cotton platform and a folding pocket-book with some of his papers in it was lying on a bale of cotton on the platform. He was lying on his back with one leg straight out and the other drawn up. His left arm was lying down by his side [158] and his right arm was lying over his breast with his hand on a 38 caliber pistol. The pistol had been fired twice. The ground was dusty and there was no evidence of a struggle or even of any other tracks around there.

It was also shown by the defendant that the insured had formerly been a man of means and had always made a good deal of money until about a year before his death, when misfortune overtook him. The defendant's evidence also tended to show that the insured was making very little money just prior to his death and had been unable to even pay his board; that he was drinking heavily and was very much depressed. Other circumstances tending to show death by his own hand were adduced in evidence.

The testimony on the part of the plaintiff tended to show that the deceased had not been drinking heavily prior to his death; that he was in good spirits and had sent his wife a small amount of money, writing a cheerful letter.

The jury returned a verdict for the plaintiff, and the defendant has appealed.

M. Danaher and Palmer Danaher for appellant.

Gustin, Gillette & Brayton and Taylor, Jones & Taylor for appellee.

HART, J. (after stating the facts).—This action was commenced by Ella S. Sears, the beneficiary named in the policy. During the pendency of the action and before the case was tried she died and the suit was revived in the name of Dan Taylor, as special administrator of her estate. This was done over the objection of the defendant. The motion to revive was accompanied by the affidavit of three persons showing that Ella S. Sears had died at Salt Lake City, Utah, and that no administration upon her estate had been had. There was no error in the action of the court in this regard.

In *Anglin v. Cravens*, 76 Ark. 122, 88 S. W. 533, the court said: "When the plaintiff dies during the pendency of the action, any

person interested in the further prosecution thereof may have a revivor in the name of the administrator or executor, if there be such, and the right of action be [159] one that survives in favor of the personal representative; and if there be no general administrator or executor, the revivor shall be in the name of a special administrator appointed by the court in which the action is pending. The order to revive may be made forthwith—as soon as the court in which the action is pending convenes after the death of the plaintiff, and must be made within one year after that time, except by consent of parties. The limitation of time in the statute applies equally where there is no general administrator or executor as where there is one, because in such event the persons interested may have a revivor in the name of a special administrator."

(1) Again, in *Keffer v. Stuart*, 127 Ark. 498, 193 S. W. 83, the court held that under our statute when a plaintiff dies the revivor may be made in the name of his representatives forthwith, whether the defendant consents to it or not. The court further said that the statute does not require that the defendant be consulted until after the expiration of a year from the time when the order of the revivor might have been first made, but that after that time, the order of revivor could not be made without the consent of the defendant.

The court also gave at the request of the plaintiff, among others, the following instructions:

"1. If you believe from the evidence that the deceased came to his death as the result of a pistol shot fired by some person other than himself, your verdict will be for plaintiff.

"2. The burden is upon the defendant insurance company to establish by a preponderance of the evidence that the deceased committed suicide, and unless you so find, your verdict will be for the plaintiff."

It is insisted that the court erred in giving instruction No. 2.

(2) The burden was on the plaintiff to establish that the death of the insured resulted directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental [160] means; but he was not required to prove that the death of the insured did not result from suicide, which by the terms of the policy would relieve the company from liability thereunder.

(3-4) When the plaintiff proved that the insured was found dead with a pistol wound through his head and that this caused his death, he had made out a *prima facie* case under the policy. The reason is that there is a presumption that one does not commit

suicide. Such a presumption being one of evidence, stands until overthrown by evidence. As stated by Judge Agnew in *Allen v. Willard*, 57 Pa. St. 374, "The natural instinct which leads men in their sober senses to avoid injury and preserve life is an element of evidence. In all questions touching the conduct of men, motive, feeling and natural instincts are allowed to have their weight and to constitute evidence for the consideration of courts and juries."

(5) The defendant claimed that the insured had committed suicide, which is made an exception to the risk of the policy. This was a defense and the law cast upon the company the burden of proving it.

The policy insures against death to Sears by external, violent and accidental means. It is made subject to a condition that the defendant is not liable in case of the suicide of the insured. The occurrence of this condition operates to defeat the policy, and this fact should be shown by the party relying on it. 1 Cyc. 289; 1 Corpus Juris, §§ 278 and 284, pp. 495 and 496; 14 R. C. L. § 416, pp. 1235 and 1236; *Travellers Ins. Co. v. McConkey*, 127 U. S. 661, 8 S. Ct. 1360, 32 U. S. (L. ed.) 308; *Coburn v. Travelers Ins. Co.* 145 Mass. 226, 13 N. E. 604; *Starr v. Aetna Life Ins. Co.* 41 Wash. 199, 83 Pac. 113, 4 L.R.A.(N.S.) 636, and case note; *Cronkhite v. Travelers Ins. Co.* 75 Wis. 116, 43 N. W. 731, 17 Am. St. Rep. 184; *Meadows v. Pacific Mut. L. Ins. Co.* 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427; *Fetter v. Fidelity, etc. Co.* 174 Mo. 256, 73 S. W. 592, 97 Am. St. Rep. 560, 61 L.R.A. 459; *Accident Ins. Co. of North America v. Bennett*, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685; *Wilkinson v. Aetna Life Ins. Co.* 240 Ill. 205, 88 N. E. 550, 130 Am. St. Rep. 269, 25 L.R.A.(N.S.) 1256.

[161] In a case note to 9 Ann. Cas. at page 921, it is said that accident policies generally contain a clause, the purpose of which is to relieve the insurer from responsibility in case of death of the insured caused by intentional injuries inflicted by the insured or some third person, or caused by disease, or caused by voluntary exposure to unnecessary danger, etc.; and that where the insurer sets up the breach of one of these conditions as a defense, the burden is of course upon it to prove by a preponderance of the evidence that death was caused by a breach of one of these conditions.

The rule, we believe, is not only supported by the better reasoning but is in accord with the great weight of authority as shown by the cases cited in the note just referred to. This general rule is also in accord with the trend of our decisions bearing on the question.

In *Grand Lodge of Ancient Order of United Workmen v. Banister*, 80 Ark. 190, 96 S. W.

742, it was held that where, in a suit upon a benefit certificate, the insurer claims non-liability upon the ground that the insured committed suicide, the burden of proving that fact is upon the defendant. It is true this was an action on a life insurance policy and that there is a difference in the amount of proof required to recover on a life insurance policy and on an accident policy. In the former, all that is necessary for the plaintiff to show to make out a *prima facie* case is the contract and death. In the latter, in addition to this, the plaintiff in order to recover must prove that the death or injury was accidental within the meaning of the terms of the policy. This difference, however, does not in any manner affect the reasons for the rule casting upon the defendant the burden of proving suicide when that is alleged as a defense to the policy. Both in actions on life and accident insurance policies, the plaintiff must first make out a *prima facie* case, and when that is done, the defendant having set up a breach of a condition of the policy as a defense, the burden is upon it to prove by a preponderance [162] of the evidence that the death was caused by a breach of this condition.

In the present case it is shown beyond question or dispute that the insured came to his death by external and violent means. The only controverted question of fact in the case is as to whether or not he committed suicide. This being the case under the principles of law above announced, the court did not commit reversible error in giving the instruction complained of.

(6) The jury returned a verdict for the plaintiff in the sum of \$8,000, and there is no claim that the plaintiff was not entitled to recover this sum under the terms of the policy. The court fixed the attorneys' fee at \$1,000. It is claimed that this is excessive, as being evidently made upon the basis of a contingent fee. We do not agree with counsel in this contention. We have held that the court should only allow a reasonable fee for legal services performed and that this should not be made on the basis that the fee was contingent. *Mutual Life Ins. Co. v. Owen*, 111 Ark. 554, 164 S. W. 720. In that case the policy sued on was \$10,000 and the court allowed a fee of \$2,000. We held that this was unreasonable and that \$1,000 would have been a reasonable fee. Here the recovery was for \$8,000 and we do not think, when all the circumstances of the case are considered, that a fee of \$1,000 was excessive. Three attorneys who testified on the question stated that \$1,500 would have been a reasonable fee, but we think that the court properly fixed it at not exceeding a thousand dollars. The judgment will be affirmed.

NOTE.

The reported case holds that where a person is found dead with a pistol shot wound in his head, the presumption arises, in an action on a policy of accident insurance, that his death was accidental, so that the burden is on the insurer of showing that the death was caused by suicide.

The burden of proof and the sufficiency of evidence to show accidental death in an action on an accident insurance policy are discussed in the notes to *Preferred Acc. Ins. Co. v. Fielding*, 9 Ann. Cas. 916; *Moon v. Order of United Commercial Travelers*, Ann. Cas. 1916B 222; and *Wilkinson v. Aetna L. Ins. Co.* 130 Am. St. Rep. 269.

TAYLOR

v.

MOSELEY.

Kentucky Court of Appeals—June 6, 1916.

170 Ky. 592; 186 S. W. 634.

Appeal and Error — Harmless Error — Admission of Evidence — Fact Otherwise Proved.

Admission of hearsay evidence is not prejudicial, where the same fact is established by other proof in the record.

Trial — Cross-examination — Power of Court to Control.

It is within the discretion of the court at any time to put a stop to irrelevant cross-examination.

Appeal and Error — Harmless Error — Exclusion of Evidence — Fact Otherwise Proved.

The exclusion of testimony where the facts to be established thereby were brought out by other evidence in the record, is not prejudicial.

Libel and Slander — Language Libelous Per Se — Attributing Statement to Candidate for Office.

In a suit for libel, the language of an affidavit stating that plaintiff, a candidate for office, had said that he had been pandering to the Catholics as long as he was going to, but that if he did run again he could give the priests \$10 for their picnics and they would see to it that he got all the votes, is not actionable per se.

[See Ann. Cas. 1914C 997.]

Special Damages for Libel.

Where the language of an alleged libel is not actionable per se, the plaintiff can recover only upon proof of special damages which

are the natural, immediate, and legal consequence of the charge, and due exclusively to its publication by defendant.

Loss of Election as Element of Damage.

Special damages cannot be predicated upon failure of election to office, as damages in such connection are necessarily too remote and speculative to justify serious consideration.

[See note at end of this case.]

Appeal and Error — Harmless Error — Refusal of Instructions — Party Not Entitled to Recover.

In an action for libel and slander, the refusal to give instructions offered by plaintiff, is held not to be prejudicial error, where the plaintiff had no case in any event because the language used was not libelous per se, and the special damages avowed were too remote and speculative to authorize a recovery.

Appeal from Circuit Court, Daviess county.

Action by E. P. Taylor, plaintiff, against C. J. Moseley, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

W. T. Ellis, L. P. Tanner, Little & Slack and Aud & Higdon for appellant.

O. M. Finn, Le Vega Clements and W. P. Sandidge for appellees.

[593] MILLER, C. J.—E. P. Taylor and Jamie Weir were rival candidates for the Democratic nomination for clerk of the Daviess county court in the primary election held on August 2nd, 1913. Taylor was then serving his second term as county court clerk, and formerly had held the office of judge of the county court.

The contest between Taylor and Weir was spirited, and resulted in Weir obtaining a majority of 43 out of a total vote of 5307.

For several weeks before the election it had been rumored that Taylor had made certain remarks in 1911 in criticism of the Catholic voters of the county. At a public speaking at West Louisville in Daviess county, on July 21st, 1913, Taylor, who was the principal speaker, denounced as slanderous the remarks which had been attributed to him.

In answer to Taylor's speech, Mullican, a candidate for the legislature, interrupted Taylor and stated that he had in his possession the affidavit of C. J. Moseley, the man to whom it was claimed Taylor had made the statements attributed to him. Taylor, however, declined to be interrupted or to let Mullican read the affidavit, and nothing further was said about it on that occasion.

However, on August 1st, 1913, the day before the primary election, C. J. Moseley made the following affidavit:

[594] "I, C. J. Moseley, state that about two years ago, in the race for the legislature in Daviess county between J. H. Elder and R. M. Stuart, Judge E. P. Taylor called me by telephone and asked me to come to his office. When I went he wanted to know why I was against Robert Stuart and wanted me to be for him. I told him I had nothing against Mr. Stuart, but I was for Mr. Elder because I thought it best for the Democratic party to nominate him. I called Judge Taylor's attention to the fact that both he and Stuart were related to Governor McCreary's family, and that Mr. Ben Johnson had withdrawn from the race for Governor against McCreary, charging that McCreary was using the fact that he (Johnson) was a Catholic against him in the race. I told Judge Taylor that in view of this fact I did not think we ought to turn Mr. Elder down, although I did not then know Mr. Elder. I told him if we did it might be some ground for the Catholics to get mad and refuse to vote the Democratic ticket; and, I further said to him that in view of the fact that both he and Stuart claimed to be kin to Governor McCreary's family that I did not think he ought to be running Stuart, and that his activity for Stuart might make against him hereafter. He said he did not know that he would ever run again, and that he had been pandering to the Catholics any way as long as he was going to. He further said that if he did run again, however, he could give the priests ten dollars for their picnics and they would see to it that he got all the votes.

"While I was at West Louisville on the night of the 21st I heard Judge Taylor criticizing Mr. Sim Mullican for circulating the report that he had made statements as above, and I made this affidavit in justice to Mr. Mullican, for I was the one, or one of the ones, for I understand that the same statements were made by Judge Taylor to others, who gave Mr. Mullican his information.

"C. J. MOSELEY.

"Subscribed and sworn to before me by C. J. Moseley this the 1st day of August, 1913.

"ERNEST WEILL,

"Notary Public Daviess Co., Ky."

Moseley's affidavit was not printed in the papers, but two copies of it were made, and one copy was given to [595] Hazel who, on his own motion, showed it to certain voters on the day of the election.

In the local morning papers of August 2, 1913, Taylor published the following counter affidavit:

"State of Kentucky,

"Daviess County, Sct.

"The undersigned affiant, E. P. Taylor, states that fortunately he has discovered at

this late date, namely 7:30 P. M., August 1, 1913, that there is being circulated affidavits dated August 1st, 1913, and signed by C. J. Moseley, attacking his loyalty and honesty of purpose to the people of his county; that the affidavit so signed by C. J. Moseley is malicious and a falsehood; is a lie, born of prejudice and malice, and is being circulated by C. J. Moseley at the eleventh hour in his race for county clerk to injure this affiant and with the hope and view in said C. J. Moseley's mind that said affidavit will get in its work against this affiant too late for this affiant to get to the people with the truth.

"I, E. P. Taylor, further state and believe the fact to be true that the affidavit signed by C. J. Moseley was prepared by crafty politicians with the designing and malicious purpose of defeating affiant for the office of county clerk.

"E. P. TAYLOR.

"Subscribed and sworn to before me by E. P. Taylor this the 1st day of August 1913, 8:30 P. M.

"TANDY L. HAZEL,
"Clerk Daviess Circuit Court."

To this publication a rejoinder by Moseley was made in the papers, which contained this statement:

"But since Judge Taylor in his speech at West Louisville denied any recollection of having a pistol at a recent meeting of the fiscal court, and of the fact that Sheriff Winsted disarmed him on this occasion, I am not surprised that he should deny the truth of the facts in my affidavit. These facts, however, can be proven, and will be, if he desires, by others and myself."

On July 27th, 1914, Taylor filed this suit for libel against Moseley, claiming damages in the sum of \$25,000.00. Moseley justified by alleging the truth of the statements contained in his affidavit; and, upon a trial of the issues thus made, the jury returned a verdict for the defendant. Taylor appeals.

[596] Appellant insists that the trial court erred: (1) in admitting incompetent evidence offered by appellee, and in excluding competent evidence offered by the appellant; (2) in striking out that part of the petition which alleged special damages based upon the loss of the office; and, (3) in failing to give certain instructions offered by the appellant.

We will consider these questions in the order named.

1. Moseley stated that he made the affidavit for the protection of Mr. Mullican, the candidate for the legislature, who seems to have made the statement denounced by Taylor. On his direct examination Moseley testified as follows, in this connection: "Q. Did you hear him (Taylor) go all over the

county abusing Mr. Mullican? A. I have heard of it." Plaintiff objected to this question and moved the court to exclude the answer from the jury, but the court overruled the objection. Appellant insists that Moseley should not have been permitted to tell what he had heard upon that subject.

In view, however, of other proof appearing throughout the record that Taylor and his friends had denounced Mullican, the error, if it be so considered, was of minor importance. Certainly, it did not affect the appellant's case.

Upon the cross-examination of Moseley, the plaintiff put into the record the rejoinder card of Moseley in which he had referred to the pistol incident in the fiscal court, and then asked Moseley this question: "You do not have any knowledge at all on the subject of what took place in the county court room?" The court of its own motion excluded the question, and the plaintiff now complains that in doing so it committed a reversible error.

We see no error here. The plaintiff having first brought this matter into the record on cross-examination is in no position to complain that he was not permitted to further pursue it. This testimony was irrelevant and the trial court properly took the view that it had nothing to do with this case.

It is next insisted that the court erred in refusing to permit Taylor to show what the fees of the office of county court clerk were reasonably worth per annum to the clerk; and he avowed that if permitted to answer the question the witness would state that the fees of the office were worth \$5,000.00 a year, clear of expenses.

[597] This objection raised the question whether the plaintiff was entitled to show special damages, and will be considered under the next paragraph of this opinion.

Finally, Hazel, who procured Moseley to make the affidavit, was asked as to the extent of the circulation of the two copies of the affidavit which he had made, but the court sustained an objection by the defendant and declined to let him answer the question. But later in his testimony Hazel in an answer to a similar question by plaintiff's counsel, said: "I went to Knottsville, and I can tell you what I did with these copies. I gave one to Mr. Aull who was to be his deputy, and took the other and showed it to my brother-in-law, who is a Catholic priest."

In this connection, it is further insisted that when Hazel was asked if there were not a very large number of the Democratic voters of the Knottsville precinct who were members of the Roman Catholic church, the court refused to allow him to answer the question. In this, however, counsel for appellant is mistaken, since the record upon this subject

shows that Hazel testified as follows in answer to questions by appellant's counsel:

"Q. Knottsville is a precinct in Daviess county in which there is a very large number of Democrats who are members of the Roman Catholic church, is not that true?

"The defendant objected to this question and the court being advised overruled said objection to which ruling the defendant excepted.

"A. Yes, sir. Q. That is your old home precinct, you had formerly lived there a great number of years? A. I was born and raised there. Q. How far is that from Owensboro? A. Thirteen miles. Q. Was Guy Aull a Catholic too? A. Yes, sir. Q. Did you deliver one to Felix Heady? The defendant objected to this question and the court being advised overruled said objection, to which ruling the defendant excepted. A. I hardly think I did. I do not remember. I do not think I had but two made and I never did give up the original until I was called in court about it."

From this review of the rulings of the court upon the evidence, we feel sure appellant was in no way prejudiced.

2. Upon motion of the defendant, the court struck from the petition all that part of it which recited that Taylor was clerk of the Daviess county court and a candidate [598] for re-election, with good prospects of re-nomination and election; that the affidavit was made for the malicious purpose of injuring plaintiff in his canvass and to bring him into contempt and disrepute with those Democratic voters who were members of the Catholic church, and into dishonor and disrepute with the public generally; that there were fifteen hundred legal Democratic voters in the county that belonged to the Catholic church; that the fees of said office were reasonably worth \$5,000.00 each year; and, that he would have received a majority of all the Democratic votes cast in said primary and the nomination to the office for which he was a candidate, for a term of four years, but for said libelous publication complained of.

By this ruling it is contended the court erroneously held that plaintiff could not recover special damages in this action. The language of the affidavit which is the basis of the action is not actionable *per se*, Williams v. Riddle, 145 Ky. 459, Ann. Cas. 1913B 1151, 140 S. W. 661, 36 L.R.A. (N.S.) 974; Pollard v. Lyon, 91 U. S. 225, 23 U. S. (L. ed.) 308. In such a case plaintiff can recover only upon a showing of special damages. And, the language of the alleged libel not being actionable *per se*, the plaintiff cannot recover, unless the proof shows that the special damages alleged are the natural, immediate, and legal consequence of the charge, and due exclusively to the publication by defendant. 25 Cyc.

525; Axton-Fisher Tobacco Co. v. Evening Post Co. 169 Ky. 64, 183 S. W. 269, L.R.A. 1916E 667.

In Williams v. Riddle, *supra*, we said:

"To sustain a recovery plaintiff must not only show damages, but the damage must be the natural and probable consequence of the words used. Lynch v. Knight, 9 H. L. Cas. 591; 8 Eng. Rul. Cas. 387. The damage here alleged is too remote, uncertain and speculative, to claim the attention of a court. Field v. Colson, 93 Ky. 348."

See also The Windish-Muhlhauser Brewing Co. v. Bacon, 21 Ky. L. Rep. 928, 53 S. W. 520.

As to what character of loss will be sufficient to show special damages for which a recovery may be had, 25 Cyc. 525, says:

"The special damages must flow from impaired reputation. It must be a loss of a pecuniary character, or the loss of some substantial or material advantage. [599] Thus loss of fuel and clothing previously gratuitously furnished, the refusal of civil-entertainment at a public house, loss of a marriage, loss of substantial hospitality of friends or third persons, loss of a customer, or a general falling off in business, a refusal of credit, or loss of profitable employment is sufficient evidence of special damages. But evidence of the loss of *consortium vicinorum*, or evidence that plaintiff's relatives slighted and shunned him, is not sufficient to show special damages. Neither mental suffering nor physical sickness will alone be sufficient to show special damages to support an action for words not actionable *per se*."

We have been cited to no case in which it has been held that failure of election to an office could be shown to authorize a finding of special damages. The loss of the office cannot be said to be the natural, immediate, and legal consequence of the charge and due exclusively to it.

Appellant quotes from section 247 of Townsend on Slander and Libel in which that author, with due deference to the decisions, says that the rule must be the same for every kind of employment, and office is another name for employment, and that the right which one has to speak concerning a candidate for employment as a mechanic or domestic is neither more extensive nor more limited than the right one has to speak of a candidate for the office of legislator.

The author, however, conceded that his opinion thus expressed, is at variance with the weight of authority. We think the trial court was right in holding that special damages for the loss of the office had no proper place in this case, for the reason that the damages specially alleged were too remote and speculative to justify serious consideration.

In *Field v. Colson*, 93 Ky. 348, 20 S. W. 264, Field had been a candidate for the legislature against Howard and withdrew from the contest. Later, he re-entered the race, and the defendant, Colson, charged him with having accepted a bribe to abandon the contest against Howard. Field was defeated and sued Colson for slander.

In affirming a judgment for the defendant, the court said:

"The plaintiff had no cause of action. The words charged did not, if true, constitute an indictable offense, nor were they spoken of him in the way of his office, [600] profession or trade, unless his candidacy can be so regarded; and even if actionable by averring special damages, the damage alleged is too remote, uncertain and speculative."

When we remember that the affidavit which is the foundation of this action was not published in a newspaper, and that the counter-affidavit of Taylor was published in the newspapers, how can it be said that plaintiff lost the office by reason of the Moseley affidavit and its circulation limited to two copies? Special damages to be recoverable must have some direct and immediate connection with the charge; they must be the direct result of the action complained of.

The trial court properly held, as a matter of law, that special damages were not recoverable for the loss of the office; and, that being true, that portion of the petition which sought to show special damages by alleging the value of the office of county court clerk, was properly stricken out.

3. The complaint is made, not that instructions 1, 2 and 3 given by the court are erroneous, but that similar instructions offered by the appellant more clearly stated the law on that subject. If appellant's contention in this respect was sound, it would not be a reversible error because, as he concedes, the first three instructions correctly stated the law upon the subject of which they treated. The fourth instruction properly defined actual malice, and the fifth instruction prohibited a recovery based upon the result of the primary election. Plaintiff insists that the court should have given instructions 5 and 7 offered by him, and that the failure to give them constituted reversible errors. The fifth instruction so offered, advised the jury that it was not necessary for the plaintiff to prove any specific damage in order to recover, and that the law presumed the reputation of the plaintiff to be good in the community; while, by the seventh instruction tendered, the appellant asked the court to instruct the jury that if they found any of the injurious statements contained in the alleged libel false, they should find for the plaintiff; and, that malice was properly inferable from the falsity of the words "charged in the com-

plaint as libelous," the principal question being as to the truth of the matter contained in the alleged libel.

[601] These questions, however, were submitted by the first three instructions. The first instruction peremptorily directed a finding for the plaintiff unless the jury should believe from the evidence that the charges contained in the publication complained of were in fact or in substance found to be true as published. The second instruction was the converse of the first, and directed a verdict for the defendant in case the jury should believe from all the evidence that the whole publication complained of was proven in terms, or in substance, to have been true. The third instruction gave the proper measure of damages and authorized a recovery of punitive damages in case the publication was induced by actual malice upon the part of Moseley, or by a reckless disregard of plaintiff's rights. But the jury having found for the defendant upon his plea of justification, the instruction upon the measure of damages becomes unimportant.

The language used being not libelous *per se*, and the special damages avowed being too remote and speculative to authorize a recovery, the plaintiff had no case. *Field v. Colson*, *supra*.

From a careful reading of the entire record, we fail to find that appellant has been prejudiced in any of his substantial rights.

Judgment affirmed.

NOTE.

Loss of Election or Appointment to Office as Element of Damages for Libel or Slander.

While it is well settled that a criticism of a candidate for an office may be actionable (see the note to *Black v. State Co.* Ann. Cas. 1914C 989) there are but few cases discussing the question whether the loss of an election or appointment to office may in such a case be considered as an element of damages.

In *Field v. Colson*, 93 Ky. 347, 20 S. W. 264, an action for slander, it was held that an averment in the complaint that the plaintiff by reason of the slander was defeated in a race for the legislature and lost the emoluments of the office, was not sufficient to establish special damages, such damages being too remote, uncertain and speculative. The court said: "The words charged did not, if true, constitute an indictable offense, nor were they spoken of him in the way of his office, profession or trade, unless his candidacy can be so regarded; and even if actionable by averring special damage, the damage alleged is too remote, uncertain and speculative. The plaintiff held neither an office of trust nor

confidence; and while the words said to have been spoken might affect to some extent his moral standing, to say that one candidate gave another three hundred dollars to abandon the race are not actionable, coupled with the averment of special damage. It is true that words spoken of another that would necessarily result in the loss of some future benefit or advantage to the party injured may, with the averment of the special damage, present a cause of action; but we do not think such a state of case is presented here, and if the petition is good it clearly appears from the testimony that no such special damage resulted from the language used."

In the reported case it is decided that in an action for libel for language used concerning a candidate for office, where the language constituting the alleged libel is not actionable per se, the failure of election by the plaintiff and the value of the office are too remote and speculative to authorize a finding of special damages; since the loss of the office cannot be said to be the natural, immediate and legal consequence of the charge and due exclusively to it.

In *Crawford v. Barnes*, 118 N. C. 912, 24 N. E. 670, it was held that an action for slander, seeking to recover special damages for the loss of the plaintiff's election to Congress, was premature if brought before the date set for the election. The court did not enter into the question whether the loss of the election would constitute an element of damage.

In *Brewer v. Weakley*, 2 Overt. (Tenn.) 99, 5 Am. Dec. 656, it appeared that the plaintiff was a candidate for office and the defendant said of him that "he committed a misdemeanor in the state of North Carolina for which he was arraigned and tried for his life and I will show it in black and white." In an action for slander the court held that the loss of an election is a legal injury for which the law will afford redress, saying that "if an injury results to the voter when he is deprived of his vote tending to the loss of his favorite candidate, it would surely be an injury to that candidate to be deprived of votes by defamation."

In *Galveston Tribune v. Johnson* (Tex.) 141 S. W. 302, it was held that a publication by the defendant concerning the plaintiff's conduct as a member of a legislative committee which tended to expose the plaintiff to public hatred and contempt was libelous per se and that an injury to the plaintiff's political career and his opportunities to secure public office were proper elements for special damages.

In *Sherwood v. Kyle*, 125 Cal. 652, 58 Pac. 270, it appeared that the defendant who was a trustee of the school in which the plaintiff was teaching spoke words of a slanderous

character of the plaintiff as a school teacher. In an action for damages the plaintiff testified that she had had no difficulty in obtaining schools since a verdict for \$1,000 was rendered. An order of the trial court granting a new trial on the ground of excessive damages unless the plaintiff would remit \$700 of the judgment was sustained on appeal, the appellate court saying: "The trial was two years after the alleged slander, and Mrs. Sherwood testified that she had found no difficulty in obtaining schools in Lake county since. She might have continued at the same school. The judge probably concluded that she had not been seriously injured by the slander, and that the jury had simply imposed a fine on the defendant for his bad manners."

RAVENS CROFT

v.

STULL ET AL.

Illinois Supreme Court—October 23, 1917

280 Ill. 406; 117 N. E. 602.

Wills — Testamentary Capacity — Opinion Evidence.

Where the proponents produced witnesses who stated that testator had capacity to make a will, the contestant, to meet the opinions of such witnesses, may introduce witnesses who will state their opinion that testator did not have such capacity.

Test of Testamentary Capacity.

While sufficient mind and memory to attend to the ordinary business affairs of life makes one competent to make a will, such test is higher than the law requires.

[See Ann. Cas. 1912A 621.]

Evidence as to Capacity.

A party to a will contest has a right to ascertain and present to the jury any fact in relation to the mental capacity of the testator and the strength of his mental powers.

General Business Capacity of Testator.

Witnesses may be asked as to the ability of testator to transact ordinary business.

Remote Statements of Testator.

Statements imputed to testator, four or five years previous to his death, concerning his intention to give his property to a certain person, are inadmissible as too remote.

Use of Intoxicants by Testator.

Evidence of testator's habit of drinking intoxicating liquors is admissible.

Burden of Proof — Confidential Relations.

In a will contest, a requested instruction that confidential relations between proponent

and testator, and the fact that she was substantially benefited by the will, did not change the burden of proof, is properly refused.

Use of Intoxicants by Testator.

It is proper to instruct that the jury may consider the use of intoxicating liquors by testator for the purpose of determining whether he had mental capacity to make a will.

Instructions as to Capacity.

An instruction that, if testator was of unsound mind when he executed the will, they should find that it was not his will, though they might believe that he could enter into conversation with some witnesses on the day of making the will, is error.

Evidence — Presumptions — Failure to Call Attorney as Witness.

In a will contest, it is error for contestant's attorney in argument to the jury to ask why the executor's attorney, who had helped draw up the will, did not testify as to testator's mental capacity.

[See note at end of this case.]

Argument of Counsel — Cure by Instruction.

Such error is not cured by instruction that for an attorney to testify was a reprehensible practice, and the jury should not indulge in presumption against the validity of the will.

Comment on Failure of Incompetent Witness to Testify.

Where a witness was known to an attorney to be incompetent, and he had in fact objected to her when offered, it is error for him to comment on her failure to testify.

Wills — Contest — Jurisdiction.

The city court of Mattoon has jurisdiction of a will contest by bill in chancery, such suit being of the same nature as the common-law right to a contest.

Appeal from City Court of Mattoon: McNUTT, Judge.

Action by Mary Alice Ravenscroft, plaintiff, against Catherine Stull et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. REVERSED.

Edward C. Craig, Donald B. Craig, James W. Craig, Jr., and William M. Moran, Jr., for appellants.

Bryan H. Tivnen for appellee.

[407] CARTWRIGHT, J.—The appellee, Mary Alice Ravenscroft, the only child and heir-at-law of Thomas Gorman, filed her bill in this case in the city court of the city of Mattoon against the appellants, the executor, legatees and devisees under the will of her father, by which he devised to Catherine Stull his residence property in the city of Mattoon and bequeathed to her his building and loan stock

remaining after the payment of a mortgage on the property, made bequests of \$50 to the Roman Catholic church for masses, \$10 to his daughter, [408] the complainant, Mary Alice Ravenscroft, \$1,500 to his sister, Mary Hayes, \$1,500 to his brother, James Gorman, and \$500 to his grandson, James Ravenscroft, son of the complainant. The residue of the estate was given to his sister, Mary Hayes, his brother, James Gorman, and Catherine Stull. The bill prayed the court to set aside the probate of the will on the grounds of want of testamentary capacity and undue influence of Catherine Stull. Answers of the executor and Mary Hayes, James Gorman and Catherine Stull were filed, and replications to the answers having been filed, issues were made up whether the testator was of sound mind and memory, whether the instrument was his will and whether it was obtained by undue influence of Catherine Stull. The jury found all of the issues for the complainant and a decree was entered accordingly, from which this appeal was allowed and perfected.

At the trial there was the customary assemblage of persons who had known Thomas Gorman (counsel have counted them, and there were thirty-two for the complainant and thirty-five for the defendants), some of whom had met him either frequently or occasionally and some had been intimately associated with him. They gave opinions as to his mental and physical condition, and there was evidence concerning his relations with Catherine Stull and her influence over him. Gorman was foreman of a wrecking crew of the Big Four Railroad Company from 1891 to October 15, 1914. He could not read or write, and orders and other matters relating to his duties were read to him, but he could write his name. He was in the habit of drinking intoxicating liquor, and his physical health and mental condition had been seriously impaired before the making of the will. His wife died in 1911, and he lived with his daughter, the complainant, until February, 1913, when he left her home and stayed for a time at his wrecking car, after which he went to the home of his sister, Mary Hayes. For several years he visited Catherine Stull at her home, [409] and he had bought her a ring and it was understood that they were to be married. He went to live at her house some time before his death and the will was made and he died at that place. After leaving his daughter's home he complained of her treatment of him, and on March 18, 1914, he commenced a suit against her to quiet the title to his home property, in which she claimed some interest. There was no evidence that his charges against his daughter were well founded but the contrary appeared from the evidence. He suffered from chronic nephritis, commonly called Bright's disease,

and had become inefficient and incapable of intelligently managing the wrecking business. His mind was largely directed toward intimate relations with women and his language was of a lecherous character. His manner of living and habits had greatly impaired his constitution and weakened his mind, and at least six weeks before his death the disease had reached its final stage. He had dropsy of the legs. The will was made on October 10, 1914, and he died nine days afterward, in a comatose state from the poisons common to the disease. During his stay at the home of Catherine Stull she was extremely kind to him and the evidence shows that she had great influence over him. The will was made at her home, and the daughter was not present at the time of making the will nor in his last illness.

The court did not err in refusing to direct a verdict on either issue nor in refusing to grant a new trial on the ground that the verdict was contrary to the evidence. The evidence, however, was conflicting and the defendants had a right to have it submitted to the jury without material or prejudicial error, and errors have been assigned on the admission and exclusion of evidence. The trial court allowed various witnesses for the complainant to testify that in their opinion Thomas Gorman was not capable of transacting the ordinary business affairs of life. The defendants, as proponents of the will, had examined a large number of witnesses and inquired of each one whether Gorman was capable [410] of understanding and transacting the ordinary business affairs of life, and the witnesses had expressed the opinion that he had that degree of capacity. The complainant would have had a right, in any view of the law, to meet the opinions of those witnesses by testimony that Gorman did not have that degree of capacity. It is true that one who has sufficient mind and memory to attend to the ordinary business affairs of life is capable of making a will, but such a test is higher than the law requires. The transaction of ordinary business involves a contest of judgment and experience and the exercise of mental powers in dealing with other persons not necessary to the testamentary division of property (*Rowcliffe v. Belson*, 261 Ill. 566, Ann. Cas. 1915A 359, 104 N. E. 268) but a party to a will contest has a right to ascertain and present to the jury any fact in relation to the mental capacity of the testator and the strength of his mental powers. Witnesses may be asked as to the ability of a testator to transact ordinary business, as that is one of the elements to be considered in determining whether he had the capacity to make a valid will. (*Coleman v. Marshall*, 263 Ill. 330, 104 N. E. 1042.) Such evidence is competent and legitimate, but the jury

must finally determine the question of testamentary capacity under the rule of law and with the proper test. In this case the court instructed the jury that it is not necessary that a man should be capable of understanding and transacting the ordinary business affairs of life, and the final test was correctly explained to the jury. On both the grounds stated there was no error in the ruling.

The court admitted evidence of declarations made by Gorman four or five years previous to his death concerning his intention to give his property and money to James Ravenscroft, son of the complainant. Such evidence had no tendency to show the mental condition of Gorman at the time the will was made, which was the avowed purpose of offering it, and it was too remote to be admissible for any purpose. It was error to admit it.

[411] It is further contended that the court erred in allowing evidence of the habit of Gorman drinking intoxicating liquor, on the ground that there was no evidence that he was intoxicated when he made the will. The use of intoxicating liquor on a particular occasion does not have the effect to render a person incompetent to execute a will unless operative at the time of making it, but the evidence that he was addicted to the habitual use of intoxicating liquors was competent, for the reason that, as a matter of common knowledge, such use would impair the faculties of body and mind, and in this case the evidence fairly tended to prove that his habit had produced or contributed to that result.

There is a great deal of argument concerning the giving and refusal of instructions, but we are not disposed to review the great number of instructions given, which were unnecessary, and which would impose an unreasonable burden on the court. Simple statements of the rules of law governing the questions of mental capacity and undue influence would have been entirely sufficient in place of numerous lengthy instructions, many of them amounting, in substance, to arguments. The first instruction offered by the defendants was refused, and it is insisted that the refusal was wrong. The meaning of it, as applied to the case, was that confidential relations between Gorman and Catherine Stull, and the fact that she was substantially benefited by the will, did not change the burden of proof, and unless undue influence was proved by a preponderance of the evidence, and that it was directly connected with the making of the will and destroyed the free agency of Gorman the jury should find against undue influence. It practically eliminated the elements of confidential relations and substantial benefit, which were material to be considered on the question, and it was not error to refuse it. The court gave to the jury an instruction that they had a right to con-

sider the use of intoxicating liquors by Gorman, together with all the other circumstances of the case in evidence, for [412] the purpose of determining whether he had the mental capacity to make the will. The instruction was right for the reason already stated, and that it was right is recognized by an instruction given at the instance of the defendants telling the jury that unless they believed that Gorman was under the influence of intoxicating liquor at the time of executing the will, or that from the use of it his mind had become impaired so that he was not mentally capable of making a will, they should disregard the evidence. Both instructions called attention to particular evidence, and there was no difference between them in that respect. An instruction given for the complainant told the jury that if Gorman was of unsound mind and memory when he executed the will they should find that the writing was not his will, even though they might further believe, from the evidence, that he was able to enter into conversation with some of the witnesses on the day of making the will. This instruction tended to belittle the testimony of witnesses present at the time the will was made, of conversations with Gorman, and it was error to give an instruction affecting the judgment of the jury as to whether the conversations tended to show testamentary capacity. It is not necessary to review any other instructions.

James W. Craig, Jr., an attorney at law, prepared the will in question and was present at its execution, and he was a member of a firm representing the executor in this case. The attorney for the complainant, in his argument to the jury, repeatedly stated: "Where is James W. Craig, Jr.? Why didn't he testify? If he believed that Thomas Gorman was of sound mind he would have been here testifying. Why didn't Catherine Stull testify?" To this sort of argument the defendants objected, but the trial court overruled the objections and allowed the attorney to continue such argument. For James W. Craig, Jr., to have testified would have been a breach of professional propriety, and if he had so far forgotten his duty and obligation as [413] an attorney but little weight would have been given to his testimony and he would have lost public confidence and respect and the respect of the courts. (Ross v. Demoss, 45 Ill. 447; Wilkinson v. People, 226 Ill. 135, 80 N. E. 699; Bishop v. Hilliard, 227 Ill. 382, 81 N. E. 403; Grindle v. Grindle, 240 Ill. 143, 88 N. E. 473; Wetzel v. Firebaugh, 251 Ill. 190, 95 N. E. 1085.) If he had testified he would have exposed himself to an assault by the same attorney for placing himself in an unprofessional position, and the conduct of the attorney was a flagrant abuse of the privilege of argument to the jury, who, not knowing that it

was improper for the attorney to testify, had a right to believe that he did not testify because he did not believe that Gorman was of sound mind and memory or that the will was not caused by the influence of Catherine Stull. The court gave an instruction to the jury that for an attorney to testify was a reprehensible practice and the jury should not indulge any presumption against the validity of the will because the attorney interested in the outcome of the suit did not testify. The instruction was directly contrary to the ruling of the court, and at any rate did not meet the serious error committed in not promptly sustaining the objection and stopping the course of argument. Besides the argument concerning Craig the attorney repeatedly asked why Catherine Stull did not testify, when he knew that she was incompetent and had in fact objected to her testifying, and as to her there was no instruction designed to obviate the error. When Catherine Stull was offered as a witness the attorney objected and the objection was sustained, and the fact that she was not conducted to the witness stand was of no importance whatever.

The defendants moved in arrest of judgment on the ground that the city court of Mattoon had no jurisdiction of the subject matter. The statute confers upon a city court concurrent jurisdiction with the circuit court within the city in which the same may be in all civil cases, both law and chancery, and the ground of the motion was that this is not [414] a civil case in law or chancery but a purely statutory proceeding not existing in the original jurisdiction of chancery courts. In considering such jurisdiction in *Brueggemann v. Young*, 208 Ill. 181, 70 N. E. 292, it was said that the class of cases mentioned as civil cases in the first section of the City Court act was intended to include only law cases and equity cases as they were known to the common law, and such other cases since provided for by statute as belong to the same class or are of the same nature as previously existing actions at law or in equity, in which personal or property rights are involved and where a remedy for the recovery of property or for damages occasioned by an infringement of a right is given. There was a right to contest a will at the common law but no method was provided for a single contest. Where lands were devised and the heir or devisee brought a suit, the devisee claiming under the will was required to prove it as well as the capacity of the testator to make a devise, and there could be a contest every time a will was offered in evidence. (*Dibble v. Winter*, 247 Ill. 243, 93 N. E. 145.) Our statute provides for a contest by the filing of a bill in chancery wherein an issue of law is to be made up whether the writing produced be the will of the testator or testatrix or not,

and the issue is to be tried according to the practice in courts of chancery. The jurisdiction invoked is not the general equity powers of the court but a special statutory jurisdiction providing a method for trying, at the suit of any person interested, the validity of a writing alleged to be a will. The suit is of the same nature as the previously existing right to a contest whenever a will should be offered in evidence and property rights are involved. The court did not err in overruling the motion in arrest of judgment.

The decree is reversed and the cause remanded.

Reversed and remanded.

NOTE.

The reported case holds that for an attorney employed in a case to testify as a witness therein involves such a violation of the proprieties of his office that no presumption can be indulged against his client because of the attorney's failure to testify to facts shown to be within his knowledge. The failure of a party to an action to produce evidence as raising a presumption against him is discussed in the note to *D'Addio v. Hinckley Rendering Co.* Ann. Cas. 1914A 907, the effect of the failure of a party to call his attorney being specifically treated therein at page 919.

HEISKELL

v.

MORRIS ET AL.

Tennessee Supreme Court—May 20, 1916.

135 Tenn. 238; 186 S. W. 99.

Corporations — Subscription to Stock — Effect of Failure to Subscribe Entire Amount.

Under a subscription contract, making all subscriptions contingent upon the whole amount being subscribed, no assessments can be enforced until the entire capital stock has been subscribed.

[See note at end of this case.]

Right of Promoters to Subscribe.

Promoters who complete subscription by subscribing for the balance of unsold shares, intending to sell such shares to others, are liable for the amount so subscribed.

Effect of Failure to Subscribe Entire Amount.

A subscription contract, providing that all subscriptions are on condition that the promoters "procure" subscriptions to the full

amount of the capital stock, is held not to require that all subscriptions be made by persons other than the promoters.

[See note at end of this case.]

Same.

Subscriptions of corporate stock by insolvent persons cannot be counted to hold other subscribers for the amount of their subscriptions; but, if such subscriber was apparently solvent at the time he made the subscription, no fraud is perpetrated upon other subscribers by the acceptance of his subscription in good faith, though he afterward proves to have been insolvent.

[See note at end of this case.]

Same.

The insolvency of a subscriber, as relieving other subscribers from obligation to pay subscriptions, is a matter of defense, the burden of proving which is on those subscribers asserting it.

[See note at end of this case.]

Fraud on Subscriber — Waiver by Delay.

The shareholder, whose subscription is obtained through fraud, must be diligent in discovering the fraud and repudiating the contract, to avoid his subscription as against creditors of the corporation.

Same.

Where subscribers for more than two years took no steps to repudiate subscriptions, but allowed their names to remain on the corporate books as shareholders, and paid one assessment, it is held that they could not defeat an action by receiver to recover unpaid subscriptions on the ground of fraud.

Appeal from Chancery Court, Shelby county: ALLEN, Chancellor.

Consolidated actions by Lamar Heiskell, receiver, plaintiff, against M. Morris et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

Caruthers Ewing for appellants.

R. P. Cary for appellees.

[240] GREEN, J.—These suits were brought by the receiver of the United Investors' Company, an insolvent Tennessee corporation, to recover from the several defendants unpaid balances on their subscriptions to the capital stock of the corporation. The facts of each case are the same, and they were consolidated and heard together by the chancellor. There was a decree in favor of the complainant, and defendants have appealed.

The United Investors' Company was organized under the laws of Tennessee for the purpose of dealing in real estate at Memphis. Its capital stock was fixed at \$100,000, to be divided into one thousand shares, of \$100 each.

The concern was promoted by E. R. Parham and Burton B. Weil. They carried around the

subscription list, and the said paper was headed by a subscription from Parham and Weil for seventy-five shares. The subscription list was dated October 30, 1912.

The first meeting of the incorporators was held February 15, 1913, by consent. At that meeting it appeared that subscriptions had been obtained for only seven hundred and forty shares. Counsel present advised the incorporators that the concern could not be legally organized until there were subscriptions for the entire one thousand shares. Parham and Weil then subscribed as trustees for the remaining two hundred and sixty shares. Notice had previously been [241] sent to all the subscribers, and immediately following this meeting of the incorporators a stockholders' meeting was held and directors elected. A directors' meeting was then held and officers elected, and the corporation was formally launched into business.

The subscription agreement contained a stipulation that ten per cent of the subscriptions were to be payable in cash upon organization of the company, and the balance was to be payable in noninterest-bearing installments of fifteen per cent every six months until the entire subscription was paid. The agreement also contained this provision:

"This agreement is made upon the condition that said E. R. Parham and Burton B. Weil shall procure subscriptions to the full amount of the capital stock, to wit, \$100,000."

The minutes of the incorporators' meeting recited that the subscription book "was declared open and subscriptions for the capital stock were made by the parties whose names appear upon the subscription book, with the number of shares opposite their respective names in the following language." The subscription list then followed. The last subscription appearing is that of "Parham and Weil, Tr., two hundred and sixty shares." The minutes also set out "that one thousand shares have been subscribed for in full, and it was moved and seconded that the subscription book be closed." The stockholders' meeting which ensued was held upon three days' notice, and the [242] minutes of the stockholders' meeting show that the action of the incorporators accepting the stock subscriptions was ratified and confirmed.

The corporation purchased a piece of real estate in Memphis, which it did not pay for. The vendor sold the lot and recovered judgment for balance of purchase money, unpaid by the proceeds of sale, against the corporation. The corporation having no assets visible, proceedings were had by which a receiver was appointed.

Burton B. Weil was made general manager of this corporation when organized, and the direction of its affairs intrusted to him. The first call of ten per cent on their subscriptions was collected from all the stockholders, except

from Parham and Weil. It seems that the second call was collected from some of the stockholders.

Defendants resist these suits upon the ground that the capital stock of the corporation never was fully subscribed; that the subscription of Parham and Weil for two hundred and sixty shares was fictitious; further charging that Parham and Weil were insolvent.

It is moreover contended in behalf of defendants that under the subscription agreement Parham and Weil were "to use their best endeavors to obtain subscriptions for stock," and that Parham and Weil were to "procure subscriptions to the full amount of the capital stock," and it is insisted that this language of the contract contemplated that Parham and Weil were to procure or obtain such subscriptions to the capital [243] stock from others than themselves. Parham and Weil headed the list with a subscription for seventy-five shares, and it is urged that the terms of the agreement required them to procure all additional subscriptions necessary from others. It is accordingly said that their final subscription for two hundred and sixty shares as trustees was no compliance with the written specifications for the organization of this corporation.

As a matter of course, under this subscription contract and under the law, it was a condition of defendants' subscriptions to stock in this corporation, the capital of the corporation being fixed, that the whole amount of stock should be subscribed before a valid assessment could be levied upon them. Read v. Memphis-Gayoso Gas Co. 9 Heisk. (Tenn.) 545; Anderson v. Middle, etc. Cent. R. Co. 91 Tenn. 44, 17 S. W. 803; Newport Cotton Mill Co. v. Mims, 103 Tenn. 466, 53 S. W. 736; Pope v. Merchants' Trust Co. 118 Tenn. 506, 103 S. W. 792.

We are unable to agree, however, that the necessary implication from this subscription contract was that all the stock except the seventy-five shares first taken by Parham and Weil was to be subscribed for by persons other than Parham or Weil. We are not able to give such construction to the words "procure" and "obtain."

The subscribers had a right to insist that the full amount of stock be taken by persons apparently solvent before such subscribers became liable for assessment. They had no right, however, to insist that any [244] particular persons or class of persons be secured as subscribers. If Parham and Weil were apparently solvent, the provisions of this contract and of the law would be met if they procured or obtained themselves to subscribe for such an amount of stock as they were apparently able to pay for.

The evidence indicates that the incorporators supposed Parham and Weil took these two hundred and sixty shares for the purpose

of selling to others, but it was assumed that Parham and Weil were primarily liable for this last subscription. As a matter of law, they were so liable, and if such subscription reasonably appeared to be within their financial ability, there was no infraction of defendants' rights by the acceptance thereof.

The subscription was not fictitious. Parham and Weil are liable thereupon, whatever they themselves may have intended.

There is no showing made by defendants that Parham and Weil were not solvent at this time, and not apparently able to take care of the subscription. Insolvent subscriptions to corporate stock cannot be counted, so as to hold other subscribers. The test, however, is the apparent solvency of the subscriber at the time the subscription was made by him. If the subscriber was apparently solvent, there is no fraud on other subscribers occasioned by the acceptance of his subscription "in good faith, although afterwards he may prove insolvent.

[245] "Whether subscriptions by insolvent or irresponsible persons can be taken into consideration depends upon the circumstances. If they were not made and accepted in good faith, but with knowledge that the subscribers were insolvent and irresponsible, they cannot be counted. But it is otherwise if they were made by persons apparently solvent and able to pay, and accepted in good faith, although it may appear that the subscribers were and still are totally insolvent." 2 Clark & Marshall on Corporations, p. 1549.

"Fictitious subscriptions, or subscriptions made by persons unable to contribute their proportion of the capital, do not satisfy the requirement that the whole capital of a corporation shall be subscribed before its members can be assessed; but if the required number of subscriptions has been obtained in good faith from persons apparently able to perform their duties as shareholders, it is no defense to an action against a shareholder that some of the subscribers have proved to be insolvent." I Morawetz on Private Corporations, section 141.

See also 7 R. C. L. p. 234.

It has been held that the decision of the incorporators that the necessary amount of stock has been subscribed, and that the subscribers are responsible, is conclusive on these questions, in the absence of fraud on the part of such incorporators. *Belfast, etc. Ry. Co. v. Brooks*, 60 Me. 568; *Louisiana Purchase Exposition Co. v. Kuenzel*, 108 Mo. App. 105, 82 S. W. 1099. In the *Maine* case there appears to have been, however, [246] commissioners authorized by law to effect the organization of corporations.

But in *Stone v. Monticello Constr. Co.* 135 Ky. 659, 117 S. W. 369, 40 L.R.A.(N.S.) 978, 21 Ann. Cas. 640, it was held to be a

question for the jury to determine the good faith of a subscription and to say whether the apparent financial ability of a subscriber was such as a person of ordinary prudence would have deemed reasonably sufficient to meet his assessments. See also note under *Morgan v. Landstreet*, 109 Md. 558, 72 Atl. 399, 130 Am. St. Rep. 531, as reported in 16 Ann. Cas. 1247, referring particularly to cases collected in page 1256.

We need not, however, determine whether the acceptance of the subscription of Parham and Weil, trustees, by the incorporators, was conclusive of their apparent solvency or not. If this question is open for review by the court, the solvency of such subscription is a matter of defense, and there is no proof whatever offered to sustain this defense. There is nothing to indicate that Parham and Weil were not actually solvent, as well as apparently solvent, at the time of the organization of this corporation.

We think that defendants are likewise precluded at this late date from relying on the matters urged in their behalf. The law is well settled that a shareholder whose subscription was obtained through fraud must be diligent in discovering the fraud and repudiating the contract, if he expects to avoid his subscription as against creditors of the corporation.

[247] This subscription was dated October 30, 1912. The corporation was organized February 15, 1913. These suits by the receiver were not brought for more than two years after organization, and prior to the bringing of the suits the defendants herein had taken no steps to repudiate their subscriptions, had allowed their names to remain on the books of the corporation as shareholders, and had paid the first assessment on their subscriptions. Such delay and laches on their part deprived them of the defenses they seek to make herein.

"There are obvious reasons why a shareholder of a corporation should not be released from his subscription to its capital stock after the insolvency of the company, and particularly after a proceeding has been inaugurated to liquidate its affairs, unless the case is one in which the stockholder has exercised due diligence, and in which no facts exist upon which corporate creditors can reasonably predicate an estoppel. When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, on one pretense or another, and to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion." *Newton Nat. Bank v. Newbegin*, 74 Fed. 135, 40 U. S. App. 1, 20 C. C. A. 339, 33 L.R.A. 727.

To the same effect, see *Chamberlain v. Trogden*, 148 N. C. 139, 61 S. E. 628, 16

Ann. Cas. 177; Sanger v. Upton, 91 U. S. 56, 23 U. S. (L. ed.) 220; Chubb v. Upton, 95 U. S. 667, 24 U. S. (L. ed.) 524; Lantry v. Wallace, 97 [248] Fed. 865, 38 C. C. A. 510; Upton v. Tribilcock, 91 U. S. 45, 23 U. S. (L. ed.) 203.

See other cases collected in note in 16 Ann. Cas. 180.

For the reasons stated, we think there was no error in the decree of the chancellor, and the same must be affirmed.

There is, however, in the record a stipulation between counsel that defendants shall take no objection to the form in which these suits are brought, and that if complainant is successful no execution will issue on any judgment until proper steps are taken by complainant to equalize among all the subscribers to the capital stock of this corporation the burden of discharging its unpaid indebtedness. That such steps may be taken to equitably work out the rights of all parties interested, these causes will be remanded to the chancery court of Shelby county for further proceedings.

NOTE.

Liability on Stock Subscription as Dependent upon Whole Amount of Stock Having Been Subscribed.

Introductory, 1137.

Amount of Stock Necessary to Be Subscribed:

Original Stock, 1137.

Increase of Stock, 1138.

Statute Authorizing Less than Whole Amount, 1138.

Waiver of Failure to Secure Amount, 1138.

Introductory.

The purpose of this note is to review the recent cases dealing with the question whether the liability on a stock subscription is dependent on the whole amount of the stock being subscribed. The earlier cases are discussed in the notes to Morgan v. Landstreet, 16 Ann. Cas. 1247, and Gettysburg Nat. Bank v. Brown, 93 Am. St. Rep. 339, 368.

Amount of Stock Necessary to Be Subscribed.

ORIGINAL STOCK.

It is well settled that where the amount of the original stock of a corporation is specified in the charter, articles of association, or contract of subscription, and there is nothing to show a different intention, a subscription to the stock is made on the implied condition that the whole amount

Ann. Cas. 1918B.—72.

thereof shall be subscribed by bona fide subscribers. National Leather Co. v. Roberts, 21 Fed. 922, 137 C. C. A. 492; Commerce Trust Co. v. Hettinger, 181 Mo. App. 338, 168 S. W. 911; Rogers v. Baird, 167 N. Y. S. 35; Boushall v. Myatt, 167 N. C. 328, 83 S. E. 352. And see the reported case. See also Johns v. Clothier, 78 Wash. 602, 139 Pac. 755.

Under a contract of subscription which requires the promoter to dispose of all the shares, a subscriber is not relieved from the payment of the subscription price because subscribers whose contracts are made in good faith refuse to consummate them by paying the amount of their subscriptions. Edwards v. Johnston, 23 Wyo. 384, 152 Pac. 273, wherein the court said: "When Grant had, within the time limited, procured good faith subscriptions to the full amount of the capital stock, the conditions on which said subscriptions were to become subsisting and binding contracts were complied with, and neither the defendant nor other subscribers could abrogate such contract by violating it on her or their part by refusing to make final payment. That is, the defendant cannot be heard to say that because she did not make final payment according to the contract she was not a good faith subscriber, and therefore, Grant did not secure the required amount of subscriptions."

A subscription to the stock of a corporation may be made on the condition that the subscriber shall not be liable until the corporation has received actual subscriptions to its capital stock to a specified amount, and where there has been neither performance nor waiver of the condition an action for the amount due on the subscription must fail. Alexander v. North Carolina Sav. Bank, etc. Co. 155 N. C. 124, 71 S. E. 69.

Although there is no present payment of cash by the subscriber, if a subscription is made in good faith, with a reasonable expectation of being able to pay the assessments when called for, it is sufficient to bind other subscribers, and in an action on the subscription contract the solvency of the subscribers to the balance of the stock is not in issue. Boushall v. Myatt, 167 N. C. 328, 83 S. E. 352.

It has been held that in an action on a subscription to the stock of a corporation where the subscriber does not seek to rescind the contract on the ground of fraud, the fact that the agent of the corporation in procuring the subscription falsely represented that the stock had been wholly subscribed by responsible persons is immaterial. Johns v. Clothier, 78 Wash. 602, 139 Pac. 755. And to warrant a rescission because of a misstatement as to the amount previously subscribed the discrepancy must be material.

National Leather Co. v. Roberts, 221 Fed. 922, 137 C. C. A. 492, holding that a shortage of ten per cent which was supplied by subsequent subscriptions before the corporation commenced to transact business was not ground for a rescission.

In an action on a stock subscription note it is no defense that the corporation has accepted from other subscribers in payment of their subscriptions, property of less value than the amount of the subscriptions. *Wikle v. Avary*, 12 Ga. App. 148, 76 S. E. 1039.

The reported case holds that under a contract of subscription making all subscriptions contingent on the whole amount being subscribed, the subscribers are not liable on the assessments until the entire capital stock has been subscribed, and further decides that under a provision in the contract that the subscriptions are to be procured by the promoters, it is not required that all subscriptions shall be made by persons other than the promoters.

INCREASE OF STOCK.

It has been held that there is an implied condition to a subscription to an increased issue of stock that the increase shall at least be substantially subscribed for, and while compliance with this condition may be waived by the payment of the purchase money, and the acceptance of a certificate, if it is not waived it may be insisted on and after a reasonable time for compliance therewith the subscription may be rescinded and the money paid as a deposit, recovered back. *Housley v. Feilchenfeld Co.* 152 Ill. App. 68.

Where a subscription was made on condition that a certain amount of the preferred stock should be subscribed and that in the event of a failure to obtain purchasers the attempt to increase the capital stock should be abandoned, it was held that the liability of the subscribers was contingent on the event as agreed to at the time of the subscription. *Foote v. Greilick*, 166 Mich. 636, 132 N. W. 473.

STATUTE AUTHORIZING LESS THAN WHOLE AMOUNT.

Where a corporation is authorized to do business when ten per cent of the capital stock has been subscribed and paid in, it is no defense to a subscriber's agreement to take stock in the corporation that the whole amount intended to be raised and specified in the subscription contract has not been subscribed to. *Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577, wherein the court said: "It is contended in this regard that it is implied from what is said in the agree-

ment of subscription that the full amount of the authorized capital stock stated therein should have been subscribed before the agreement became effective. Under the statute, as we have seen, a corporation may be organized and commence business as soon as a certain amount of the capital stock is subscribed for and paid in. There are no terms in the agreement sued on which in any way are contrary to the statute, and we must assume, therefore, that the parties entered into the agreement in pursuance of the general law upon the subject. We cannot impose conditions other than those stated in the agreement or such as are necessarily implied by law. The corporation was organized strictly in accordance with both the terms of the agreement and the statute. Counsel's contention must therefore fail."

Waiver of Failure to Secure Amount.

A subscriber of stock may waive his right to defend on the ground that the entire stock has not been subscribed. Thus, where a subscriber for about a year succeeding the incorporation acted as its president and director and received a salary of six thousand dollars a year for his services during which time he was aware that only a small proportion of the entire authorized capital had been subscribed for, it was held that the defendant acquiesced in the doing of business by the company without full subscription and his right to defend a call on him for the payment of his subscriptions was waived. *Rogers v. Baird*, 167 N. Y. S. 35. See to the same effect *Commerce Trust Co. v. Hettinger*, 181 Mo. App. 338, 168 S. W. 911.

MATTER OF SEAMAN.

New York Court of Appeals—April 25, 1916.

218 N. Y. 77; 112 N. E. 576.

Wills — Condition in Restraint of Marriage — Validity.

A condition of a will preventing vesting of the absolute title of a devisee if she is married to a certain individual, or until such individual's death, is not invalid as violating any constitutional right of such individual to security of life and liberty.

[See note at end of this case.]

Same.

At common law conditions in general restraint of marriage were regarded as contrary to public policy.

[See note at end of this case.]

Same.

The common-law rule that conditions in a will in general restraint of marriage are contrary to public policy still prevails in New York.

[See note at end of this case.]

Same.

At common law there was no prohibition against testamentary conditions in restraint of marriage with particular classes of persons or specific persons.

[See note at end of this case.]

Same.

A condition in a will preventing vesting of the estate absolute in a devisee, if she marries a certain individual, or in any event until his death, is not invalid as tending to incite her to cause his death, but is a valid restriction.

[See note at end of this case.]

Same.

A condition in a will preventing vesting of the estate absolute in a devisee, if she marries a certain individual, or in any event until his death, will not be held invalid as contemplating illegal performance of the condition; it being presumed that the testator intended the condition to be legally and naturally performed.

[See note at end of this case.]

Matter of Seaman, 170 N. Y. App. Div. 971, affirmed.

Appeal from Appellate Division of Supreme Court, First Judicial Department.

Proceeding to probate will of Egbert B. Seaman. Will admitted to probate by New York County Surrogates' Court. Decree affirmed by Appellate Division of Supreme Court. Frances P. S. Oakley appeals. The facts are stated in the opinion. **AFFIRMED.**

Leo Fassler for appellant.

William W. Robison and *Harry N. French* for respondents.

[78] WILLARD BARTLETT, Ch. J.—This controversy relates to the validity of certain provisions in the last will and testament of Egbert B. Seaman, deceased, late of the city of New York, who died on the 27th of June, 1914. By his will, which was executed on February 15, 1912, he devised and bequeathed his entire estate to his executors and trustees to pay the net income thereof to his wife Maria T. Seaman during her life. Upon the death of his wife or upon his own death, in case she died first, he directed his executors and trustees to divide the principal of his estate into three equal shares, one of which he devised and bequeathed to his son Egbert B. Seaman, Jr., absolutely; the second share to his daughter Carrie L. [79] Eidlitz, absolutely; and the third share to his daughter Frances P. Oakley, widow of John B. H.

Oakley, absolutely, "provided, however, that at the time of my decease my said daughter Frances P. Oakley shall be married to some person other than one Leo Fassler, who now resides in the city of New York and is there engaged in the practice of law, or provided that at the time of my death the said Leo Fassler is dead."

The will further provides in the fourth paragraph thereof that in the event the testator's daughter Frances P. Oakley is unmarried at the time of his death and the said Leo Fassler is then living or she is married to the said Leo Fassler, his trustees shall retain the said third share in trust to pay over the net income thereof to his daughter Frances P. Oakley during her natural life. The fifth, sixth and seventh paragraphs of the will are as follows:

"Fifth. Should my said daughter, Frances P. Oakley, marry the said Leo Fassler, then upon her death, either with or without issue her surviving and leaving the said Leo Fassler her surviving, I hereby give, devise and bequeath the portion of my estate held in trust for my daughter, Frances P. Oakley, as aforesaid, and direct my Trustees to pay over and distribute the principal thereof, in equal shares, to my son, Egbert B. Seaman, Jr., and to my daughter, Carrie L. Eidlitz, to him, to her, their heirs, executors, administrators and assigns, absolutely and forever; and in the event that either or both of them shall have predeceased my said daughter, Frances P. Oakley, leaving issue him or her surviving, I give, devise and bequeath the share which the parent would have received to such issue, share and share alike, *per stirpes* and not *per capita*.

"Sixth. In the event that my said daughter, Frances P. Oakley, should marry the aforesaid Leo Fassler, and should survive him as his widow, then upon his death, leaving her surviving, I give, devise and bequeath and [80] direct my Trustees to pay over and deliver to my said daughter, Frances P. Oakley, the principal of the trust created for her benefit, to her and her heirs, executors, administrators and assigns forever, absolutely and without reserve.

"Seventh. In the event that my said daughter, Frances P. Oakley, remains unmarried and survives the said Leo Fassler, then upon the death of the aforesaid Leo Fassler, leaving her unmarried and surviving, I direct and empower my Trustees to pay over and deliver to my said daughter, Frances P. Oakley, the principal of the trust created for her benefit, to her and her heirs, executors, administrators and assigns forever, absolutely and without reserve."

Upon the proceedings in the Surrogate's Court for the probate of the will Mrs. Frances P. Oakley was represented by Mr. Leo

Fassler, who contended that the will was invalid and illegal "as being equivalent to putting a price on the head of a person and offering an inducement for the termination of his life, and as such being contrary to public policy." The Surrogate's Court held that the testamentary provisions to which objection was thus made were in all respects valid and admitted the will to probate. The decree of that court has been affirmed by the Appellate Division.

There is no doubt that under the terms of Mr. Seaman's will the principal sum of the one-third of his estate, which is to be held in trust for the benefit of his daughter, Mrs. Oakley, cannot go to her absolutely as long as Mr. Fassler lives. She contends upon the present appeal, or rather Mr. Fassler contends in her behalf, that the conditions designed to prevent her marriage with him are void as against public policy because they put a price upon his life; because they violate the natural and inalienable rights of Fassler to security of life and liberty; and because they are in derogation of rights secured to his person by the Constitution of the United States and the [81] Constitution of New York. We are unable to perceive how they violate any constitutional right of Mr. Fassler; but the point that the conditions in restraint of marriage with him are invalid is intelligible, and one which the appellant is entitled to have considered.

Conditions in general restraint of marriage were regarded at common law as contrary to public policy, and, therefore, void. (Hogan v. Curtin, 88 N. Y. 162, 42 Am. Rep. 244.) Notwithstanding the doubt intimated in the prevailing opinion in Robinson v. Martin, 200 N. Y. 159, 93 N. E. 488, we think this rule still prevails in New York. In the case cited it was held that the will under consideration⁶ did not in fact contain any condition in general restraint of marriage. At common law, however, there was no prohibition against testamentary conditions in restraint of marriage with particular classes of persons or specific persons. "Conditions not to marry a Papist," says Mr. Jarman, "or a Scotchman; not to marry any but a Jew . . . have also been held good." (2 Jarman on Wills [6th ed.], p. 47.) In the present case the condition is designed to prevent the marriage of the testator's daughter with a particular individual who is named in his will; and such prohibitions have not only received the sanction of judicial authority but we think may be justified by sound reasoning. In Graydon v. Graydon, 23 N. J. Eq. 229, Chancellor Zabriskie held that a condition imposed upon a bequest to a son of the testator that it should be void if within a stated time he should marry a daughter of a person named in the will was not unlawful as a restraint upon marriage; and this al-

though it required the son, if he would obtain the bequest, to break an engagement of marriage into which he had entered before he knew of the provision in his father's will and, indeed, before the will was executed. "It is the duty of the courts," said the chancellor, "to favor this or any other legal means which a father may adopt to enforce the authority which the law, for wise [82] purposes, has given to him over his minor children, and that regard for his wishes and counsel in the more important concerns of their lives after maturity, which the untrammelled testamentary power conferred by our law is calculated to secure." In Cowley v. Twombly, 173 Mass. 393, 53 N. E. 886, 46 L.R.A. 164, the will under consideration by the court established a trust for the benefit of the testator's son, and provided that it should not continue for more than ten years after he should cease to be the husband of the person who was then his wife, but that upon the termination of the trust by the death or divorce of his wife and the expiration of ten years or of less than ten years if the son should so elect, he should have all the trust property as his own, forever free from any trust and in fee. It was contended that the trust was void because it was against public policy as tending to break up the marriage relation between the testator's son and the son's wife. The Supreme Judicial Court of Massachusetts, speaking through Mr. Justice Barker, said: "The scheme of the trust no more tended to induce the son improperly to procure a divorce between himself and his wife, than to induce him to procure her death. Either event would give the son an estate which otherwise he could not have. . . . There is no more likelihood or presumption that a divorce will be wrongfully brought about by one of the parties to a marriage in order to secure property, than that a death will be so occasioned. A testator no more offends public policy by simply making his bounty contingent upon the occurrence of a divorce than of a death." This language clearly implies that no legal objection exists to the action of a testator who makes the realization of a gift dependent upon the death of some other person than the final donee. In Daboll v. Moon, 88 Conn. 387, Ann. Cas. 1917B 164, 91 Atl. 646, L.R.A.1915A 311, a testamentary gift conditioned to take effect upon the death of the wife of the donee, or if he should obtain a divorce or become separated from her at the end of a year, or should [83] marry a good respectable woman within the year, was held not to be void as against the public policy of the state. In the case cited the gift was to vest in a son of the testator, one Willard B. Moon, upon the death of his wife or upon his divorce from her or upon his permanent separation from her. The court was asked to hold that the condi-

tion upon which the legacy was to vest was void as against public policy with the result of making the gift absolute so as to vest in the donee without performance of the condition. The court declared that this would be directly contrary to the express intent of the testator, who did not intend that the gift should vest in Willard unless he became separated from his wife by her death or a divorce, or in some other way. "Where it is possible that the condition may be legally performed it will not be presumed that the testator intended an illegal performance. The present gift was upon alternative conditions, one of which was the death of Willard's wife. It will not be presumed that the testator in the absence of express language so directing, intended that his son should procure his wife's death." Applying this language to the case at bar, it is not to be assumed for a moment that it was the intention of Mr. Seaman to incite his daughter to bring about the death of Mr. Fassler. It might just as well be presumed in every case of a devise for life to one person with a remainder over to another, that the remainderman would be thereby induced to compass the death of the life tenant. This would wholly disregard the legal presumption that men do not commit criminal offenses. (*Bradish v. Bliss*, 35 Vt. 326.)

The position of the appellant in the present proceeding is simply this. She asks us to invalidate a portion of her father's will because its tendency is to incite her to take the life of the gentleman whom she has selected to represent her interests in this court as her counsel. Such a contention would hardly merit serious consideration [84] were it not for the fact that it has been so urgently and earnestly argued before us. It is quite natural that the gentleman who was the object of the testamentary prohibition in this case should feel sensitive at the slight put upon him by the testator; but that fact does not justify him in distorting the provisions of the will into an invitation to murder.

The order appealed from should be affirmed, with costs.

Hiscock, Collin, Cuddeback, Hogan and Pound, JJ., concur; Seabury, J., not voting. Order affirmed.

NOTE.

Validity of Testamentary Disposition in Restraint of Marriage.

Introductory, 1141.

Marriage as Condition Precedent, 1141.

Condition Subsequent in Restraint of Marriage, 1142.

Restrictive Words as Limitation of Estate, 1145.

Introductory.

The purpose of this note is to review the recent cases passing on the validity of a testamentary disposition in restraint of marriage. The earlier cases are discussed in the notes to *Holbrook's Estate*, 5 Ann. Cas. 137; *Matter of Alexander*, 9 Ann. Cas. 1141; and *Chapin v. Cooke*, 84 Am. St. Rep. 139.

The closely related question of the validity of a testamentary disposition of property conditioned on a divorce or a separation of spouses is discussed in the note to *Daboll v. Moon*, Ann. Cas. 1917B 164.

The general rules with respect to the validity of a condition in restraint of marriage and the distinction in that regard between a condition precedent and a condition subsequent were stated in *Knost v. Knost*, 229 Mo. 170, 129 S. W. 665, 49 L.R.A.(N.S.) 627, as follows: "There have been in some cases introduced subtleties and refinements in distinguishing between conditions precedent and conditions subsequent, between conditions and limitations, between devises of real estate and bequests of personal property and 'gifts over,' so that, the line of demarcation between void conditions and reasonable limitations does not always run plain and true in case-made law. Speaking to the point, by way of summary, *Pomeroy* well deduces from the cases the following propositions as live verities of modern law. . . . The system which has been developed is a partial compromise between the technical common-law rules concerning conditions, and the doctrines of the Roman law, which made void all attempts to restrict the perfect freedom of marriage; and, like most compromises, it has some incongruous features. If a condition is precedent and annexed to a gift of land, it operates as at the common law; when broken, it prevents the estate from vesting, whatever be its nature; when annexed to a gift of personal property, if general or unreasonable, it is wholly void, and the gift takes effect; if partial and reasonable, it is operative. When a condition is subsequent and annexed to a gift of land, if general, it is void, and, although broken, the estate of the donee continues; if partial and reasonable, it is operative; and on its breach the estate of the donee is defeated. When a subsequent condition is annexed to a gift of personal property, if general, it is void; if partial and reasonable, and there is a gift over, it is operative, and upon its breach the interest of the first donee ceases, and the gift over takes effect; but, if there is no gift over, then the condition is said to be in *terrorem* merely, and is inoperative."

Marriage as Condition Precedent.

A condition precedent attached to a testamentary gift is valid and a breach of it pre-

vents the estate from vesting, no matter how restrictive of marriage it may be. *Daboll v. Moon*, 88 Conn. 387, Ann. Cas. 1917B 164, 91 Atl. 646, L.R.A.1915A 311; *In re Bacon*, 140 Wis. 589, 123 N. W. 262. And see the reported case.

In the case of *In re Bacon*, supra, it appeared that a testatrix bequeathed certain sums of money to trustees for the support of her insane son, and provided in the will that after his death the residue in the hands of the trustees was to be divided equally among her nieces who should be unmarried at that date. In holding that this was a condition precedent and not void as in restraint of marriage, the court said: "Appellants further urge, however, that the bequest may be saved by considering that it gives a vested estate from the testatrix's death to all her nieces as a class, and that the effect of the restriction to those who may be unmarried at a subsequent date amounts merely to a condition subsequent serving, if valid, to divest such interest upon the event of marriage and, therefore, only the condition antagonizes public policy and is void, and not the bequest. We think, however, that the premise of this argument is erroneous. Future interests are said to be vested when there is a person or a class of persons at all times existent to whom the future estate would immediately pass if the precedent estate terminated at any moment, although that class may change from time to time, individual members thereof dropping out, as by death, and other members coming in, as by birth."

A condition in a bequest to a girl under ten years of age that her marriage shall be with the consent of her parents is a partial restraint only of marriage and is reasonable and valid. Such a condition is not satisfied by the assent of the parents after the marriage. *Pacholder v. Rosenheim*, 129 Md. 455, 99 Atl. 673, L.R.A.1917D 464, wherein the court said: "The testimony shows that Edith, now Mrs. Senker, complied with the provision as to marrying in the Jewish faith; but it further shows that she eloped and was married on the 24th January, 1912, some two years and a half before the death of her uncle, the testator. Her marriage, therefore, was not with the consent previously had of her parents, both of whom were living, though they appear to have given their assent after the fact, and this court is asked to say that the subsequent assent of the parents is such a substantial equivalent for the antecedent consent, as to constitute a compliance with the conditions of the will. The condition it is conceded was a condition precedent, not subsequent. It is, of course, evident that the condition might have been waived by the testator himself, if it could be shown, for example, that he had given his consent to the

marriage before it took place; but there is no suggestion in the testimony of any such waiver in point of fact, nor can one be implied because of the lapse of two and a half years between the time of Edith's elopement and the death of the testator." Commenting on the rule applicable in such cases the court after reviewing the authorities on the point said further: "It is, of course, familiar law that a condition in general restraint of marriage is void, as against public policy, while a condition partial only in operation and reasonable in its nature has been almost invariably upheld. In some cases the English decisions have drawn a distinction as between a valid and void condition, dependent upon whether there was a devise or bequest over, upon a violation of the condition. These cases have proceeded upon the theory that, where there was such bequest or devise over, there was substantial interest of other parties which attached immediately upon and as the result of any breach of the condition; while, if there were no such bequests, devises, or limitations over, the condition was to be regarded as one in *terrorem*, and as such void and inoperative. Other distinctions have been drawn dependent upon the character of the property which was the subject-matter of the legacy or devise, holding one rule where the legacy was made a charge upon land, and a different rule where it affected only personalty. The various distinctions and refinements have found their most severe critics among some of the English judges themselves, and a condition in restraint of marriage, consisting in requiring the assent thereto of the parents of a beneficiary, is so manifestly intended as a safeguard against ill-advised and improvident marriages, that courts should not be astute to break it down."

The reported case decides that a condition in a will which prevents the vesting of the estate in a devisee if she marries a certain individual, or in any event until the death of the individual who is named in the will, is not void as tending to incite her to cause the death of the individual, there being a legal presumption that the testator intended the condition to be performed legally.

Condition Subsequent in Restraint of Marriage.

It is held generally that a condition subsequent annexed to a will, which condition is in general restraint of marriage, is void. *Knost v. Knost*, 229 Mo. 170, 129 S. W. 665, 49 L.R.A.(N.S.) 627; *Sullivan v. Garesche*, 229 Mo. 496, 129 S. W. 949, 49 L.R.A.(N.S.) 605; *Matter of Catlin*, 97 Misc. 223, 160 N. Y. S. 1034; *In re Miller*, 159 N. C. 123, 74 S. E. 888; *Goffe v. Goffe*, 37 R. I. 542, 94 Atl. 2, Ann. Cas. 1916B 240; *Meek v. Fox*,

118 Va. 774, 88 S. E. 161, L.R.A.1916D 1194; In re Tucker, 3 Sask. 473, 16 West. L. Rep. 172; Re Cutter, 37 Ont. L. Rep. 42, 31 Dominion L. Rep. 382, 10 Ont. W. N. 203; Re Johnson, 23 Ont. W. Rep. 132, 7 Dominion L. Rep. 375, 4 Ont. W. N. 153. See also Re Hamilton, 23 Ont. W. Rep. 549, 8 Dominion L. Rep. 529, 4 Ont. W. N. 441, *affirmed* 12 Dominion L. Rep. 861.

In the case of In re Tucker, *supra*, it appeared that a testator devised his property in trust for the benefit of his wife and two sons share and share alike, providing that in the event of the remarriage of his wife the executors might in their discretion apply all the property for the advantage of the children. The clause as to the event of remarriage was held to be a condition in restraint of marriage, and void because a condition subsequent. The court relied on the decision of *Morley v. Rennoldson* [1895] 1 Ch. (Eng.) 449, 2 Hare 570, 12 L. J. Ch. 372, 7 Jur. 938, and quoting therefrom said: "In the English law a distinction has been taken between the cases in which the restraint operates as a condition precedent and those in which it is expressed to take effect as a condition subsequent. . . . There are some points, however, which seem clearly settled according to the law as administered in courts of justice in this country; one is that if the restraint is a general restraint and the condition is subsequent, then the condition is altogether void, and the party retains the interest given to him discharged of the condition; that is, supposing a gift of a certain duration and an attempt to abridge it by a condition in restraint of marriage, generally the condition is *prima facie* void, and the original gift remains."

In *Sullivan v. Garesche*, 229 Mo. 496, 129 S. W. 949, 49 L.R.A.(N.S.) 605, it appeared that a testatrix bequeathed to several of her children one dollar each, giving all the rest of her property to her two daughters Kate and Julia in equal parts, the whole of it to go to either if the other should marry, and in the event of the marriage of both, the property should be divided equally among all children. The provision was held to be void as in restraint of marriage.

A devise of land by the testator to his daughter forever, "except she marry, then to her legal heirs," has been held to be on a condition subsequent in restraint of marriage. *Meek v. Fox*, 118 Va. 774, 88 S. E. 161, L.R.A. 1916D 1194, wherein the court said: "As a matter of construction, it is impossible to see how the words in the will 'except she marry' can be deemed identical with 'until she marry,' as contended by appellant. The word 'except' as it appears to us, must be construed as a condition and not a limitation. Indeed, to construe 'except' as 'until' in the

sentence where it is used in the devise, would involve a self-contradiction, in that the sentence would then read, that the testator gives the land 'to Julia Anne forever until she marries, then after her death (in the event of marriage) to her heirs. The language used can only make good sense by construing 'except' as 'but if' or its equivalent, which would constitute it a condition subsequent."

So it has been held that a clause in a will providing that if a daughter should marry, one-half of the income provided for in the will should go to others, was void as a restraint on marriage. *Goffe v. Goffe*, 37 R. I. 542, 84 Atl. 2, Ann. Cas. 1916B 240.

A will vesting an estate in the daughter of the testator on a condition that she should receive a lesser share than the other children if she should marry has been held to be void. *Knost v. Knost*, 229 Mo. 170, 129 S. W. 665, 49 L.R.A.(N.S.) 627, wherein the court said: "Subject to the modifications thus suggested, it may be said that contracts in restraint of marriage are in the teeth of reason and public policy, tend to immorality by subverting nature, and are void; that conditions subsequent in deeds and testamentary devises of real estate providing for, or obviously and intentionally tending to, a total restraint of marriage are odious and held to the utmost rigor and strictness; that conditions precedent are sustained because they prevent the estate from vesting, which is in accord with the free right of testamentary disposition; and that on the nice points of learning which arise in the application of the law to concrete cases, the courts lie under a bounden duty to feel for the intent of the testator to see if it contravenes public policy. . . . Any marriage whatever, however appropriate, at any time however reasonable, to any person however suitable, took from Anna Marie Louisa a part of the estate vested in her by the will. Testator had no right to coerce the daughter in that way against nature. It was clearly in *terrorem* and therefore abhorrent to the law."

In re Cutter, 37 Ont. L. Rep. 42, 31 Dominion L. Rep. 382, 10 Ont. W. N. 203, it appeared that a testator left his estate to executors in trust to pay debts and legacies, and provided that the residue of the estate was to go to his sister, and that in the event of her marriage the unused part should revert to the Odd Fellows Home. The condition was held to be in general restraint of marriage and void.

In the case of In re Catlin, 97 Misc. 223, 160 N. Y. S. 1034, it appeared that the testatrix left real estate and personalty to her nephew, and in the event of his marriage or death at any time the property was to go in trust to her goddaughter and a sister of the goddaughter. This condition was held to be in general restraint of marriage and void as

against public policy. The court said: "Such a provision is valid only when it is in partial restraint of marriage or the remarriage of widows or widowers. A limitation of an estate absolutely to a person, conditioned upon his never marrying, is absolutely void, and the estate vests notwithstanding the condition, as it is an unlawful condition subsequent. The next condition referring to the event of the devisee's death means his death before that of testatrix in the absence of a plain direction to the contrary. Thus, when we come to analyze the clauses alleged to 'cut down' the fee, they prove not to cut it down in any true sense of the term."

A condition in a testamentary gift against the marriage of the legatee with a specified person has been sustained. *Daboll v. Moon*, 88 Conn. 387, Ann. Cas. 1917B 164, 91 Atl. 646, L.R.A.1915A 311. And see the reported case.

Where, however, a condition subsequent in total restraint of marriage is imposed on the wife or the husband of the testator the courts will uphold the condition. *Daboll v. Moon*, 88 Conn. 387, Ann. Cas. 1917B 164, 91 Atl. 646, L.R.A.1915A 311; *Nagle v. Hersch*, 59 Ind. App. 282, 108 N. E. 9; *Knost v. Knost*, 229 Mo. 170, 129 S. W. 665, 49 L.R.A.(N.S.) 627; *Sullivan v. Garesche*, 229 Mo. 496, 129 S. W. 949, 49 L.R.A.(N.S.) 605; *Matter of Schriever*, 91 Misc. 656, 155 N. Y. S. 826; *Littler v. Dielman*, 48 Tex. Civ. App. 392, 106 S. W. 1137; *Haring v. Shelton* (Tex.) 114 S. W. 389; *Re Allen*, 7 Dominion L. Rep. 494; *Re Lacasse*, 24 Ont. W. Rep. 300, 9 Dominion L. Rep. 831, 4 Ont. W. N. 986.

The court in *Knost v. Knost*, supra, said: "There is only one main qualification to the rule against total restraint of marriage and that is an exception touching widows. (See the excerpt from Montesquieu's *Spirit of Laws*, supra.) It seems settled that men have a sort of mournful property right, so to speak, in the viduity of their wives and that a grant or devise to them may be defeated by the violation of a condition subsequent providing for the grant or devise becoming inoperative or reverting in case of remarriage. The exception has been put on sundry grounds, and courts have not always been able to find common reasons to sustain it. But it has been long established and is almost universally followed."

Where a will gave the testator's widow the income of his estate while she remained his widow and provided that should she remarry the estate should go to the testator's son, the widow to take whatever the law allowed her in lieu of dower, it was held that the widow in the event of her remarriage forfeited her right to the income from the estate except her dower right in the realty. *Matter of Schriever*, 91 Misc. 656, 155 N. Y. S. 826.

A devise for the widow's natural life or so long as she does not remarry gives her the absolute right to dispose of her personality. *Re Allen*, 7 Dominion L. Rep. 494. But a bequest to a widow of all the husband's moneys, notes and mortgages and real and personal property for the term of her widowhood with a remainder to his children in the event of her remarriage, has been held to create a life estate only for the widow in the property bequeathed. *Re Johnson*, 23 Ont. W. Rep. 132, 7 Dominion L. Rep. 375, 4 Ont. W. N. 153.

Where a husband by will gave his property to the wife absolutely, with a provision that in case of her marriage such part of the estate as had not been consumed by her should vest in his children, it was held that a conveyance of the property by the widow to a man who reconveyed it and then married her was void and that on the marriage the property went to the children since the conveyance was with the intent to defeat the will. *Littler v. Dielman*, 48 Tex. Civ. App. 392, 106 S. W. 1137.

A gift by a testator to his widow of everything, coupled with a condition that if she should remarry the property should go to his children has been held to give the widow an absolute estate subject to a divesting in case she remarried. *Re Lacasse*, 24 Ont. W. Rep. 300, 9 Dominion L. Rep. 831, 4 Ont. W. N. 986.

A devise to the testator's wife of an estate which is to terminate on her remarriage is not void as in restraint of marriage. *Haring v. Shelton* (Tex.) 114 S. W. 389.

In *California* the rule in regard to conditions imposing restraints on marriage is governed by the code which provides as follows: "Conditions imposing restraints upon marriage, except upon the marriage of a minor, are void; but this does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage." Under that provision, a will which gave to the testator's widow the residue of his estate for life and in the event of her remarriage the estate to be divided, one-third to the widow and two-thirds to the son, has been held to be valid and not in restraint of marriage under the statutory provision above quoted. *Matter of Fitzgerald*, 161 Cal. 319, 119 Pac. 96. But under the same statutory provision the following provision has been held to be void: "I give all my Earthly Positions both real and persnel to my wife Eliza V. Scott. Should she wish to marrie agane then then 75 per cent of the hole amount at my death will go to my children." In *re Scott* (Cal.) 148 Pac. 221. That case apparently overrules the *Fitzgerald* case since the provisions in the two wills are similar; but the court, in the *Scott* case, makes no reference to the previous decision.

Restrictive Words as Limitation of Estate.

It is well settled that a devise or bequest to a woman with a limitation over in case of marriage is an estate on special limitation and the devise or bequest is valid since there is in fact no condition in restraint of marriage; the effect of such limitation being to circumscribe the duration of the estate devised. *Daboll v. Moon*, 88 Conn. 387, Ann. Cas. 1917B 164, 91 Atl. 646, L.R.A.1915A 311; *Mitchell v. Mitchell*, 29 Md. 581; *Maddox v. Yoe*, 121 Md. 288, Ann. Cas. 1915E 1235, 88 Atl. 225; *Ruggles v. Jewett*, 213 Mass. 167, 99 N. E. 1092; *Irwin v. Irwin*, 179 App. Div. 871, 167 N. Y. S. 76; *In re Miller*, 159 N. C. 123, 74 S. E. 888; *Du Bouchet's Estate*, 22 Pa. Dist. 402; *Re Taylor*, 19 British Columbia 447, 28 West. L. Rep. 630.

In *Irwin v. Irwin*, supra, it appeared that the testator created a trust to pay part of the income to his daughter-in-law for life or until she remarried, and on her remarriage to pay her \$20,000, and on her remarriage or decease to pay the principal sum to the remaining devisees equally deducting the \$20,000 in case of remarriage. It was held that the term "until" in the phrase "until she remarry" was one of limitation looking to the daughter-in-law's remarriage as terminating her income. The court said: "The term 'until,' in the phrase 'until she remarry,' is one of limitation, equivalent to the words 'upon,' or 'up to,' or 'in the event of.' It looks to remarriage as terminating the use or income, because breaking up the family dependence. It is the end of the annual payments, not the beginning of them. It shows a purpose, very natural and commendable; that this 'intermediate maintenance' shall stop as fulfilled when that legal duty of support shall fall on a husband by such remarriage."

It has been held that the fact that there is a limitation over, should always be given full and proper weight in arriving at the mind and the will of the testator and determining whether the disposition made of the property shall be considered an estate on limitation or a condition in general restraint of marriage. *In re Miller*, 159 N. C. 123, 74 S. E. 888.

Where by the terms of its creation an estate is so defined and limited that it terminates of itself on the happening of a marriage without entry or other action on the part of the grantor, the limitation is ordinarily not void as being in restraint of marriage. *In re Miller* supra.

A will by which the testatrix bequeaths her home to her two daughters "as long as they

remain single" is valid, the words creating a life interest determinable on the marriage of each. *Ruggles v. Jewett*, 213 Mass. 167, 99 N. E. 1092, wherein the court said: "The object of the clause is to provide for the beneficiaries while they remain single. The main purpose is not to promote celibacy, and therefore it is not against public policy as being in violation of the rule against restraint of marriage."

A devise to a woman so long as she should remain unmarried and in case of her marriage then to the nephew of the deceased has been held to be valid as it created a conditional limitation in the nephew and vested a life estate in the first devisee. *Maddox v. Yoe*, 121 Md. 288, Ann. Cas. 1915E 1235, 88 Atl. 225.

In the case of *In re Miller*, 159 N. C. 123, 74 S. E. 888, it appeared that the testator devised a small tract of land to his wife and daughter during their natural lives on condition that if either or both married the devise should become void. It was held that although the testator had used words of condition, his purpose was to provide a home for the widow and daughter while they remained unmarried. The court said: "There is well-considered authority to the effect that, although the terms used may ordinarily import a condition, if, from a perusal of the entire will and the facts and circumstances permissible in aid of a proper interpretation, it appears that the testator intended to make provision for a beneficiary while she remained single, and that the words were not used and intended as a restraint upon marriage, the qualifying words will be given effect according to testator's devise as intended and expressed in the will." After citing numerous authorities the court quoted *Underhill on Wills*, saying: "The authorities distinguish between a provision for a legatee 'until he or she shall marry,' or 'while she is unmarried,' and an estate upon condition subsequent terminating in the marriage of the legatee. The distinction is largely technical, depending upon the exact language used; but the test is, 'What was the purpose of the gift? What did the testator intend to accomplish?' If it is apparent from the will that he did not intend to prevent a marriage or to condemn the legatee to a life of celibacy, but that he intended solely to provide for her support while unmarried, and that, as soon as she was in a position to be supported by her husband, he desired the provision to cease and the property to be devoted to others, it is valid. The law will regard it as an estate upon limitation, not as an estate upon condition, and the gift over will go into effect as a conditional limitation."

In *Du Bouchet's Estate*, 22 Pa. Dist. 402, it appeared that a testator by his will gave

his estate to his wife in the following words: "I bequeath to my wife Julia Isabelle my entire estate including furniture and personal belongings that I leave on date of my decease. In case of my wife remarrying, the legacy which I hereby bequeath becomes null and void, and she will return to my legal heirs what she has received from the estate." The limitation over in case of her remarrying was held not to be void as a condition subsequent in restraint of marriage or in *terrorem*.

A devise by a testator to his wife of all his property as long as she remains unmarried, and in the event of her remarrying the property to go to his daughter, has been held to constitute a conditional limitation as to the real estate, and as to the personalty to confer an absolute title to the widow, subject to an executory bequest in favor of the daughter contingent on the wife's remarriage. *Re Taylor*, 19 British Columbia 447, 28 West. L. Rep. 630.

KOONOVSKY

v.

QUELLETTE.

Massachusetts Supreme Judicial Court—
May 21, 1917.

226 Mass. 474; 116 N. E. 243.

Automobiles — Registration — Use by Dealer.

In an action for injuries when struck by an automobile, the evidence is held to be sufficient to justify a finding that the person, who, according to defendant's evidence, had charge of the machine at the time of the accident, was a dealer in automobiles.

Same.

In an action for injuries when struck by an automobile, the evidence is held to be sufficient to justify a finding that a dealer, a third person, was in control of the automobile for the purpose of sale, for renting, or for use.

Injury by Unregistered Automobile.

If an automobile is unregistered by the owner or dealer, as required by St. 1909, c. 534, its presence on the highway is unlawful, and against the right of all other persons lawfully using the highway; it is outside the pale of travelers, and an outlaw.

[See note at end of this case.]

Same.

Where an automobile is on the highway unregistered by defendant, its owner, or a dealer, as required by St. 1909, c. 534, the owner as a wrongdoer and creator of a nuisance is liable for all direct injury resulting from his unlawful act, though the resulting

injury could not have been contemplated as the probable result of the act done, and so is not the result of an act of negligence.

[See note at end of this case.]

Exceptions from Superior Court, Bristol county: CALLAHAN, Judge.

Action by Frank Koonovsky, by next friend, plaintiff, against August Quellette, defendant. Judgment for plaintiff. Defendant alleges exceptions. The facts are stated in the opinion. **EXCEPTIONS SUSTAINED.**

D. R. Radovsky for plaintiff.

David Silverstein for defendant.

[475] *PIERCE, J.*—The motor car that the defendant owned and was operating on Pleasant Street, a public highway in the city [476] of Fall River, on March 8, 1914, when it came in collision with the plaintiff, was not registered under St. 1909, c. 534, § 2.

The defendant offered testimony tending to prove that the machine had been since the first of January, 1914, was at the time of the accident, and continued to be until April or May, 1914, in the control of one Fontaine for the purpose of sale, of renting or for use; that Fontaine kept a garage; that he was a dealer in motor vehicles as such a person is defined by St. 1909, c. 534, §§ 1, 4; that Fontaine as such dealer had number plates registered under St. 1909, c. 534, § 4; that the plates which were on the defendant's machine were registered plates for the year 1914, and were paid for by Fontaine.

It was not shown affirmatively that Fontaine had applied to the highway commission for any distinguishing numbers or marks, but the jury well could find that Fontaine had the distinguishing numbers for the year 1914, and from that fact could find that he not only had applied to the commission but also that the commission had acted favorably upon his application and had caused to be issued to him as a dealer distinguishing marks for that year. That Fontaine was a dealer could be found from the testimony of one Briggs, who answered "Garage, yes, dealer and repairs" in response to the question "Let's see, this Fontaine is a dealer in automobiles, isn't he?" The fact that "Nowhere does it appear in evidence what knowledge Briggs had of the nature or character of Fontaine's business except above testimony" does not prove that the statement was not true. The knowledge of Briggs may well have been intimate and accurate, and the weight to be given to his testimony was therefore a matter for the consideration of the jury.

That Fontaine was in control of the motor car of the defendant for the purpose of sale,

or for renting or for use, could be found from the uncontradicted fact that Fontaine put his own registered number plates on it and from the testimony of the defendant that "he gave his car to Mr. Fontaine for sale, to sell it or use it or let it . . . that if Fontaine sold it he would get a commission, the same as anyone who sells a machine or a house for some one else," that he asked Fontaine to use the car, "that if Mr. Fontaine had let the car the money for letting it would have to go to Mr. Quellette," the defendant.

[477] In reference to the first request, "If the defendant was operating an automobile which had been placed in the care and control of a garage owner and dealer and the garage owner had placed a dealer's plate upon the automobile, while upon the highways of Fall River and at the time of the accident, then there was no violation of the law and the automobile was lawfully upon the highways," the presiding judge after reading to the jury St. 1909, c. 534, § 4, continued, "The section which I have just read is pertinent, because there had been introduced by the defendant in this case some evidence which the defendant offered for the purpose of showing that the automobile passed into the general control of another person. In other words, the defendant sought, as he had a right to do, to claim that at the time of the accident his machine had passed into the control of another, whose general distinguishing mark or number was upon the machine at the time of the accident, and that that being true, the burden was upon the plaintiff to show that the other person had not registered the machine in accordance with the requirements of the law. If the defendant offered sufficient evidence upon that point, it would be my duty to submit to you the question of whether Mr. Fontaine had control of this machine, within the meaning of the statute, at the time of the accident. But I rule that the defendant offered no sufficient evidence to show that Mr. Fontaine was a manufacturer or dealer within the meaning of those terms as employed by the statute, and that even if there had been such evidence there was no sufficient evidence that the physical control of the machine passed from this defendant to Mr. Fontaine. I, therefore, instruct you, that you would not be justified in finding that the defendant's automobile had passed from his control so as to exempt him from the laws relating to registration; and I further instruct you, that in using the machine without registration, as provided for in § 2, which I have read, he was engaged in an act contrary to law."

The evidence required the submission to the jury of the issues, whether Fontaine was a dealer in motor vehicles, whether he con-

trolled as a dealer the motor car of the defendant, and whether at the time of the accident the motor car had upon it a distinguishing number or mark given to the dealer by the highway commission; as also, whether the dealer's right to use the number [478] or mark was in force. In the opinion of a majority of the court, the withdrawal of these issues from the consideration of the jury was error, and the exceptions must be sustained.

Should the jury find that Fontaine was not a dealer in motor vehicles or was not the registered holder of number plates for the year 1914 or was not in control of the defendant's machine, or should it find that the motor car did not in fact bear the number or mark of the dealer, the defendant's requests "2. That the plaintiff must prove that the defendant was negligent in the operation of the automobile" and "3. That if the defendant was operating an unregistered automobile, that said operation was only evidence of the defendant's negligence but not conclusive," could not have been given, because, if the machine was unregistered by owner or dealer, its presence on the highway was in itself unlawful and against the right of all other persons who were lawfully using the highway. It was "outside the pale of travelers" and was an outlaw, *Dudley v. Northampton St. R. Co.* 202 Mass. 443, 89 N. E. 25, 23 L.R.A.(N.S.) 561; *Holden v. McGillicuddy*, 215 Mass. 563, 102 N. E. 923; and because as a wrongdoer and creator of a nuisance the defendant is liable at least for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as the probable result of the act done, and therefore was not the result of an act of negligence. "If I am sued for a nuisance and the nuisance is proved, it is no defense on my part to say and to prove that I have taken all reasonable care to prevent it." *Rapier v. London Tramways Co.* [1893] 2 Ch. (Eng.) 588, 600; *Amberg v. Kinley*, 214 N. Y. 531, 108 N. E. 830, L.R.A. 1915E 519; *Fairbanks v. Kemp*, 226 Mass. 75, 115 N. E. 240.

Exceptions sustained.

NOTE.

The reported case adheres to the doctrine obtaining in a few jurisdictions that a person operating on a public highway an automobile which has not been registered as required by law and which does not bear the legally required license plate, is the creator of a nuisance on the highway, and is liable for any personal injury inflicted by the car though he is guilty of no negligence in its operation. The rights and duties of a person driving an automobile on a highway are discussed in the

notes to the following cases: *House v. Cramer*, 13 Ann. Cas. 461; *Tudor v. Bowen*, 21 Ann. Cas. 646; *Deputy v. Kimmell*, Ann. Cas. 1916E 656; and *Christy v. Elliott*, 108 Am. St. Rep. 196. See also the following more recent cases reported in this series: *Devine v. Brunswick-Balke-Collender Co.* Ann. Cas. 1917B 887; *Kelly v. Weaver*, Ann. Cas. 1917D 611.

AMERICAN EXPRESS COMPANY

v.

FOX.

Tennessee Supreme Court—June 3, 1916.

185 Tenn. 489; 187 S. W. 1117.

Injunction — Restraining Suit in Another State.

A court may restrain a citizen of the state of the forum from prosecuting a suit against a citizen of the same state in a foreign state. [See note at end of this case.]

Same.

Defendant, a resident of Tennessee, will not be enjoined from suing a complainant in the state of Mississippi on a cause of action arising in Tennessee, because it would be to complainant's convenience to be sued in Tennessee, or because the rules of law in Mississippi are slightly different, for probably the laws of Tennessee would be applied, and such an injunction should be granted only in a very special case, and not one merely where the practice in two states differed.

[See note at end of this case.]

Same.

A court will not, at the suit of a nonresident corporation which might remove a suit brought by a resident of the state to the federal courts, enjoin a resident from suing in a foreign state, for such corporation could not be compelled to submit to the jurisdiction of the local courts.

[See note at end of this case.]

Certiorari to Court of Civil Appeals: FENTRESS, Judge.

Action by American Express Company, plaintiff, against Sam Fox, defendant. Judgment for plaintiff in trial court. Judgment affirmed by Court of Civil Appeals. Defendant brings certiorari. The facts are stated in the opinion. REVERSED.

Burch & Minor and *C. H. McKay* for plaintiff.

W. G. Cavett and *H. S. Buchanan* for defendant.

[490] GREEN, J.—Sam Fox, a citizen of Shelby county, Tenn., brought a suit for \$20,000 damages for personal injuries in a circuit court of that county, against the American Express Company, a New York corporation or joint stock company, having an office and place of business in Shelby county, Tenn. The accident happened in Shelby county. This suit was removed to the district court of the United States at Memphis on petition of the American Express Company. Before trial in the federal court, Fox took a nonsuit.

Three months later, Fox began a new action on account of the same matters in the circuit court of De Soto county, Miss., for \$3,000 damages.

This bill was filed by the American Express Company in the chancery court of Shelby county to enjoin the prosecution by Fox of his said damage suit in the circuit court of De Soto county, Miss. A demurrer was interposed by Fox, which was overruled by the chancellor and the injunction was granted as prayed. The court of civil appeals affirmed the chancellor's decree, and the case is before us on a petition for *certiorari*, which has been granted.

Notwithstanding a *dictum* to the contrary in *Lockwood v. Nye*, 2 Swan. (Tenn.) 515, 58 Am. Dec. 73, we think there is no doubt that the courts of one State have the power in a proper case to restrain a citizen of that State from prosecuting a suit against another citizen of the same State in the courts of another [491] State. This jurisdiction rests on the theory that the injunction operates *in personam* and is not an interference with the proceedings of the courts of a sister State. High on Injunctions (4th ed.), sections 103-107; Story's Eq. Jurisp. sections 899, 900; Pomeroy's Eq. Remedies, section 670.

Two of the leading cases in America announcing this rule are *Dehon v. Foster*, 4 Allen (Mass.) 545, and *Cole v. Cunningham*, 133 U. S. 107, 10 S. Ct. 269, 35 U. S. (L. ed.) 538. In the last case it was held that such proceedings were not in derogation of section 1, article 4, of the Constitution of the United States providing that full faith and credit shall be given in each State to the judgments of another State.

This question has received elaborate consideration in recent years and the cases on the subject are collected and classified in notes in 10 Ann. Cas. 26, 21 L.R.A. 71, and 25 L.R.A. (N.S.) 267. Two recent cases are *Jones v. Hughes*, 156 Ia. 684, 137 N. W. 1023, 42 L.R.A. (N.S.) 502; *Freick v. Hinkly*, 122 Minn. 24, 141 N. W. 1096, 46 L.R.A. (N.S.) 695. It appears, from an examination of the authorities referred to, that injunctions have been granted against suits in the courts of another State to prevent embarrassment, op-

pression, or fraud, to prevent evasion of domiciliary laws, where insolvency proceedings are pending, where the local court had prior jurisdiction, and perhaps other cases.

The decisions do not appear to be altogether agreed as to what circumstances justify such relief. It would be perhaps impossible to state a rule to which all the cases would conform. We are impressed with the idea that such injunctions have in some of the cases been improvidently granted.

[492] We indulge ourselves in quotations from the opinions of three eminent judges who have had occasion to consider this jurisdiction of courts of equity.

Chancellor Pitney, of New Jersey, observed:

"But on general principles, equity will not interfere with the right of any person to bring an action for the redress of grievance—the right preservative of all rights—except for grave reasons, and on grounds of comity the power of one State to interfere with a litigant who is in due course pursuing his rights and remedies in the courts of another State ought to be sparingly exercised. . . . They must be very special circumstances that will justify this court in restraining the prosecution of an equitable action already pending in a court of ample jurisdiction. I speak not of any limitation upon the power of this court, but upon the propriety of its exercise in the particular case. Its exercise is not to be properly based upon any theory that this court knows better how to do justice than the court of last resort of that commonwealth; that it can weigh evidence better or more justly apply to the facts any general principle of law or equity, nor upon the ground that this court recognizes different rules of law or of equity from those which obtain in the commonwealth." *Bigelow v. Old Dominion Copper Min. etc. Co.* 74 N. J. Eq. 457, 71 Atl. 153.

Chief Justice McClain of Iowa said:

"But, beyond the prevention of some threatened evasion of the specific laws of the State intended to regulate the relations of its citizens to each other in [493] some definite manner, courts have been reluctant to interfere with the exercise of the undeniable right of a resident to go into the courts of another State to secure such relief as may there be available to him, and have not felt justified in scrutinizing his motive in doing so." *Jones v. Hughes*, 156 Ia. 684, 137 N. W. 1023, 42 L.R.A. (N.S.) 502.

Judge Brewer, while on the supreme court of Kansas, used this language:

"The question is: Under what circumstances will a court of equity restrain a party from invoking the aid of the courts and processes of another State? It certainly will not do that, simply to compel him to carry on his litigations at home. It will not act upon

the basis of any distrust of the courts of a sister State." *Cole v. Young*, 24 Kan. 435.

Tested by the rules expressed in the above quotations from these three learned jurists, we think that the bill of complaint does not state a case which entitles it to the relief here sought.

It is said for the complainant that it will be unable to compel the attendance of any of its witnesses in the Mississippi court and unable to procure the attendance of some of them; that Fox's contributory negligence will only mitigate his damages in Mississippi and will not bar his recovery there as it would in Tennessee; that in Mississippi all questions of negligence and contributory negligence must go to the jury, while in Tennessee a defendant is entitled to peremptory instructions as to these matters, under certain circumstances. Other [494] reasons are set out why it would be more convenient for the complainant, and more to its advantage, to have Fox's damage suit tried in Tennessee. While some of the decided cases would apparently justify an injunction in favor of the complainant, we do not think it entitled to such relief on the showing it has made. So far as we can see, every defense available to the American Express Company against this damage suit in Tennessee will likewise be available to it in Mississippi. The accident occurred in Tennessee, and Tennessee law will doubtless be applied. The fact that the procedure in Mississippi differs somewhat from procedure in Tennessee does not authorize the exercise of the jurisdiction invoked. We cannot doubt that justice will be administered in the Mississippi courts, nor would we feel authorized in restraining the suit in Mississippi merely because it is more convenient for the complainant to litigate such matters in Tennessee, or because our practice may be more favorable to it. It may be more convenient for Fox to litigate in Mississippi, and more to his advantage. We see no evidence of fraud or oppression, nor any attempt to evade domiciliary laws.

What we have heretofore said, however, is not absolutely necessary to a decision of this case. Such injunctive relief as is here sought by the complainant, in all the cases to which our attention has been called, has been accorded to citizens of a particular State in proceedings against citizens of the same State. We know of no case, reaching a court of last resort, where an [495] injunction has been issued in behalf of a nonresident by the courts of any State to restrain a citizen of that State from suing the nonresident in another State.

We are not aware that this identical question has heretofore arisen, but we think there are very good reasons why the jurisdiction invoked should not be exercised in favor of

a nonresident, at least in a case involving such facts as the present one.

We pass the suggestion that the courts of a given State have enough to do when they protect the rights of their own citizens and citizens of other States within their borders. It is obvious, however, that our citizens should not be restrained from asserting their rights against any person in other forums, and compelled to litigate with such person in our own courts, unless we can also restrain that person from litigating elsewhere, and force him to yield to the jurisdiction of our courts.

From the statement of the case, it appears that the American Express Company has not been willing to submit its rights to the courts of Tennessee in the matter of Fox's claim for damages. Fox first sued the complainant in the circuit court of Shelby county, and the complainant—the defendant in that suit—forthwith removed the case to the federal court. If we enjoin Fox's suit in Mississippi and he brought another suit in the Tennessee courts for more than \$3,000 or for \$20,000, we would be utterly without power to compel the American Express Company to surrender to this jurisdiction. It would be entitled by reason of diverse [496] citizenship to remove the controversy to the courts of the United States, and judging from its previous course, the American Express Company would do that very thing.

If the case were removed to the federal court, Fox would be inconvenienced in certain particulars, just as the complainant claims it will be inconvenienced by the suit in Mississippi. The *quantum* of evidence necessary to take the case to the jury is greater in the federal courts than in the Tennessee courts. The fellow-servant rule has broader application in the federal courts. Proceedings in the federal courts are more expensive and cannot be carried on upon the oath of a poor person.

It is true that inasmuch as the complainant has qualified to do business in Tennessee, it is a resident of Tennessee for certain purposes. *Turcott v. Yazoo, etc. R. Co.* 101 Tenn. 108, 45 S. W. 1067, 40 L.R.A. 768, 70 Am. St. Rep. 661; *Adams v. Chattanooga Co.* 128 Tenn. 505, 161 S. W. 1131, L.R.A.1916F 907. The American Express Company, nevertheless, is still a resident of the State of New York for jurisdictional purposes, so as to enable it to remove this controversy to the courts of the United States.

Inasmuch, therefore, as we would be unable to compel the complainant to submit to our jurisdiction, should we enjoin Fox's suit in Mississippi, we must decline for that reason, if for no other, to grant the relief here sought. The result would be an injustice to a citizen of this State. It would force

him without doubt [497] to suffer much of the very trouble and inconvenience which the complainant seeks to obviate for itself.

The decree of the court of civil appeals and the decree of the chancellor will be reversed, and the bill dismissed at complainant's cost.

ON PETITION TO REHEAR.

(August 15, 1916.)

A petition to rehear is filed, which points out that the case was submitted on demurrer to the complainant's bill, and challenges the accuracy of the statement in the opinion that "no fraud or oppression nor any attempt to evade domiciliary laws" appears, on the part of defendant herein. If it be conceded that on the former hearing the court did not give adequate force to certain charges of the bill confessed by the demurrer, nevertheless the result must remain the same. As noted in the opinion, that portion criticized as just indicated was not "absolutely necessary to a decision of this case."

We remain unshaken in the belief that such an injunction as is herein sought should not be granted to a nonresident complainant under the circumstances appearing in this case. The observation in the opinion that litigation might not be pursued in the courts of the United States upon the pauper's oath was founded upon the practice that has prevailed therein within the knowledge of the writer. Our attention is moreover called to a rule of the federal district court for the Western Division of Tennessee, absolving the clerk of that court from the duty of docketing any case until [498] the plaintiff makes a deposit to cover costs. Whether such practice and rule be authorized by federal law, it is not for us to say. This matter is not determinative of the controversy before us.

We are the better satisfied upon reconsideration that we properly decided this case, and the petition to rehear is dismissed.

NOTE.

Power of Court to Enjoin Proceedings in Another State or Country.

Introductory, 1150.

General Rule, 1151.

Application of Rule, 1152.

Introductory.

The earlier cases passing on the power of a court to enjoin proceedings in another state or country are collected in the notes to Rader

v. Stubblefield, 10 Ann. Cas. 20; Greer v. Cook, 16 Ann. Cas. 671; Guggenheim v. Wahl, Ann. Cas. 1913B 201; and Eingartner v. Illinois Steel Co. 59 Am. St. Rep. 859, 879. This note presents the recent cases on the subject.

General Rule.

It has been repeatedly held that a court of equity having jurisdiction of a person may restrain him from prosecuting a suit in another state or country. Where the necessary parties are before a court of equity it is immaterial that the res of the controversy is beyond the territorial jurisdiction of the court. Without regard to the situation of the subject-matter, the courts consider the equities between the parties and decrees in personam according to those equities, and enforce obedience to their decrees by process in personam. However, the power, involving as it does an interference with a court of a co-ordinate jurisdiction, is one which is to be exercised only when it is necessary to prevent fraud or injustice and not from considerations of mere convenience. *Equitable Trust Co. v. Western Pac. R. Co.* 231 Fed. 478, order reversed 231 Fed. 571, 145 C. C. A. 457; *American Seeding Mach. Co. v. Dowagiac Mfg. Co.* 241 Fed. 875, 154 C. C. A. 577; *Weaver v. Alabama Great Southern R. Co.* (Ala.) 76 So. 364; *Ambursen Hydraulic Constr. Co. v. Northern Contracting Co.* 140 Ga. 1, 78 S. E. 340, 47 L.R.A.(N.S.) 684; *Illinois Life Ins. Co. v. Prentiss*, 277 Ill. 383, 115 N. E. 554; *Freick v. Hinkly*, 122 Minn. 24, 141 N. W. 1096, 46 L.R.A.(N.S.) 695; *Wilser v. Wilser*, 132 Minn. 167, 156 N. W. 271; *Fisher v. Pacific Mut. L. Ins. Co.* 112 Miss. 30, 72 So. 846; *Federal Trust Co. v. Conklin* (N. J.) 99 Atl. 109; *Williams v. Williams*, 83 Misc. 560, 145 N. Y. S. 564; *Clark v. Banker's Trust Co.* 99 Misc. 300, 163 N. Y. S. 748; *Carpenter v. Hanes*, 162 N. C. 46, Ann. Cas. 1915A 832, 77 S. E. 1101; *Hume v. Rice* (Ore.) 167 Pac. 578; *Pennsylvania Coal Co. v. Hurney*, 252 Pa. St. 564, 97 Atl. 736; *Wade v. Crump* (Tex.) 173 S. W. 538; *International Paper Co. v. Bellows Falls Canal Co.* (Vt.) 100 Atl. 684. See also *Grey v. Independent Order of Foresters* (Mo.) 196 S. W. 779; *Sanitary Street Flushing Mach. Co. v. Studebaker Corp.* 229 Fed. 591. And see the reported case.

Such an injunction is not a violation of the comity existing between the several states, and is not in violation of the Constitution of the United States and the laws passed under it having reference to the full faith and credit to be given to the judicial proceedings in another state. The court has the power to prevent those who are amenable to its own processes from instituting or carrying on suits in other states which will result in injury or fraud. *Clark v. Banker's Trust Co.* supra.

"It is now settled beyond controversy that the exercise of this power of restraint by the courts of a state over its own citizens does not offend the Federal Constitution, especially sections 1 and 2, art. 4, guaranteeing full faith and credit in each state to the judicial proceedings of the several states, and equality of privileges and immunities for their citizens." *Weaver v. Alabama Great Southern R. Co.* (Ala.) 76 So. 364.

In *Fisher v. Pacific Mut. L. Ins. Co.* 112 Miss. 30, 72 So. 846, the court said: "And the rule is well established that a citizen of one state may be enjoined from prosecuting an action against another citizen of the same state in a foreign jurisdiction for the purpose of evading the law of his own state. . . . And this rule applies, although the suit enjoined has been commenced in another state before the injunction issues. It is hardly necessary to say that the above rule, to the effect that a citizen of one state may be enjoined from prosecuting an action against another citizen of the same state, applies equally when an injunction is sought to restrain a citizen of one state from prosecuting an action against a nonresident corporation doing business with lawful authority in such state."

In *Federal Trust Co. v. Conklin* (N. J.) 99 Atl. 109, it was said: "There is no doubt about the power of a court of equity in one state to restrain its citizens, or other persons within the control of its process, from prosecuting suits in other states, if the prosecution of such suits is contrary to equity and good conscience, and to the injury of others. In such cases the courts act in personam."

Similarly in *Freick v. Hinkly*, 122 Minn. 24, 141 N. W. 1096, 46 L.R.A.(N.S.) 695, it was said: "That the courts of a state may, in a proper case, enjoin one citizen of the state from prosecuting a suit against another citizen of the state in the courts of a sister state is well settled and is supported by numerous authorities."

Likewise, in *Carpenter v. Hanes*, 162 N. C. 46, Ann. Cas. 1915A 832, 77 S. E. 1101, the court said: "There are many cases that hold that the courts of a state where both parties are domiciled may restrain the prosecution of suits between parties in a foreign jurisdiction."

In *Grey v. Independent Order of Foresters* (Mo.) 196 S. W. 779, the court said: "In order that full and complete justice may be done between the parties and the rights of each be fully protected a court of equity may, and in a proper case will, restrain a party from instituting or continuing the prosecution of a suit at law involving the same matter then to be adjudicated in the equity court; this, too, regardless of whether the suit at law is begun in a domestic or a foreign jurisdiction. . . . A court of equity in restraining the prosecu-

tion of an action at law does not undertake to restrain the court. Its process is not directed to the court, but to the party litigant. Its actions and its judgment is in personam only, and while a party restrained may be dealt with for violating the restraining order, the jurisdiction of the court in which his action is pending is not affected by the restraining order."

In *American Seeding Mach. Co. v. Dowagiac Co.* 241 Fed. 875, 154 C. C. A. 577, it was said: "It is the general rule, strongly fortified by both reason and authority, that one will not be restrained by injunction from proceeding with a pending suit in equity in the courts of another jurisdiction, either state or federal, except to prevent a manifest wrong or injustice, or otherwise stated, unless it clearly appears that full and complete relief cannot be obtained in such pending suit. Ordinarily the court which first acquires jurisdiction retains it free from interference from other courts."

Application of Rule.

In *Wade v. Crump* (Tex.) 173 S. W. 538, where it appeared that the parties resided in the same state, and that one had sued the other in a sister state, the court in vacating a temporary injunction said: "If full and complete justice may be done as between citizens of the same state in a suit in the courts of a sister state, a court of this state will not interfere to prevent the foreign suit unless there is oppression or fraud. And the fact that the defendant who is sued in the courts of a sister state prefers to have the matter determined by the courts of his domicile is no ground for an injunction against the plaintiff, if the courts have concurrent jurisdiction."

In *Freick v. Hinkly*, 122 Minn. 24, 141 N. W. 1096, 46 L.R.A.(N.S.) 695, it appeared that both parties to the suit were residents of Minnesota, and that one had brought suit against the other in New Jersey to recover on four promissory notes executed and made payable in Minnesota. In denying an injunction against the prosecution of the action in New Jersey, the court said: "The question is, under what circumstances will a court of equity restrain a party from invoking the aid of the courts and processes of another state? It certainly will not do that, simply to compel him to carry on his litigation at home. It will not act upon the basis of any distrust of the courts of a sister state. . . . To warrant such an injunction, some sufficient ground for the interposition of a court of equity must be shown. Perhaps the most common ground for such action is that the prosecution of the foreign suit, if permitted, would result in evading some law that applies in the state in which the parties reside. Courts will inter-

vene where a suit is brought in a foreign court to evade exemption laws, or where a creditor proceeding in the foreign jurisdiction would secure a preference forbidden by the state of his residence, or perhaps where an action in the state of residence was prior in time, or, as said in *Hawkins v. Ireland*: 'Whenever the facts of the case make such restraint necessary to enable the court to do justice, and prevents one citizen from obtaining an inequitable advantage over other citizens.' "

In *Ambursen Hydraulic Constr. Co. v. Northern Contracting Co.* 140 Ga. 1, 78 S. E. 340, 47 L.R.A.(N.S.) 684, the plaintiff was a New Jersey corporation, and the defendant was a New York corporation. The plaintiff had contracted with the defendant to do certain work in Georgia. After the work was under way the defendant sued the plaintiff in Georgia, for a breach of the contract. Before that action was brought to trial, the plaintiff sued the defendant in New York, also alleging a breach of the contract. The defendant sought an injunction in Georgia to restrain the prosecution of the action pending in New York. In denying the injunction, the court said: "The general rule is well settled that the pendency of a suit in one state between the same parties and for the same cause of action furnishes no cause to stay or abate a new suit brought in a court of another state. . . . The more common instance of the application of this rule is where the plaintiff in the first suit is also the plaintiff in the second action. The rule, however, is not limited to cases where the plaintiff in both suits is the same person. If each of the parties to a contract claims that the other has breached it, each would be entitled to sue for the breach. The defendant in the first suit could recoup his damages of the plaintiff in that suit, but this right would not forbid his going into another state, where his adversary resides, and there bringing a suit to recover damages for a breach of the contract. If the defendant in such case can place his claim for damages in a more favorable condition to obtain redress; if his remedy in the state of his adversary party is more comprehensive, no sound reason appears to us why he may not go into the state of the other party to the contract alleged to have been breached and sue him there. It would be, indeed, anomalous for a resident of one state, claiming an action for breach of contract, to leave his own jurisdiction to sue for its breach, and to set up such prior suit in abatement of an action brought by the defendant against him in his own state to recover damages for a breach of the same contract. To grant such a privilege would be to allow a citizen of a state to evade its laws of remedial procedure, by instituting a suit in a foreign jurisdiction. Hence we conclude that

the rule that the pendency of a prior suit in one state cannot be pleaded in abatement of a suit between the same parties for the same cause of action in a court of another state applies as well where the second suit is instituted by the defendant in the first suit as where the plaintiff in both actions is the same person. The circumstance that one of the suits may be pending in a court of equity and the other in a court of law does not alter the principle."

In *Illinois L. Ins. Co. v. Prentiss*, 277 Ill. 383, 115 N. E. 554, it appeared that the beneficiary of a life insurance policy was a resident of Illinois, and that the insurer was an Illinois corporation. It also appeared that the beneficiary had filed a suit on the policy in Illinois, and that he intended to institute another suit on the same policy in Missouri where a verdict may be returned by three-fourths of the members of a jury. The insurer sought an injunction to restrain the institution of a suit in Missouri or in any other jurisdiction where the right of trial by jury was different from that then existing in the state of Illinois. The court holding that the appellee had failed to show any ground which would warrant a court of equity in restraining appellant from bringing suit in the state of Missouri or in any other, foreign jurisdiction, said: "A court of equity has power to restrain a person within its jurisdiction from beginning a suit against the complainant in a foreign state which will result in a fraud or gross wrong or oppression. (*Royal League v. Kavanagh*, 233 Ill. 175.) As we said in that case, this jurisdiction rests upon the authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process to stay acts contrary to equity and good conscience, but the prosecution of a suit in a foreign jurisdiction will not be restrained unless a clear equity is presented requiring the interposition of the court to prevent a manifest wrong and injustice. A party has the legal right to bring his action in any court which has jurisdiction of the subject-matter and which can obtain jurisdiction of the parties. Should he begin two suits within the same jurisdiction, the pendency of the suit first brought may be pleaded in abatement of the later proceeding. This is not true of suits brought in different jurisdictions upon the same cause of action. The mere pendency of a suit in a sister state or in a court of the United States cannot be pleaded in abatement of a proceeding in a state court. While the doctrine announced in the *Kavanagh* case, *supra*, is now applied in every jurisdiction in the Union, this power is sparingly exercised, and it is only where it clearly appears that the prosecution of an action in a foreign state will result in a fraud, gross

wrong or oppression, that a court of equity will interfere with the general right of a party to press his action in any jurisdiction which he may see fit and in as many of them as he chooses and restrain him from prosecution of such a suit. A suit against appellee on a policy of insurance is a transitory action. Appellee is licensed to do business in the state of Missouri and has agents there upon whom service of process may be had. Appellant has the legal right to bring his action against appellee on this policy of insurance in the state of Missouri, and this right will not be interfered with unless a clear equity is presented requiring the interposition of the court to prevent a manifest wrong or injury. The bare fact that a suit on this policy has been begun and is now pending in this state, in the absence of equitable considerations, furnishes no ground to enjoin appellant from suing his claim in a foreign jurisdiction, although the cause of action is the same and arises out of the contract of insurance involved in the litigation in the circuit court of Cook county. Before the prosecution of the second suit in a foreign jurisdiction will be enjoined the propriety and necessity of confining the litigation to the court in which the first suit is instituted must appear. That it may be inconvenient for appellee to go to a foreign state to try the suit, or that the maintenance of two suits will cause double litigation and added expense, is insufficient cause for injunction against prosecuting the suit proposed to be brought in the state of Missouri and does not justify any interference by a court of equity."

In *Wilser v. Wilser*, 132 Minn. 167, 156 N. W. 271, it appeared that on the death of an insured several claimants instituted suits against the insurance company to recover on the benefit certificate, the widow bringing suit in North Dakota, and other relatives of the insured instituting an action on the same certificate in Minnesota. The insurer appeared in the latter action, and interposed a defense and made application for an order of interpleader of the widow, and for permission to pay the amount of the benefit certificate into court and for an order enjoining the further prosecution of the action in North Dakota. In affirming an order restraining the prosecution of the North Dakota suit, the court said: "The facts stated bring the case within the statute as well as within the common-law rule of interpleader, and we hold that the relief applied for by defendant was properly granted. . . . Defendant is in the position of a stakeholder, having a fund in its hands to which conflicting claims are made by different persons. On the record before us it is clear that the association is not liable to both. The association is confronted with separate actions brought by such conflicting claimants,

one in North Dakota and one in Minnesota. The matter in issue is the same in both. It would be an injustice to defendant to compel it to conduct its defense in both actions, when the claimants are all within this state, and the rights of all may be fully adjudicated in the action pending therein. Plaintiffs reside in Missouri but by bringing their action in this state they have submitted to the jurisdiction of the court and will be concluded by the judgment rendered therein. Appellant claims to be a citizen of the state of North Dakota, but she in fact resides in this state, and in the county wherein this action is pending. Defendant has no other legal remedy to avoid the situation, and there is no suggestion of collusion between it and the plaintiffs. . . . And the fact that appellant may be required to submit the evidence of Dakota witnesses by deposition is not a sufficient reason for denying to defendant the relief sought. The further contention of appellant that the court below had no jurisdiction or authority to restrain the prosecution of her Dakota action is not sustained. As heretofore stated appellant in fact resides in this state, and her claim of citizenship in North Dakota does not overcome that conceded fact. The court had jurisdiction over her person, and was authorized to restrain her from the prosecution of her action in the other state. All her rights may be protected in this action."

In *Pennsylvania Coal Co. v. Hurney*, 252 Pa. St. 564, 97 Atl. 736, the defendant submitted to the court the following question: "Should a preliminary injunction granted (ex parte) to restrain one from proceeding with a tort action, which action is concededly transitory, and pending in a foreign jurisdiction in which jurisdiction the plaintiff corporation (defendant in the tort action) has property, transacts business and has designated an agent to accept process in conformity with the law of such jurisdiction, be continued until final hearing, where the jurisdiction of the sister state in the tort action is admitted and where no substantive testimony is produced at the preliminary hearing, to show fraud, embarrassment or oppression?" It appeared that an employee, after receiving a personal injury, instituted suit in New York to recover damages, and a summons was served on his employer's representative in that state. The jurisdiction of the tribunal in which the action was brought was admitted, but it was contended by the employer that the prosecution of the action should be restrained, because the evidence showed that prejudice would inure to the appellee. The court, deciding that the question submitted to it should be answered in the negative, held that there was nothing to justify the conclusion that the employee had instituted his action in another state, in order to evade the

laws of his home state, or that the trial of the case in the jurisdiction chosen by him would to any degree bring about that result.

In *Weaver v. Alabama Great Southern R. Co.* (Ala.) 76 So. 364, it appeared that a resident of Alabama sued in Georgia for personal injuries received in Alabama. The law of Georgia regarding contributory negligence was shown to be much more favorable to the plaintiff than that of Alabama. It was held that the prosecution of the suit in Georgia was properly enjoined, because it was brought to evade the law of the domicile of the parties.

In *Federal Trust Co. v. Conklin* (N. J.) 99 Atl. 109, it appeared that an assignor had a deposit with a trust company, and that this deposit amounted to less than the aggregate total of two unmatured notes which the trust company held against the assignor. It also appeared that the assignor resided in a different state from the trust company and that his assignee was a resident of the same state as the trust company and also maintained a residence in the state where the assignor resided. On the company's refusal to pay the assignee the balance which the assignor had on deposit, he instituted proceedings by attachment against the trust company in the courts of the state where the assignor resided for the recovery of the amount of his balance. The trust company sought to have the assignee permanently restrained from prosecuting the attachment proceedings in a foreign state, and to compel him to litigate his differences against the company in the courts of the state where the trust company had its place of business. Denying an injunction the court said: "In the present case, Mr. Conklin, individually, is not sought to be restrained; it is against him in his capacity as assignee of a New York estate, which he is administering, under the authority of the laws and the control of the courts of that state, that the injunction is sought. Individually, Mr. Conklin is domiciled in this state; officially, as assignee, his domicile is in New York. The attachment case pending in the New York supreme court was instituted by him as assignee, and not in his individual capacity. As assignee, it was his right and duty to resort to the aid of the court to collect the insolvent's estate; and the fact that he chose a court in New York which may entertain a different view of the law regarding complainant's right to set off against the debt due the assignor the debt owing by the assignor to the complainant, from that which it is thought the courts of this state may hold, does not present any grounds for the interference of this court in the matter. Certainly the defendant has the same right to select the court in which he thinks his contentions and his view of the law will be sustained that com-

plaintant has to select a court in which it thinks it can defeat these contentions or can obtain the benefit of a different rule of law."

In *Searchlight Horn Co. v. American Graphophone Co.* 240 Fed. 745, it appeared that the plaintiff was a New York corporation, and that the defendant maintained an office in Connecticut. It also appeared that the plaintiff had previously instituted an infringement suit in California against a West Virginia corporation. This suit resulted favorably to the plaintiff, who thereafter made a motion in the California court for leave to file a supplementary bill of complaint bringing in the American Graphophone Company, as a party defendant, whereupon that company sought an injunction in the district court of Connecticut to enjoin the plaintiff from impleading it as a party defendant in the infringement suit which was then pending in California. The motion for an injunction was denied, the court saying: "A motion by the plaintiff is now pending in the California case for leave to file a supplementary bill of complaint making the American Graphophone Company a party defendant, and for a decree to the effect that the American Graphophone Company committed the acts of infringement therein complained of and proved, and for a judgment for profits and damages against the American Graphophone Company for the six years prior to the commencement of the California action. The purpose of the present motion and rule is to restrain the plaintiff from prosecuting this motion in California. All of the infringing articles had been supplied by the American Graphophone Company to the Columbia Graphophone Company for the purposes of the sale, the latter corporation being the sales agent of the American Graphophone Company. All of the capital stock of the Columbia Graphophone Company is under the full and complete control and management of the American Graphophone Company, and the Columbia Graphophone Company has been and is, as a matter of fact, a mere name under which the defendant herein has conducted its business. Its stores have been rented for it by the American Graphophone Company, and all of its goods belong to the American Graphophone Company, as do all the proceeds of the sales, and the Columbia Graphophone Company has made no profits and received no compensation whatever for its handling of the American Graphophone Company's goods, and all the acts and doings of the Columbia Graphophone Company have, as a matter of fact, been the acts and doings of the defendant herein, doing business under the name of the Columbia Graphophone Company. Moreover, the action in the California

suit against the Columbia Graphophone Company was openly defended by counsel employed by the defendant herein, who had the conduct and management of the litigation, and with full knowledge of opposing counsel. Clearly this court has no power to take any action which will take from the final decree to be entered in the California case the force and effect to which it is clearly entitled. Although the American Graphophone Company was not a party of record to the California litigation, its conduct in taking part in and managing the litigation makes it bound by any judgment therein as fully and to the same extent as though it were a party to the record."

In *Williams v. Williams*, 83 Misc. 560, 145 N. Y. S. 564, it appeared that the parties to the suit were copartners at the time of its commencement. It also appeared that the plaintiff had previously sued the defendant for a dissolution of the copartnership and for the appointment of a receiver. The receiver was duly appointed by proceedings had in the court below and subsequently the defendant instituted suit in a foreign state against the plaintiff for the appointment of a receiver in that state and for a dissolution of the copartnership. Whereupon the plaintiff instituted in the courts of the same state, in which he had brought his first suit against the defendant, a second action to restrain and enjoin the defendant from prosecuting or taking any steps or proceedings in the suit brought by him in the foreign state. In granting the plaintiff's motion to continue the injunction pendente lite, the court said: "While proceedings in this state for the dissolution of a copartnership and the appointment of a receiver have no extraterritorial effect over the disposition or possession of property situate in a sister state, except as they may be permitted to have effect through the courtesy of the courts of that state, nevertheless it seems to be settled that the courts of this state have authority to act upon residents of this state personally with reference to suits in a sister state, as the ends of justice may require, and, with that view, to order them to take or omit to take any steps or proceedings in the same state or a sister state."

It has been held that where a resident creditor proceeds by attachment in the courts of his own state against the property of his debtor, there is no cause for interference by injunction on the part of the courts of the debtor's domicile, even though the creditor is temporarily found within the jurisdiction of the latter court. *Carpenter v. Hanes*, 162 N. C. 46, Ann. Cas. 1915A 832, 77 S. E. 1101.

COBB

v.

**WESTERN UNION TELEGRAPH
COMPANY.**

Vermont Supreme Court—October 9, 1916.

90 *Vt.* 342; 98 *Atl.* 758.**Adjoining Landowners — Overhanging
Tree — Right to Cut to Line.**

When the base of a tree is wholly on the land of one owner, the whole tree is his without reference to its ramifications, the word "trunk" meaning the body of the tree at and above the surface of the soil; but where a tree stands wholly on the ground of one any part overhanging the land of an adjoining owner may be cut off by the latter at the division line, if done without a trespass; but the rule is different where the tree stands on a division line and is one in which both the adjoining landowners have an interest.

[See note at end of this case.]

**Telegraphs and Telephones — Right of
Way — Incidental Rights — Contract
with Railroad.**

In an action of trespass on the freehold for damages for the cutting of parts of shade trees on plaintiff's ground overhanging a railroad right of way, a contract between the railroad and the defendant telegraph company permitting the construction of a telegraph line over the right of way for the joint use of the railroad and the company is admissible as showing that the telegraph company had derived from the railroad the right to construct the line with rights incidental thereto.

[See generally 2 *Ann. Cas.* 642; 12 *Ann. Cas.* 251.]**Same.**

A railroad might properly empower a telegraph company to construct and maintain a line over its right of way for the joint use of the railroad and company, preference being given to the railroad's use in the moving of trains, as the exercise of such right was in furtherance of the duty to move its trains.

Exceptions from Addison County Court:
MILES, Judge.

Action by Joseph B. Cobb, plaintiff, against Western Union Telegraph Company, defendant. Judgment for defendant. Plaintiff alleges exceptions. The facts are stated in the opinion. **AFFIRMED.**

Leroy C. Russell for plaintiff.

E. W. Lawrence for defendant.

[343] *HASKELTON, J.*—This is an action of trespass on the freehold brought to recover damages for the cutting of portions of certain shade trees in front of the plaintiff's house in Middlebury.

The plaintiff's premises adjoined the right of way of the Rutland Railroad Company: the dividing line, as agreed to on the trial, being the easterly face of a certain wall.

The trees, two in number, upon which the cutting was done, [344] were not line trees, but stood upon the premises of the plaintiff a short distance westerly of the dividing line; though some of the limbs and branches of both and what the exceptions call "the main trunk" of one overhung the right of way.

Upon the trial it appeared that the defendant by its servants and agents cut certain branches from both trees, where they overhung the right of way, and cut off the main trunk of one of the trees at a point where such trunk overhung the right of way.

The defendant, the Western Union Telegraph Company, relied, for its right to do the cutting, upon a contract with the Rutland Railroad Company, by the terms of which, among other things, a joint line of telegraph poles and lines along the railroad company's right of way was to be maintained and renewed by the telegraph company for the transaction thereover of both railroad business and commercial telegraph business. Trial by jury was had, and verdict and judgment were for the defendant.

It seems clear that the railroad company might have done this cutting on its right of way, of which it had a deed.

When the base of a tree is wholly on the land of one owner, the whole tree is his without reference to its ramifications. Some confusion has been caused by the use of the word "trunk," but in *Skinner v. Wilder*, 38 *Vt.* 115, 88 *Am. Dec.* 645, our Court, in a thoroughly considered opinion by Judge Peck, calls the trunk "the body of the tree above the surface of the soil," and this means the body of the tree at the surface of the soil. We do not here traverse the ground gone over in that opinion. We merely note, for the convenience of future students, that the case from Popham, there cited as *Miller v. Fondyce*, is in fact *Mitten v. Faudrye*, that the case cited as *Holden v. Coates* is, to be correct, *Holder v. Coates*; and that *Norris v. Baker* is to be found at page 196 of 3 *Bulstrode*, instead of at page 178 as the printed opinion indicates, and that the name of the case in *Bulstrode* is *Morrice v. Baker*, though the same case is reported as *Norris v. Baker* in 1 *Rolle* at page 393.

These matters we mention in aid of those who care to make independent research. To resume: After considering the discussion in many cases, we are satisfied that it is a sound principle that where a tree stands wholly on the ground of one and so is his tree, any part of it which overhangs the land of an adjoining owner may be cut off by the latter at the division line.

This is the doctrine of the recent English case of *Lemmon* [345] v. *Webb*, 3 Ch. 1, decided in the Court of Appeal in 1894, and affirmed on appeal to the House of Lords [1895] A. C. 1.

There the parts of the tree cut had overhung for more than 20 years.

The doctrine of the case is that whatever overhangs may be cut off, without reference to the length of time during which such condition has existed, and without notice to the owner of the tree if the cutting is done without going upon his land.

In the Chancery Division it was held that the right to cut overhanging "timber" is clear, that it is too late "to say that a neighbor's tree overhanging my land is not a nuisance;" that the owner of the tree "must not allow it to interfere with his neighbor's rights;" but it was there held that the owner of the tree ought to have notice and opportunity to do the cutting himself.

However, the Court of Appeal held that the right of an owner of land to free it from the obstruction of overhanging trees exists without notice so long as he operates on his own land in clearing away obstructions vertically above it, that without notice, the owner of land is entitled to cut away all encroachments over his land from trees of another so long as he does not trespass upon the land of that other.

On appeal to the House of Lords the decision of the Court of Appeal was sustained. The head-note of the case there is this: "The owner of land, which is overhung by trees growing on his neighbor's land, is entitled, without notice, if he does not trespass on his neighbor's land, to cut the branches so far as they overhang, though they have done so for more than twenty years."

After the base of a tree standing on one man's land divides, each division, without respect to its size, is a branch, and no matter what it is called or what its size, if a branch extends over the land of another, the latter may cut it off at the division line.

It is a tree standing on the division line, one in which both adjoining owners have an interest, to which a different rule applies. *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645; 1 R. C. L. § 41, p. 401.

Not only were the trees in question not of that character, but the plaintiff claimed below that the tree was his own, and requested and got a charge to the jury to that effect.

There was evidence tending to show, and under the instructions [346] of the court, the jury must have found, that in connection with the cutting the land of the plaintiff was not trespassed upon.

But the plaintiff urged and urges that whatever the rights of the railroad company

may have been, the defendant, the telegraph company, had no rights in the matter. But the contract, introduced in evidence, showed an agreement between the two companies by which the telegraph company, acting in behalf of the railroad company and of itself, might construct and maintain telegraph lines over the right of way for the joint use of both companies, preference being given to the railroad use in the moving of trains, and it was upon this contract that the telegraph company relied for its right to construct a line for such use at the time it did the cutting in question. The plaintiff objected to the admission of the contract in evidence, but it was admissible.

It showed that the telegraph company had derived from the railroad company the right to construct the line in question with the rights incidental to such construction. For the railroad company might properly empower another to exercise such right or rights over its right of way, such exercise being in furtherance of the duties of the railroad company in moving its trains and in no respect obstructive thereof. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 468, 23 U. S. (L. ed.) 356; *Osgood v. Central Vermont R. Co.* 77 Vt. 334, 344, 60 Atl. 137, 70 L.R.A. 930; *Ide v. Boston, etc. R. Co.* 83 Vt. 66, 76, 74 Atl. 401.

It may be mentioned that the occasion for the construction or reconstruction of the line in question was the recent elimination of a grade crossing.

What has been said sufficiently covers the material matters raised by exceptions and here relied on.

Judgment affirmed.

NOTE.

Rights of Adjoining Landowners with Respect to Tree on or Overhanging Boundary Line.

Introductory, 1157.

Tree on Boundary Line:

Ownership, 1158.

Right to Remove, 1159.

Right to Cut to Line, 1160.

Tree Overhanging Boundary Line:

Ownership, 1161.

Right to Remove, 1164.

Right to Compel Removal, 1164.

Right to Damages, 1166.

Right to Fruit, 1168.

Introductory.

While it is true that ordinarily the ownership of land implies the ownership of everything beneath it to the center of the earth,

and everything in a direct line above the land, this principle is somewhat qualified in considering the rights of adjoining landowners with respect to a tree on or overhanging the boundary line. 1 R. C. L. tit. *Adjoining Landowners*, p. 400 et seq. A tree on a boundary line is generally considered as being the common property of the adjoining landowners; but a tree the trunk of which is entirely on the land of one person belongs together with its roots, branches and fruit, to that person although it may overhang the lands of another. The latter, however, may cut the tree back to the boundary line. See the cases cited throughout this note.

In France it is declared by the civil code that boundary hedges and the trees in them are the common property of the owners of the estates separated thereby. See *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326, *affirming Relyea v. Beaver*, 34 Barb. 547; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645 (citing note to *Holder v. Coates*, 22 E. C. L. 265).

Tree on Boundary Line.

OWNERSHIP.

The rule supported by nearly all of the decisions on the subject is that trees on a boundary line are owned by the adjoining landowners as tenants in common. *Anonymous*, 2 Rolle 255, 81 Eng. Rep. (Reprint) 783; *Scarborough v. Woodill*, 7 Cal. App. 39, 93 Pac. 383; *Quillen v. Betts*, 1 Penn. (Del.) 53, 39 Atl. 595; *Phillips v. Brittingham*, 2 Boyce (Del.) 173, 77 Atl. 964; *Benamina v. Clark*, 3 Hawaii 247; *Musch v. Burkhardt*, 83 Ia. 301, 48 N. W. 1025, 32 Am. St. Rep. 305, 12 L.R.A. 484; *Harndon v. Stultz*, 124 Ia. 440, 100 N. W. 329; *Wideman v. Faivre*, reported in full, post, this volume, at page 1168; *Bialock v. Atwood*, 154 Ky. 394, 157 S. W. 694, 46 L.R.A. (N.S.) 3; *Yoakum v. Davis*, 162 Mo. App. 253, 144 S. W. 877; *Hancock v. Fitzpatrick*, 183 Mo. App. 220, 170 S. W. 408; *Griffin v. Bixby*, 12 N. H. 454, 37 Am. Dec. 225; *Miller v. Holland*, 13 Pa. Co. Ct. 622; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645. And see the reported case. See also *Simpson v. Gibson*, 164 Ill. App. 147; *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326, *affirming Relyea v. Beaver*, 34 Barb. 547. Thus in *Scarborough v. Woodill*, supra, discussing the nature of the ownership of a tree whose trunk stood on the boundary line, the court said: "Line trees are 'trees whose trunks stand partly on the land of two or more coterminous owners,' and 'belong to them in common.' (Civ. Code, sec. 834, Am. & Eng. Enc. of Law (2d ed.) 538.) While at common law there appears to have existed two views as to the character of the estate created in the adjacent owners of real property by reason of the roots of

trees near the boundary line extending into and deriving nourishment from the other property, the rule as to trees growing in a hedge that divided the lands of two proprietors was the same as that of our civil code. The ownership of the soil was several, in the proprietors of the two estates, while the tree, standing and growing partly on the soil of each, not capable as an entire thing of several ownership by the two was the property of the two in common as tenants in common. (*Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 329.) If the tree stands so nearly upon the dividing line between the lands that portions of its body extend into each, the same is the property, in common, of the landowners. . . . The tenancy in common in a 'line tree' appears to be of a peculiar nature and may be stated to be, 'that each of the landowners upon whose land any part of a trunk of a tree stands has an interest in that tree, a property in it, equal, in the first instance, to, or perhaps, rather identical with, the part which is upon his land; and in the next place, embracing the right to demand that the owner of the other portion shall use his part as not unreasonably to injure or destroy the whole.'"

In *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645, it was said: "A tree standing upon the division line between adjoining proprietors, so that the line passes through the trunk or body of the tree above the surface of the soil, is the common property of both proprietors as tenants in common. This is not denied. This is another instance where the maxim that he who owns land owns to the sky above it, is qualified and made to give way to a rule of convenience, more just and equitable, and more beneficial to both parties. To hold in such case that each is the absolute owner of that part of the tree standing on or over his own land, would lead to a mode of division of the tree when cut, that would be impracticable, and give the right to one to hew down his part of the tree to the line and thereby destroy the part belonging to the other. The rule is therefore settled that in such case the parties are tenants in common."

It is immaterial so far as its common ownership is concerned, whether a tree standing on a line between adjoining owners is marked as a line tree. *Phillips v. Brittingham*, 2 Boyce (Del.) 173, 77 Atl. 964, *citing Quillen v. Betts*, 1 Penn. (Del.) 53, 39 Atl. 595; *Griffin v. Bixby*, 12 N. H. 454, 37 Am. Dec. 225.

"So, undoubtedly, if twigs, such for instance, as a young hedge, should be set along, but not on, the line between landowners, and wholly on the side of the owner putting them out, they would of course be his property, yet when their bodies grew into such size as to crowd across the line onto the land of the

other owner, they would become the property of both in common." *Yoakum v. Davis*, 162 Mo. App. 253, 144 S. W. 877.

In *Robinson v. Clapp*, 65 Conn. 365, 32 Atl. 939, 29 L.R.A. 582, discussing the nature of the ownership of adjoining landowners in a boundary tree, the court said: "In the case of a tree like the one in question, yielding no fruit, of trifling value for wood, if cut, of no value while standing, except for ornament or shade, what relief by any remedy, legal or equitable, provided for ordinary tenants in common, can a part owner of such tree, to whom its continued existence is of no advantage but an injury, obtain? Can he call upon the other part owner to account for the benefit which he has derived from such ornament or shade? Could he in this state procure a partition of the growing tree, as real estate, under General Statutes, sec. 1304? And if he did, would not the lines of his own, and the adjacent land, divide the trees as they did before, leaving the rights of the parties identical in effect with what they were before? Could he obtain a sale of the tree under General Statutes, sec. 1307, either as real estate or personal property, that would carry the right to have it destroyed or removed? If it be conceded, as it must be, that he could do none of these, it will be evident, we think, that the tenancy in common in a tree is of a peculiar nature, if there be such tenancy at all. It would really seem to come to this, that each of the landowners upon whose land any part of a trunk of a tree stands has an interest in that tree, a property in it, equal in the first instance to, or perhaps rather identical with, the part which is upon his land; and in the next place embracing the right to demand that the owner of the other portion shall so use his part as not unreasonably to injure or destroy the whole."

It seems that two adjoining landowners may make an agreement whereby each of them may own a part of a line hedge and of course in such a case each one owns solely the trees growing in his part of the hedge. *Hancock v. Fitzpatrick*, 183 Mo. App. 220, 170 S. W. 408.

In *Yoakum v. Davis*, 162 Mo. App. 253, 144 S. W. 877, it was held that adjoining landowners were tenants in common in boundary line trees and that consequently one of them could not maintain an action of replevin against the other for the recovery of posts which the latter had cut from boundary line trees.

RIGHT TO REMOVE

Trees on a boundary line may not be cut down or destroyed by one adjacent landowner without the consent of the other, and trespass will lie for an unauthorized cutting.

Quillen v. Betts, 1 Penn. (Del.) 53, 39 Atl. 595; *Phillips v. Brittingham*, 2 Boyce (Del.) 173, 77 Atl. 964; *Slve v. Guerdrum*, 29 App. Cas. (D. C.) 550; *Beniamina v. Clark*, 3 Hawaii 247; *Harndon v. Stultz*, 124 Ia. 440, 100 N. W. 329; *Blalock v. Atwood*, 154 Ky. 394, 167 S. W. 694, 46 L.R.A. (N.S.) 3; *Griffin v. Bixby*, 12 N. H. 454, 37 Am. Dec. 225; *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326, *affirming* *Relyea v. Beaver*, 34 Barb. 547; *Miller v. Holland*, 13 Pa. Co. Ct. 622; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645. See also *Simpson v. Gibson*, 164 Ill. App. 147.

In the case last cited it was held that a building regulation requiring party fences to be erected and kept in good repair by the adjacent landowners did not authorize the destruction of a division hedge by one of two adjoining landowners.

In *Blalock v. Atwood*, 154 Ky. 394, 167 S. W. 694, 46 L.R.A. (N.S.) 3, it appeared that a tree standing on a boundary line on the border of a sidewalk was destroyed by one of the adjacent landowners. Discussing the right of the other landowner to maintain an action for its destruction the court said: "The fact that the shade tree in question stood on the border of the sidewalk, where it afforded shade for the benefit of those who traveled the sidewalk, did not interfere with the appellee's right to protect it from destruction or with his right to recover damages for the injury done his property right therein by the act of appellants in destroying it." It was also held that exemplary damages could be awarded if the trespass was wantonly committed.

In *Miller v. Holland*, 13 Pa. Co. Ct. 622, construing a statute authorizing a tenant in common in timber land to bring trespass against his cotenant for the unauthorized cutting and removal of trees, the court said: "While this act refers to timber lands alone, it is a remedial statute, and may be construed so as to extend to the cutting of a single tree in which the adjoining owners have an undivided interest as tenants in common whether standing and growing on what would be, strictly speaking, called timber land or not. The object of the legislature was to provide a new and different remedy from that which previously existed for injuries done by one tenant in common against another with respect to the joint estate."

In *Hancock v. Fitzpatrick*, 183 Mo. App. 220, 170 S. W. 408, it was held that one of two adjoining landowners could not maintain a statutory action in trespass for the recovery of treble damages against the landowner for the cutting of trees standing on the boundary line, where the statute required an allegation of the sole ownership of the plaintiff.

A suit can be maintained by one of two adjoining landowners to enjoin the other from wrongfully destroying boundary trees. *Scarborough v. Woodill*, 7 Cal. App. 39, 93 Pac. 383; *Musch v. Burkhart*, 83 Ia. 301, 48 N. W. 1025, 32 Am. St. Rep. 305, 12 L.R.A. 484. Thus in the case first cited, in affirming the judgment of the trial court in granting an injunction at the suit of one landowner to prevent an adjacent landowner from cutting down or destroying cypress trees on the boundary line between the orange orchards of the parties to the suit, the court said: "Defendant contends that as the parties were tenants in common of the trees, no injunction will issue against one at the suit of the other. . . . An injunction will be granted to restrain one of the owners of adjoining tracts of land (tenants in common) from cutting down trees growing on the boundary line where they serve to shelter and protect the buildings of the other, even though their presence be a damage to his land, and notwithstanding the complainant has himself cut down some of the trees. (*Musch v. Burkhart*, 83 Ia. 301, 32 Am. St. Rep. 305, 48 N. W. 1025; *Harndon v. Stultz*, 124 Ia. 440, 100 N. W. 329; *Robinson v. Clapp*, 65 Conn. 365, 32 Atl. 939.) It is argued by appellant in the case at bar that neither the complaint nor the findings show any peculiar conditions or circumstances justifying the issuance of an injunction under the authorities cited. This court will take judicial notice of the flora and climatic conditions of the country. It may from these and the character of the trees in question determine whether they are natural timber growing upon the land, or trees of an ornamental nature planted for a special purpose. From these premises it will be presumed that the cutting of cypress trees for fire wood on the boundary line of an orange orchard in Southern California was not a 'legitimate enjoyment of the estate,' in such trees. We do not think any more specific allegation or finding is necessary to sustain the judgment."

In *Musch v. Burkhart*, 83 Ia. 301, 48 N. W. 1025, 32 Am. St. Rep. 305, 12 L.R.A. 484, holding to be proper the grant of an injunction, the court said: "The plaintiff has an interest in the trees for which he cannot be compelled, at the election of the defendant, to accept a money consideration. A person is not obliged to suffer his property to be destroyed at the will of another, even though he may be able to recover ample pecuniary compensation therefor. This is especially true of property like trees, planted for and adapted to a certain use, and serving a special purpose. Their owner has an interest in them which he may protect, and to be deprived of it without his consent would be to suffer irreparable injury, within the meaning of

the law. It appears in this case that the plaintiff has cut down and appropriated a few of the trees which at one time constituted a part of the line of trees in question, but the fact does not authorize the defendant to cut down and remove the remainder." In that case construing a decree obtained by one adjoining landowner against the other which enjoined the defendant from "tearing down or interfering with the fence on said line, and from interfering" with trees on the boundary line, the court further said: "This must be construed in connection with the injury threatened and the relief asked, to enjoin the defendant from destroying, or in any manner injuring the trees and fence. It was not designed to prevent him from taking care of the trees and maintaining the fence. His right to do so is as great as that of the plaintiff."

One of two adjoining landowners cannot maintain a suit against the other to compel the removal of trees on the boundary line between their lands. *Harndon v. Stultz*, 124 Ia. 440, 100 N. W. 329. See also *Grandona v. Lovdal*, 78 Cal. 611, 21 Pac. 366, 12 Am. St. Rep. 121. In the case first cited the suit was brought by a landowner against an adjoining owner to compel the removal of a hedge on the boundary between the properties owned by the respective parties. As alternative relief, the plaintiff asked that if the defendant was found to be under no obligation to remove the hedge she might be allowed to remove it at her own expense. While the defendant denied the plaintiff's right to the relief demanded she disclaimed all interest in the hedge. Modifying a decree in favor of the plaintiff the court said: "In view, however, of the disclaimer made by appellee in argument, and her expressed willingness that appellant may remove the hedge if she so desires, we are disposed to hold that, if appellant so elect, she may have a modification of said decree, allowing her to remove the hedge at her own expense and cost."

"A tree located on the boundary line between the street and private property is the joint property of the city and the property owner. . . . The mere fact that the trees were or might have been owned jointly by the city and the plaintiff does not authorize the city to destroy the trees to the injury or damage of the plaintiff without making due complaint therefor." *Simpson v. Gibson*, 164 Ill. App. 147.

RIGHT TO CUT TO LINE.

The ownership of a tree standing on a boundary line being in the adjacent owners as tenants in common neither of them has the right to cut away the part of the tree ex-

tending on his land to the injury of the common property. *Scarborough v. Woodill*, 7 Cal. App. 39, 93 Pac. 383; *Robinson v. Clapp*, 65 Conn. 365, 32 Atl. 939, 29 L.R.A. 582, 67 Conn. 538, 35 Atl. 504, 52 Am. St. Rep. 298; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645.

"If the tree stands so nearly upon the dividing line between the lands that portions of its body extend into each, the same is the property, in common, of the landowners and neither of them is at liberty to cut the tree without the consent of the other nor to cut away the part which extends into his land, if he thereby injures the common property in the tree." *Robinson v. Clapp*, supra. In that case as reported in 65 Conn. 365, 32 Atl. 939, 29 L.R.A. 582, it appeared that a large shade tree stood on the boundary line between the lots of the plaintiff and the defendant. The defendant desiring to build on his lot close to the boundary line, was about to be cut away the portion of the tree standing on his lot when an action for injunction was brought against him to prevent the injury to the tree. It was held that the matter was one for the discretion of the trial court. The appellate court said: "It might perhaps fairly be urged that to prevent the defendant from removing that portion of the trunk of the tree upon his own land—thereby depriving him of the opportunity to build upon it as desired—would be likely to produce a greater irreparable injury to the defendant than such removal and the consequent destruction of the life of the tree would cause the plaintiff, and that therefore the equitable remedy of injunction which is not adapted finally to adjust the rights of the parties should have been refused and the contestants left to settle such rights in methods pertaining to the legal and not the chancery jurisdiction. We are inclined to think such elements of discretion enter into this matter that we ought not to disturb the conclusion of the trial court upon it. But we think the law is already well settled in this state as well as elsewhere, and as before stated, that where the branches of a tree extend over an adjacent owner's land, he may lop them off up to the line, even though that were practically to the trunk of the tree. In this case a portion of the trunk is on the defendant's land, and the branch extension of forty to fifty feet, as found, presumably reaches across it. That he should have less right to lop these branches because he owns a portion of the tree than if he owned none of it, appears to us to be unreasonable."

In *Bright v. New Orleans R. Co.* 114 La. 679, 38 So. 494, it was held that a hedge which was planted on the plaintiff's land and which had been allowed to spread for a number of feet on the lands of an adjacent owner

could be cut down by the latter so far as it overreached on his lands.

Tree Overhanging Boundary Line.

OWNERSHIP.

It is said in the reported case that when the base of a tree is wholly on the land of one owner the whole tree is his without reference to its ramifications. That rule is supported by the authorities. *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 723; *Robinson v. Clapp*, 65 Conn. 365, 32 Atl. 939, 29 L.R.A. 582, 67 Conn. 538, 35 Atl. 504, 52 Am. St. Rep. 298; *Wideman v. Faivre*, reported in full, post, this volume, at page 1168; *Hoffman v. Armstrong*, 48 N. Y. 201, 8 Am. Rep. 537, *affirming* 46 Barb. 337; *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326, *affirming* *Relyea v. Beaver*, 34 Barb. 547.

Thus in *Lyman v. Hale*, supra, it was said: "This writ of error is reserved for our advice; and the principal question raised and discussed, is, whether, upon the facts disclosed on the record, the plaintiff and defendant are joint owners, or tenants in common, of the tree in controversy. It is admitted, that the tree stands upon the plaintiff's land, and about four feet from the line, dividing his land from that of the defendant. It is further admitted that a part of the branches overhang, and that a portion of the roots extend into, the defendant's land. If then he be a joint owner of the tree with the plaintiff, he is so, in consequence of one or the other of these facts, or of both of them united. It has not been insisted on, in the argument, that the mere fact, that some of the branches overhang the defendant's land, creates such a joint ownership. Indeed, such a claim could not have been made with any well-grounded hope of success. It is opposed to all the authorities, and especially to that on which the defendant chiefly relies. 'Thus' (it is said) 'if a house overhang the land of a man, he may enter and throw down the part hanging over, but no more; for he can abate only that part which constitutes the nuisance. 2 Rolle (Eng.) 144, l. 30; *Rex v. Pappineau*, 2 Stra. (Eng.) 688; *Cooper v. Marshall*, 1 Burr. (Eng.) 267; *Welsh v. Nash*, 8 East (Eng.) 394; *Dyson v. Collick*, 5 B. & Ald. 600, 7 E. C. L. 203; *Com. Dig. tit. Action on the case for a Nuisance D. 4.* And in *Waterman v. Soper*, 1 Ld. Raym. (Eng.) 737, the case principally relied on, by the defendant's counsel, it is laid down: 'That if A plants a tree upon the extreme limits of his land, and the tree growing extends its root into the land of B next adjoining, A and B are tenants in common of the tree. But if all the root grows in the land of A though the boughs overshadow the land

of B, yet the branches follow the root, and the property of the whole is in A.' The claim of joint ownership, then, rests on the fact that the tree extends its roots into the defendant's land, and derives a part of its nourishment from his soil. On this ground, the charge proceeded, in the court below; and on this, the case has been argued in this court. We are to inquire, then, whether this ground be tenable. The only cases relied upon, in support of the principle, are the cases already cited from *Ld. Raymond*, and an anonymous case from *Rolle's Reports*. (2 *Rolle* (Eng.) 225.) The principle is, indeed, laid down in several of our elementary treatises. 1 *Sw. Dig.* 104; 3 *Stark. Ev.* 1457n; *Bul. N. P.* 84. But the only authority cited is the case from *Ld. Raymond*. And it may well deserve consideration, whether that case is strictly applicable to the case at bar; and whether it carries the principle so far as is necessary to sustain the present defense. That case supposes the tree to be planted on the 'extremest limit'—that is, on the utmost point or verge of A's land. It is not then fairly inferable, from the statement of the case, that the tree, when grown, stood in the dividing line? And in the case cited from *Rolle*, the tree stood in the hedge, dividing the land of the plaintiff from that of the defendant. Is it the doctrine of these cases, that whenever a tree, growing upon the land of one man, whatever may be its distance from the line, extends any portion of its roots into the lands of another, they therefore become tenants in common of the tree? We think not; and if it were, we cannot assent to it. Because in the first place, there would be insurmountable difficulties in reducing the principles to practice; and, in the next place, we think the weight of authorities is clearly the other way. How, it may be asked, is the principle to be reduced to practice? And here, it should be remembered, that nothing depends on the question whether the branches do or do not overhang the lands of the adjoining proprietor. All is made to depend solely on the inquiry, whether any portion of the roots extend into his land. It is this fact alone, which creates the tenancy in common. And how is the fact to be ascertained? Again; if such tenancy in common exist, it is diffused over the whole tree. Each owns a certain proportion of the whole. In what proportion do the respective parties hold? And how are these proportions to be determined? How is it to be ascertained what part of its nourishment the tree derives from the soil of the adjoining proprietor? If one joint owner appropriate all the products, on what principle is the account to be settled between the parties? Again; suppose the line between adjoining proprietors to run through a forest or grove.

Is a new rule of property to be introduced, in regard to those trees growing so near the line as to extend some portions of their roots across it? How is a man to know whether he is the exclusive owner of trees growing indeed, on his own land, but near the line; and whether he can safely cut them without subjecting himself to an action? And again; on the principle claimed, a man may be the exclusive owner of a tree, one year, and the next, a tenant in common with another; and the proportion in which he owns may be varying from year to year, as the tree progresses in its growth. It is not seen how these consequences are to be obviated, if the principle contended for be once admitted. We think they are such as to furnish the most conclusive objections against the adoption of the principle. We are not prepared to adopt it, unless compelled to do so, by the controlling force of authority. The cases relied upon for its support, have been examined. We do not think them decisive. We will very briefly review those, which, in our opinion, establish a contrary doctrine. In the case of *Masters v. Pollie*, 2 *Rolle* 141, it was adjudged, that where a tree grows in A's close, though the roots grow in B's, yet the body of the tree being in A's soil, the tree belongs to him. The authority of this case is recognized and approved by *Littledale, J.*, in the case of *Holder v. Coates*, 1 *M. & M.* 112 (22 *E. C. L.* 264). He says: 'I remember when I read those cases, I was of opinion that the doctrine in the case of *Masters v. Pollie*, was preferable to that in *Waterman v. Soper*; and I still think so.' The same doctrine is also laid down in *Mitten v. Faudrye*, *Popham* 161, 163; *Norris v. Baker*, 3 *Blustr.* 178 [proper citation 1 *Rolle* 394—?]. See also 20 *Vin. Abr.* 417; 1 *Chitt. Gen. Pr.* 652. We think, therefore, both on the ground of principle and authority, that the plaintiff and defendant were not joint owners of the tree; and that the charge to the jury, in the court below, was, on this point, erroneous."

In *Hoffman v. Armstrong*, 46 *Barb.* 337, affirmed 48 *N. Y.* 201, 8 *Am. Rep.* 537, the court said: "The strong current of authority shows that the mere fact of the boughs or limbs of a tree planted upon the land of one man extending to or overhanging the land of an adjoining owner, does not give the latter any right or title to any part of the tree or to the overhanging branches, or the fruit growing thereon."

The fact that a tree stands in such proximity to a boundary line that its roots extend into the soil of the adjacent owner does not affect the sole ownership of the tree by the person on whose soil the tree is standing. *Lyman v. Hale*, 11 *Conn.* 177, 27 *Am. Dec.* 728; *Robinson v. Clapp*, 65 *Conn.* 365, 32 *Atl.* 939, 29 *L.R.A.* 582, 67 *Conn.* 538, 35 *Atl.* 504,

52 Am. St. Rep. 298; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645. Thus in the case last cited it was said: "This principle of tenancy in common in a tree merely because some of its roots extend into the land of the adjoining proprietor, regardless of the location of the tree, would be attended with so much inconvenience, uncertainty and embarrassment in its practical application, that it furnishes a strong argument against the construction of these cases contended for by the defendant, as well as against recognizing such a principle unless the authorities lead to that result, or the purposes of justice imperiously demand it. There is at first view an apparent equity in the proposition that the proprietor from whose land a tree draws a portion of its support should have some benefit in return, but to allow him an equal right to the tree and its fruits because a single root penetrates his soil, is quite as unjust as to deny him any right in the tree whatever. If he is tenant in common, what proportion does he own? If his interest is in proportion to the portion of nourishment the tree draws from his land how is the fact to be ascertained? Suppose the division line runs through a grove, a fruit yard, a nursery of trees or a forest, and this rule is adopted, there might be a belt of land rods in width, on which the parties would be tenants in common of more or less of the trees. How is each to know or ascertain what he owns solely, and what in common, and what in proportion, especially as the rights of the parties would be constantly changing by the growth, and consequent extension of roots across the division line. Principles of law and rules of property must be such as are capable of practical application to business affairs. . . . On the whole, we think the weight of authority, reason and analogy, as well as convenience, is in favor of the principle that a tree and its product is the sole property of him on whose land it is situated; and that, considering the necessary uncertainty of evidence as to the location and extent of the roots of a tree, its location and property should be determined by the position of the trunk or body of the tree above the soil, rather than by the roots within or branches above it. But even if a tree standing with its trunk at the extreme limit of one's land, with the main roots extending immediately into the soil of the adjoining proprietor, should be regarded as so far substantially upon the line as to become common property, it cannot be so regarded in relation to the tree in question, situate six feet from the division line."

In *Grandona v. Lovdal*, 78 Cal. 611, 21 Pac. 366, 12 Am. St. Rep. 121, discussing the title of the plaintiff as to trees which overhung his land, the court said: "The trees and the

overhanging branches, in so far as they were on or over his land, belonged to the plaintiff, and he could have cut them off or trimmed them at his pleasure."

In *Reed v. Drake*, 29 Mich. 222, the facts were stated by the court as follows: "Plaintiff sued defendant for removing certain peach trees from his freehold. It appeared on the trial, and the jury found, that some fourteen years before the suit defendant purchased of the common grantor of both parties a parcel of land eighteen rods wide, and that they procured a surveyor to find the line; and they set a worm fence and set out the trees in question on defendant's side of the fence. Defendant has ever since continued in possession up to that boundary. The plaintiff claims that the fence laps over a few feet on his land. The court instructed the jury, if they believed these facts, that defendant was entitled to a verdict." Affirming the judgment of the trial court, the appellate court said: "We think the charge was correct. Whether there was such action as would have conclusively fixed the boundary for all purposes, was not decided, and is not important in this controversy. The defendant, being in a possession which was taken by joint consent as his rightful possession under his deed, has merely removed what he placed there with the co-operation of his grantor, and for his own use and advantage. It would be difficult to find a plainer case. He has done nothing which was not within the direct intent of his grantor when he was put in possession. He has not removed what he found already there, but what was placed there after his purchase, with his grantor's aid as well as assent. The trees were planted by their joint help for the defendant's benefit as owner. His actual possession was measured by their joint action, and was notice to plaintiff of the extent of his claim. It would operate as a fraud upon defendant, to deny his right to remove the trees which were planted and retained under such circumstances; and plaintiff must be held estopped from complaining of such removal, which comes within the scope of the authority under which they were placed on the ground. We think there is no support for any principle which would not go far enough to sustain this defense for the removal of such improvements, whatever may be the case as to the title itself, which, as already stated, is not involved in the case, and needs no discussion."

In *England* the rule appears to be that a tree overhanging a boundary line belongs to the owner of the soil on which it was planted. *Holder v. Coates*, M. & M. 112, 22 E. C. L. 265. The fact that a tree belonging to a landowner extends its roots into the soil of an adjoining landowner does not give the latter any right or title to the tree. *Masters v.*

Pollie, 2 Rolle 141, 81 Eng. Rep. (Reprint) 712; Holder v. Coates, M. & M. 112, 22 E. C. L. 264. *Compare* Waterman v. Soper, 1 Ld. Raym. 737, 91 Eng. Rep. (Reprint) 1393. It seems that if the owner of a tree cuts the overhanging boughs so that they fall on the land of another an action of trespass may be maintained by the latter. Mitten v. Faudrye, Popham 161, 79 Eng. Rep. (Reprint) 1259 (reported as Millen v. Fawdry, Latch. 120, 82 Eng. Rep. (Reprint) 304); Lambert v. Bessey, T. Raym. 421, 467, 83 Eng. Rep. (Reprint) 220, 244.

RIGHT TO REMOVE.

A landowner may cut or lop off the overhanging branches of a tree belonging to an adjoining landowner. Lemmon v. Webb [1895] A. C. (Eng.) 1, *affirming* [1894] 3 Ch. 1; Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623; Grandona v. Lovdal, 78 Cal. 611, 21 Pac. 366, 12 Am. St. Rep. 121; Lyman v. Hale, 11 Conn. 177, 27 Am. Dec. 728; Robinson v. Clapp, 65 Conn. 365, 32 Atl. 939, 29 L.R.A. 582, 67 Conn. 538, 35 Atl. 504, 52 Am. St. Rep. 298; Harndon v. Stultz, 124 Ia. 440, 100 N. W. 329; Tissot v. Great Southern Tel. etc. Co. 39 La. Ann. 996, 3 So. 261, 4 Am. St. Rep. 248 (citing statute); Buckingham v. Elliott, 62 Miss. 296, 52 Am. Rep. 188; Tanner v. Wallbrunn, 77 Mo. App. 262. And see the reported case. See also Lonsdale v. Nelson, 2 B. & C. 302, 9 E. C. L. 96, 107 Eng. Rep. (Reprint) 396; Skinner v. Wilder, 38 Vt. 116, 88 Am. Dec. 645.

"Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they are nuisances, and the person over whose land they extend may cut them off." Grandona v. Lovdal, *supra*.

A landowner desiring to cut off overhanging branches of trees belonging to an adjacent landowner is not required to give notice. Lemmon v. Webb [1895] A. C. (Eng.) 1, *affirming* [1894] 3 Ch. 1; Lonsdale v. Nelson, 2 B. & C. 302, 9 E. C. L. 96, 107 Eng. Rep. (Reprint) 396 (dictum); Hickey v. Michigan Cent. R. Co. 96 Mich. 498, 55 N. W. 989, 35 Am. St. Rep. 621, 21 L.R.A. 729.

Thus in Lemmon v. Webb, *supra*, it was said: "I think it is clear that a man is not bound to permit a neighbor's tree to overhang the surface of his land, however long the space above may have been interfered with by the growth of the tree. Nor can it, I think, be doubted that if he can get rid of the interference or encroachment without committing a trespass or entering upon the land of his neighbor he may do so whenever he pleases, and that no notice or previous communication is required by law."

A landowner cannot destroy or cut down an overhanging tree belonging to his neighbor, but has only the right to cut the overhanging branches back to the boundary line. Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623; Hickey v. Michigan Cent. R. Co. 96 Mich. 498, 55 N. W. 989, 35 Am. St. Rep. 621, 21 L.R.A. 729; Newberry v. Bunda, 137 Mich. 69, 100 N. W. 277. See also Harndon v. Stultz, 124 Ia. 440, 100 N. E. 329. And the owner of the tree may maintain an action to enjoin the adjacent landowner from destroying it. Wideman v. Faivre, reported in full, post, this volume, at page 1168.

A landowner has the same right to remove encroaching roots of trees belonging to an adjoining owner as he has to cut off the overhanging branches. Robinson v. Clapp, 65 Conn. 365, 32 Atl. 939, 29 L.R.A. 582, 67 Conn. 538, 35 Atl. 504, 52 Am. St. Rep. 298; Tissot v. Great Southern Tel. etc. Co. 39 La. Ann. 996, 3 So. 261, 4 Am. St. Rep. 248 (citing statute). See also Lemmon v. Webb [1894] 3 Ch. (Eng.) 1, *affirmed* [1895] A. C. 1; Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623; Skinner v. Wilder, 38 Vt. 116, 88 Am. Dec. 645.

In Simpson v. Gibson, 164 Ill. App. 147, discussing the right of a municipality in regard to a tree belonging to a private person, the branches of which overhung a street, the court said: "If the trees were so located that the branches which overhung a portion of the street and damaged the street or were an inconvenience to the public in the use of the street or if the body of the tree extended into the street so as to obstruct its use by the public, the city would have the right to remove such branches of the tree as extended into the public street without any compensation to the property owner."

While a landowner may cut off the overhanging branches of trees belonging to an adjacent landowner, he may not convert them to his own use. Lyman v. Hale, 11 Conn. 177, 27 Am. Dec. 728. *Compare* Grandona v. Lovdal, 78 Cal. 611, 21 Pac. 366, 12 Am. St. Rep. 121, discussed in the preceding subdivision.

RIGHT TO COMPEL REMOVAL.

Two cases apparently support the doctrine that a landowner who suffers damages by reason of the overhanging branches of trees belonging to an adjoining landowner may maintain a suit to have the branches removed. Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623; Hoffman v. Armstrong, 46 Barb. 337, *affirmed* 48 N. Y. 201, 8 Am. Rep. 537. Thus in the case last cited it was said: "If the branches of the tree which overhung the defendant's land were a nuisance, his remedy was an action for the damages in which, if he succeeded, the nuisance would be abated."

In *Tanner v. Wallbrunn*, 77 Mo. App. 262, holding that an injunction would not lie against a landowner to compel the removal of his trees because their roots extended into his neighbor's soil, the court said: "The extraordinary relief awarded in this case should not be granted except where the right thereto is clear and the necessity therefor imperative. Such relief will not ordinarily be given, either, when other legal remedies are open to the complaining party. While it is true that my neighbor has no technical right to overhang my soil with the branches of his trees, yet if he do so I have no right to cut his tree down and destroy it entirely. I may, however, clip off the overhanging branches, but only to the extent of such overhanging. . . . The judgment in the case at bar commands not only the destruction of the overhanging branches, but would destroy the tree itself. This clearly is erroneous. At most the plaintiff could only have been entitled to cut away these branches and to the extent only that they may have overhung his property. And this cutting away may have been done without calling in aid the extraordinary writ of injunction. Before this equity power can be successfully invoked there should be 'a strong and mischievous case of pressing necessity.' Washb. on E. & S. [3d ed.] 701; 1 High on Injunctions [3d ed.] sec. 740. From the evidence it appears that about the date of the institution of this suit (whether before or after is not clear) defendant did cut away the branches of the tree to the extent that they overhung plaintiff's building, and thereby plaintiff got all that he was entitled to. But even had defendant refused to cut off such overreaching limbs plaintiff had the undoubted legal right, himself, so to do. And, having this right, it was his duty to avail himself thereof before resorting to this extraordinary remedy. As to the extension of the roots from defendant's tree into the soil of plaintiff's lot, the evidence fails to show that any substantial damages were thereby committed. There is no basement under plaintiff's house; it rests on a stone foundation beginning down three feet below the surface, and the roots complained of have grown beneath this. It is difficult to understand how this did or could damage the foundation wall or the building resting thereon—and indeed the evidence fails to show that any damage did result therefrom. Equity will not interfere where the injury from a private nuisance is merely nominal or uncertain; there must be satisfactory proof of real substantial damage."

In *Grandona v. Lovdal*, 78 Cal. 611, 21 Pac. 366, 12 Am. St. Rep. 121, the suit was brought for damages and to abate a nuisance consisting of trees overhanging the boundary line of the plaintiff's land. Affirming a judg-

ment in favor of the defendant as against various objections raised by the plaintiff, the court said: "It is urged for appellant that the trees were a nuisance because they interfered with and prevented his enjoying the free and full use of his land for growing fruit trees. But we are unable to see how it can be said that land is injuriously affected, or that its owner's personal enjoyment is lessened, because he cannot use it for a purpose which he has never attempted or wished to use it for. . . . It is specified that the evidence was insufficient to justify the decision, because it appeared that the trunks had crowded the division fence over and upon plaintiff's land, and thereby ousted him from a part of his land. But the plaintiff had never been called upon to repair that part of the fence, and had never been prevented from plowing and cultivating his land as near the line as he could, if the trees had not been there. His property therefore was not injuriously affected, nor his personal enjoyment lessened by the crowding. Besides, the trees and the overhanging branches, in so far as they were on or over his land, belonged to the plaintiff, and he could have cut them off or trimmed them at his pleasure. This being so we do not see how the fact that the trees had grown so that a small part of them was on plaintiff's land could give any cause of action. It is further specified that the decision was contrary to the evidence, for the reason that defendant maintained the trees for the purpose of supplying himself with fuel and hop-poles, and thereby using the plaintiff's land for his own profit and advantage. But how can this maintain plaintiff's contention? The fuel and hop-poles growing over plaintiff's land were his, and could have been claimed by him as against the defendant. And the fact that the balance of the limbs and branches were useful to defendant in no way harmed the plaintiff or gave him cause for complaint. We conclude that the judgment cannot be reversed on the ground that the decision was contrary to the evidence of the law."

Under the *Louisiana* statute a landowner who suffers a damage from his neighbor's overhanging trees may compel the owner to have them torn up or to have their branches cut off. *Tissot v. Great Southern Tel. etc. Co.* 39 La. Ann. 996, 3 So. 261, 4 Am. St. Rep. 248.

In *Brock v. Connecticut, etc. Rivers R. Co.* 35 Vt. 373, a suit was brought against a railroad to enjoin the planting of willow trees within a few feet of the line between the plaintiff's line and the railroad right of way. It was alleged that the soil for a considerable distance from the boundary line would be injured by the willows. Holding that relief

was properly granted, the court said: "From a consideration of all the testimony which has been introduced on both sides, we are of opinion that the orator has established the fact by a fair balance of testimony, that the planting and continuance of the trees and their growth, as designed and contemplated by the defendants, would produce the injuries to the orator which he has alleged in his bill would result therefrom. The question then arises, have the defendants a right to plant and cultivate a row of willow trees on each side of their road, through the orator's land, in the manner and for the purposes contemplated, notwithstanding the great injury that must inevitably ensue to the orator therefrom? The defendants surveyed their road across the orator's land, under and by virtue of their charter. Whether they obtained it all by proceedings in invitum, or whether a part was transferred to them by deed, would seem to be immaterial, so far as this question is concerned. They obtained it for the purpose of constructing and operating a railroad. By their charter the company were bound to fence their road, and it was in view of this obligation that the price to be paid was fixed upon by the commissioners of the parties but evidently neither party contemplated that the road was to be fenced in this unusual and extraordinary manner, in a way that should virtually destroy or render nearly worthless an amount of land along the sides of the road nearly, if not quite, equal to the amount taken, and that, too, by the introduction into the farms of the willow tree, which some of the witnesses represent as the common enemy of the farmer in that vicinity, and one with which they have been contending half their lives, a tree that most of the witnesses seem to consider as injurious to the surrounding land, to an extent beyond that of most other trees. Whether one or two adjoining landowners, holding their titles in fee, and for the ordinary purposes of cultivation, would have the right to construct a fence, in this manner on the line between them, to the manifest injury of the other, is a question we are not now called upon to decide."

RIGHT TO DAMAGES.

The owner of a tree whose branches overhang the premises of an adjoining landowner is liable to an action for damages for the injuries caused by the overhanging branches. *Smith v. Giddy* [1904] 2 K. B. (Eng.) 448; *Crowhurst v. Amersham Burial Board*, 4 Ex. D. (Eng.) 5. See also *Lemmon v. Webb* [1894] 3 Ch. (Eng.) 1; *Buckingham v. Elliott*, 62 Miss. 296, 52 Am. Rep. 188; *Hoffman v. Armstrong*, 46 Barb. 337, *affirmed* 48 N. Y. 201, 8 Am. Rep. 537.

Thus in *Smith v. Giddy*, *supra*, the court said: "It is no doubt quite true that there is no case to be found in the books in which the action has been held to lie against an adjoining owner for allowing his trees to project over the boundary line where the only damage resulting from the projection has been a damage to the plaintiff's crops. It was pointed out by Kelly, C. B., in *Crowhurst v. Amersham Burial Board*, 4 Ex. D. 5, that there was no precedent for such an action, and it was there suggested that there was much to be said on grounds of general convenience in favor of such an action not being maintainable. But I am of opinion that the principle upon which that case was decided is enough to enable us to decide the present case in favor of the plaintiff. There the action was brought against the owners of a yew tree which they or their predecessors in title had planted on their land and which they allowed to overhang their boundary, whereby the plaintiff's horse in the adjoining meadow feeding on the projecting branches was poisoned; and it was held that the action lay. The court treated the case as an illustration of the rule in *Rylands v. Fletcher*, L. R. 3 H. L. 330, that a person who brings on to his land something that is likely to do damage if it escapes is responsible if that damage occurs. It seems to me that there is no distinction in principle between the damage occasioned in that case and the damage in the present. The injury to the plaintiff's fruit trees was the natural consequence of the defendant's trees being allowed to overhang. I have come to this conclusion with considerable reluctance, for I have a strong feeling that it is highly desirable not to establish new causes of action if it can possibly be avoided, but I do not see how we can refuse to hold that this action lies without departing from the principle of *Crowhurst's* case. Moreover, we are fortified in this view by the dictum of Kay, L. J., in the case of *Lemmon v. Webb* [1894] 3 Ch. 1, where, although it was not necessary to the decision, he distinctly states it as his opinion that for any damage occasioned by overhanging boughs an action on the case would lie. It has been contended that the remedy which the plaintiff has of cutting the trees back himself is all-sufficient, and that under those circumstances it is unnecessary to invent a new cause of action. But that, in my opinion, is no answer to the action."

In *Buckingham v. Elliott*, 62 Miss. 296, 52 Am. Rep. 188, it was said: "Undoubtedly, if the branches of a noxious tree extend over the land of another and do injury, the owner of the tree may be held responsible for the damage done."

In *Smith v. Giddy* [1904] 2 K. B. (Eng.) 448, the plaintiff was awarded damages for

injuries to his crops caused by the overhanging boughs of trees belonging to the defendant.

In *Crowhurst v. Amersham Burial Board*, 4 Ex. D. (Eng.) 5, it appeared that the plaintiff's horse was poisoned by eating some of the overhanging branches of a yew tree belonging to the defendant. It was held that the plaintiff could recover damages.

In *Ackerman v. Ellis*, 81 N. J. L. 1, 79 Atl. 883, discussing the right of a landowner to bring an action against an adjoining landowner whose trees overhung the boundary line, the court said: "Trees which overhang the premises of another are a nuisance to the extent that their branches extend over such premises and the person over whose land they spread is entitled to his action for damages against the person who is responsible for their presence there. Wood Nuis. § 112; Cooley Torts (1st ed.) 567. And this is so without regard to the extent of the damage resulting therefrom, the insignificance of the injury going to the extent of the recovery and not to the right of action. Cooley Torts, supra. The right of action in the present case, therefore, depends upon the fact that the trees overhang the plaintiff's premises, not upon the character of the trees, that being merely an element in determining the amount of the damage sustained by reason of the nuisance." In that case it was held that a landowner could maintain an action against a person in possession of an adjoining tract of land for planting spruce trees so close to the boundary line that the roots and branches of the trees extended into the plaintiff's premises. It was alleged that the trees were "poisonous or noxious" but that allegation was disregarded as surplusage, the character of the trees being considered only in determining the amount of the damage sustained. But it was held that a tenant in possession of the land on which the overhanging trees grew was not liable merely because he maintained the demised land in the condition in which it came to him.

But it has been held that no landowner has a cause of action from the mere fact that the branches of an innoxious tree belonging to an adjoining landowner overhang his premises, his right to cut off the overhanging branches being considered a sufficient remedy. *Countryman v. Lighthill*, 24 Hun (N. Y.) 405, wherein the court said: "It would be intolerable to give an action in the case of an innoxious tree whenever its growing branches extend so far as to pass beyond the boundary line and overhang a neighbor's soil. The neighbor has a remedy in such case by clipping the overhanging branches, especially if the owner of the tree refuses to do it on being requested. . . . The overhanging branches of a tree, not poisonous or noxious in its nature, are not a nuisance,

per se, in such a sense as to sustain an action for damages. Some real, sensible damage must be shown to result therefrom. The complaint in this case alleged that in consequence of the overhanging limbs the plaintiff's garden was damaged. That was not a necessary result, and in what way it was produced was not alleged. The only proof on the subject was, that plaintiff had berry bushes on his side of the line, and he thought there was a difference between those in the shade and those that were not. What the difference was—whether the shaded bushes were injured or benefited by the shade—does not appear. The action was misconceived, and the justice erred in rendering judgment for the plaintiff."

In *Buckingham v. Elliott*, 62 Miss. 296, 52 Am. Rep. 188, holding that a landowner could recover damages from an adjoining landowner for injuries caused by the noxious roots of a tree belonging to the latter, the court said: "We are not able to draw a distinction between the roots of a tree which extend into a neighbor's land and overhanging branches. It seems to be settled law that overhanging branches are a nuisance, and it must follow that invading roots are. The person intruded on by branches may cut them off; it must be true that one may cut off invading roots; it must be true that he who is injured by encroaching roots from his neighbor's tree can recover the damages sustained from them. The right of action seems clear. In determining how much the person injured shall recover, it may be proper to consider the means of protection in his own hands against the injury complained of. It is an admitted fact in this case that the roots of the mulberry trees destroyed the well. That proves the noxious character of the trees. The trees were planted by a former owner, but the appellee has no right to maintain and continue a nuisance after notice of its character and the injury done by it. True, he has as much right to shade and ornamental trees as his neighbor has to his well of unpolluted water; but if in the enjoyment of his right he invades his neighbor's he is answerable for it. The trees and their roots are his; he must so restrain his roots as not to work injury to his neighbor; he can enjoy the full advantage of his trees, as we suppose, without permitting them to damage his neighbor; he is not required to destroy them, but only to prevent them from encroaching injuriously upon others. This he is required to do upon the principle embodied in the fundamental maxim, 'So use your own as not to hurt another.'"

In *Wilson v. Newberry*, L. R. 7 Q. B. (Eng.) 31, the action was brought against the owner of yew trees to recover damages for injuries to the plaintiff's stock which had eaten some of the clippings of the tree and were thereby poisoned. It was alleged

that the defendant had allowed the clippings to escape from his land. Holding that no cause of action was shown, the court said: "It is not alleged that the defendant clipped the yew trees; it is not alleged that he knew the yew trees were clipped; and it is not alleged that he had anything to do with the escape of the yew clippings on to his neighbor's land. It is quite consistent with the averments of this declaration that the cutting may have been done by a stranger without the defendant's knowledge. I cannot think that the duty charged can be deduced from the facts stated; and therefore, in my opinion, the declaration is bad."

RIGHT TO FRUIT.

The fruit of a tree overhanging a boundary line belongs to the owner of the tree. *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728; *Newkirk v. Sabler*, 9 Barb. (N. Y.) 655; *Hoffman v. Armstrong*, 48 N. Y. 201, 8 Am. Rep. 537, *affirming* 46 Barb. 337; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645. In the case last cited the court said: "In this case it appears that the plaintiff planted or set apple trees on his own land six feet from the division line between his land and the defendant's land; the trees grew until the roots extended into, and the branches overhung, the defendant's land. The question is whether the defendant is liable either in trespass on the freehold or in trover for picking, carrying away and converting to his own use the apples growing on the branches overhanging his own land. Each party claims to be the sole owner of the fruit in question; the plaintiff upon the ground that he is the owner of the tree and the defendant upon the ground that the branches and the fruit thereon overhung his land, and that in virtue of his ownership of his land he owns everything above it. . . . The defendant . . . cannot be regarded as the owner of the apples merely because the branches on which they grew were wrongfully encumbering his ground. Suppose the defendant's counsel is correct as he probably is, in the proposition that the defendant had the right to cut the roots and branches of the tree to the division line so far as they penetrated or overhung his land, upon the ground that they were unlawfully encumbering his premises; this justification does not extend to the carrying away and converting the apples upon such branches to his own use, unless he was the owner of the apples, either solely, or in common with the plaintiff. The title to the apples depends upon the title to the tree, and the defendant was not the sole owner of any part of the tree. The defendant is liable in either count in the declaration unless he has some property in the tree."

Hence, if an owner of premises converts to his own use fruit on branches overhanging his premises, the owner of the tree may maintain trespass against him. *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728. And if fruit on an overhanging tree falls to the ground in the neighboring close, the owner of the tree may enter to gather it. *Norris v. Baker*, 1 Rolle 394, as cited in *Lemmon v. Webb* [1894] 3 Ch. (Eng.) 1. See also *Mitten v. Faudrye*, Popham 161, 79 Eng. Rep. (Reprint) 1259, also cited as *Millen v. Fawdry*, Latch. 120, 82 Eng. Rep. (Reprint) 304.

In *Hoffman v. Armstrong*, 46 Barb. 337, *affirmed* 48 N. Y. 201, it appeared that the plaintiff while picking fruit from a tree which overhung the land of another was forcibly prevented by the latter from doing so. The plaintiff was not the owner of the tree but she was authorized by its owner to pick the fruit. It was held that the plaintiff could maintain an action for assault and battery.

WIDEMAN

v.

FAIVRE ET AL.

Kansas Supreme Court—March 10, 1917.

100 Kan. 102; 163 Pac. 619.

Trial — Motion to Strike Out — Necessity of Disclosing Ground.

It is not error to overrule a motion to strike out evidence when the objection to it is not disclosed and when its impropriety or insufficiency is not apparent.

Appeal and Error — Scope of Review — Questions of Fact.

Rule followed that where questions of fact have been determined by the trial court upon substantial and competent evidence, such determination is conclusive on appeal.

Estoppel — As Establishing Ownership of Line Hedge.

The doctrine of estoppel cannot be invoked to settle the ownership of a hedge fence when the issues of fact raised by the parties are so determined by the evidence and the findings of the court as to preclude the operation of estoppel.

Same.

Before the doctrine of estoppel can be invoked to settle a boundary line or the ownership of a fence as a boundary line, it must first be established that the parties have recognized the boundary line, or recognized the

fence as the division line, and when the facts are resolved to the contrary, the doctrine of estoppel cannot operate.

Evidence — Weight — Conflicting Evidence.

Duty of trial court or jury in determining the facts from conflicting testimony discussed.

Adjoining Landowners — Trees Near Boundary — Ownership.

Where a person has planted hedge trees on her own land and cultivated and cared for them, they are her property; and, although they are growing near the boundary line of a neighbor, such neighbor has no property in them, and unless the trees are doing him an injury, he may be enjoined from meddling with them.

[See note at end of this case.]

Statute Discussed.

Certain constitutional limitations of the scope of section 580 of the Civil Code discussed.

(Syllabus by court.)

Appeal from District Court, Clay county:
SMITH, Judge.

Action by Eugenie Wideman, plaintiff, against Adrian L. Faivre et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

F. B. Dawes and R. C. Miller for appellants.
F. L. Williams for appellee.

[103] DAWSON, J.—This lawsuit grows out of a controversy between neighboring landowners over a hedge fence. About 1876 the plaintiff, Eugenie Wideman, with the aid of her children and a neighbor planted a hedge fence one hundred and sixty rods long, east and west, near the surveyed line between her land and the defendants' land which bounded hers on the north. The hedgerow was planted in a plowed furrow about one foot south of a direct line between the corner stones which had been set by government surveyors some years prior thereto. Thus the hedgerow was entirely on plaintiff's land. The plaintiff and her children cultivated the hedge until it attained sufficient growth to care for itself. Thereafter she cut the weeds on the south side of it and the defendants cut the weeds on the north side.

About 1883 or 1884, the hedge being insufficient to turn live stock, the plaintiff and defendants placed two strands of wire and fence posts in the hedgerow, the plaintiff placing the wire and posts for eighty rods in the easterly half of the hedge, and the defendants doing likewise in the westerly half of the hedge for eighty rods.

The hedge was never cut or laid, but permitted to grow into trees, and in January, 1915, the plaintiff commenced at the west end of the hedgerow to cut down the hedge trees.

Ann. Cas. 1918B.—74.

Thereupon the defendants likewise began to cut down the hedge trees, beginning at the middle of the half mile of it and working westward. Hence this lawsuit. The plaintiff prayed for damages for the value of the hedge trees cut down and converted [104] by defendants, and for an injunction. Defendant Adrian Faivre disclaimed, and Lester Faivre answered that the hedge fence was on the dividing line between plaintiff's and defendants' land, that the hedge fence was planted about 1882 by plaintiff and himself, she furnishing the plants and he doing the plowing and assisting in setting them out; that he and plaintiff both cultivated the hedgerow. He further alleged:

"That at the time said hedge plants were set out it was mutually agreed and understood by and between the plaintiff and this answering defendant, that when the hedge was set out it was to be the line fence separating plaintiff's and this answering defendant's fence.

"That said hedge fence was set out about the year eighteen eighty-two or three and has remained on the line between said farms ever since.

"That for more than thirty years the plaintiff as well as the defendant, has treated the fence as upon the line. That during all that time she was acquiesced in and governed herself according to said parol agreement. That in law and equity and in good conscience, she is now estopped from claiming that said hedge is not situated upon the true line separating the plaintiff's and this answering defendant's farm."

The trial court made special findings and found all the material issues in favor of plaintiff and enjoined the defendants from further meddling with the hedge trees.

Various errors are assigned which will be noted in the order of their presentation.

The first of these relates to the testimony of a witness touching the value of the hedge trees cut down by the defendants. Since the total amount recovered by plaintiff on this account was only \$65, there is some question about the propriety of its review here, our jurisdiction on mere recoveries of money being limited to sums exceeding \$100. (Civ. Code, § 566.) But laying that aside, the objection below was thus stated:

[Counsel for defendants] "Now, if the court please, we move to strike out the witness's testimony about there being \$100 damage done.

"The Court: The motion to strike out will be overruled."

This general objection did not disclose any reason for the motion to strike out the testimony, and no impropriety or insufficiency was apparent in the evidence objected to. The motion was therefore properly overruled. Professor Wigmore well says:

"The cardinal principle (no sooner repeated by courts than it is [105] forgotten by counsel) is that a *general objection, if overruled*, can not avail." (1 Wigmore on Evidence, § 18, citing cases.)

It is next contended that—

"There is not one syllable of evidence . . . showing that Eugenie Wideman instructed one James Hodgins . . . that he should run that furrow one foot or any distance whatever south of the monument stone," etc.

Hodgins was the neighbor who helped Mrs. Wideman and her children to set out the hedge plants. He plowed the furrow. It is true; as defendants contend, that there is no evidence that Mrs. Wideman *instructed* him about how the work should be performed. These people were farmers. When their neighbors turn in to help them with farm work, it is not common—indeed it would be extraordinary—for the party receiving this neighborly assistance, with or without payment therefor, to issue *instructions* like a train despatcher to a train crew, or the manager of a large business to his employees. Country folks would consider such formality as rank affectation. The trial court's use of the word was merely part of the text of its finding that the furrow was plowed by neighbor Hodgins about a foot from and within Mrs. Wideman's boundary line agreeable to her wishes. There was no lack of evidence to that effect. Defendants' contention on this point is hypercritical and lacks substantial merit.

The next contention is that the evidence shows that the hedge was planted on the true line between the lands of plaintiff and defendants. There being some evidence to support the trial court's findings that it was planted about a foot south of the true line, that proposition is concluded. (United Pac. R. Co. v. Coldwell, 5 Kan. 82; Humphrey v. Wyandt Mortg. etc. Co. 98 Kan. 266, 158 Pac. 42.) The same rule forecloses the question whether Mrs. Wideman and her children and her neighbor planted the hedge about 1876 or whether Mrs. Wideman and defendant Lester Faivre jointly planted it about 1882, and similarly disposes of the question whether there was an understanding and agreement between Faivre and Mrs. Wideman about the hedge or for a division of it.

The doctrine of estoppel is next invoked, on the ground that the parties treated the hedge fence as a division line for over [106] thirty years. That doctrine is sound and well supported by authorities (Tarpenning v. Cannon, 28 Kan. 665); but the findings of fact based upon the issues which the parties sought to submit, and which negative the defendants' contention that the parties treated the hedge as a division fence or that

there was any parol agreement thereto or acquiescence therein, preclude its operation here.

Counsel for defendants propound this query: "Mrs. Wideman says she entered into no contract in regard to the fence, the defendant says she did, what shall the court do?" That is easily answered. The trial court or jury shall determine from the appearance and demeanor of the witnesses, their apparent candor or lack of candor, their opportunities for knowing the facts about which they testify, and shall weigh their motives and their interest in the result, and may discount the improbable, or ignore the evidence of one who is seemingly giving false testimony, and the trial court or jury may and should consider all the surrounding circumstances, and thereupon conscientiously but courageously find for the party producing the more credible and preponderating evidence and against the party who is probably lying or mistaken in what he says. When this is done, courts of appeal adopt the result without question as a conclusive ascertainment of the issues of fact. (Underwood v. Fosha, 96 Kan. 240, 242, 150 Pac. 571; Pittman, etc. Co. v. Hayes, 98 Kan. 273, 277, 157 Pac. 1193.)

If the hedge trees were planted on the true boundary line or on a line adopted or acquiesced in as the division line, they would derive their growth and sustenance from the lands of both adjoining landowners and each would be entitled to a share of the hedge timber as tenants in common (1 R. C. L. 401), but this would be wholly apart from the question of the utility of the hedge trees as a fence (Griffith v. Carrothers, 86 Kan. 93, 119 Pac. 548). But since the hedge trees were exclusively on the land of Mrs. Wideman, and were planted and cared for by her, they were her property, with which the defendants had no right to meddle unless upon the ground that the trees were a nuisance.

"A person who has planted trees on his own side of a division fence—the fence being set and the trees planted by the joint action and co-operation of the adjacent owner, who was his grantor,—has a right, as against the grantees of such neighboring owner, to remove the trees, [107] whether such location and planting would or would not have created an estoppel as to the title to the land where they were planted." (Reed v. Drake, 29 Mich. 222, syl.)

"A tree growing near a boundary line, so that its roots extend on each side, is, it seems, wholly the property of him on whose land the trunk stands." (Dubois v. Beaver, 25 N. Y. 123, 82 Am. Dec. 326, syl.)

"It seems that a tree and its product is the sole property of him on whose land it is situated, and its location and property should be determined by the position of the trunk or

body of the tree above the soil, rather than by the roots within or branches above it." (Skinner v. Wilder, 38 Vt. 115, 88 Am. Dec. 645, syl.)

(See also 1 R. C. L. 400; 11 R. C. L. 909.) In 1 C. J. 1232, it is said:

"In spite of some confusion among the older authorities as to the ownership of a tree standing wholly on the land of the owner, when its roots extended into the land of another, it is now the generally adopted view, both in this country and in England, that the ownership of a tree under such circumstances is in him in whose land the tree stands."

The defendants present to this court certain photographs showing the hedge stumps, a blue print purporting to show that the hedge-row is on the defendants' land and not on the plaintiffs, and produce an affidavit of the county surveyor who made these photographs and the blue print. The affidavit narrates that the government stones, which were of sandstone, can not be found, that the stones which he did find are limestones, etc. Counsel for the plaintiff move to strike these photographs, blue print and affidavit from the files, since they are no part of the record nor were they presented to or considered by the trial court. Defendants cite section 580 of the civil code as authorizing this practice. It would seem that the scope and limitations of section 580 of the code have been sufficiently explained to the profession to need no discussion here; but it may be repeated that the scope of that section can not constitutionally extend to include what would be mere cumulative evidence, nor evidence which it would be possible to controvert or dispute in the trial court, nor concerning the effect of which there might be differences of opinion or from which different conclusions could possibly be drawn. This court has jurisdiction of a cause in one of two ways—by an invocation of its original constitutional jurisdiction in *mandamus*, *quo warranto* or *habeas corpus*, or through its appellate [108] jurisdiction where it reviews alleged errors of trial courts. In the former, we may glean the facts with the same freedom and liberality accorded to all trial courts. In the latter, when we sit to review the work of a trial court, we are limited to the record made in that court; and there would never be an end of litigation if first one party and then the other were permitted to pile up further evidence in the appellate court which was never submitted to the trial court or jury. The supreme court's jurisdiction is invariably and exclusively *original* or *appellate*. There is never a confusion or blending of both. (Hess v. Conway, 93 Kan. 246, 144 Pac. 205; Robinson v. Chicago, etc. R. Co. 96 Kan. 137, 144, 145, 150 Pac. 636; Haseltine v. Nuss, 97 Kan. 228, 231, 155 Pac. 55; Doty v. Shepard, 98 Kan. 309, 312,

158 Pac. 1; Girten v. National Zinc Co. 98 Kan. 405, 408, 158 Pac. 33.)

This disposes of all the errors urged by defendants, and since nothing prejudicial appears whereby the result in the trial court can be disturbed, the judgment must be affirmed.

NOTE.

The reported case contains a discussion of the rights of adjoining landowners with respect to hedge trees near a boundary line holding that the trees were the property of the owner of the land on which they grew and that he was entitled to an injunction against their removal by the adjoining owner. This question is fully treated in the note to Cobb v. Western Union Tel. Co. reported ante, this volume, at page 1156.

CONRAD

v.

ELLISON-HARVEY COMPANY.

Virginia Supreme Court of Appeals—March 15, 1917.

120 Va. 458; 91 S. E. 763.

Master and Servant — Wrongful Discharge — Question for Jury.

In a discharged bookkeeper's action on the common counts in assumpsit for salary, the question whether the plaintiff was discharged or quit the service of defendant of his own accord is held to be for the jury.

Pleading — Variance — Sufficiency of Objection.

In view of Code 1904, § 3384, authorizing amendments whenever a variance between pleadings and proof develops during the trial, in a discharged bookkeeper's action for salary, where the declaration contained only the common counts in assumpsit and plaintiff offered in evidence his contract covering his original employment of one year, but defendant at the trial made no objection on the ground of variance between the declaration and proof or upon the insufficiency or the inaptness of the evidence to sustain recovery on the common counts, but his sole objection to the admission of the contract being that it was not then in force, defendant cannot on review successfully contend that plaintiff should have declared especially on his contract and its breach, since parties are not permitted to make one objection to evidence in the trial court and another and different one in the appellate court, but are regarded

as having waived all objections save those specifically pointed out.

Master and Servant — Action for Discharge — Evidence — Contract for Previous Term.

The original written contract of employment for one year is admissible to show the terms of the original hiring.

Form of Remedy for Wrongful Discharge.

Where a bookkeeper was employed under a written contract for one year and subsequently continued in service for several years thereafter receiving one increase in salary, the appropriate remedy on his discharge is an action on the common counts in assumpsit.

Pleading — Variance — Trial Amendments.

Code 1904, § 3384, authorizing amendments when a variance between pleadings and proof develops during the trial, is to be construed with liberality by the courts.

Master and Servant — Renewal of Contract — Continuing in Service.

As plaintiff after his original employment for the year 1910 continued in the service of defendant without further contract and received one increase of salary, whether he was employed by the month or by the year in 1914, when he left plaintiff's service, is held to be for the jury.

[See note at end of this case.]

Same.

Plaintiff is entitled to show the circumstances and negotiations under which he began his original term of service, to be considered with the original contract itself in determining the probable intention of the parties to continue in the relation after the first year expired.

[See note at end of this case.]

Same.

The fact of plaintiff's subsequent employment implies some sort of a contract, from the continuance in service, depending upon the intention of the parties, and there is a rebuttable presumption that he was again employed for a like term.

[See note at end of this case.]

Frauds, Statute of — Renewal of Written Contract for Year.

Where a bookkeeper was employed under a written contract for one year and continued from year to year thereafter, his contract for each of the succeeding years was a contract for one year's service to begin and be performed within the year, and consequently was not within the statute of frauds.

Error to Law and Equity Court of City of Richmond.

Action by L. A. Conrad, plaintiff, against Ellison-Harvey Company, defendant. Judgment for defendant. Plaintiff brings error. The facts are stated in the opinion. **REVERSED.**

J. O. Page for plaintiff in error.

Jo Lane & Cary Ellis Stern for defendant in error.

[460] KELLY, J.—L. A. Conrad, claiming to have been employed as a bookkeeper by the Ellison-Harvey Company, a corporation, for a period of one year from January 1, 1914, and to have been unlawfully discharged on June 30, 1914, brought this action of assumpsit to recover on account of his salary for the balance of the year. There was a verdict and judgment against him, and thereupon he obtained this writ of error.

Conrad's original employment with the Ellison-Harvey Company began on January 1, 1910, under a written contract which fixed his compensation at \$100 per month and his term of service at one year. When the year expired, he continued in the same employment without anything being said as to a new arrangement. In May, 1911, the company, upon a recommendation made by Mr. Harvey at a meeting of the directors, increased Conrad's salary to \$125 per month. So far as the record discloses, this increase was [461] not intended to have, or regarded as having, any effect upon the term of his employment. He remained in the service of the company throughout the years 1911, 1912, 1913 and until June 30, 1914, when, as he alleges, he was discharged.

The assignments of error relate exclusively to the action of the trial court upon the instructions to the jury, which necessarily resulted in a verdict for the defendant. Before taking up these assignments, however, it will be in order, and will facilitate and clarify the discussion of the assignments themselves, to dispose of certain contentions of the defendant which, if sound, would defeat the plaintiff's action entirely, and make it necessary for us to affirm the judgment on the ground that no other verdict could have been properly returned, regardless of the instructions.

The first of these contentions is that the plaintiff was not in fact discharged, but quit the service of his own accord. Of this it is sufficient to say, that while the evidence is by no means clear upon the question, it was, in our opinion, one for the jury to determine. The defendants would not deal frankly with him, were moving their principal effects and main place of business out of the State, appeared to have no further position or use for him, and would give him no assurance whatever as to his future employment. Without discussing it in detail, the evidence seems to us, when viewed as a whole, to have tended to show that the company had secretly determined to drop him, and in effect had done so, before he instituted this suit and attached

their estate to secure his claim. In this state of the evidence, the question whether he was discharged, or quit, was one for the jury to answer. (*Goldsmith v. Latz*, 96 Va. 680, 685, 32 S. E. 483.)

It is urged by the defendant, in the second place, that, as this is an action based upon a wrongful discharge, the plaintiff should have declared specially upon the contract and its breach, whereas his declaration contains only the [462] common counts in *assumpsit*, and that, therefore, his action must fail. This point was not made in the lower court and cannot be successfully raised for the first time here. It is true that when the plaintiff offered in evidence the written contract covering the original employment for the year 1910, the defendant objected, but the objection was not upon any such ground as is here suggested. The objection, and the sole objection indicated, was that the written contract "is not the contract in force in 1914," and that the plaintiff should "be confined to proving the contract under which he is claiming." The contract for 1910 was clearly admissible for the purpose of showing the terms of the original hiring. (26 Cyc. 976, note; 20 Am. & Eng. Enc. of Law, 2d ed. 16, note; *Hermann v. Littlefield*, 109 Cal. 430, 42 Pac. 443; *Tatterson v. Suffolk Mfg. Co.* 106 Mass. 56; other authorities cited *infra*.) At no time during the progress of the trial was there, so far as the record shows, any intimation that the defendant relied upon a variance between the declaration and the proof, or upon the insufficiency or inaptness of the evidence to sustain a recovery upon the common counts. Parties are not permitted to make one objection to evidence in the trial court and another and different one in the appellate court, but are regarded as having waived all objections save those specifically pointed out. *Warren v. Warren*, 93 Va. 73, 74, 76, 24 S. E. 913; *McCrorey v. Thomas*, 109 Va. 373, 376, 63 S. E. 1011, 17 Ann. Cas. 373.

In *Warren v. Warren*, *supra*, Judge Buchanan, speaking for this court, said: "The parties must stand or fall by the case as made in that (the trial) court. An appellate court is not a forum in which to make a new case. It is merely a court of review to determine whether or not the rulings and judgment of the court below upon the case as made there were correct. Any other rule, it has been well said, would overturn all just conceptions of appellate procedure in cases at law, and would result in making an appeal in such action [463] a trial *de novo*, without the presence of witnesses, or the means of correcting errors and omissions."

Furthermore, and perhaps more directly to the point in this connection, the action of *assumpsit* was the appropriate remedy, if

the plaintiff was entitled to recover upon the facts as proved, and, conceding that the declaration was defective, it was the duty of the defendant, if it intended to rely upon that point, to then and there call the court's attention to it. Section 3384 of the Code of Virginia, authorizing amendments, upon terms fair to both parties, whenever a variance between the pleadings and the proof develops during the trial, was expressly designed to meet just such a situation as would have been presented in the trial court if the question now made before us had been raised there. This statute has always, and most properly, been regarded with favor, and construed with liberality by the courts of this State; and its terms would have fully met the condition now complained of by defendant. Having failed to avail itself of the remedy thus provided, or to give the plaintiff or the court the opportunity to invoke it, the defendant cannot now take advantage of the irregularity which the statute would have cured. This conclusion is in accord with the well settled policy and repeated decisions of this court. *Eagles v. Hook*, 22 Grat. (Va.) 510, 512; *Langhorne v. Richmond City R. Co.* 91 Va. 364, 367, 22 S. E. 357; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 801, 22 S. E. 869, 70 L.R.A. 999; *Moore Lime Co. v. Johnson*, 103 Va. 84, 86, 48 S. E. 557; *Virginia, etc. R. Co. v. Bailey*, 103 Va. 205, 228, 49 S. E. 33; *Newport News, etc. R. Co. v. McCormick*, 106 Va. 517, 518, 56 S. E. 281; *Norfolk, etc. R. Co. v. Perdue*, 117 Va. 111, 117, 83 S. E. 1058; *Hawkins, etc. v. Edwards*, 117 Va. 311, 317, 84 S. E. 654; *Burks Pl. & Pr. pp. 585-6-7*; *Id.* p. 770.

Another contention of the defendant, urged as conclusive against the plaintiff's demand, is that he was employed [464] in 1914 by the month and not by the year, and that therefore any action by him based upon a yearly contract must fail. In our view of the evidence, the question thus presented, to say the most that can be said of it for the defendant, was one for the jury to settle. The evidence certainly tended to show, if it did not conclusively show, that the plaintiff, having been originally hired for a fixed term of one year, held over in the succeeding years of 1911, 1912, 1913 and 1914, without any new agreement or different understanding as to the term of service. The only change ever made was the increase of salary in May, 1911, already pointed out. Nothing whatever appears in the record to explain the occasion or purpose of this increase, except the uncontradicted statement of Conrad that, in the course of the original negotiations with representatives of the defendant, he was hesitating about accepting their offer of \$100 per month, and called their attention to the fact that he then held an equally remunera-

tive position which he could keep as long as he chose, whereupon Mr. Ellison, the president of the company, said: "Well, come on with us and we will give you one hundred dollars a month now, and later on will increase you." This statement was objected to at the trial solely on the ground that Mr. Ellison was then dead, but when it was made to appear that Mr. Harvey also was present during the conversation, the objection was not further urged. The statement does not appear to us to be very material in any aspect of the case. If it be left out of view entirely, the mere unexplained increase in salary would not in itself be sufficient to show any intent to convert into a monthly employment one which had commenced under a yearly contract. But the plaintiff was entitled to show, for whatever they were worth, the circumstances and negotiations under which he began his original terms of service, so that they might be considered along with the original contract itself in determining the probable intention [465] of the parties continuing the relationship after the first year had expired. The contract for the year 1911, or for any succeeding year, did not exist, and is not claimed to have existed, until the preceding year had expired; but when, after the end of each year, the employment continued some sort of contract was necessarily implied, and the question of what this implied contract was depended upon the intention of the parties. In ascertaining this intention, it was proper for the jury to have before them the original contract and the circumstances under which it was made. It is to be remembered in this connection that the defendant, not the plaintiff, was relying upon the increase of salary, invoking that fact to sustain its contention that the hiring after 1910 was by the month; and, in this aspect, the case became peculiarly one for the application of the general rule permitting evidence of previous dealings and negotiations.

In *Tatterson v. Suffolk Mfg. Co.* 106 Mass. 56, *supra*, the court used the following language, which is especially pertinent here: "There was no express stipulation, either written or oral, which fixed the time for the continuance of the employment of the plaintiff by the defendant. That element of their contract depended upon the understanding and intent of the parties: which could be ascertained only by inference from their written and oral negotiations, the usages of the business, the situation of the parties, the nature of the employment, and all the circumstances of the case. It was an inference of fact, to be drawn only by the jury. The whole question, What was the contract existing between the parties, at the time the defendants undertook to terminate the em-

ployment? was properly submitted to the jury."

In the case of *Chamberlain v. Detroit Stove Works*, 103 Mich. 124, 61 N. W. 532, the plaintiff had worked for the defendant company for some years at a yearly salary, and then, in January, 1886, he was elected a director and secretary [466] of the concern. Thereafter he continued to render the same service as formerly, but at an increased salary. He was also re-elected as director and secretary each succeeding year until 1892, when another person was chosen in his place. In May, 1892, he was discharged from the company's employment, and, in an action brought by him, the jury found that he was employed for a full year and that this employment continued distinct from his offices in the corporation. It was held, on appeal, that the character of the hiring was properly left to the jury and that their determination was not improper. See also *Mechem on Agency* (2d ed.) 602 and cases cited.

So, in the instant case, we find no difficulty in holding that, under the law and the evidence, the jury might very properly have found that the plaintiff had a contract by implication for the entire year 1914. The evidence has already been sufficiently reviewed, and the law applicable to it is perfectly well settled. The English rule is that every general hiring is presumed to be for one year, in the absence of stipulations or circumstances to rebut the presumption. (1 Min. Inst. 4th ed. p. 209; 26 Cyc. 973.) In the United States the prevailing doctrine is that every such general hiring is terminable at the will of the parties (*Lile's Notes* on 1 Min. Inst. p. 54; 20 Am. & Eng. Enc. of Law, 2d ed. p. 14; 26 Cyc. 874). Both in England and in this country, however, when one enters the employment of another for a definite period (of one year or less) and continues in that employment after the expiration of that period without any new agreement, the presumption, rebuttable of course by evidence, is that he is again employed for a like term.

"A person who has been previously employed by the month, year or other fixed interval, and who is permitted without any new arrangement to continue in the employment after the period limited by the original employment has expired, will, in the absence of anything to show a contrary [467] intention, be presumed to be employed until the close of the current interval and upon the same terms. This, however, is merely a presumption, and gives way before evidence that such a continuation was not intended." *Mechem on Agency* (2d ed.) sec. 605, p. 434. See also to the same effect, 20 Am. & Eng. Enc. of Law (2d ed.) p. 16; 26 Cyc. p. 976; *McCullough Iron Co. v. Carpenter*, 67

Md. 554, 11 Atl. 176; Wallace v. Floyd, 29 Pa. St. 184, 72 Am. Dec. 620; Tatterson v. Suffolk Mfg. Co. supra; Standard Oil Co. v. Gilbert, 84 Ga. 714, 11 S. E. 491, 8 L.R.A. 410; Kelly v. Carthage Wheel Co. 62 Ohio St. 598, 57 N. E. 984; Douglass v. Merchants Ins. Co. 118 N. Y. 484, 23 N. E. 806, 7 L.R.A. 822.

In the Gilbert Case, cited above, the Supreme Court of Georgia, in the course of the opinion, said:

"In the argument notice was taken of the difference between the English and the American rule as to presuming that an indefinite hiring is for a whole year. It was said that in the former country this presumption holds, but in the latter it does not. Wood, Mast. and Serv. sec 136.

"We think, however, this presumption has nothing to do with the matter; for whether the first hiring has its duration fixed by express or implied contract, if it be fixed in either way, the term (if not longer than one year) admits of duplication by tacit as well as express agreement. When we have a definite term of service, no matter how we get it, subsequent service of the same kind, where no new contract is made and nothing appears to indicate a change of intention, may be referred to the previous understanding, and to a tacit renewal of the engagement."

Summarizing the results of the foregoing discussion, we are of opinion, (1) that the objection to the form of the plaintiff's declaration comes too late to avail the defendant in this court; (2) that whether the plaintiff was discharged, or quit the service prematurely and of his own accord, and [468] (3) whether he was employed for the entire year 1914, or for a shorter period within that year, were questions upon which, under the evidence adduced, the plaintiff (to say the least of his rights upon the latter question) was entitled to a determination by the jury. And it follows further, therefore, that we cannot say, upon any of the anterior contentions of the defendant, that a verdict in its favor was necessarily proper as being the only one which could have been legally found.

This brings us to the plaintiff's assignments of error, which, in view of what has already been said, may be very briefly disposed of. They involve two rulings of the trial court, both of which were erroneous. The first was the refusal of the court to instruct the jury, at the instance of the plaintiff, "that when one enters into the service of another for a definite period, and continues in the employment after the expiration of that period, without any new agreement, the presumption is that the employment is continued on the terms of the original agree-

ment, and this presumption must prevail, unless there be a new agreement shown, or at least facts which are sufficient to rebut the legal presumption and show that a different hiring was in fact intended by the parties."

This instruction contained a correct statement of the law as applicable to the case, and should have been given.

The second error complained of, and in our opinion well assigned, was the refusal of the court to give plaintiff's instruction number 1, and giving instead thereof instruction "A." Instruction No. 1, refused, was as follows:

"The court instructs the jury, that if they believe from the evidence and all the facts surrounding the contract between L. A. Conrad, and the Ellison-Harvey Co., that it was the intention of the parties to enter into a contract of employment by the year, and the said employment to commence at once, it was not necessary that the agreement [469] should be in writing, and if they further believe from the evidence that L. A. Conrad was discharged on the 1st day of July, 1914, they shall find for the plaintiff, and assess his damages at such amount as he would have received in wages for the remainder of his term, less the amount earned by him from other employment."

Instruction "A" was as follows:

"The court instructs the jury that they should disregard the oral testimony on the part of the plaintiff tending to prove the contract for a year's service with the defendant covering the year 1914, for a breach of which the plaintiff sues because the statutory law requires such a contract to be in writing, or to be proven by a memorandum or other writing signed by the party to be charged."

The contract which the plaintiff claimed and sought to prove was a contract for one year's service beginning on January 1, 1914. There was no contention that the agreement for that year was made prior to the day on which it began. The evidence, both oral and written, of the previous contract and relationship between the parties was introduced for the purpose of throwing light upon the intention of the parties during the subsequent year of 1914, and as such has already shown to have been proper, even though in that way it did tend to prove a contract which came into existence during a subsequent year. It was a contract based upon implication and presumption drawn in part from previous dealings between the parties, but it was nevertheless a new contract, not made until the year 1914 began, and to be performed within that year. In other words, it was the ordinary case of a contract for one year's service, to begin and be performed within the year, and consequently not within the statute

of frauds, or parol agreements. 3 Min. Inst. (2d ed.) 197; 1 Chitty on Contracts (11th Am. ed.) p. 101; 20 Am. & Eng. Enc. of Law (2d ed.) 48, and cases cited in note 1.

[470] "The position of the defendants would be correct, if the plaintiff relied upon the original negotiations as the contract upon which his action was founded. The written evidence does not show any contract which binds the defendants to employ the plaintiff for the whole of a second year. That obligation, if it exists, must be found in some agreement into which the parties had entered within the year. They did enter into some agreement, by the mere fact of continuing their relations of employment and service. It was a relation of contract. The terms of the contract, in the absence of express words, are to be ascertained, not alone by what occurred within the year, but also from all that had transpired previously. From all the evidence the jury must determine, as an inference of fact, what was the understanding with which the parties entered upon the second year of employment and service. That, when found, constitutes their contract. The contract which resulted from the original negotiations did not by its terms, and could not by reason of the statute, extend into the second year. But those negotiations were competent evidence from which to infer what were the terms of the new contract under which the parties continued their relations. We think that the jury were rightly instructed that the statute of frauds did not apply to the contract upon which the plaintiff relied; . . ." *Tattersson v. Suffolk Mfg. Co.* supra.

The judgment complained of will be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had in conformity to the views expressed in this opinion.

Reversed.

NOTE.

Term of Employment and Rate of Compensation of One Continuing in Service after Termination of Contract.

Introductory, 1176.

Term of Employment:

General Rule, 1176.

Application of Rule, 1178.

Qualification of Rule, 1179.

Rate of Compensation, 1181.

Introductory.

Where a person employed under a contract for a definite period continues in the service

after its expiration the courts ordinarily apply a rule analogous to that obtaining in case of a holding over by a tenant, treating the contract as renewed for another like period at the same salary. See the cases cited throughout this note.

"Tacit relocation is a doctrine borrowed from the Roman Law. It is a presumed renovation of the contract from the period at which the former expired, and is held to arise from implied consent of parties, in consequence of their not having signified their intention that the agreement should terminate at the period stipulated. . . . Though the original contract may have been for a longer period than one year, the renewed agreement can never be for more than one year, because no verbal contract of location can extend longer." *Standard Oil Co. v. Gilbert*, 84 Ga. 714, 11 S. E. 491, 8 L.R.A. 410.

The continuance of an obligation once established is presumed. *National Automatic F. Alarm Co. v. Louisiana, etc. R. Co.* 115 La. 633, 39 So. 738. This presumption does not alter, but continues the terms of, the original contract, and therefore does not have the effect of converting an express into an implied contract. It merely raises an inference as one of fact that the parties have agreed to extend the operation of the old contract for the same term. *Morris v. Z. T. Briggs Photographic Supply Co.* 192 Mo. App. 145, 179 S. W. 783.

For a discussion of the duration of a general contract of hiring for an indefinite time, see the notes to *Gould v. McCrae*, 8 Ann. Cas. 279, and *Watson v. Gugino*, Ann. Cas. 1913D 215.

Term of Employment.

GENERAL RULE.

It is generally held that where one is employed by another for a definite and fixed period, and is permitted to continue in the same service after the expiration of the period limited by the original employment, it is presumed in the absence of anything to show a contrary intention that the continued services are to be rendered for the same period as that fixed by the original agreement.

England.—*Beeston v. Collyer*, 4 Bing. 309, 13 E. C. L. 444, 2 C. & P. 607, 12 E. C. L. 286; *Stevenson v. North British Ry. Sc. Ct. Sess.* 7 F. 1106. See also *Rex v. Sow*, 1 B. & Ald. 178.

California.—*Hermann v. Littlefield*, 109 Cal. 430, 42 Pac. 443; *Gabriel v. Suisun Bank*, 145 Cal. 266, 78 Pac. 736.

Colorado.—*State Board of Agriculture, etc. v. Meyers*, 20 Colo. App. 139, 77 Pac. 372.

Georgia.—*Standard Oil Co. v. Gilbert*, 84 Ga. 714, 11 S. E. 491, 8 L.R.A. 410.

Illinois.—Grover, etc. Sewing-Mach. Co. v. Bulkley, 48 Ill. 180; Ingalls v. Allen, 132 Ill. 170, 23 N. E. 1026; Crane Bros. Mfg. Co. v. Adams, 142 Ill. 125, 30 N. E. 1030; Moline Plow Co. v. Booth, 17 Ill. App. 574; Mears v. O'Donoghue, 58 Ill. App. 345; Fish v. Marzluff, 128 Ill. App. 549; Painter v. Durham, 195 Ill. App. 468.

Indiana.—Akron Milling Co. v. Leiter, 57 Ind. App. 394, 107 N. E. 99.

Kentucky.—Stewart Dry Goods Co. v. Hutchinson, 177 Ky. 757, 198 S. W. 17.

Louisiana.—Alba v. Moriarity, 36 La. Ann. 680; Lalande v. Aldrich, 41 La. Ann. 307, 6 So. 28. See also Burton v. Behan, 47 La. Ann. 117, 16 So. 769.

Maryland.—McCullough Iron Co. v. Carpenter, 67 Md. 554, 11 Atl. 176; Lister's Agricultural Chemical Works v. Pender, 74 Md. 15, 21 Atl. 686; Travelers' Ins. Co. v. Parker, 82 Md. 22, 47 Atl. 1042.

Massachusetts.—Tatterson v. Suffolk Mfg. Co. 106 Mass. 56; Allen v. Chicago Pneumatic Tool Co. 205 Mass. 569, 91 N. E. 887. See also Dunton v. Derby Desk Co. 186 Mass. 35, 71 N. E. 91.

Michigan.—Sines v. Superintendents of Poor, 58 Mich. 503, 25 N. W. 485; Chamberlain v. Detroit Stove Works, 103 Mich. 124, 61 N. W. 532. See also Laughlin v. School Dist. No. 17, 98 Mich. 523, 57 N. W. 571.

Missouri.—Bell v. Paper Tobacco Warehouse Co. 205 Mo. 475, 103 S. W. 1014; Morris v. Z. T. Briggs Photographic Supply Co. 192 Mo. App. 145, 179 S. W. 783.

Nebraska.—Hale v. Sheehan, 41 Neb. 102, 59 N. W. 554; Home F. Ins. Co. v. Barber, 67 Neb. 644, 93 N. W. 1024, 108 Am. St. Rep. 716, 60 L.R.A. 927; Fitch v. Martin, 74 Neb. 538, 104 N. W. 1072.

Nevada.—See Capron v. Strout, 11 Nev. 304.

New Hampshire.—Chamberlain v. Davis, 33 N. H. 121.

New Jersey.—Passino v. Brady Brass Co. 83 N. J. L. 419, 84 Atl. 615.

New York.—Vail v. Jersey Little Falls Mfg. Co. 32 Barb. 564; Wallace v. Devlin, 36 Hun 275; Huntingdon v. Claflin, 38 N. Y. 182; Douglass v. Merchants' Ins. Co. 118 N. Y. 484, 23 N. E. 806, 7 L.R.A. 822; Adams v. Fitzpatrick, 125 N. Y. 124, 26 N. E. 143, affirming 56 Super. Ct. 580, 5 N. Y. S. 181; Hodge v. Newton, 14 Daly 372, 13 N. Y. St. Rep. 139; Greer v. People's Telephone, etc. Co. 50 Super. Ct. 517; Bacon v. New Home Sewing Mach. etc. Co. 59 Hun 624, 13 N. Y. S. 359, affirmed in 129 N. Y. 658; Brightson v. H. B. Claflin Co. 84 App. Div. 557, 82 N. Y. S. 667, reversed on other grounds in 180 N. Y. 76, 72 N. E. 920; Bennett v. Mahler, 90 App. Div. 22, 85 N. Y. S. 669; Treffinger v. Groh, 112 App. Div. 250, 98 N. Y. S. 291; Mendelson v. Bronner, 124 App. Div. 396, 108 N. Y.

S. 807; Schott v. La Compagnie Generale, etc. 52 Misc. 236, 102 N. Y. S. 901; Wood v. Miller, 78 Misc. 377, 138 N. Y. S. 502; Moskowitz v. Mawhinney, 137 N. Y. S. 903. See also Mason v. New York Produce Exch. 196 N. Y. 548, 89 N. E. 1104, affirming 127 App. Div. 282, 111 N. Y. S. 163; Schrader v. Fraenckie, 117 App. Div. 97, 102 N. Y. S. 335; Summers v. Phenix Ins. Co. 50 Misc. 181, 98 N. Y. S. 226.

Ohio.—Kelly v. Carthage Wheel Co. 62 Ohio St. 598, 57 N. E. 984.

Pennsylvania.—Wallace v. Floyd, 29 Pa. St. 184, 72 Am. Dec. 620.

Texas.—Houston Ice, etc. Co. v. Nicolini, 96 S. W. 84.

Virginia.—Norfolk Hosiery, etc. Mills Co. v. Westheimer, 92 S. E. 922. And see the reported case.

Wisconsin.—Kellogg v. Citizens' Ins. Co. 94 Wis. 554, 69 N. W. 362; Dickinson v. Norwegian Plow Co. 96 Wis. 376, 71 N. W. 606; Dickinson v. Norwegian Plow Co. 101 Wis. 157, 76 N. W. 1108; Appleton Waterworks Co. v. Appleton, 132 Wis. 563, 113 N. W. 44.

"It is elementary that when a person performing labor at an agreed price and for a stated time continues in the same employment after the expiration of the term, without a new agreement, it is presumed by the law in the absence of anything to the contrary, that the terms of the original contract are continued." Hermann v. Littlefield, 109 Cal. 430, 42 Pac. 443.

"It is the same in principle as a holding over by a tenant who is under a specified contract; if he holds over he will be considered as holding under the first contract if no change is shown." Fish v. Marzluff, 128 Ill. App. 549.

In *California* a statute (Civ. Code, § 2012) provides as follows: "Where after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service." In *Gabriel v. Suisun Bank*, 145 Cal. 266, 78 Pac. 736, it appeared that the plaintiff was employed as a bookkeeper for the year 1898 at a yearly salary of \$1,200 payable monthly and was discharged after two months' employment in 1899, there having been no specific agreement for the renewal of the old agreement. It was held that the testimony sufficiently showed that the plaintiff was employed for the year 1898 and that under the foregoing statute the presumption arose that the employment was renewed for the ensuing year.

Opposed to the foregoing decisions is the case of *Harnwell v. Parry Sound Lumber Co.* 24 Ont. App. 110, wherein it appeared that

the plaintiff was hired as a bookkeeper for a year, at the expiration of which nothing was said by either party, but the plaintiff continued in his employment. Shortly afterwards his employer gave him three months' notice to "quit." In an action to recover for the balance of the year, the court, after a review of the decisions, held that he could be dismissed on reasonable notice, and that three months' notice was, under the circumstances, reasonable, saying that the fact that the previous hiring was expressly for one year certain could not be regarded as creating an implied contract for a similar period. See also *Halter v. Goody*, 4 Sask. L. Rep. 161, wherein the court seemingly cited with approval *Harnwell v. Parry Sound Lumber Co.* supra, saying: "The conclusion, therefore, seems to be that where there has been a hiring for a definite period and at the expiration of that period the employee continues working without any new arrangement being entered into, the employment is continued so far as remuneration is concerned on the same terms as before, but the master may dismiss him at any time on giving him reasonable notice."

In *New York* it appears that where a contract of hiring is for a term less than a year, the presumption that the parties agree to a renewal of the contract for the same period by reason of the plaintiff's continuance in the employ of the defendant does not arise, the presumption being confined to cases where the original contract of hiring is for the term of one year. *Barnes v. Summit Silk Mfg. Co.* 113 N. Y. S. 977. Thus it was said in *Caldwell v. Caldwell Co.* 88 N. Y. S. 970: "Before the rule contended for by the plaintiff, namely, that where one enters into the employ of another under a contract for a year's service, and continues in the employment after the expiration of the year, the presumption, in the absence of evidence to the contrary, is that the parties agreed to a continuance for another year at the same salary, can have any application, it must appear that in fact there was a prior contract for a whole year's service, and that services were rendered thereunder for at least one year." To the same effect see *Moskowitz v. Mawhinney*, 137 N. Y. S. 903, wherein the plaintiff sued to recover damages for the breach of a contract whereby he was employed as a salesman for six months with the privilege of renewal for a further period of six months, which privilege was exercised. An action for the balance of a third six months' period was held not to be maintainable. But see *Wood v. Miller*, 78 Misc. 377, 138 N. Y. S. 562, wherein the court said that "in passing, although not necessary to the determination, we might observe that, if the first hiring was for a definite term of six months, a renewal for

that term would be implied, and not an indefinite hiring."

APPLICATION OF RULE.

In *Allen v. Chicago Pneumatic Tool Co.* 205 Mass. 569, 91 N. E. 887, it appeared that a written contract of hiring for one year provided that "in the event that either or both parties do not desire to renew this agreement at the time of its expiration that notice be given in writing of intention not to renew at least thirty days prior to the expiration of this agreement." The court said: "From the fact that no notice was given before the expiration of the first year the trial judge had the right to infer that there was a disposition to renew the contract, and from the additional fact that [the employee] without any other express arrangement, either written or oral, continued to work as before, with the full knowledge and approbation of the defendant, the judge could properly infer that it was the understanding of the parties that the contract was renewed. If renewed, then the new contract, like the old, was a contract of hiring for a year, with compensation for the year, to be paid quarterly as before, with the same right in either party to give notice within thirty days of its expiration that there was no further desire for renewal."

In *Akron Milling Co. v. Leiter*, 57 Ind. App. 394, 107 N. E. 99, the appellant contended on a motion for a new trial that the "appellee was paid for all work performed up to the time of his discharge; that there was no renewal of the original contract, but that appellee's employment thereafter, with no new or different arrangement, was necessarily 'indefinite as to time, and was at the will of either party, and did not operate to continue such expired written contract for another year.'" In denying appellant's contention the court said: "As affecting the question now under consideration, appellee contends in effect that this contract of employment was for a definite period of one year at a fixed yearly compensation and that, 'where one enters into the services of another for a period of one year, and continues in the employment after the expiration of that period, without any new contract, the presumption is that the employment is continued for another year on the terms of the original contract; and this presumption must prevail, unless there be a new agreement shown, or at least facts which are sufficient to rebut the legal presumption, and show that a different hiring was in fact intended by the parties.' Appellee's contention is supported by the decisions of numerous courts of other jurisdictions. . . . In our examination of the question involved we have been unable

to find any case, decided by either of the courts of appeal of this state, in which was presented, or decided, the exact question here presented. However, the courts of this state have recognized the rule to be as contended for by appellee when a contract between landlord and tenant was involved, that is to say, this court and the supreme court have held that: 'If a tenant for a year or for a number of years holds over after the expiration of his term by efflux of time, the landlord, at his option and against the will or intention of the tenant, may hold the latter liable as a tenant for another year.' *Alleman v. Vink* (1902) 28 Ind. App. 142, 146, 62 N. E. 461, and authorities cited."

In *Lister's Agricultural Chemical Works v. Pender*, 74 Md. 15, 21 Atl. 686, it appeared that the plaintiff, a traveling salesman, entered the service of the defendant, the latter guaranteeing him employment for six months, at the end of which period he continued in the same service for seven months longer and under the same terms, after which he was discharged. In an action for the wages that would have been earned if the plaintiff had been allowed to continue to the end of the third six months' period, it was said: "The first question presented is that in regard to the true construction of the contract. As we have seen, the letter of the 4th of January, 1888, is definite in regard to time only as to the first six months, ending July 1st, 1888. The defendant guaranteed employment to the plaintiff until that date. At the expiration of that period, there was no new contract, and the employment continued as under the original contract for a second period of six months, and a third period of six months was entered upon without any change being suggested as to the terms of employment. And such being the case, it would seem to be fully embraced within the principle adopted by this court in *McCullough Iron Co. v. Carpenter*, 67 Md. 554. In that case, adopting a principle that seems to be well supported by authority, this court held, in principle and effect, that where there is a contract for hiring or employment on the one part, and service for salary or wages on the other, for any definite or specified time, there is an implied engagement that the service shall continue for the time specified, unless the conduct of one of the parties be such as to justify the other in dissolving the relation; and at the end of each period of hiring, if the parties do not disagree, or come to some new understanding, and the employee continues in the same service, the presumption arises that he is engaged and continues under the original contract, and such service cannot be terminated at the mere will of one of the parties, but only at the end of the current period, unless the employee be guilty

of some misconduct that will warrant dismissal."

The fact that the original contract is invalid under the statute of frauds cannot affect the validity of the implied contract, where the first contract is fully performed and performance commences under the implied contract. *Hodge v. Newton*, 14 Daly 372, 13 N. Y. St. Rep. 139. Compare *Schott v. La Compagnie Generale, etc.* 52 Misc. 236, 102 N. Y. S. 901.

An agreement to employ one for a trial period of four months and if satisfactory to continue his services for the balance of the year does not impose any duty on the employer to notify the employee that he does not intend to continue the contract. *Carter v. Weber*, 138 Mich. 576, 101 N. W. 818, 11 Detroit Leg. N. 668.

QUALIFICATION OF RULE.

The presumption of continuance under the terms of a fixed contract may be overcome by proof of a new contract or of facts and circumstances indicating that the parties in fact understood that the terms of the original contract were not to apply to the continued services. *Standard Oil Co. v. Gilbert*, 84 Ga. 714, 11 S. E. 491, 8 L.R.A. 410.

Where an employee, after his term of hiring expires, renders service of a different character for his former employer there is no presumption that his former contract is renewed. *White v. U. S. Gypsum Co.* 168 Mich. 238, 133 N. W. 501. So it was said in *Ewing v. Janson*, 57 Ark. 237, 21 S. W. 430: "The presumption depends upon a continuance of the same character of service and would be contrary to reason if it applied where the character of the service was altered. If one should complete his term of service as a carpenter, and continue service as a plowman or a teamster, there would be no reason to presume that the parties understood he was to receive the same rate of compensation, and we are aware of no authority to support such a principle. On the contrary it is held that no such presumption arises."

In *Reed v. Swift*, 45 Cal. 255, the court said: "Where a servant has been employed at a stated rate of wages, in a hotel in another state, and the business has been broken up and closed, and the servant paid up and discharged, and two months afterwards the same servant comes and resides with her former employer occupied as a house servant on a farm, this is not evidence of a continuing contract of hiring at the former rate of wages."

Whether the services rendered in a given case are of the same nature, and of the character of service within the view or contemplation of the parties when the original con-

tract was entered into is a question of fact, and as such is proper to be submitted to and be determined by the jury. *Ingalls v. Allen*, 132 Ill. 170, 23 N. E. 1026.

In *O'Connor v. Briggs*, 182 Mass. 387, 65 N. E. 836, the plaintiff brought an action to recover for personal services as a salesman for the defendants. The court said: "The evidence tended to show that the plaintiff had been employed by the defendants at a yearly salary of \$1,000 for the year ending January 4, 1899, and this suit is brought to recover for services under an alleged renewal of the contract for one year ending January 4, 1900. In December, 1898, the plaintiff met with an accident which rendered him entirely incapable of performing the services called for by the contract. He went to a hospital where he remained more than seven weeks. There is no doubt that the inability to perform his contract absolved both parties from liability to continue performance of it in the future. *Stewart v. Loring*, 5 Allen 360; *Harrison v. Conlan*, 10 Allen 85. The evidence, which was contradicted, that the defendants conferred with the plaintiff while he was in the hospital in regard to the collection of certain bills for goods previously sold by him, is not enough to warrant a finding that the relations of the parties under the contract were continued while he was disabled. The plaintiff contends that there was a renewal of the contract for another year, beginning January 4, 1899. He does not contend that there was an express renewal of it, nor any express agreement on the subject. He says that such a renewal should be implied from the conduct of the parties. . . . The work which he had previously done under his contract was that of a traveling salesman. There is no evidence that after his return he ever undertook such work in a regular or formal way. He admitted on cross-examination that so far as he could remember he did not send the defendants any order, nor collect any money for them in the year 1899. There was dispute as to whether he did anything, but if we take his own testimony most favorably for himself, it tends to show that he worked a little about the store, and saw several of his former customers who were delinquent about their bills, and asked them why they did not pay. There were extended negotiations between the parties about March 20 in regard to making a contract for services of the plaintiff to be paid for by commissions, but they failed to agree, and these efforts are of no consequence in the present case. The plaintiff did not complete his contract for the former year, because he could not. He did not come back until nearly two months after the expiration of the year. He did not resume the work in which he was engaged

under his former contract, and there is no evidence of any continuity of service or continuance of the former employment in such a way as to warrant a finding that the parties assented to an arrangement for services for another term of the same length at the same salary."

It was held in *Anderson v. Freeman*, 80 Ga. 364, 9 S. E. 1075, that where a book-keeper was employed by the defendant for a definite term, his continuance after the expiration of the term in the employ of a partnership formed by the defendant and another was not governed by the terms of the former contract.

So in *Mason v. Secor*, 76 Hun 178, 27 N. Y. S. 570, it appeared that the plaintiff was employed as a salesman by one Craft for several years at a yearly salary, during which time the latter formed a partnership with the defendants to carry on the same business and the plaintiff continued to work for the firm several months after the expiration of his original contract when he was discharged. The court in denying recovery of salary for the balance of the year said: "There was no evidence produced showing that the firm of Charles G. Craft & Co., formed on January 1, 1890, ever made any express contract with plaintiff to employ him for any length of time, or at any agreed salary or otherwise. It seems that having been at work for Craft prior and up to January 1, 1890, as a salesman, he continued in the same employment with the new firm without entering into any express contract with it. Under such circumstances ordinarily an employer can discharge the servant when he elects, and is only liable to pay him the value of his services for the period of his employment. But the plaintiff contends that, having been employed by Charles G. Craft for several years at an annual salary of \$1,000, and defendants having on January 1, 1890, formed a copartnership with Craft and continued the same business, and he (plaintiff) having continued after the formation of the partnership in their employ, the presumption is that he continued in the service of the defendants on the same terms as when in the employment of Craft alone. . . . The learned counsel for the appellant fails to cite any authority to sustain his contention as applicable to such a case as this. It is conceded that had Craft continued in business alone after January 1, 1890, and plaintiff had remained in his employ after his last year's service, a contract to employ him another year on the same terms might have been implied. If there was such an implied contract to employ him in this case it arose after January 1, 1890; that is, after the formation of the copartnership, and was implied because plaintiff had been employed by

Craft for some years prior to January 1, 1890, and after the formation of the firm and continued in their employ. In fact it is a well-settled principle that where parties have entered into a contract for services for a certain period, which has elapsed, and their connection still continues, they are deemed to have renewed the contract by tacit relocation without any new agreement being entered into. (14 Am. & Eng. Enc. of Law 770, 771.) But we are of the opinion that this principle does not apply to such a case as this. The connection between Charles G. Craft and plaintiff was not continued. The firm of Charles G. Craft & Co., . . . is an entirely different party from the one who employed plaintiff prior to and up to January 1, 1890. At that time Craft ceased to do business and a copartnership took his place, and there could be no renewal of the contract then existing between Craft and plaintiff unless by an express contract. Certainly the plaintiff failed to show any renewal of the contract existing between Craft and himself, because it was not made to appear when the personal agreement between Craft and the plaintiff terminated or in fact that it was ended prior to the discharge of plaintiff by the defendant. Also, it does not appear that one of the defendants, Secor, ever knew the terms of the contract between plaintiff and Craft. The plaintiff, therefore, failed to show any contract with defendants to employ him for any definite length of time, and the trial judge properly granted a nonsuit. . . . There was no question of fact for the jury. There was no evidence given from which the jury could have properly found an agreement on the part of defendants to employ plaintiff for a year." See to the same effect *Lichtenhein v. Fisher*, 87 Hun 398, 34 N. Y. S. 304.

If the nature of the service required to be performed is not different from what the parties had in contemplation when the original contract was entered into, the fact that the services are rendered after the original term expires at a different place, or are of a slightly different character, will not destroy the presumption of a renewal of the contract, if the service is a continuation of the original service and within the scope generally of the original employment. *Ingalls v. Allen*, 132 Ill. 170, 23 N. E. 1026. Nor does the fact that the plaintiff receives increases in salary rebut the legal presumption that the original term or period of plaintiff's employment is extended for each of the subsequent years by plaintiff's continuing in the service of the defendant after the expiration of those periods. Such changes affect only the amount of plaintiff's compensation but not the duration or period of employment. *Stewart Dry Goods Co. v. Hutchison*, 177 Ky. 757, 198 S. W. 17.

Rate of Compensation.

It is generally held that where one is hired for a compensation fixed by agreement of the parties for a specified time and continues to serve in the same capacity after the expiration of that time, the law will presume that in the absence of other proof he is to receive compensation at the same rate. *Down v. Pinto*, 2 C. L. R. 547, 9 Exch. 327, 23 L. J. Exch. 103, 2 W. R. 202; *Ewing v. Janson*, 57 Ark. 237, 21 S. W. 430; *Nicholson v. Patchin*, 5 Cal. 475; *Perry v. J. Noonan Furniture Co.* 8 Cal. App. 35, 95 Pac. 1128; *Gabriel v. Suisun Bank*, 145 Cal. 266, 78 Pac. 736; *Standard Oil Co. v. Gilbert*, 84 Ga. 714, 11 S. E. 491, 8 L.R.A. 410; *Ingalls v. Allen*, 132 Ill. 170, 23 N. E. 1026; *Laubach v. Cedar Rapids Supply Co.* 122 Ia. 643, 98 N. W. 511; *Curtis v. Dodd*, 172 Ia. 521, 154 N. W. 872; *Thompson v. Detroit*, etc. Copper Co. 80 Mich. 422, 45 N. W. 189; *Smith v. Velie*, 60 N. Y. 106; *Caldwell v. Caldwell Co.* 88 N. Y. S. 970; *Wallace v. Floyd*, 29 Pa. St. 184, 72 Am. Dec. 620; *Ranck v. Albright*, 36 Pa. St. 367; *Burden v. Cropp*, 7 Wash. 198, 34 Pac. 834; *Weise v. Milwaukee County*, 51 Wis. 564, 8 N. W. 295. See also *Frati v. Jannini*, 226 Mass. 430, 115 N. E. 746; *Tucker v. Philadelphia*, etc. Coal, etc. Co. 53 Hun 139, 6 N. Y. S. 134.

Services rendered without a new agreement after the contract term has expired are to be compensated at the same rate, and to that extent the prior contract is renewed or continued in force. *Standard Oil Co. v. Gilbert*, 84 Ga. 714, 11 S. E. 491, 8 L.R.A. 410.

When a person hired at an agreed price, for a certain time, continues to perform the same service in the same employment after the time expires, without any new agreement, the law raises a presumption that the parties agree that the original rate of compensation is to be continued. *Ewing v. Janson*, 57 Ark. 237, 21 S. W. 430; *Ranck v. Albright*, 36 Pa. St. 367.

Thus it was said in *Ingalls v. Allen*, 132 Ill. 170, 23 N. E. 1026: "The rule undoubtedly is, that if one person employ another at an agreed price for a time certain, and the employment is continued after the expiration of the time agreed upon without any new agreement as to price, the presumption is that the parties understood that the original rate of compensation is also to be continued; and it can make no difference that there may be some change in the services required and performed, as, that there be an increase or diminution of the labor, so long as it is clearly within the scope of the original employment. The reason is, that if the employee remains in the same employment, after his term of service has expired, without making demand for increased pay, the employer

may well presume that no increased compensation is expected or will be required, and having acted upon that presumption, and failed to protect himself by a new contract, the employee will be held to have assented to a performance of the service at the original price. The rights of the employee and employer are mutual and reciprocal. So where the employer permits a continuation of the service after the term has expired, without a new stipulation as to the price, it will be presumed that he expected and intended to pay for the service the original compensation stipulated. In such case, the recovery will not be upon the quantum meruit, but upon the contract implied by law, and for the compensation presumed to have been fixed by the parties."

But where one is employed as a general manager of a concern at a fixed salary per annum and continues in the same service after the expiration of the agreement for a number of years at a reduced salary, he cannot thereafter recover the amount of the reduction. *Home F. Ins. Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024, 108 Am. St. Rep. 716, 60 L.R.A. 927.

In *New Hampshire Iron Factory Co. v. Richardson*, 5 N. H. 294, it appeared that one agreed to enter the employ of another for one year at a salary of eight hundred dollars, but said that he should expect one thousand dollars the succeeding year if he continued in the service, to which the employer declined to pledge himself. It was held that a continuance by the employee in the service for two years after the expiration of the original contract did not warrant the presumption that he was to receive the increased wage.

Where an employee hired at a fixed salary continues in the same employment after the expiration of the term of the original hiring, without any new contract, there can be no recovery on a quantum meruit, since the terms of the original contract control. *Perry v. J. Noonan Furniture Co.* 8 Cal. App. 35, 95 Pac. 1128. To the same effect see *Nicholson v. Patchin*, 5 Cal. 475.

METROPOLITAN LIFE INSURANCE COMPANY

v.

NELSON.

Kentucky Court of Appeals—June 8, 1916.

170 Ky. 674; 186 S. W. 520.

Life Insurance — Insurable Interest — Necessity.

One who has no insurable interest in the life of another cannot be the beneficiary in a policy issued upon his life and cannot collect the insurance upon the insured's death.

Assignee without Insurable Interest.

The rule of insurance law relative to insurable interest applies with equal force after a life policy is issued, and the beneficiary is changed by assignment or otherwise as it does to the naming of the beneficiary at the time of procuring the insurance.

[See 5 Ann. Cas. 360; 12 Ann. Cas. 686; Ann. Cas. 1913B 864; 87 Am. St. Rep. 506.]

Insurable Interest of Creditor.

A creditor, to the extent of his debt, has an insurable interest in the life of his debtor.

Industrial Insurance — Insurable Interest.

Payment by the insurance company which issued a policy of "industrial insurance," the purpose of which is to provide a reasonable fund with which insured may alleviate his last sickness and secure decent burial, to insured's aunt, his beneficiary, who cared for him in his sickness and buried him, is permissible under the usual "facility of payment" clause in such a policy, providing that payment may be made to the beneficiary or any person equitably entitled, etc., though the aunt has no insurable interest in insured's life.

[See note at end of this case.]

Appeal from Circuit Court, Jefferson county, Common Pleas Branch, First Division.

Action by Elnora Nelson, plaintiff, against Metropolitan Life Insurance Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **REVERSED.**

Clarence Smith and Keith L. Bullitt for appellant.

L. Frank Withers and L. A. Hickman for appellee.

[674] THOMAS, J.—The appellant, Metropolitan Life Insurance Co., who was defendant below, on March 4, 1912, insured the life of Abraham Nelson by issuing to him what is called in this record an industrial policy. The premiums agreed to be paid were

twenty-five cents per week. The sum to be paid to his beneficiary, or the person named in the clause, which we shall hereafter consider, was \$385.00, provided the insured died six months after the delivery. [675] of the policy and the policy should be in force at the time of his death; but only one-half that amount was to be paid upon his death if it should occur within six months after issuing the policy. The insured at the time was twenty-eight years of age, and he had some years before married the appellee Elnora Nelson, who was plaintiff below; but under the proof she abandoned him in 1909 and continued separated from him until his death, which occurred some time in February, 1914. The beneficiary named in the policy at the time it was issued was Lizzie Nelson, the mother of the insured, but some time about Thanksgiving day in 1913, she died. At that time the insured, Abraham Nelson, was living with his mother, they being the only members of the family. For a considerable time previous to the death of his mother, the insured had been afflicted with a disease which had culminated into what is commonly known as dropsy. This had produced considerable swelling of different parts of the body, and especially of the lower limbs. The history of this affliction, for it is not called a disease, is that sooner or later it entirely disables the patient from doing anything, not even attending to his immediate necessities and rendering him completely helpless.

After the death of his mother, there was no one left at the home of the insured to nurse or take care of him, and he determined to move to the house of his aunt, Maria Fields, who was his mother's sister. She lived but a short distance from the home of the insured, and she appears from this record to have been very much attached to him, having assisted in nursing him before his mother's death, and she gladly received the suggestion that the insured should move to her house, and was willing to assume the task of rendering to him all the services of which she was capable, which she seems to have faithfully done. Shortly after the death of the mother, who, as we have seen, was the named beneficiary in the policy, the insured, voluntarily, as is shown by the record, caused his aunt, Maria Fields, to be substituted as beneficiary in the policy in lieu of his deceased mother. After the death of the insured, and upon proof thereof, the company paid to the aunt the amount due under the policy. Shortly after this the appellee, Elnora Nelson, claiming to have the right to administer upon the estate of the insured, was appointed administratrix [676] of his estate, and filed this suit against the defendant company, claiming the right to recover the proceeds of the policy as such

administratrix, because she was his widow, and further alleging that the original beneficiary, Lizzie Nelson, left no heirs except Abraham Nelson, the insured, and that he inherited the proceeds of the policy from his mother, and because of this fact, she claimed to have the right as such personal representative to maintain the suit. It was further claimed by her in her petition that at the time her deceased husband designated his aunt as beneficiary in the policy, his mind was so enfeebled that he was mentally incapacitated to do so, but that if this was not true, that Maria Fields did not, under the law of this state, have an insurable interest in the life of her nephew, and could not, therefore, collect the proceeds of the policy, and the payment which the company made to her was, therefore, illegal and void. The defendant denied the allegations of the petition, and insisted that in this character of insurance the strict rule of the law requiring the beneficiary to have an insurable interest in the life of the insured, did not apply because of the entirely different purposes between this character of insurance and ordinary life insurance; and relied upon the following clause in the policy:

"In case of such prior death of the insured the company may pay the amount due under this policy to either the beneficiary named below or to the executor or administrator, husband or wife, or any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, or for his or her burial; and the production of a receipt signed by either of said persons shall be conclusive evidence that all claims under this policy have been satisfied."

After the evidence was introduced, which wholly failed to sustain the allegation as to mental incapacity of the insured, the court gave a peremptory instruction directing the jury to find for the plaintiff, which was done and a judgment rendered accordingly. The company has filed a transcript of the record in this court and entered motion that it be granted an appeal from the judgment. [677] It is the settled rule everywhere and has been for a century or more, that one who had no insurable interest in the life of another could not be the beneficiary in a policy issued upon his life, nor could such beneficiary collect the insurance upon the happening of the contingency insured against. The reason for this universal and long-standing rule is, that to hold otherwise would be in violation of a sound public policy, in that if the beneficiary could collect the insurance, without having an insurable interest in the life of the deceased, inducements would be

offered for the beneficiary to cause, bring about, or produce, the death of the insured so that the former could reap the benefit of the insurance. This rule as to insurable interest applies with equal force after the policy is issued and the beneficiary is changed by assignment or otherwise, as it does to the naming of the beneficiary at the time of the procuring of the insurance. Some of the Kentucky cases upholding the rule are: *Smith v. Agnew*, 137 Ky. 83, 122 S. W. 231; *Hess v. Segenfelder*, 127 Ky. 348, 105 S. W. 476, 128 Am. St. Rep. 343, 14 L.R.A.(N.S.) 1172; *Western, etc. L. Ins. Co. v. Grimes*, 138 Ky. 338, 128 S. W. 65; *Bramlett v. Hargis*, 123 Ky. 141, 94 S. W. 20; *Irons v. U. S. L. Ins. Co.* 128 Ky. 640, 108 S. W. 904, 129 Am. St. Rep. 318; *Equitable L. Assur. Soc. v. O'Connor*, 162 Ky. 262, 172 S. W. 496; *Bayes v. Adams*, 81 Ky. 368; *New York L. Ins. Co. v. Brown*, 66 S. W. 613, 23 Ky. L. Rep. 2070.

The trial court followed the doctrine of these cases in rendering the judgment appealed from.

It could serve no useful purpose here to point out those whom the courts have held to possess an insurable interest in the life of another, further than to say that this court has held that an aunt, because of her blood relationship alone, has no insurable interest in the life of her nephew. *Equitable L. Assur. Soc. v. O'Connor*, 162 Ky. 262, 172 S. W. 496; *Hess v. Segenfelder*, 127 Ky. 348, 105 S. W. 476, 128 Am. St. Rep. 343, 14 L.R.A.(N.S.) 1172; *Woods v. Woods*, 130 Ky. 162, 113 S. W. 79, 19 L.R.A.(N.S.) 233.

It is, however, universally held that a creditor to the extent of his debt has an insurable interest in the life of his debtor. The right of Maria Fields, however, to collect this insurance is not sought to be upheld because of any relationship as creditor for services which she rendered to the insured, although such services as we find from the record she did render, coupled with the physician's bills and burial expenses which she paid, might have been more than sufficient to have consumed [678] this policy. As this is not relied upon, the only question to be considered is, whether the payment to Maria Fields of the proceeds of this policy can be justified under the quoted clause therefrom. In other words, shall we draw a distinction between ordinary life insurance and that which we have here? As we have seen, it is insisted that the character of insurance with which we are dealing is what is known as 'industrial insurance.' Whatever that may mean we find it defined in volume two, second series of Words and Phrases, to be: "Industrial insurance' means small policies issued in consideration of weekly payments in con-

tradistinction to the ordinary insurance, where premiums are payable annually, semi-annually, or quarterly." The purpose of this character of insurance seems to have for its object, not the creation of a fund to provide for the future support and maintenance of the family or near relatives of the insured having an insurable interest in his life, or to augment his estate, as ordinary life insurance does; but to provide a reasonable fund with which the insured may procure in his last sickness, which in many cases may be lingering in character, needed aid and assistance by way of nursing and medical attention, etc., and to secure respectable and decent burial. When limited in amount to a reasonable provision for these purposes, the plan, as we view it, is to be commended rather than discouraged. It is the impecunious only who would need such a fund for such purposes and such expenses, if not thus provided, would doubtless have to be furnished through the instrumentality of some charity maintained either by public or private donations. It would seem then, that when this character of insurance is limited strictly within the confines of the purposes stated, to permit it to be issued and paid as provided by the clause, *supra*, would foster rather than impair the public policy of the state. In such cases the reason for the rule as applicable to ordinary life insurance concerning the feature of the contract now under consideration, does not exist, or, to say the least of it, is largely removed for the manifest reason that the size of the policy is not sufficient to render it probable that any sum would remain after applying the proceeds to the purposes stated, but, if so, it would be so insignificant as to offer no temptation to [679] commit murder. Furthermore, no one would know beforehand whether or not he would be the payee of the proceeds of the policy, as in all of them there is a clause of the character quoted, which is called 'the facility of payment' clause and the expenses provided for are largely incurred after the death of the insured. This character of insurance presenting the question now under consideration, has never been before this court so far as we are able to learn, but has been under consideration by the courts of Massachusetts, Pennsylvania and New Jersey in the cases of *Bradley v. Prudential Ins. Co.* 72 N. E. 989, 187 Mass. 226; *Thomas v. Prudential Ins. Co.* 24 Atl. 82, 148 Pa. St. 594; and *Metropolitan L. Ins. Co. v. Schaffer*, 11 Atl. 154, 50 N. J. L. 72. In the *Bradley* case the equities of the person to whom the insurance was paid were not so favorable as those possessed by Maria Fields in this case. But the court in upholding the right of the company to pay to him the insurance, and

giving its approval to the "facility of payment" clause in this character of insurance, after reciting the clause in that policy, which is substantially the same as the one we have here, said:

"Such stipulations are common in industrial policies, the amounts of which always are small; and one purpose of them is to enable the amount of the policy to be paid very speedily after the death of the insured, without the delay or expense of taking out administration, and another purpose is to remove the chance of litigation between claimants. The insurance being taken out by the person whose life is insured, and the person to whom the policy is paid under the provisions of such articles (facility of payment clause) being either a relative or in the position of a creditor, we see no ground for holding such an article void as against public policy. In effect, the article gives the company power, acting in good faith, to discharge its debt and perform its contract by making payment to any person who is a relative by blood or marriage of the insured, or who has incurred expense for the insured."

In the Schaffer case, after reciting the terms of the policy, etc., the Supreme Court of New Jersey, said:

"The company has paid, in strict accordance with that condition, and is thereby discharged, under its express terms, from further liability. The purpose and object [680] of this kind of insurance seem to require the payment to be made in that way, and it should, in good policy, be upheld.

"Unlike the ordinary life insurance, small sums are provided by these industrial policies, to be paid at once on proof of death and surrender of policy. Suit may be brought on it in ten days thereafter, and must be brought within six months from date of the death of the assured. The terms and manner of the insurance contemplate speedy payment to the family of the assured, immediately after his death, to provide a burial fund, or to meet the expenses which in such an emergency must be incurred."

The policy involved in the Thomas case from the Supreme Court of Pennsylvania contained a clause almost identical with the one found in the policy now under consideration, and payment was made as in the Bradley case to one having no insurable interest in the life of the insured, and the court upheld the payment and adjudged the "facility of payment" clause in this character of insurance policies to be valid, saying:

"So far as we can gather from the case before us it will appear to be to insure its members to the extent of a small sum of money (in this case it was \$60, and the weekly payment, five cents), in order to provide the means for any necessary expenses

Ann. Cas. 1918B.—75.

in the last sickness or death of the assured. The manifest object of the second schedule of the policy, which I have quoted, was to enable the company, in case of the death of the assured, to pay the amount of the policy without the expense of an administration. . . . The contract itself does not offend against any rule of law or public policy; and we cannot hold that the administrator is entitled to recover without making a new contract for the parties."

Under the doctrine of these cases, within prescribed limitations, industrial policies of the character we now have before us seem to be taken out of the rule forbidding none but those having insurable interest from becoming beneficiaries in life insurance contracts or collecting the insurance after the death of the assured. Considering the purpose in view and the benefits to be accomplished, together with the consequent relieving of the public of such burdens, we are not disposed to dissent from the holding of the courts referred to. On the [681] contrary, it is our conclusion that an adherence to them violates no public policy; and that the reason for the rule requiring an insurable interest in the life of the assured by the beneficiary does not exist in this character of insurance.

We do not mean to be understood that the well-established rule on the subject may be set aside or ignored or evaded under the pretense of effecting 'industrial insurance,' but when the policy is clearly of that character, and the size of the policy is not beyond a sum reasonably sufficient to accomplish the purposes intended, and good faith is shown by the parties concerned, we see no reason why the contract should not be enforced; especially when the one receiving payment is related by blood to the assured and exhibits a course of conduct demonstrative of good faith as did Maria Fields in this case.

The business of insurance is gradually expanding and the contingencies provided against and risks assumed by the insurer are constantly increasing. Each time a new field is covered its beneficial results to the people have been demonstrated. We believe the character of insurance now under consideration, if confined to the attainment of the end in view, will not prove to be an exception to past experience. We are, therefore, unwilling to apply to strictly "industrial insurance" as herein defined, the same rule as to requirement of insurable interest of the beneficiary in the life of the assured as prevails in ordinary life insurance which has for its object more of the features of a bonus than of charity.

We, therefore, conclude that the court was in error when he instructed the jury to find for the plaintiff.

The motion for the appeal is sustained and the appeal granted, and the judgment reversed for proceedings consistent with this opinion.

Whole court sitting.

NOTE.

Industrial Insurance.

- I. Nature and Purpose, 1186.
- II. Applicability of Principles Governing Life Insurance:
 1. Generally, 1187.
 2. Insurable Interest, 1190.
- III. "Facility of Payment" Clause:
 1. Provision for Payment to Person Equitably Entitled Thereto:
 - a. Generally, 1193.
 - b. Option Exercised, 1194.
 - c. Option Not Exercised, 1198.
 - d. Rights of Assignee, 1199.
 2. Provision for Payment to One of Several Designated Persons:
 - a. Generally, 1200.
 - b. Option Exercised, 1201.
 - c. Option Not Exercised, 1203.

I. Nature and Purpose.

The present note deals with that character of insurance which is known as "industrial insurance," and which has been defined as follows: "Industrial insurance" means small policies issued in consideration of weekly payments, in contradistinction to the ordinary insurance, where premiums are payable annually, semiannually, or quarterly." *Russell v. Prudential Ins. Co.* 176 N. Y. 178, 68 N. E. 252, 98 Am. St. Rep. 656, reversing 73 App. Div. 617, 76 N. Y. S. 1029. And see the reported case.

As is stated in the reported case, the purpose or object of this character of insurance seems to be, not the creation of a fund to provide for the future support and maintenance of the family or near relatives of the insured, or to augment his estate, as ordinary life insurance does, but to provide a reasonable fund with which the insured may procure in his last sickness needed assistance by way of nursing, medical attendance, etc., and to secure respectable and decent burial.

"It is obvious from this class of contracts, and on consideration of the fact that the provision is for the immediate happenings on the death of the insured, and of the small amount provided for, that it cannot be said, with any propriety or with any proper consideration of this form of insurance, that they are intended to provide a fund for the benefit of creditors, unless that is dis-

tinctly set out in the policy itself, as has been done in several cases where a special provision, by pledge or otherwise, has been made for the creditor. In general, to place a policy of this small amount and apparently at times consisting of the whole estate left by a decedent in the hands of an appointed administrator would be to tie up the whole fund, obviously intended to meet burial and other immediate expenses attendant on death, to pervert it from its real object and to cause it to be eaten into seriously by court expenses, and administrative and other allowances of various kinds. These policies are considered as highly benevolent, and are to be so treated." *Renfro v. Metropolitan L. Ins. Co.* 148 Mo. App. 258, 129 S. W. 444.

In *Foryciarz v. Prudential Ins. Co.* 95 Misc. 306, 158 N. Y. S. 834, the court said: "These industrial policies are for small amounts and have small weekly premiums. They are sold usually to laboring people of small means. One great purpose of the 'facility of payment' provision must be to afford a ready method of raising money for the benefit of the insured, to pay funeral expenses at the time of death or to furnish medical assistance or some other relief in the last illness; or to have the policy an asset in the hands of the insured in any emergency in life, so that funds for something other than ordinary purposes may be provided. It is also of advantage that a payment may be made to a person other than the administrator or executor; in cases where there is no estate except the policy, the delay and expense incident to the appointment of such officers may be avoided. We may readily see that these would be strong arguments to be used by agents in selling this kind of insurance to this class of customers; and we find these arguments were used among the people where the insured resided. Under the terms of the policy there are several possible payees. First, the executor or administrator; second, any relative by blood or connection by marriage; third, any other person equitably entitled to the same by having incurred expense for her burial, or, if the insured is more than fifteen years of age, for any other purpose. Who is entitled to select the beneficiary? Always it is the insured so long as the selection falls within any permissible class. The company should have no right to select a beneficiary, particularly if it contravenes the expressed wish of the insured. The option contained in the policy should be exercised by the company only where the insured has failed to make a choice."

In *Metropolitan L. Ins. Co. v. Schaffer*, 50 N. J. L. 72, 11 Atl. 154, it was said: "Unlike the ordinary life insurance, small sums are provided by these industrial poli-

cies, to be paid at once, on proof of death and surrender of policy. Suit may be brought on it in ten days thereafter, and must be brought within six months from the date of the death of the assured. The terms and manner of the insurance contemplate speedy payment to the family of the assured, immediately after his death, to provide a burial fund, or to meet the expenses which, in such an emergency, must be incurred."

It is provided by statute in Washington (Rem. & Bal. Code, §§ 6155, 6159) that no policy of life or endowment insurance, except policies of industrial insurance where the premiums are payable monthly or oftener, shall be issued unless all statements made by the insured are attached to or contained in the policy, or received in evidence unless the application is attached to the policy. Thereunder, in *Pride v. Continental Casualty Co.* 69 Wash. 428, 125 Pac. 787, it was held that the policy in suit was neither a life nor endowment policy within the meaning of the law, but fell within the exception as an industrial or accident insurance policy. By its terms it expired one year after issuance, unless renewed; it provided for monthly payments of premiums; and it covered loss of life from external, violent and purely accidental means. It contained provisions for the payment of a weekly indemnity in case of accident or injury arising from numerous violent or external means. It referred to the industrial and special class of employment the assured was engaged in at the time; and it made provision for his inability, because of injuries from purely accidental means, to engage in any labor or occupation. The court said: "It is in every sense of the term a policy of industrial insurance, as contemplated by the legislature in excluding such policies from the provisions of the law. If this is not industrial insurance, we fail to appreciate what character of insurance should be so designated. If the legislature had in mind any distinction between life insurance and industrial insurance as those terms are used in ordinary understanding, and it is evident from making the latter class of insurance an exception to the rules governing the former class that such was the intention, then it must be evident that this policy falls within the exception, or it would be impossible to indicate to a person of ordinary understanding what was meant by the expression industrial insurance as distinguished from straight life or endowment insurance."

II. Applicability of Principles Governing Life Insurance.

1. GENERALLY.

Industrial insurance being but one form of life insurance, with the exception of the

special features hereinafter discussed, the general rules relating to life insurance have been held to be applicable to the former without distinction. *Industrial Mut. Indemnity Co. v. Thompson*, 83 Ark. 574, 104 S. W. 200, 119 Am. St. Rep. 149, 10 L.R.A. (N.S.) 1064; *McGurk v. Metropolitan L. Ins. Co.* 56 Conn. 528, 16 Atl. 263, 1 L.R.A. 563; *Seaback v. Metropolitan L. Ins. Co.* 274 Ill. 516, 113 N. E. 862, *affirming* 196 Ill. App. 76; *Nebergall v. Prudential Ins. Co.* 193 Ill. App. 189; *Metropolitan L. Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785; *Metropolitan L. Ins. Co. v. Wolford*, 49 Ind. App. 392, 97 N. E. 444; *Public Sav. Ins. Co. v. Coombes*, 59 Ind. App. 523, 108 N. E. 244; *Metropolitan L. Ins. Co. v. Mulleady*, 53 S. W. 282, 21 Ky. L. Rep. 879; *Western, etc. L. Ins. Co. v. Oppenheimer*, 104 S. W. 721, 31 Ky. L. Rep. 1049; *Baltimore L. Ins. Co. v. Howard*, 95 Md. 244, 52 Atl. 397; *Home Friendly Soc. v. Roberson*, 100 Md. 85, 59 Atl. 279; *McNicholas v. Prudential Ins. Co.* 191 Mass. 304, 77 N. E. 756, 196 Mass. 565, 82 N. E. 692; *Jones v. Prudential Ins. Co.* 173 Mo. App. 1, 155 S. W. 1106; *Jaggi v. Prudential Ins. Co.* 191 Mo. App. 384, 177 S. W. 1064; *Melick v. Metropolitan L. Ins. Co.* 84 N. J. L. 437, 87 Atl. 75, *affirmed* 85 N. J. L. 727, 91 Atl. 1070; *Heffernan v. Prudential Ins. Co.* 88 Misc. 93, 150 N. Y. S. 644; *Foryciarz v. Prudential Ins. Co.* 95 Misc. 306, 158 N. Y. S. 834; *Hood v. Prudential Ins. Co.* 26 Pa. Super. Ct. 527; *Dominco v. Prudential Ins. Co.* 49 Pa. Super. Ct. 156.

Thus, the rules that insurance contracts are to be strictly construed against the company and liberally construed in favor of the insured whenever necessary to prevent a forfeiture of the policy, and that where the policy contains inconsistent provisions or terms requiring construction, that view should be adopted, if possible, which will sustain, rather than forfeit, the contract, have been held to be peculiarly applicable to industrial insurance. *Metropolitan L. Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785; *Public Sav. Ins. Co. v. Coombes*, 59 Ind. App. 523, 108 N. E. 244; *Melick v. Metropolitan L. Ins. Co.* 84 N. J. L. 437, 87 Atl. 75, *affirmed* 85 N. J. L. 727, 91 Atl. 1070; *Foryciarz v. Prudential Ins. Co.* 95 Misc. 306, 158 N. Y. S. 834. The reason for so holding advanced in *Metropolitan L. Ins. Co. v. Johnson*, supra, was that the persons who were thus insured were usually people of limited means, many of them women, children, and busy laboring men, not versed in matters of contract, and frequently illiterate and dependent on the agent, in a large measure, for their information.

The doctrine that knowledge affecting the rights of the insured, which comes to the agent of the insurance company while he

is performing the duties of his agency in procuring applications for insurance, delivering policies, and collecting premiums, becomes the knowledge of the company, and that if the company afterwards collects the premiums, it waives all objection with regard to the matters of which it has knowledge, has been held to be applicable to industrial insurance companies. *McGurk v. Metropolitan L. Ins. Co.* 56 Conn. 528, 16 Atl. 263, 1 L.R.A. 563; *Metropolitan L. Ins. Co. v. Johnson*, 40 Ind. App. 233, 94 N. E. 785; *Jones v. Prudential Ins. Co.* 173 Mo. App. 1, 155 S. W. 1106. In the case last cited, in holding that there had been a waiver of the provision in the policy prohibiting its assignment, the court said: "But it is obvious the provision of the policy rendering it void in case of an assignment is incorporated for the benefit and convenience of the defendant and may therefore be waived by it. . . . It does not appear that the general officers in charge of defendant's office in St. Louis had knowledge of the assignment until after the death of the insured and the question is, may a waiver touching this matter be predicated on the knowledge and acquiescence of James, the soliciting agent, who negotiated the insurance, delivered the policy to plaintiff and collected the premiums thereon week after week with full knowledge concerning the entire transaction? When the application was entered into by the insured, it was with an express understanding on the part of the insured, Lang, the agent, James, and plaintiff that the insurance was taken out to the use of plaintiff as the creditor of Lang, and that plaintiff should pay the premiums thereon. Plaintiff then paid the first and thereafter all subsequent premiums to the agent, James, who not only possessed full knowledge touching the matter but expressly agreed thereto. In keeping with this arrangement, the policy was delivered by James, the agent, to plaintiff at his barber shop, but no beneficiary was named therein as is usual in such policies containing the 'facility of payment' clause, for they appear to authorize the insurer to exercise considerable discretion as to who shall receive the insurance money. About two weeks thereafter, the assignment was executed by the insured on the policy, and James was fully informed by plaintiff concerning it. It appears that James consented by saying, 'All right,' and continued to collect the premiums from plaintiff week after week. All of the premiums were paid until the death of the insured occurred. In the circumstances of the case, such knowledge and conduct on the part of James, the soliciting agent, should be regarded as revealing a waiver on the part of the company of the condition of the policy against assignments, for though such agent is but a mere solicitor,

it is obvious that he possessed authority to take applications, deliver policies thereon and collect the premiums. In this case, the insurance was induced in the first instance by James with a full understanding that it was to be for plaintiff's benefit and on that he paid all of the premiums to James and received credit in the book of the insured therefor. The premiums thus obtained by the agent were paid to defendant and retained by it, it is true, without knowledge on its part concerning all of the facts, but in so far as those premiums were solicited and collected, no one can doubt the authority of James in that behalf. If it were competent for James to induce the insurance and collect the premiums and deliver the policy therefor, it was certainly competent for him to waive the condition of the policy, which waiver alone rendered the insurance valid to the use contemplated and which he utilized to the end of negotiating it. . . . Moreover, in answer to the suggestion that it is not competent as a rule for a mere soliciting agent to either waive such a condition of the policy or estop the company thereabout, the nature and character of the business and the authorized duties of such agents are to be considered. As before stated, the business of industrial insurance is conducted principally among people of the poorer classes, many of whom are illiterate and but slightly informed concerning intricate business matters. Soliciting agents are given separate portions of territory with a view of soliciting insurance among these people, delivering policies to them, and by dividing the payments into weekly stipends, founding a sort of credit system therein known as a 'debit.' These agents call upon the patrons of the company weekly, make collections and enter credit therefor in the book of the insured and seem to have general supervision pertaining to such matters within the immediate 'debit.' To the people with whom they deal, such agents are justly regarded as representatives of the company, with complete power touching the performance of the duties which they daily exercise in their presence. In these circumstances, it would seem, furthermore, that, besides the waiver referred to, the precepts of natural justice should preclude the company, through the intervention of the principle of estoppel, from disputing the validity of the acts and conduct of such a soliciting agent, by which its patrons are induced to part with the premium which eventually finds its way into the home office till of the company. It is the high aim and purpose of the common law to afford adequate relief, to the end of effectuating a just result in the circumstances of every case. It should be administered, too, in every instance with reference to the

peculiar facts of each case, in connection with a degree of common sense from which the law itself is evolved. In this view, the acts and conduct of such agents in so far as they are put forward and performed in the fulfillment of their office in negotiating insurance and collecting the premium thereon should be regarded as those of the company. It is certain that the company itself will be estopped to insist upon a forfeiture if, impliedly by the course of its conduct, it leads the insured or his assignee honestly to believe that the premiums being paid are received as compensation on a valid insurance contract."

So, the rule that the lapsing or forfeiture of a policy for nonpayment of the premiums is waived by the act of an agent in subsequently receiving, and of the company in retaining, the premiums after forfeiture for nonpayment, with knowledge of the facts, has been held to be applicable to industrial insurance policies. *Industrial Mut. Indemnity Co. v. Thompson*, 83 Ark. 574, 104 S. W. 200, 119 Am. St. Rep. 149, 10 L.R.A.(N.S.) 1064; *Nebergall v. Prudential Ins. Co.* 193 Ill. App. 189; *Metropolitan L. Ins. Co. v. Mulleady*, 53 S. W. 282, 21 Ky. L. Rep. 879; *Baltimore L. Ins. Co. v. Howard*, 95 Md. 244, 52 Atl. 397; *McNicholas v. Prudential Ins. Co.* 191 Mass. 304, 77 N. E. 756, 196 Mass. 565, 82 N. E. 692; *Jaggi v. Prudential Ins. Co.* 191 Mo. App. 384, 177 S. W. 1064; *Melick v. Metropolitan L. Ins. Co.* 84 N. J. L. 437, 87 Atl. 75, *affirmed* 85 N. J. L. 727, 91 Atl. 1070. In *Baltimore L. Ins. Co. v. Howard*, *supra*, the court said: "The policyholders of this kind of an insurance company are generally poor and illiterate people who most need protection against harsh, technical forfeitures, because least able to appreciate their significance and because easily induced by the conduct of the company to act upon the belief that their policies are in force."

Likewise, the rule that where an insurance company, with a full knowledge of all facts known to the insured with respect to the latter's state of health, continues to collect and retain the premiums and does not elect to rescind the conduct of insurance and to notify the insured, or to tender back the premiums paid, the right to rescind is waived, and the company is estopped to deny liability on the policy, is applicable to cases arising under industrial policies. *Metropolitan L. Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785.

So, the collection of the premiums on an industrial policy for over a year after the officials had learned that the requisite indorsement consenting to a second policy had not been entered on the first policy, has been held to be a waiver by the company of

its right, if it ever had any, to cancel the policy for that reason. *Western, etc. L. Ins. Co. v. Oppenheimer*, 104 S. W. 721, 31 Ky. L. Rep. 1049. See also *Hood v. Prudential Ins. Co.* 26 Pa. Super Ct. 527.

In *Home Friendly Soc. v. Roberson*, 100 Md. 85, 59 Atl. 279, it was held that there was some evidence legally sufficient to show that the plaintiff was prevented from bringing suit within the six months' limitation in the industrial policy sued on by the action or conduct of the company's agents and that there was also some evidence of a waiver of this provision after the six months.

In *Lally v. Prudential Ins. Co.* 75 N. H. 188, 72 Atl. 208, the evidence authorized a finding that the insurance company had led the insured to believe that payment of her weekly premiums at the time stipulated for in the policy would not be insisted on. It was urged that as the insured was in good health when the overdue payments were received and critically ill when the tender in question was made, the former waiver did not apply. The court held, however, that as the question was solely one of the time for paying an existing obligation, and as the waiver was not based on any condition as to the health of the insured when the payments were made, under such circumstances the insurer might not, without previous notice, insist on the letter of its contract when illness should overtake the insured.

Where an industrial insurance policy stated that the premium was to be paid on or before each Monday, a payment made at any time during Monday, was held to be a compliance with the policy. *Public Sav. Ins. Co. v. Coombes*, 59 Ind. App. 523, 108 N. E. 244.

The rule that a provision in a policy of insurance that if the premium is not paid in accordance with the terms of the policy the same shall be void, is enforceable, in the absence of a statutory provision to the contrary, likewise applies to industrial insurance policies. *Public Sav. Ins. Co. v. Coombes*, 59 Ind. App. 523, 108 N. E. 244.

So, the rule that a waiver of the provisions of a policy need not be in writing indorsed on the policy, but that such a stipulation itself may be waived by the company either by express agreement or by conduct, applies to an industrial policy. *Metropolitan L. Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785.

A gift may be made of a policy of industrial life insurance payable to the representatives of the insured as effectually as a gift may be made of other choses in action belonging to the insured. *Metropolitan Ins. Co. v. Clanton*, 76 N. J. Eq. 4, 73 Atl. 1052.

A Kentucky statute (Ky. Stats. 1903, § 659, subd. 3) provides as follows. "On policies of industrial insurance, where the week-

ly premiums are less than fifty cents each, it shall be optional with the company issuing said policy, to pay either the cash surrender value, or issue a paid-up policy of insurance, and upon such payments the company shall be absolutely released from all further claims or demands whatsoever, under or by reason of said policies, which shall then be canceled." Thereunder, it has been held that where a policy of industrial insurance, providing that in consideration of ten cents per week, the Sun Life Insurance Company agreed at the death of the insured to pay her personal representative \$144, was assumed by the Metropolitan Life Insurance Company by a contract between it and the former company, and the insured consented to the latter contract, and continued to pay the premiums to the latter company, she could not recover a part of the Sun Life Insurance Company's reserve fund. *Jenkins v. Sun L. Ins. Co.* 120 Ky. 790, 87 S. W. 1143, 27 Ky. L. Rep. 1142.

For evidence held to show that an industrial policy of life insurance was procured by impersonation, see *Loughran v. Prudential Ins. Co.* 88 Misc. 11, 150 N. Y. S. 153.

2. INSURABLE INTEREST.

It is well settled with respect to life insurance that one who has no insurable interest in the life of another cannot be the beneficiary in a policy issued on his life, nor can such a beneficiary collect the insurance on the happening of the contingency insured against. 14 R. C. L. tit. *Insurance*, § 96. See also *Baltimore L. Ins. Co. v. Floyd*, 5 Boyce (Del.) 201, 91 Atl. 653. And see the reported case. The reason for this universal and long-standing rule is that to hold otherwise would be in violation of a sound public policy, in that, if the beneficiary could collect the insurance, without having an insurable interest in the life of the deceased, inducements would be offered for the beneficiary to cause the death of the insured, so that he might reap the benefit of the insurance. See the reported case.

In view, however, of the purposes of strictly industrial insurance as heretofore stated, policies of this character seem by the courts generally to have been taken out of the rule forbidding none but those having an insurable interest from becoming beneficiaries in life insurance contracts, or from collecting the insurance after the death of the insured. *Potvin v. Prudential Ins. Co.* 225 Mass. 247, 114 N. E. 292; *Foryciarz v. Prudential Ins. Co.* 95 Misc. 306, 158 N. Y. S. 834; *Carraher v. Metropolitan Ins. Co.* 11 N. Y. St. Rep. 665. And see the reported case for an extended discussion of the reason for this view.

Compare, however, *Baltimore L. Ins. Co. v. Floyd*, 5 Boyce (Del.) 201, 91 Atl. 653, wherein the court said, in charging the jury: "A contract of life insurance is an agreement between the insurer and the insured, whereby the insurer undertakes to pay a certain sum of money to a certain person, who may be and usually is a person other than the insured, upon the happening of a particular event, usually the death of the insured, in consideration of the payment by the insured of certain premiums, made at stated periods. Such an undertaking, though based upon a contingency that has in it an element of chance, when entered into with legal requisites and for a lawful purpose, is in this day a perfectly legal and commonplace transaction, but the legitimate scheme of life insurance is inclined to be distorted and to some it affords an invitation for a mischievous kind of gambling. To avoid this misuse of a most useful character of undertaking, in which a beneficiary may become interested in the early death of the insured, it is held that the insurance upon a life shall be effected and resorted to only for some benefit incident to or contemplated by the insured, and that insurance procured upon a life by one or in favor of one under circumstances of speculation or hazard amounts to a wager contract and is therefore void, upon the theory that it contravenes public policy. Just what constitutes a wager contract and therefore a void contract of insurance, varies with the different circumstances of each case and the different principles of law applicable thereto. The presence of an insurable interest on the part of the beneficiary is urged as a request to avoid the appearance of a wager contract, holding that without such an interest, the interest of the beneficiary is speculative. An insurable interest in the beneficiary may be shown by proof of the fact of relationship between the beneficiary and the insured within certain degrees, and by proof of pecuniary interest, such as arise between partners and between debtors and creditors. Evidence of such an insurable interest is evidence that the contract is not a wager and is evidence of the contract's validity. But a contract of life insurance may be a valid contract though the beneficiary be without an insurable interest, because no longer does the presence or absence of an insurable interest of the beneficiary alone control the question whether the contract is valid or void. If the beneficiary has an insurable interest and the transaction is otherwise legal, the policy is valid; if he has not such an interest, the policy may still be valid, if the transaction is bona fide and free from speculation. . . . Giving consideration to this instruction upon the law, we say to

you, that if you find that the contract of insurance sued upon was procured and entered into by Hanlin, the insured, and the premiums were paid by Hanlin, the insured, either personally or through his agent, and the circumstances otherwise indicate a bona fide nonspeculative transaction, the contract cannot then be held a gambling contract, and your verdict should be for the plaintiff, for the amount of his claim, and interest, whether the plaintiff, as beneficiary, had or had not an insurable interest in the life insured for him. If, however, you find that the plaintiff had an insurable interest in the life of the insured, in the manner before defined to you, evidence of such an insurable interest is evidence which you may consider in connection with all the other evidence in the case, in determining the good faith of the transaction and in reaching a verdict for the plaintiff. But if you find that the plaintiff had no insurable interest in the life of the insured, that is, he was not related to the insured as a relation or in a friendly way, and that the plaintiff procured or was the instrumentality in procuring the contract of insurance for the insured, but in his own favor as beneficiary, and that the contract was not procured by the insured and the premiums thereon were not paid by him or by his agent with his money or upon his obligation, you may find the transaction void as a wager transaction and then your verdict should be for the defendant."

In *Prudential Ins. Co. v. Leyden*, 47 S. W. 767, 20 Ky. L. Rep. 881, it was insisted that a niece suing as administratrix had no insurable interest in the life of the insured, her aunt. The court held that this contention had no application to the facts of the case, inasmuch as the policy was not taken out on the life of the aunt for the benefit of the niece, but for the benefit of the estate of the insured, and the suit was in the name of her administratrix.

In *Hall v. Prudential Ins. Co.* 72 Misc. 525, 130 N. Y. S. 355, it was held that a person who had no insurable interest in the life of the assured, but who had voluntarily paid the premiums on a policy of industrial insurance could, by proper action, establish a lien against the policy on the death of the insured to the extent of the premiums paid by him.

It has been held that a person may assign an industrial insurance policy to any one standing in the position of a creditor or dependent, that is, to one who has an insurable interest in his life, and it is not necessary that the assignee should be a relative. *Kelly v. Prudential Ins. Co.* 148 Mo. App. 249, 127 S. W. 649.

Under the English Friendly Societies Act of 1875 (38 & 39 Vict. c. 60, § 15, subsec. 3)

a policy of assurance, effected by a member of a friendly society on his own life, is legally assignable by him as an ordinary incident of property and not solely by means of a nomination under the statute. In *re Griffin* [1902] 1 Ch. 135, 71 L. J. Ch. 112, 86 L. T. N. S. 38, 50 W. R. 250, 18 Times L. Rep. 142, [1901] W. N. 240, *overruling* In *re Redman* [1901] 2 Ch. 471, and *Caddick v. High-ton* [1901] 2 Ch. 476 note.

Another English statute (*Assurance Companies Act 1909* [9 Edw. VII, c. 49, § 86]) provides as follows: "(1) Amongst the purposes for which collecting societies and industrial assurance companies may issue policies of assurance there shall be included insuring money to be paid for the funeral expenses of a parent, grandparent, grandchild, brother, or sister. (2) No policy effected before the passing of this act with a collecting society or industrial assurance company shall be deemed to be void by reason only that the person effecting the policy had not, at the time the policy was effected, an insurable interest in the life of the person assured, or that the name of the person interested, or for whose benefit or on whose account the policy was effected, was not inserted in the policy, or that the insurance was not one authorized by the acts relating to friendly societies, if the policy was effected by or on account of a person who had at the time a bona fide expectation that he would incur expenses in connection with the death or funeral of the assured, and if the sum assured is not unreasonable for the purpose of covering those expenses, and any such policy shall inure for the benefit of the person for whose benefit it was effected or his assigns." Thereunder, it has been held that a person who had effected insurance on the lives of his father and mother before the passage of the act, without any bona fide expectation that he would have to pay or contribute towards the funeral expenses of his parents, was not deprived by the latter section of the right to say that he had been induced to enter into the policies by fraud so that the policies were voidable at his instance, and to claim rescission and repayment of the premiums which he had paid. *Tofts v. Pearl L. Assur. Co.* [1915] 1 K. B. 189, 84 L. J. K. B. 286, 112 L. T. N. S. 140, [1914] W. N. 388, 31 Times L. Rep. 29, 59 Sol. J. 73. In *Hughes v. Liverpool Victoria Legal Friendly Soc.* [1916] 2 K. B. 482, 85 L. J. K. B. 1643, 115 L. T. N. S. 40, 30 Times L. Rep. 525, [1916] W. C. & Ins. Rep. 308, *reversing* 114 L. T. N. S. 45, it appeared that a grocer effected with the defendants in their industrial branch five policies, two on the life of a debtor and three on the lives of two of his customers. After a short time, he determined to allow the policies to drop,

stopped paying the premiums, and burned the policies. Some two years later the agent went to the plaintiff and by representing that if she paid the arrears of premiums owing on the policies and the future premiums, everything would be all right, induced her to keep up the policies, giving her duplicate policies. It was held that it was a clear case of fraud, that the parties were not *in pari delicto*, and that the plaintiff could recover the premiums paid by her, though the Assurance Companies Act, 1909 (9 Edw. VII, c. 49, § 23; § 36, subsec. 3), prohibited under a penalty the issue of such policies.

In *New Jersey*, in industrial life insurance policies, the interest of a person designated as beneficiary is a vested property right, subject to the terms of the policy, construed as applying to such a vested right. *Metropolitan Ins. Co. v. Clanton*, 76 N. J. Eq. 4, 73 Atl. 1052. However, the rule in force in that state with respect to life insurance, that where the beneficiary in the policy has been changed the original beneficiary is entitled to receive the amount of the policy for the period during which he was such beneficiary, does not apply to industrial insurance policies. *Metropolitan L. Ins. Co. v. Hooppel*, 76 N. J. Eq. 94, 74 Atl. 467, wherein the court said: "The contract of the insurance company in respect to the very vital question to whom the company is legally bound to pay the amount of the policy is singularly obscure. In the Schaffer case [50 N. J. L. 72] above cited Mr. Justice Van Syckel states (at p. 74) that 'there is no contract or agreement to pay to the beneficiary named in the application.' The company in its policy agrees 'to pay to the person or persons designated in condition fifth' therein set forth, upon receipt of proofs, etc., the stipulated sum. But when we turn to condition five we do not find a specification of the person or persons to whom the stipulated sum must be paid; we find only an enumeration of persons to any one of whom the company may, in discharge of its obligation, make a payment of the stipulated sum provided in support of such payment the company can subsequently produce the policy and a receipt for the amount paid, signed by the party who received the same. We find the contract of insurance in this case not only in the policy which Mrs. Hooppel received and kept in her possession, but also in the application for the policy signed by her and retained by the insurance company. The policy refers to the application and makes it 'part of this contract.' Notwithstanding the attempted wholesale incorporation in the policy of this complex paper, containing many words which do not import

any contract obligation on the part of anybody, it may not follow that every proposition contained in the application must be deemed as a promise on the part of both of the contracting parties, or the one of them to whom the proposition can be attributed most naturally or plausibly, or with the least possible disregard of common sense. Taking the two clauses of the policy above referred to, viz., the express agreement of the company to pay, and the enumeration of persons to any one of whom a binding payment under conditions stated may be made by the company, in connection with the appointment of the beneficiary contained in the application, the result seems to be that the legal obligation of the company is either—(1) to pay the amount of the policy to any member or members of any of the classes of persons named in condition five, or (2) to pay such amount to 'the beneficiary.' If the legal obligation of the company is to pay the amount of the policy to the beneficiary, then, carrying out the suggestion of Mr. Justice Van Syckel in the Schaffer case, the terms of condition five, so far as they warrant payment to a relative or connection of the deceased, 'operate as an appointment both by the assured and the beneficiary of persons, any of whom are authorized to receive payment of the sum agreed to be paid.' This view seems to be more consistent than the other view above stated with the theory of the contract as a contract of life insurance, rather than a contract for a burial fund. It would be put to a test if a relative, not the beneficiary, should bring an action at law in his own name against the insurance company, and the company should defend on the ground that while the policy provided for paying the amount thereof to a relative, such relative merely acted under an appointment on behalf of the beneficiary, and that the beneficiary alone could sue at law in his own name. If by naming a party as the beneficiary in the application the assured merely adds an extra person to those enumerated in condition five to whom a binding payment under the conditions stated can be made by the company, the words employed are certainly inapt and misleading. The party so nominated in no proper sense, especially having in view the common use of insurance terms, could be called 'the beneficiary.' The language of the application where the beneficiary is styled as the 'person to whom benefit is to be paid' is also inappropriate. The description should not be of a person to whom the so-called benefit is to be paid, but of a person who by the appointment is merely added to the numbers of eligible persons to whom the company can make a binding payment under certain specified

conditions, or rather make a payment which, under certain specified conditions, subsequently will be binding upon all parties concerned—all parties who were 'lawfully entitled' to receive such payment. Perhaps a third theory of the legal obligation of the insurance company under this peculiar contract is tenable, viz., that the company enters into a legal contract with every person coming within the enumeration of condition five which can be legally enforced by such person in an action at law, while the equitable title to the money, to whomsoever it may in fact be paid, is deemed to be vested in the beneficiary. One difficulty, perhaps insurmountable, in the way of this theory is perceived when it is considered that it permits 'any relative by blood or connection by marriage,' a brother-in-law, for instance, to maintain an action at law on the policy in his own name. The insurance company in the policy expressly agrees 'to pay the person or persons designated' in condition five, the amount of the policy upon production of proofs of death. There is no requirement here that the person to whom the payment must be made must produce the policy. The company can discharge all its contract obligations by paying to any relative or connection by marriage, husband or wife of the deceased, the amount named in the policy, provided subsequently when such payment is challenged it can produce the policy and a receipt signed by the party to whom the payment was made, and who, of course, comes within the enumeration of condition five. Perhaps also a legal theory of this insurance contract is tenable which makes it enforceable in an action at law brought by the beneficiary or his executor or administrator, or in the absence of any beneficiary by the executor or administrator of Mrs. Hooppel, the party with whom the contract was made, while at all times and under all conditions the insurance company has the right under condition five to discharge itself from all liability to the party 'lawfully entitled' by making payment in the manner therein prescribed. Such a theory would not permit a relative, husband or wife of the deceased, as such, to maintain an action at law for the amount of the insurance, although supported by a tender of the policy for surrender."

III. "Facility of Payment" Clause.

1. PROVISION FOR PAYMENT TO PERSON EQUITABLY ENTITLED THERETO.

a. Generally.

In some instances the "facility of payment" clause commonly inserted in industrial insurance policies provides in substance that

the company may pay the sum of money insured thereby to any relative by blood or connection by marriage of the insured, or to any other person appearing to the insuring company to be equitably entitled thereto, by reason of having incurred expense in any way on behalf of the insured for his or her burial, or for any other purpose, and the production by the company of a receipt signed by any or either of the persons enumerated, shall be conclusive evidence that such sum has been paid to the person or persons entitled thereto, and that all claims under the policy have been fully satisfied. Such a clause in a policy is inserted for the protection of the company, to enable it to discharge its obligation by payment to any one of the classes designated, without requiring administration. *Wokal v. Belsky*, 53 App. Div. 167, 31 Civ. Pro. 130, 65 N. Y. S. 815; *Ruoff v. John Hancock Mut. L. Ins. Co.* 86 App. Div. 447, 83 N. Y. S. 758; *Thompson v. Prudential Ins. Co.* 119 App. Div. 660, 104 N. Y. S. 257.

Such a provision, authorizing the selection of one of several persons to whom payment may be made by the insurer, contravenes no law, and is not against public policy. *Sheridan v. Prudential Ins. Co.* 128 Ill. App. 519, *judgment affirmed* 230 Ill. 33, 82 N. E. 426; *Bradley v. Prudential Ins. Co.* 187 Mass. 226, 72 N. E. 989; *Thomas v. Prudential Ins. Co.* 148 Pa. St. 594, 24 Atl. 82, 30 W. N. C. 107.

In *Bradley v. Prudential Ins. Co.* supra, the court said: "The stipulation is not as to payment to one in fact equitably entitled to payment, but is as to payment to any person appearing to the company to be equitably entitled to the same. Such stipulations are common in industrial policies, the amounts of which always are small, and one purpose of them is to enable the amount of the policy to be paid very speedily after the death of the insured, without the delay or expense of taking out administration, and another purpose is to remove the chance of litigation between claimants. The insurance being taken out by the person whose life is insured and the person to whom the policy is paid under the provisions of such articles being either a relative or in the position of a creditor, we see no ground for holding such an article void as against public policy. In effect the article gives the company power, acting in good faith, to discharge its debt and perform its contract by making payment to any person who is a relative by blood or marriage of the insured or who has incurred expense for the insured."

The person who is by an insurance company designated, under the "facility of payment" provision in a policy, as the person equitably entitled to the proceeds thereof, and to whom the insurance company under that designation makes payment, receives the money

absolutely for his own use, and not merely as a trustee for the estate of the insured. *Althouse v. Roth*, 35 Pa. Super. Ct. 400, wherein the court said: "The nature of the right acquired by the person who is designated by an insurance company, in pursuance of such covenants, as the person equitably entitled to receive the proceeds of the policy and the power of such person to deal with the policy and its proceeds as if it were his own individual property, was again considered in the case of *Brennan v. Prudential Ins. Co.* 170 Pa. St. 488. This case involved a question which had not been presented in the prior decisions. The policy was for \$500 and contained covenants precisely similar to that with which we are now dealing. The company settled with a person other than the legal representative of the insured, but within the class to whom it was authorized to make payment under the clause in question for one-half of the amount called for by the policy and took a receipt from such person in full of all claim against the company. The plaintiff in that case contended that as the company had not paid the full amount of the policy to the person with whom it settled, the estate was at least entitled to recover the balance. The learned judge of the court below, whose opinion upon this branch of the case was adopted by the supreme court, said: 'If, therefore, the company may determine to whom it will pay they may also make their own terms with him, and if he sees fit to take fifty cents on the dollar or any other sum in settlement of the amount insured it concerns no one but himself and the company are discharged. . . . By the selection of Mrs. Rainey, as the party equitably entitled to the money due on the policy it was conclusively determined that the plaintiff was not entitled to it, and that is the end of his case. It is immaterial to him or to us whether she got all she ought to have gotten or not. The company has discharged the obligations of its contract. The policy, by its own terms, is satisfied and no suit can now be entertained upon it.' This decision seems to conclusively settle the question that the party, who is by the insurance company designated, under the provisions of such a policy, as the person equitably entitled to receive the money, is thereby vested with an absolute property in the proceeds and may deal with it as his own. He certainly could have no authority to release the insurance company upon payment of fifty cents on the dollar if the proceeds of the policy were the property of the estate of the insured. The contract of the parties vested the company with a discretion to determine whether the proceeds of the policy equitably belonged to the executor of the decedent or to some other person, within one of the classes designated by the policy.

When the company, under such a policy, in good faith designates a person within the classes specified and that designation is not procured by fraud or misrepresentation upon the part of the person so designated, the person receiving the money acquires the same right to it as if he had been in the policy designated as the beneficiary. We are unable to avoid the conclusion that the question here presented is necessarily ruled by the case last above referred to, and must hold that, in the absence of any allegation of fraud or misrepresentation, the defendant acquired title to the money which he received in his own right."

Where, however, after being served with process in a suit by one of the claimants to recover the amounts due on the policies, the company pays the other claimant, it is not entitled to have the bill dismissed on this ground, leaving the complainant the right to bring a supplemental bill against the person to whom payment is made. *O'Donnell v. Metropolitan L. Ins. Co. (Del.)* 95 Atl. 289.

And where the administrator of the beneficiary prevented the insured from changing the beneficiary, and himself received from the insurance company the amount due on the policy, which would otherwise have gone to the complainant as an approved beneficiary, it was held that he could not take advantage of his own wrong, but held the money so received by him as administrator of the prior beneficiary for the complainant as the equitable beneficiary under the policy. *O'Donnell v. Metropolitan L. Ins. Co. (Del.)* 95 Atl. 289

b. Option Exercised.

The exercise of the option therein given to an industrial insurer, and its payment of the amount of the policy to a person appearing to it to be equitably entitled thereto, operates as a complete discharge of the company from further liability under the policy. *American Security, etc. Co. v. Prudential Ins. Co.* 16 App. Cas. (D. C.) 318; *Sheridan v. Prudential Ins. Co.* 128 Ill. App. 519, *judgment affirmed* 230 Ill. 33, 82 N. E. 426; *Thomas v. Prudential Ins. Co.* 158 Ind. 461, 63 N. E. 795; *Bradley v. Prudential Ins. Co.* 187 Mass. 226, 72 N. E. 989; *Prudential Ins. Co. v. Godfrey*, 75 N. J. Eq. 484, 72 Atl. 456, *affirmed* 77 N. J. Eq. 267, 76 Atl. 1067; *Thompson v. Prudential Ins. Co.* 119 App. Div. 668, 104 N. Y. S. 257; *Cohen v. John Hancock Mut. L. Ins. Co.* 135 App. Div. 776, 119 N. Y. S. 850; *Canavan v. John Hancock Mut. L. Ins. Co.* 39 Misc. 782, 81 N. Y. S. 304; *Thomas v. Prudential Ins. Co.* 148 Pa. St. 594, 24 Atl. 82, 30 W. N. C. 107; *Brennan v. Prudential Ins. Co.* 170 Pa. St. 488, 32 Atl. 1042; *Althouse v. Roth*, 35 Pa. Super. Ct. 400. See also *Jones v. Prudential Ins. Co.*

173 Mo. App. 1, 155 S. W. 1106; *Clarkston v. Metropolitan L. Ins. Co.* 190 Mo. App. 624, 176 S. W. 437; *Ferretti v. Prudential Ins. Co.* 49 Misc. 489, 97 N. Y. S. 1007.

So, payment of the amount due under an industrial policy to the guardian of the widow of the insured has been held to be a complete defense to a suit by the administrator of the estate of the insured. *American Security, etc. Co. v. Prudential Ins. Co.* 16 App. Cas. (D. C.) 318. In that case it appeared that the defendant insurance company paid the amount of the industrial policy therein sued on to the guardian of the widow of the insured under the "facility of payment" clause, despite a prior provision in the policy providing for payment of the amount thereof "to the executors, administrators, or assigns of the person named as the insured in said policy, unless settlement shall be made under provisions of" the facility payment clause. The court said: "It is contended on the part of the plaintiff, that the defendant company having obligated itself to pay, upon the death of the insured, the amount of the policy, to his executors, administrators or assigns, it could not afterwards elect to pay the amount to another class of persons mentioned in the second article or clause of the policy, and thus acquit itself of its obligation to pay to the executors, administrators or assigns of the deceased. In other words, that there is a repugnancy between the two conditions. But we can perceive no sufficient reason for this contention. It was competent to the parties so to agree, and there is nothing in the policy of the law that forbids it. On the contrary, the character of the insurance and the object sought to be attained by it, would seem to render it highly proper that the money due on the policy should be applied as contemplated by this second article or clause of the policy, in order to save the cost, expense and delay of administering the fund. Doubtless, the executor or administrator of the deceased would be primarily entitled to receive the fund, as provided in the first article or clause of the policy; but it was competent to the parties to the contract of insurance to stipulate that such primary obligation to pay to the executors or administrators should be conditional or defeasible, and that payment to any of the class or classes of persons designated in the second article of the policy, showing themselves to be equitably entitled to receive the money, should operate a discharge of the defendant from the obligation of the policy. Of course, good faith must be observed, and the full amount of the policy paid; but as this case is presented, we must presume good faith, and that the payment to the guardian of the widow of the insured was for her use and benefit, and that she had an equitable right

to receive the fund. The clause of the policy expressly provides 'that the production of a receipt signed by any or either of said parties, or of other sufficient proof of such payment to any or either of them, shall be conclusive evidence that such sum has been paid to the person or persons entitled thereto, and that all claims under the policy have been fully satisfied.'"

Likewise, payment to a man with whom the insured lived under an invalid marriage, who had paid part of the premiums and paid the funeral expenses of the insured, has been held to be a full and complete bar to an action by the administrator of the insured. *Bradley v. Prudential Ins. Co.* 187 Mass. 226, 72 N. E. 989.

Payment by the insurance company to the husband of the insured, as the person equitably entitled to the proceeds of the policy, has been held to vest him with an absolute property in the proceeds, to deal with them as his own, against the claims thereto of the wife's administrator. *Althouse v. Roth*, 35 Pa. Super. Ct. 400.

And payment to a person with whom the insured boarded up to the time of his death, whom he owed for board, and who advanced money for funeral expenses, has been held to be a defense to an action on the policy by the insured's administrator. *Thomas v. Prudential Ins. Co.* 148 Pa. St. 594, 24 Atl. 82, 30 W. N. C. 107.

In *Thompson v. Prudential Ins. Co.* 119 App. Div. 666, 104 N. Y. S. 257, in holding against the administratrix that payment was properly made under the "facility of payment" clause to one who was not a blood relative or connection by marriage, as one who was equitably entitled thereto by reason of expenses incurred for the education, etc., of the insured, as well as his burial, the court said: "It appears that Newton was not a relative by blood or a connection by marriage of deceased; and whatever right he had to ask of defendant payment of this insurance to him is dependent upon defendant's recognition of his claim that he was a person equitably entitled to it, because he had incurred expense for the deceased, either for his burial or in some other manner. We do not agree with plaintiff's claim, which is strenuously urged upon our attention, that the only expenses, other than those for burial, which can be considered by defendant as clothing a person with a claim to be considered as equitably entitled to the insurance moneys, are those connected with the last sickness of the assured, for the language of the quoted provision refers to expenses for the burial and also to expenses for any other purpose. This language is broad and comprehensive enough to include among the expenses which defendant could properly

consider as having been incurred by Newton for deceased, not only his payment of premiums on the policy, but also a portion at least of the cost of educating and maintaining deceased. This latter expense had been but meagrely reimbursed to him when deceased at the age of eighteen left him, and not in the full measure contemplated by the understanding under which Newton took deceased that he was to remain until he was twenty-one. It should be observed that we are now concerned only with facts which, under the circumstances, might appear to disclose the equitable rights of Newton, which might easily be greater than those which are of a character strictly legal. It is true he had no legal right to compel the lad's return after he ran away; but it is also true that having fed, clothed and educated him from early youth till the age at which his services were doubtless expected to be, and would have been, some repayment for previous expense, defendant might well have determined that Newton was equitably entitled to have this expense for which he had received no adequate return considered as an expense incurred for deceased. The evidence also conclusively shows that Newton had obligated himself to pay the funeral expenses prior to receiving the insurance moneys, and that he in fact paid them at, or immediately after, the time these moneys came to his possession. Under the terms of the policy, plaintiff, as administratrix, could recover on the policy only in the event defendant had not already paid the insurance to some person in pursuance of provision 2 above quoted. Before receiving any notice of plaintiff's appointment or of any claim in her behalf to these moneys, defendant had paid the amount of insurance to one who, as it claims, is equitably entitled thereto by reason of having incurred expense not only for the burial of, but also in other ways for, the deceased. We do not think it material to determine whether defendant's payment to Newton as a person equitably entitled thereto was based upon actual knowledge of all the facts which together would, as defendant now urges, establish his equitable right. Defendant selected Newton as the person to whom payment should be made, and we hold that defendant's action was proper regardless of whether all or only one or more of the different grounds upon which an equitable claim in his behalf could have been predicated, furnished the controlling reason for defendant's decision that he was equitably entitled to the money."

Where an insurance company had exercised the option given it in the "facility of payment" clause and had paid the amount to one of the class mentioned therein, the widow of the insured, for a purpose expressly mentioned in the clause, the payment of funeral expenses,

it was held that the beneficiary named in the application but not in the policy could not recover from the company whatever interest she had, which was expressly subject to the option of the company to make the payment which it had made. *Cohen v. John Hancock Mut. L. Ins. Co.* 135 App. Div. 776, 119 N. Y. S. 850. Likewise, a payment to the mother of the insured under a similar clause, instead of to the wife, who was the assignee of and the beneficiary in the policy, has been held to discharge the company from further liability. *Thomas v. Prudential Ins. Co.* 158 Ind. 461, 63 N. E. 795, set out at length infra, in subdivision *d. Rights of Assignee.*

It has been held that a settlement made by an industrial insurance company with the person selected by it as equitably entitled thereto by paying less than the face amount of the policy, is a complete defense to a suit by the administrator of the estate of the insured for the balance. *Sheridan v. Prudential Ins. Co.* 128 Ill. App. 519, judgment affirmed 230 Ill. 33, 82 N. E. 426; *Brennan v. Prudential Ins. Co.* 170 Pa. St. 488, 32 Atl. 1042. See also *Jones v. Prudential Ins. Co.* 173 Mo. App. 1, 155 S. W. 1106. Compare *Shea v. U. S. Industrial Ins. Co.* 23 App. Div. 53, 48 N. Y. S. 548.

In *Brennan v. Prudential Ins. Co.* supra, it appeared that the company did not pay the full amount of the policy to the person appearing to be equitably entitled thereto but paid only one-half thereof. It was contended that the transaction was fraudulent and therefore unavailing as a defense to an action by the administrator, and that if it was not fraudulent the company was liable to the legal representative of the insured for the balance. The appellate court concurred on this point in the opinion of the lower court, wherein it was said: "The only difference between the two cases is that here the company paid but a part of the money, and set up this to bar the whole. This, it is contended, does not fall within the strict terms of the policy, because it is only the payment of the amount named in the policy, and the production of a receipt for that full amount that is to work satisfaction. To allow of anything less than this, it is argued, is to invite fraud: if the company may select their own party and settle with him on his own terms, they can pick up anybody and discharge themselves with a mere song. While this is not without considerable force, yet the decision quoted, if followed to its legitimate end, is against it. If the company may select the person whom they consider to be equitably entitled to the insurance money with whom to settle, it cannot matter to anyone else upon what terms a settlement is reached. There may be subjects of controversy which call

for adjustment and compromise, and to say that the company must pay the full amount of the insurance or be debarred from taking advantage of this clause is to interfere with the right of compromise as well as their contract rights under the policy. Neither is it of any avail to inquire into the reasons which have brought about a settlement if the parties are competent to make it. Every compromise involves mutual concessions, and even if they seem to others to be unwarranted there is no power in a third party to undo them. If, therefore, the company may determine to whom they will pay they may also make their own terms with him, and if he sees fit to take fifty cents on the dollar or any other sum in settlement of the amount insured it concerns no one but himself, and the company are discharged. It may be well to add, however, that in what is thus said, we intend to speak only of a settlement made in good faith, in an honest effort to meet and discharge the obligations of the contract, and not in an attempted evasion of them. What would be the result in any case if settlement was shown to be the latter character we are not called upon to determine. But it may not be out of course to say, in response to the plaintiff's argument, that a settlement for a very much less sum than the face of the policy, arbitrarily made with a third party having no connection with the transaction, merely to escape a greater liability, would be charged with such bad faith, if not fraud, that it could not well stand. Nothing of that kind appears, however, in the present instance. While the occasion of the compromise was not brought out, it was made with a party who, if not the strictly legal owner of the policy, had an equitable claim thereon. That it was effected after suit brought does not necessarily discredit it. This might be a circumstance to be considered in judging of the good faith of the transaction, if there were others to also call it in question. But there is nothing which debars the company, even after suit brought, from determining to whom, in their judgment, the money equitably belongs. 'We are therefore of the opinion that a recovery can be had only on the first of the two policies in suit, and that to that extent only can the verdict be sustained. By the selection of Mrs. Rainey, as the party equitably entitled to the money due on the second policy, it was conclusively determined that the plaintiff was not entitled to it, and that is the end of his case. It is immaterial to him and to us whether she got all she ought to have gotten or not. The company have discharged the obligations of their contract. The policy, by its own terms, is satisfied and no suit can be now entertained upon it.'

In *Sheridan v. Prudential Ins. Co.* 128 Ill. App. 519, *judgment affirmed* 230 Ill. 33, 82 N. E. 426, it appeared that the insurance company, claiming that the insured was not "in sound health" at the time he obtained the policy, refused to recognize the policy as binding, and, under the "facility of payment" clause, paid to the person with whom the insured was boarding, on her claim for expenses incurred on account of his death and board, all the premiums which it had received from the insured, in full settlement of the claims under the policy. The majority of the court held that the "facility of payment" clause authorized the selection of the beneficiary under the policy, and that the settlement with her was a complete defense to an action by the administrator of the insured.

In *Shea v. U. S. Industrial Ins. Co.* 23 App. Div. 53, 48 N. Y. S. 548, wherein it appeared that a compromise by the company under the "facility of payment" clause was made in bad faith, the court said: "The scheme by which this company seeks to defeat this result is a fraud upon the rights of the plaintiff. The obliquity which prompted the superintendent of this company to resort to the means which the evidence shows he did resort to, in order to escape payment of these policies, is quite astonishing and calls for severe condemnation. A bare recital of the evidence is sufficient to make this clear. Koster, the husband of the insured, had never paid a penny of the premiums by which the policies were kept alive. He did not even know that the life of his wife was insured. The superintendent first informed him by letter, which had the effect of producing him at the office, and being there the superintendent suggested that he make a protest against the company paying the money to the plaintiff. This plan was readily acceded to by the husband. As he expressed it, 'I would like to get my expenses out of it.' The superintendent discouraged the suggestion by the husband that he should get an attorney, and drew the protest himself, which the husband signed. Then he suggested that the husband should see the plaintiff and see what she intended to do about it and get her to settle for half. But evidently repenting of this liberality, he subsequently induced the husband to settle for the sum of \$200, taking his receipt therefor, and procured him to execute a release to the company of all liability on account of the policies. The interest which the husband had or claimed to have arose out of the payment of the funeral expenses, amounting to \$101.50. For this the husband was personally responsible. This defendant now seeks to avail itself of this fraudulent and dishonorable act of its superintendent as a defense to this action, claiming that what it did it

had the right to do by virtue of the second article of the policy. The law permits the defeat of this unconscionable and fraudulent scheme, for so we must characterize it, despite the sanction given it by the supreme court of Pennsylvania in *Brennan v. Prudential Ins. Co.* [170 Pa. St. 488, 32 Atl. 1042.]”

c. Option Not Exercised.

It has been held that the “facility of payment” clause in a policy of industrial insurance is permissive only, and that, if the company fails or refuses to exercise its option to pay the amount due on the policy to a person appearing to it to be equitably entitled thereto, the clause does not entitle one to whom a payment might have been made thereunder, but who is not named as the beneficiary, or otherwise designated as the person who is to receive the sum, to enforce payment thereof. Such a suit can be maintained only by the executor or administrator of the insured. *Heubner v. Metropolitan L. Ins. Co.* 146 Ill. App. 282; *Griffith v. Prudential Ins. Co.* 172 Ill. App. 304; *Lewis v. Metropolitan L. Ins. Co.* 178 Mass. 52, 59 N. E. 439, 86 Am. St. Rep. 463; *Marzulli v. Metropolitan L. Ins. Co.* 79 N. J. L. 271, 75 Atl. 473; *Wokal v. Belsky*, 53 App. Div. 167, 31 Civ. Pro. 130, 65 N. Y. S. 815; *Nolan v. Prudential Ins. Co.* 139 App. Div. 166, 123 N. Y. S. 688; *Ferretti v. Prudential Ins. Co.* 49 Misc. 489, 97 N. Y. S. 1007. See also *Metropolitan L. Ins. Co. v. Johnson*, 121 Ill. App. 257; *Hall v. Prudential Ins. Co.* 72 Misc. 525, 130 N. Y. S. 355. Compare *Clarkston v. Metropolitan L. Ins. Co.* 190 Mo. App. 624, 176 S. W. 437. In *Wokal v. Belsky*, supra, the court said: “The defendant must, by the terms of the policy, pay the amount of it to such person as has become entitled to it by reason of having incurred expense on behalf of the insured or for his burial. The plaintiff, the administrator of the estate of Johan Wokal, alleges in his complaint that he has actually paid the expenses of Wokal’s burial, and, therefore, not only is he entitled to recover as administrator, if the corporation has not paid some one else, but he is also entitled to recover as a person equitably entitled under the terms of the policy. Apart, however, from authorities, it is evident from the wording of this clause in the policy that no particular beneficiary was designated, and, therefore, no one upon the death of the insured became entitled individually to enforce payment against the company except to the extent that he might have paid debts or funeral expenses, when, as a creditor, he might seek to have his claim paid out of the fund. In the absence, however, of a specified or designated beneficiary or beneficiaries to

whom the insurance money was absolutely payable, under the policy in question, it was left optional with the company whether it would or would not discharge its obligation by payment to any of the persons in the classes named. Upon failure to exercise such option, the obligation still remained; and the right to enforce it, it seems to us, devolved upon the administrator, representing as he does the estate of the deceased. Unless this were so, as none of the persons in the classes named could enforce their claims in an action because their rights were entirely dependent upon the company’s exercising the option in their favor, it would follow that unless the administrator of the estate could enforce such liability, there would be no one who could do so, and thus the company would be able to escape entirely the payment of its obligation.”

In *Marzulli v. Metropolitan L. Ins. Co.* 79 N. J. L. 271, 75 Atl. 473, it appeared that the plaintiff was the husband of a sister of the wife of the insured, and having paid the premiums on the policy, and no beneficiary being named therein, he claimed under the “facility of payment” clause. The court said, however: “By the terms of this clause of the policy an option is given the company to pay to any one of the persons having the qualifications named in the clause. This option of itself necessarily excludes any right on the part of the plaintiff to enforce payment.”

So where no beneficiary is named in the policy, it has been held that the husband of the insured, unless he proves that he is “equitably entitled” to the proceeds, “by reason of having incurred expenses on behalf of the insured or for her burial,” has no right to sue on the contract as husband, but that the right of action belongs only to the personal representative of the deceased. *Heubner v. Metropolitan L. Ins. Co.* 146 Ill. App. 282. The same has been held with respect to a son, *Griffith v. Prudential Ins. Co.* 172 Ill. App. 304, even though he had paid the premiums between the time of the issuance of the policy and the death of the insured, *Lewis v. Metropolitan L. Ins. Co.* 178 Mass. 52, 59 N. E. 439, 86 Am. St. Rep. 463.

In *Ferretti v. Prudential Ins. Co.* 49 Misc. 489, 97 N. Y. S. 1007, it appeared that the policy in suit provided that, in case of death, payment should be made “unto the executors, administrators, and assigns of the insured” unless settlement should be made under the “facility of payment” clause. It was held that the persons primarily entitled to payment were the personal representatives or assigns of the insured, and that the provision for the payment to persons other than the executors, administrators or assigns, be-

ing wholly optional with the company, created no legal liability on the part of the company toward those others, but merely provided a defense to the company against the claims of the executors, administrators and assigns, if, but not unless, it elected to make payment to the persons named. Hence, it was held that the plaintiff, who was neither the executor, administrator nor assign of his deceased wife, but who had paid her funeral expenses, amounting to as much as was due on the policy, could not recover against the company on its refusal to exercise the option to pay the insurance to him.

Likewise, in *Nolan v. Prudential Ins. Co.* 139 App. Div. 166, 123 N. Y. S. 888, it was held that, under a similar policy payment to the "executors, administrators, or assigns of the insured," the plaintiff, who took the insured, her cousin, when a little more than six years of age, into her home, giving her maintenance and clothing while in health and medical care while sick, and paid the premiums on the policy, could not compel the insurance company to exercise its option under the "facility of payment" clause in her favor.

However, in *Clarkston v. Metropolitan L. Ins. Co.* 190 Mo. App. 624, 176 S. W. 437, as action by a son of the insured was sustained on facts stated as follows: "Plaintiff, Edward Clarkston, is an infant son of the insured, six or seven years old, and prosecutes the suit by his guardian and curator. He is not expressly named as a beneficiary in the policy, but is within the terms of what is known as a 'facility of payment clause,' which is parcel of such industrial insurance policies. The policy contains a recital concerning the beneficiary as follows: 'Name of beneficiary and relationship to the insured, Jemmia Clarkston—wife.' . . . The evidence is clear that Jemmia Clarkston, the insured's wife, and mother of plaintiff, died before the institution of this suit, and it appears, too, that plaintiff is the only remaining member of the family." In concluding its discussion the court said: "What has been said is to be interpreted and considered only on the facts of the instant case, for here it appears that plaintiff is the only party now living for whose benefit the promise was made and, manifestly, he may enforce it."

Where an industrial insurance company, by its cashier, an authorized officer, promised to pay to an undertaker the expense of the burial of the insured, it was held that the promise might be deemed an election on the part of the company to pay that expense to the undertaker as the person equitably entitled so to be paid by reason of having incurred the expense of burial, and that hav-

ing led the undertaker to incur such expense on the faith of that promise, he having obtained the body and buried it, the company must be deemed to be estopped from later denying that it had exercised the option given it and agreed to make the payment. *Metropolitan L. Ins. Co. v. Johnson*, 121 Ill. App. 257.

The "facility of payment" clause is one under which the company may, but is not obligated to, make payment to anyone of the class of persons named, up to the time that suit is brought by the person entitled to payment under the contract, namely, the administrator of the insured, and such payment would be a complete defense to the administrator's action; but where the company has not made such payment, the right of the administrator becomes complete, and a plea by the company of subsequent payment to one of the class mentioned, will not operate to bar the administrator's suit. *Prudential Ins. Co. v. Godfrey*, 75 N. J. Eq. 484, 72 Atl. 456, affirmed 77 N. J. Eq. 267, 76 Atl. 1067.

However, this clause does not clothe the administrator with a right of action on the policy as against the beneficiary named and designated therein. *Ruoff v. John Hancock Mut. L. Ins. Co.* 86 App. Div. 447, 83 N. Y. S. 758. So, even if a payment made to the administrator under the optional clause would discharge the obligation of the company, that is far from establishing an absolute right of action in the administrator perforce of her inclusion in the designated class of payees, *Ruoff v. John Hancock Mut. L. Ins. Co.* supra; or from holding that the naming of a beneficiary prevents the insurer from exercising the option plainly expressed in the policy. *Cohen v. John Hancock Mut. L. Ins. Co.* 135 App. Div. 776, 119 N. Y. S. 850.

d. Rights of Assignee.

Where an industrial insurance policy is made payable to the executors or administrators of the insured, unless a settlement is made under the "facility of payment" clause therein, an assignee of the policy takes it subject to the reserved right of the company to pay to any person appearing to the company to be equitably entitled to the same by reason of having incurred expense in any way on behalf of the insured for his burial or for any other purpose. *Thomas v. Prudential Ins. Co.* 158 Ind. 461, 63 N. E. 795; *Prudential Ins. Co. v. Young*, 14 Ind. App. 560, 43 N. E. 253, 56 Am. St. Rep. 319; *Floyd v. Prudential Ins. Co.* 72 Mo. App. 455; *Kelly v. Prudential Ins. Co.* 148 Mo. App. 249, 127 S. W. 649.

And if the insurance company has lawfully exercised its option under the "facility of

payment" clause by paying the amount of the policy to one of the persons specified therein, that payment is a complete bar to an action by the assignee for the amount of the policy. *Thomas v. Prudential Ins. Co.* 158 Ind. 461, 63 N. E. 795; *Kelly v. Prudential Ins. Co.* 148 Mo. App. 249, 127 S. W. 649. See also *Floyd v. Prudential Ins. Co.* 72 Mo. App. 455. Compare *Jones v. Prudential Ins. Co.* 173 Mo. App. 1, 155 S. W. 1106. The industrial policy sued on in *Thomas v. Prudential Ins. Co.* supra, insured the life of the plaintiff's husband in a specified sum, payable at his death to his executor or administrator, unless settlement should be made under the provisions of the "facility of payment" clause therein. The policy being in danger of lapsing, owing to the failure of the insured to pay the premium, it was assigned to the wife, the plaintiff, under an agreement between the company, the insured and his wife, that if she would pay the premiums then due, the policy would be assigned to her and the company would, on the death of the insured, pay the amount named in the policy to her. The policy was assigned and delivered to the plaintiff and she paid the premiums then due and all premiums thereafter becoming due, until the death of the insured, when the company paid the amount named in the policy to the mother of the insured, under the "facility of payment" clause. It was held that the agreement among the parties was to be understood as nothing more than the designation of the plaintiff as beneficiary under the policy, as though she had originally been so named.

In *Kelly v. Prudential Ins. Co.* 148 Mo. App. 249, 127 S. W. 649, it was held that the assignee of the industrial policy therein sued on held it subject to the right of the company to pay the money to the person who had paid the funeral expenses of the insured, and that having paid it to the public administrator who was in charge of the insured's estate and who had paid his funeral expenses, the assignee could not recover on the policy.

In *Jones v. Prudential Ins. Co.* 173 Mo. App. 1, 155 S. W. 1106, however, it was held that the payment of the insurance money to the widow under the "facility of payment" clause was a full acquittance of further obligation to respond under the policy in those cases where it did not appear that the rights of others had attached thereto. But it was held that where a valid assignment of the policy appeared, the assignee was to be compensated to the extent of his rights.

But where the company has failed to exercise its option and no payment has been made to any one under the "facility of payment" provision, the assignee may recover on the policy. *Prudential Ins. Co. v. Young*, 14

Ind. App. 560, 43 N. E. 253, 56 Am. St. Rep. 319; *Floyd v. Prudential Ins. Co.* 72 Mo. App. 455. In the case first cited it was held that no right vested in the persons referred to in the "facility of payment" clause of an industrial policy, if for no other reason than that their right depended on the willingness of the insurance company to recognize them, which it was not bound to do. But it was held that where the policy was payable to the "executor or administrator" of the insured, he might assign it and the beneficiary might recover thereon, where no payment had been made under the "facility of payment" provision.

It has been held that an oral agreement whereby the assignees of certain industrial policies were to pay the premiums on the policies in which they were severally interested, and to have the benefit thereof in the event of the decease of the insured, accompanied by the delivery of the policies, was the equivalent of an unqualified oral assignment of each policy which was sufficient in the absence of a prohibition of such assignment to transfer a right to the assignees, giving them at least an equitable interest in the policies, and operating as an assignment of the beneficial interest in the policies to the exclusion of the personal representatives of the insured. *Potven v. Prudential Ins. Co.* 225 Mass. 247, 114 N. E. 292. In that case the "facility of payment" clause in the policies was held not to be then pertinent, for the reason that the insurer had not acted under it.

In *Foryciarz v. Prudential Ins. Co.* 95 Misc. 306, 158 N. Y. S. 834, though it appeared that a provision of the industrial policy in suit declared that it should be void if assigned, it was held that the plaintiff, to whom it had been assigned by the insured in order to raise money enough to take herself, her husband and their child back to their old home in Europe, fell within the class of persons "equitably entitled to payment" under the terms of the policy. In other words, it was held that the assignee was one of the very persons contemplated as payees when the company issued the policy, and that as an assignment must have been within the contemplation of the parties at that time, the insured had selected her as the beneficiary by making the assignment.

2. PROVISION FOR PAYMENT TO ONE OF SEVERAL DESIGNATED PERSONS.

a. Generally.

Another form of "facility of payment" clause, as found in industrial insurance policies, provides in substance that the company may pay the amount of the policy to either

the executor or administrator, the husband or wife, or any relative by blood, or lawful beneficiary of the insured, and that the production by the company of the policy and a receipt in full, signed by either of them, shall be conclusive evidence that all claims on the company under the policy have been fully satisfied.

This clause is merely intended as a protection to the insurance company in making quick payment on the policy and does not either grant to or take away from any person a cause of action on the policy. *Golden v. Metropolitan L. Ins. Co.* 35 App. Div. 569, 55 N. Y. S. 143; *Wachtel v. Harrison*, 84 Misc. 76, 145 N. Y. S. 982; *Matter of Shanley*, 95 Misc. 427, 160 N. Y. S. 733.

There is nothing in the clause which renders it void as opposed to public policy, or as too indefinite or uncertain to be enforced. *Wilkinson v. Metropolitan L. Ins. Co.* 63 Mo. App. 404, followed in *Wilkinson v. Metropolitan L. Ins. Co.* 64 Mo. App. 172.

b. Option Exercised.

The terms of a "facility of payment" clause permitting payment to one of several persons operate as an appointment, by the parties, beneficiary as well as insured, of the several persons therein named, any one of whom is authorized to receive payment of the sum agreed to be paid on the death of the beneficiary. *Metropolitan L. Ins. Co. v. Schaffer*, 50 N. J. L. 72, 11 Atl. 164; *Brooks v. Metropolitan L. Ins. Co.* 70 N. J. L. 36, 56 Atl. 168. Or, as stated in *Ogletree v. Hutchinson*, 126 Ga. 454, 55 S. E. 179, this clause, as to who may receive the proceeds and thus discharge the company from liability, does not amount to a designation of a class of persons or any one of them as beneficiaries, but is merely an appointment by agreement between the parties as to persons who may receipt to the company and discharge it, and thereafter hold the amount received for the benefit of the person ultimately entitled thereto.

The fact that the company may pay the death benefit to one of several persons does not make the moneys paid under the policy the property of the person to whom the company may elect to pay the same. As the provision for such payment is only for the protection of the insurance company, but does not "grant or take away a cause of action from any person," it cannot, by electing to pay any one of the persons mentioned in the "facility of payment" clause, invest that person with the absolute ownership of the moneys paid. *Ogletree v. Hutchinson*, 126 Ga. 454, 55 S. E. 179. See to the same effect *Matter of Shanley*, 95 Misc. 427, 160 N. Y. S. 733.

Ann. Cas. 1918B.—76.

So the right of the surviving husband or wife, as administrator or administratrix of the estate of the insured, to payment of the policy, accrues to him or her in an official or representative, and not in a personal, capacity. *Matter of Shanley*, 95 Misc. 427, 160 N. Y. S. 733; *Providence County Sav. Bank v. Vanda*, 26 R. I. 122, 58 Atl. 454.

In *Ogletree v. Hutchinson*, 126 Ga. 454, 55 S. E. 179, it was said that if the company had, in accordance with the "facility of payment" stipulation in the policy, paid the amount thereof to the father of the insured, and taken his receipt therefor, the company would have been discharged from liability to any other person; and that the father, being within the class appointed, would hold the money for the benefit of the beneficiary under the contract.

Hence it follows that an industrial insurance company may, at its option, under ordinary circumstances, make the payment to any one of the persons so named, and this payment, when made in good faith is a full satisfaction of all demands on the policy as against it. *Metropolitan L. Ins. Co. v. O'Farrell*, 64 Kan. 278, 67 Pac. 835, reversing 10 Kan. App. 151, 62 Pac. 673; *Western, etc. L. Ins. Co. v. Galvin*, 68 S. W. 655, 24 Ky. L. Rep. 444; *Renfro v. Metropolitan L. Ins. Co.* 148 Mo. App. 258, 129 S. W. 444; *Metropolitan L. Ins. Co. v. Schaffer*, 50 N. J. L. 72, 11 Atl. 154; *Brooks v. Metropolitan L. Ins. Co.* 70 N. J. L. 36, 56 Atl. 168. See also *Ogletree v. Hutchinson*, 126 Ga. 454, 55 S. E. 179; *Rice v. Rice* (Ky.) 63 S. W. 586; *Pfaff v. Prudential Ins. Co.* 141 Pa. St. 562, 21 Atl. 663. Thus, payment of the amount due under the policy to the husband has been held to be a complete defense to a suit by the administrator of the insured. *Metropolitan L. Ins. Co. v. O'Farrell*, 64 Kan. 278, 67 Pac. 835, reversing 10 Kan. App. 151, 62 Pac. 673. And, a plea of payment to the guardian of an infant beneficiary has been held to be good on demurrer in an action against the company by the executrix of the insured for the amount of the policy. *Brooks v. Metropolitan L. Ins. Co.* 70 N. J. L. 36, 56 Atl. 168.

Likewise, a payment to the person named as the beneficiary in an industrial insurance policy and designated in the policy and the written application therefor as "wife," has been held to be valid as against the administrator of the insured. *Metropolitan L. Ins. Co. v. Louisville Trust Co.* 89 S. W. 268, 28 Ky. L. Rep. 426, wherein the court said: "It will be observed that the policy in this case provides for the payment of the amount due thereon, upon proof of death and surrender of the policy and premium receipt books, 'to the beneficiary named below,' who was Lilly Jolly, designated in both the application and policy by the insured as 'Lilly

Jolly, wife.' It is unnecessary to determine to whom, among the other persons designated in the policy, the amount due thereon should have been paid if a beneficiary had not been named; nor is it necessary to determine whether the beneficiary named therein had an insurable interest in the life of the insured. Neither of these questions is here involved. By the voluntary act of the insured Lilly Jolly was selected as the beneficiary of the insurance on his life procured of the appellant company. By his direction she was named as such beneficiary and designated as his wife in both the policy issued to him by the company and the written application made therefor. In entering into the contract of insurance with Bemis Jolly, appellant had the right to rely upon his representation that Lilly Jolly was his wife, and when she produced to it proofs of his death, no change having in the meantime been made in the beneficiary, appellant was required by the terms of the policy to comply with its contract by paying to Lilly Jolly the amount of insurance therein named. This it did in good faith and with commendable promptness. In paying to Lilly Jolly the amount due on the policy by reason of the death of the insured, no duty rested upon appellant to ascertain whether she and the insured had been legally married, or to notify the relations of the insured that she was demanding payment to her of the proceeds of the policy, in order that they might controvert her right to same. It was enough for appellant to know that she was by direction of the insured named in the policy as beneficiary and therein described as the wife of the insured. These facts, which are shown by the answer and admitted by the demurrer, furnished Lilly Jolly a prima facie right to receive the amount due on the policy and authorized its payment to her by appellant. It does not appear from the record that appellant at the time of paying Lilly Jolly the insurance due on the life of Bemis Jolly knew, or had reason to suspect, that she had not in fact been his lawful wife, or was not then his widow. It must therefore be taken as true that, in recognizing Lilly Jolly as the beneficiary named in the policy and settling with her as such, appellant acted in good faith and in compliance with the provisions of the policy; and, this being the case, it cannot now be made to account to appellee for the proceeds of the policy. The remedy of appellee, if any it has (which we do not decide), is against Lilly Jolly. If it were true, as contended by appellee, that Lilly Jolly was not the wife and had no insurable interest in the life of Bemis Jolly, and for that reason was not entitled to the proceeds of the policy, it nevertheless cannot recover in this action, as it has neither al-

leged nor proved that appellant, at the time of the payment of the insurance to her, knew that she was not the wife of Bemis Jolly or that she had no insurable interest in his life."

In *Metropolitan L. Ins. Co. v. Schaffer*, 50 N. J. L. 72, 11 Atl. 154, it was held that a payment to the daughter of the insured, under the "facility of payment" clause, on her production of the policy and the premium receipt book, was a payment in strict accordance with the condition of that clause, and that the company was thereby discharged, under its express terms, from further liability to the beneficiary named in the application which was a part of the policy.

In *Renfro v. Metropolitan L. Ins. Co.* 148 Mo. App. 258, 129 S. W. 444, it appeared that by way of designation of the person to whom the amount due under the industrial policy was to be paid in the event of the death of the insured, the word "estate" alone was used. It was held that a payment under the "facility of payment" clause to the only child of the insured absolved the insurance company from any payment to any other possible claimant.

In *Western, etc. L. Ins. Co. v. Galvin*, 68 S. W. 655, 24 Ky. L. Rep. 444, an action by the husband, individually and as guardian for the only child and heir-at-law of the insured, the court was of the opinion that any one of the persons named in the clause might recover on the policy by a proper showing of relationship; and, while intimating no opinion as to the ultimate disposition of the proceeds of the policy after collection, the court held that, as to the insurer, a judgment in favor of the husband or heir would bar a second recovery by any other person.

While the "facility of payment" clause unquestionably confers on the insurance company the power to pay the amount of an industrial policy to anyone belonging to the classes enumerated, provided the claimant produces and surrenders to it the premium receipt book and the policy, it does not contemplate that the insurance company has the right to obtain the surrender of the book and policy and then pay the amount of the policy at its option and on its arbitrary selection to any other beneficiary falling within the classes designated. *Wilkinson v. Metropolitan L. Ins. Co.* 63 Mo. App. 404, followed in *Wilkinson v. Metropolitan L. Ins. Co.* 64 Mo. App. 172; *Carraher v. Metropolitan L. Ins. Co.* 11 N. Y. St. Rep. 665; *McNally v. Metropolitan L. Ins. Co.* 199 Pa. St. 481, 49 Atl. 299, affirming 16 Pa. Super. Ct. 111; *Smith v. Metropolitan L. Ins. Co.* 222 Pa. St. 226, 71 Atl. 11, 128 Am. St. Rep. 799, 20 L.R.A. (N.S.) 928. In the case first cited it appeared that the plaintiff, a creditor of the

insured, was named as the beneficiary in the policy, and paid the premiums thereon, and was the legal owner of the policy and the premium book which were continually in his possession until he surrendered them to the company on the death of the insured, receiving a receipt therefor. Subsequently the widow of the insured made proof of loss under the policy, and the company paid to her the full amount of the insurance. The court held that, as the plaintiff was the lawful beneficiary of the insured and hence belonged to one of the classes mentioned in the "facility of payment" clause, the company could with perfect safety have paid the amount of the insurance to him, and in case of such payment would have been fully protected by the production of the policy and his receipt, but that it was not at liberty to make an arbitrary selection of any other person belonging to the designated classes.

In *Carraher v. Metropolitan L. Ins. Co.* 11 N. Y. St. Rep. 665, it appeared that the policy was delivered to the beneficiary, who paid the premiums thereon, gave notice of the death of the insured, and surrendered the policy and premium book to the company, accompanied by a demand for payment. The widow of the insured furnished proof of his death and payment was made to her by the insurance company. In holding that the company could not disregard the beneficiary's claim, and in apparent defiance of it, arbitrarily select one of the other persons enumerated in the "facility of payment" clause, as the proper beneficiary, so as to make a payment to the one so favored binding in law against the prior claim of the beneficiary especially named in the policy, the court said: "Article 5 was evidently intended to enable the company to settle with the person having possession of the contract on which the claim arises, with the apparent right to the money, and to protect the company, after paying in good faith to one of the persons enumerated in article 5, from any future claim on the part of anyone else. This may be just where such a construction of article 5 is necessary to further its design and intent, but it would be a most unjust interpretation to place on that article, under the circumstances of this case, to hold, it was contemplated by the parties, that the company might ignore the prior claim of the beneficiary especially named in the contract, take from her the policy and premium receipt book, reject her demand for payment, and then arbitrarily select another as the recipient of the benefit the assured had designed for her. This, too, in face of the fact that she had kept alive the policy by payments of premiums, to the end that her claim might, in the event of death, be made productive to her."

In *McNally v. Metropolitan L. Ins. Co.* 199 Pa. St. 481, 49 Atl. 299, affirming 16 Pa. Super. Ct. 111, it was held that the beneficiary named in the policy could recover the amount thereof, though the company had paid the husband and administrator of the insured on his making proof of death and surrendering the policy and the premium receipt book, as "the duly appointed administrator."

So, in *Smith v. Metropolitan L. Ins. Co.* 222 Pa. St. 226, 71 Atl. 11, 128 Am. St. Rep. 799, 20 L.R.A.(N.S.) 928, it was held that if the substitution of the plaintiff as beneficiary in the industrial policy was valid, as *prima facie* it appeared to be, the payment by the company of the amount of the policy to the executor of the insured, under the "facility of payment" clause, was no defense.

c. Option Not Exercised.

The "facility of payment" clause does not give to either one of the persons named an exclusive right to sue for and recover the amount of the policy, since in any such suit the company could interpose the defense that it had paid some other of the persons named: but the effect of the provision is to give to the company a choice as to the one of the several representatives of the insured, to whom it shall make payment. No one of them, therefore, has an attachable interest in the fund. *Providence County Sav. Bank v. Vадnais*, 26 R. I. 122, 58 Atl. 454, wherein it was held that, on the death of the insured, the contents of the industrial policies in suit did not become immediately payable to the defendant as the surviving husband of the beneficiary, and hence were not attachable for his debt.

And where an industrial insurance company has not exercised the option granted in the "facility of payment" clause, and has not made payment, it cannot use that clause by way of discrimination against a beneficiary specifically designated. *Ogletree v. Hutchinson*, 126 Ga. 454, 55 S. E. 179; *Golden v. Metropolitan L. Ins. Co.* 35 App. Div. 589, 55 N. Y. S. 143; *Wachtel v. Harrison*, 84 Misc. 76, 145 N. Y. S. 982.

So, in *Golden v. Metropolitan L. Ins. Co.* 35 App. Div. 589, 55 N. Y. S. 143, it was held that the husband of the insured and the executor of her estate could not recover on an industrial insurance policy against the lawful beneficiary therein, duly named and designated by the insured, on the claim that being in possession of the policies, and having surrendered them to the company, he was the person designated by the policies as beneficiary.

And in *Wachtel v. Harrison*, 84 Misc. 76, 145 N. Y. S. 982, it was held that though

the insurance company might have been protected under the terms of the policy in making payment to one who claimed to be the beneficiary under a paper signed by the insured which purported to change the beneficiary, the rights of one named as beneficiary in the application were not affected by the clause, as he was the beneficiary named in the policy and no right to make a change of beneficiary without his consent existed.

In *McCarthy v. Metropolitan L. Ins. Co.* 162 Mass. 254, 38 N. E. 435, it was held that the administrator of the estate of the insured might maintain an action on an unsealed policy containing the "facility of payment" clause, in which a beneficiary was named, and that whether the beneficiary could sue was immaterial. But in *Lewis v. Metropolitan L. Ins. Co.* 178 Mass. 52, 59 N. E. 439, 86 Am. St. Rep. 463, the court cited *McCarthy v. Metropolitan L. Ins. Co.* supra, as authority for the proposition that the clause did not entitle one to whom such a payment might have been made, but who was not named as the beneficiary of the policy, or otherwise designated as the person who was to receive the sum to be paid, to enforce payment of the sum due under it; but that such a suit could be maintained only by the executor or administrator of the insured with whom the contract was made.

Though the "facility of payment" clause obligates an industrial insurance company to pay the amount of the policy to one of the persons named in that clause, the company is under no obligation to consent to a change of beneficiary from one to another. *Malburg v. Metropolitan L. Ins. Co.* 127 Mich. 568, 86 N. W. 1026. In that case, however, it appeared that the policy was assigned on a blank furnished by the company, which was signed by the insured, the beneficiary, and the proposed beneficiary, and contained the agreement, on a valuable consideration, that the latter should be substituted as beneficiary. It was held that as it also appeared that the proposed beneficiary had performed her promises, in part at least, she could not be divested of her interest in the policy.

THORP

v.

LUND ET AL.

Massachusetts Supreme Judicial Court—June 28, 1917.

227 Mass. 474; 116 N. E. 946.

Trusts — Right of Settlor to Revoke.

A trust cannot be revoked or modified by the settlor, in the absence of a reservation to that effect, though it was voluntarily established.

Creation of Trust — Necessity of Assent of Beneficiary.

No assent of any beneficiary is necessary to the validity of a trust voluntarily established.

Charities — Nature of Purpose as Charitable — Circumstances Considered.

In determining whether a deed of trust providing that a fund should be devoted to some national or philanthropic purposes associated with the name of the settlor's husband created a charitable trust, the circumstances of the parties and their relation to the subject-matter should be considered.

Construction in Favor of Charity.

In view of Const. pt. 2, c. 5, § 2, making it the duty of magistrates to encourage public and private charity, a gift dictated by a benevolent purpose is to be liberally construed, and, if reasonably possible, upheld as a valid charity rather than declared void.

Form of Creation — Use of Term "Charity."

The employment of the word "charity" or "charitable" in a deed of trust is not essential to the creation of a valid charity.

Construction — "Or" Construed as "And."

The rule in the construction of instruments establishing charities that the word "or" will be construed to mean "and" when this seems necessary to effectuate the meaning intended applies especially where one word expresses a charitable use and the other, if standing alone, might not indicate a strict charity, in which case the dominant word is taken to be the one pointing to a charity, and the indefinite word is narrowed by its context or used as a synonym with it.

What Constitutes Charity — National or Patriotic Purpose.

A deed of trust providing that a fund should be appointed to a "national or philanthropic purpose in Norway associated with the name of my late husband, Ole Bull," must be held to create a charity when due consideration is given to the words "national" and "philanthropic," and to the fact that Ole Bull is regarded as a distinguished patriot and national hero whose name and example serve to inspire the youth of Norway. [See note at end of this case.]

Scope of Term "Charity."

A "charity" is not confined to mere almsgiving or the relief of poverty and distress, but has a wider signification, and embraces the improvement and promotion of the happiness of man.

Perpetuities — Trust for Maintenance of Estate.

A will appointing the income of a fund to preserve, maintain, and improve real estate, the fee of which was bequeathed to trustees to hold for the benefit of a minor during her minority, and upon her reaching the age of twenty-one years to convey the same to her in fee, discharged of all trust, and in the event of her prior decease giving the fee to two trustees and the survivor with a gift over to another in case of the decease of both trustees, is an invalid attempt to appoint the fund in perpetuity for the maintenance of a private estate to be used and occupied as such.

[See Ann. Cas. 1914B 551.]

Same.

Such appointment of the fund was not to a public charity or for a "national or philanthropic purpose" within the terms of the deed of trust specifying that the fund should be devoted to such purpose.

Trusts — Administration — Asking Instruction of Court.

When in doubt, the trustee of a fund may ask the instructions of the court as to the validity of a proposed exercise of the power of appointment.

Power of Appointment — Propriety of Exercise — Beneficiary Designated Generally.

A trustee's proposed appointment to the Ole Bull fund committee of a fund appointed to a "national or philanthropic purpose in Norway, associated with the name of . . . Ole Bull" is valid, where it appears that such committee was established by royal charter in Norway to administer the surplus moneys collected for the Ole Bull monument and not needed for that purpose, and such augmentations as might come to it by gift or otherwise, the income to be applied to the distribution of donations to the younger musicians, actors, and actresses holding engagements with the National Stage of Bergen, which was founded by Ole Bull and is devoted to the fostering of a national and patriotic spirit.

Petition by Joseph G. Thorp, trustee, against John Lund et al., for instructions under written instrument of trust. The facts are stated in the opinion. INSTRUCTIONS ACCORDING TO OPINION.

Edmund M. Parker for Joseph G. Thorp individually.

Joseph Sargent for Alice A. Thorp et al.

William S. Hall for John Lund et al.

Whipple, Sears & Ogden for Ralph S. Bartlett, administrator, and Sylvea Bull Vaughan.

[476] *Ruggs, C. J.*—1. This is a bill for instructions by a trustee under a written instrument of trust. It was executed by the sister of the plaintiff, who contemporaneously handed to him certain bonds and stocks to be held according to its terms. Two trust deeds were signed by the settlor, one dated on February 5, 1903, and the other on February 25, 1903. The first was signed and delivered and at the same time all the securities were placed in the possession of the trustee. It did not require acknowledgment or record in order to be valid. There was no condition about its taking effect, and there was not inserted in it any power of revocation. Although the trust was voluntarily established, it could not be revoked or modified by the settlor in the absence of reservation to that effect. *Lovett v. Farnham*, 189 Mass. 1, 47 N. E. 246; *Sands v. Old Colony Trust Co.* 195 Mass. 575, 577, 12 Ann. Cas. 837, 81 N. E. 300. A copy of the deed of trust was sent to the daughter of the settlor, but its delivery was not made dependent upon her approval. The second instrument was not called to her attention until long after it was signed.

2. No assent by any beneficiary was necessary to the validity of the trust. *Boston v. Turner*, 201 Mass. 190, 194, 87 N. E. 634; *Bailey v. Wood*, 211 Mass. 37, 42, Ann. Cas. 1913A 950, 97 N. E. 902. The second instrument was of no consequence under the circumstances here disclosed. The first deed of trust took effect and the rights of the parties are to be determined according to its terms.

3. The pertinent words of the deed of trust, which describe the purposes to which the trust fund shall be applied, are these: "To pay over the net income therefrom to my daughter, Olea Bull Vaughan, during her life and in case she has issue surviving her during the continuance of this trust, to pay the net income in equal shares to them. And to pay over the principal, in whole or in part, as a fund to be devoted to such national or philanthropic purpose in Norway associated with the name of my late husband, Ole Bull, as my said daughter during her lifetime or by will may direct. . . . In case my said daughter shall die without issue and without directing the payment of said principal, in whole or in part, as above provided, said principal and any accumulation of income thereon shall be paid, either in equal shares to the surviving children of my said brother or to the carrying out of [477] the purpose above described, at the discretion of the Trustee." The settlor and her daughter both have deceased, the latter without issue within the meaning of the trust instrument.

The question is, whether a charitable trust was created by the words just quoted. In deciding that question the circumstances of

the parties and their relation to the subject matter may be considered as giving the connection in which the words were used.

The settlor was the widow of Ole Bull, to whom she was married in 1870 and who died in 1880. Ole Bull was a Norwegian by birth, renowned in Europe and America as a most distinguished violinist. He was intensely patriotic. His devotion to his native country and his zeal for her welfare were widely known. It was his earnest effort and unflagging purpose to arouse and stimulate among his fellow countrymen a spirit of devotion to Norway and to secure for her the position and recognition among nations which he felt was her due. He strove constantly to cultivate her national music and art. In furtherance of these nationally patriotic designs he labored for the National Theatre at Bergen in Norway, which was established largely through his personal efforts. Before 1909 a committee had been formed in Norway to solicit and receive subscriptions to erect a monument to Ole Bull. A large amount of money was collected and after erecting a suitable monument to his memory in a public square a considerable sum remained, which, according to the Norwegian statutes for the administration of the Ole Bull Fund, was to be managed by a committee of five members in general for the encouragement of music and the dramatic art in connection with the National Stage of Bergen.

A gift dictated by a general benevolent purpose is to be liberally construed and, if reasonably possible, upheld as a valid charity, rather than declared void. *Saltonstall v. Sanders*, 11 Allen (Mass.) 446, 455. The Constitution of Massachusetts by c. 5, § 2, makes it the duty of magistrates "in all future periods . . . to countenance and inculcate the principles of humanity and general benevolence, public and private charity." It was said in *Ould v. Washington Hospital* 95 U. S. 303, at page 313, 24 U. S. (L. ed.) 450. "Charitable uses are favorites with courts of equity. The construction of all instruments where they are concerned is liberal in their behalf." It was said by Mr. Justice Gray in *Jones v. Habersham*, [478] 107 U. S. 174, at page 185, 2 S. Ct. 336, 27 U. S. (L. ed.) 401: "It is only when a gift might be applied to benevolent purposes which are not charitable in that sense, that the gift fails. *Saltonstall v. Sanders*, 11 Allen (Mass.) 446; *Suter v. Hilliard*, 132 Mass. 412." A gift charitable in its nature will be upheld as valid though to be executed in a foreign country. *Fellows v. Miner*, 119 Mass. 541; *Teale v. Bishop of Derry*, 168 Mass. 341, 47 N. E. 422, 60 Am. St. Rep. 401, 38 L.R.A. 629; *Russell v. Allen*, 107 U. S. 163, 172, 2 S. Ct. 327, 27 U. S. (L. ed.) 397; *Whicker v. Hume*, 7 H. L. Cas. 124, 141, 155.

The fund under the present instrument of settlement is to be appointed to a "national or philanthropic purpose in Norway associated with the name of my late husband, Ole Bull." The word "charity" or "charitable" is not used in the instrument. But that is not essential to the creation of a valid charity. If the substance of the object described by the words employed comes within the definition of a charity, as that word is used in equity, then the gift is valid.

A gift to a civilized and friendly nation for a national purpose, if no other words were used, would be a valid charity under numerous authorities. It is within the scope of the concluding phrases of the classic definition of a charity given by this court speaking through Mr. Justice Gray in *Jackson v. Phillips*, 14 Allen (Mass.) 539, 556, "A charity, in the legal sense, may be more fully defined as a gift. . . . for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." The succinct and oft quoted definition of a charity in *Jones v. Williams*, Ambl. 651 as a "gift to a general public use, which extends to the poor as well as to the rich," looks in the same direction. This has been amplified and approved in several of our decisions. *New England Sanitarium v. Stoneham*, 205 Mass. 335, 91 N. E. 385, and cases collected at page 342. In *Nightingale v. Goulburn*, 5 Hare (Eng.) 484, a gift "to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country, Great Britain," was supported as a charity in these words: "I cannot conceive a purpose to which these trust funds could be lawfully applied, according to the will, which [479] would not be so general and public in its character as to constitute a charitable use." A trust for the benefit of the nation has been held to be a good charitable trust. In *re Verrall* [1916] 1 Ch. (Eng.) 100. Gifts in payment of the national debt are upheld. *Dickson v. U. S.* 125 Mass. 311, 28 Am. Rep. 230; *Ashton v. Langdale*, 15 Jur. (Eng.) 868; *Newland v. Atty.-Gen.* 3 Meriv. (Eng.) 684. Bequests to promote the efficiency of the army. In *re Good* [1905] 2 Ch. (Eng.) 60, to teach shooting among the National Rifle Association "so as to prevent . . . a catastrophe similar to that at Majaba Hill," In *re Stephens*, 8 Times L. Rep. 792, [1892] W. N. 140. and to a volunteer military company. In *re Stratheiden* [1894] 3 Ch. (Eng.) 205, all have been held to be good charities. Gifts for the furtherance and inculcation of patriotism are

charitable. *Molly Varnum Chapter, D. A. R. v. Lowell*, 204 Mass. 487, 90 N. E. 893, 26 L.R.A.(N.S.) 707; *Old South Asso. v. Boston*, 212 Mass. 299, 99 N. E. 235; *Sargent v. Cornish*, 54 N. H. 18. Doubtless a gift for a general public utility is not necessarily a charity. But a gift for a purpose confined to that which is national in the sense that it might be supported at public expense and by general taxation is a close approach to a charity.

The words "or philanthropic" are conjoined with "national" as expressive of the purpose to which the fund may be appointed.

It is a familiar rule in the interpretation of instruments relating to the establishment of charities that "the word 'or' will be construed to mean 'and' when this seems necessary to give effect to the meaning" of the person declaring a general purpose of that sort. *Clarke v. Andover*, 207 Mass. 91, 96, 92 N. E. 1013, and cases there cited. *McClench v. Waldron*, 204 Mass. 554, 557, 91 N. E. 126. This rule is applicable, especially in instances where one word expresses a charitable use and the other if standing alone might not indicate a strict charity. The dominant word is taken to be the one pointing to a charity and the more indefinite word linked with it is held to be narrowed and colored by its context or used as a synonym with it, in order to make effective the main charitable intent. Numerous illustrations may be given. In *St. Paul's Church v. Atty.-Gen.* 164 Mass. 188, 41 N. E. 231, a gift for "any charitable or benevolent object or objects" was upheld as a charity, "or" being construed as "and," although a bequest for benevolent purposes alone was held to be too indefinite to be supported as a charity, in *Chamberlain v. Stearns*, 111 Mass. 267. [480] A gift in aid "of objects and purposes of benevolence or charity" was sustained as a charity on the same principle in *Saltonstall v. Sanders*, 11 Allen (Mass.) 446, 465 to 471. To the same effect is *Rotch v. Emerson*, 105 Mass. 431, 434; and *Weber v. Bryant*, 161 Mass. 400, 37 N. E. 203.

There is nothing about the frame of the sentence in the instant trust deed to indicate that "or" was used in a disjunctive sense as distinguishing "national" from philanthropic." The word "philanthropic" is almost if not quite synonymous with the word "charity," at least as it was used at the time of the enactment of St. 43 Eliz. c. 4, about which centres so much of the law concerning charitable uses. That is illustrated, as was pointed out by counsel in argument, by the nearly contemporaneous use of the word "charity" in the King James Version of the familiar thirteenth chapter of First Corinthians, while the Revised Version translates the same Greek word as "love." This accords nearly with the definition of charity given in argu-

ment in the *Girard will* case and quoted in 14 Allen 556, and adopted in *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303, 24 U. S. (L. ed.) 450; "Whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives, and to these ends—free from the stain or taint of every consideration that is personal, private or selfish." It was said in *Rotch v. Emerson*, 105 Mass. 431, 434, "‘Philanthropic’ is not in itself widely variant from ‘charitable.’" Philanthropic has been used either in bequests or in definitions as not essentially different from charitable. *Mackinnon v. Mackinnon* [1908-1909] Sc. Sess. Cas. 1041; *In re Cranston* [1898] 1 Ir. R. 431, 446; *In re Wedgewood* [1915] 1 Ch. 113, Ann. Cas. 1917B 924; *Pell v. Mercer*, 14 R. I. 412.

The words "national" and "philanthropic" are coupled with the further description that the purpose is to be executed "in Norway" in association "with the name of my late husband, Ole Bull." In this connection it is plain that Ole Bull rightly was regarded as a distinguished patriot, whose name and example would be an inspiration to the youth of the future generations in that country. He was in a sense a national hero, whose achievements were a just source of pride to the Norwegian people. A fitting memorial to such a person, national in scope and philanthropic in character, was the thought expressed by the settlor. [481] Whatever may be said as to these elements singly, all combined constitute the trust thus created a charity under the established principles of law.

These circumstances seem to distinguish the case at bar from *In re Macduff* [1896] 2 Ch. (Eng.) 451; but if and so far as it is inconsistent with this conclusion, we are not inclined to follow it. They establish a charity as defined in *New England Sanitarium v. Stoneham*, 205 Mass. 335, 342, 91 N. E. 385: "It is not confined to mere almsgiving of the relief of poverty and distrees, but has a wider signification, which embraces the improvement and promotion of the happiness of man." *Little v. Newburyport*, 210 Mass. 414, 417, Ann. Cas. 1912D 425, 96 N. E. 1032.

4. The daughter of the settlor, Olea Bull Vaughan, died leaving a will wherein the only provision concerning the power of appointment is in these words: "V. I give and bequeath to 'The Ole Bull Fund Committee' of Bergin, Norway, all stocks, bonds, money or other evidences of indebtedness now held in trust for me by Joseph G. Thorp as trustee under a deed of trust to said Thorp as trustee from my mother, Sara C. Bull, said deed of trust being dated February 5, 1903, or thereabouts, to hold and manage as a perpetual trust for the following purposes; To use the annual net income of said fund, said fund

now amounting to thirty thousand (\$30,000), dollars or thereabouts—for the purpose of preserving, maintaining and making improvements upon Lysoen, Norway,—the home of my father Ole Bull—as a Memorial to his memory. This bequest is made in accordance with and by virtue of a power to me given in said above mentioned deed of trust.” Lysoen is an island off the coast of Norway. It was owned in fee by Mrs. Vaughan at the time of her death. By her will and codicil she gave the fee to trustees to hold for the benefit of a minor, Sylvea Bull Vaughan, during her minority, and upon her reaching the age of twenty-one years to convey the same to her in fee discharged of all trust, and in the event of her prior decease, then the island is given in fee to the two trustees and the survivor, with a gift over to another person in case of the decease of both trustees. In substance this was an attempt to appoint the fund in perpetuity for the maintenance of a private estate to be used and occupied so far as concerned right and title by named individuals in their personal capacity. An attempt to create a perpetual trust for a private use is a [482] nullity. *Bates v. Bates*, 134 Mass. 110, 45 Am. Rep. 305. Moreover, it is plain that such an appointment is not to a public charity. It is too plain for discussion that it is not for a “national or philanthropic purpose.”

5. The attempted appointment by the daughter being invalid, and she having died without issue within the meaning of the trust instrument, the right to make the appointment vests in the trustee by the express terms of the deed of gift. The trustee proposes to exercise that power of appointment in a definite way and asks the instruction of the court, as he may, *Minns v. Billings*, 183 Mass. 126, 66 N. E. 593, 97 Am. St. Rep. 420, 5 L.R.A.(N.S.) 686, as to its validity.

The trustee proposes to appoint the fund to the Ole Bull Fund Committee. That committee is established by royal charter in Norway to administer the surplus moneys collected for the Ole Bull monument and not needed for that purpose, and such augmentations as may come by gift or otherwise, the income of which is to be applied directly or by accumulations to the distribution of donations to the younger musicians, actors and actresses holding engagements with the National Stage of Bergen. The National Stage

of Bergen is in a sense a national theatre of Norway. It was founded by Ole Bull. It is devoted to the fostering of a national and patriotic spirit. It presents plays and music, the authors of which and the actors and musicians performing which, must be Norwegian. It is supported in part by grants from the national government of Norway and the city of Bergen. The Brigade Band, members of which are eligible to the benefits of the fund, is a part of the national army of Norway. Thus it is an institution established directly for the inculcation of patriotism, for the cultivation of music and the drama, and in a broad sense for the promotion of popular education in these departments of the fine arts. The distribution of prizes among the meritorious youth who are pursuing these studies and cultivating their skill in these branches is a charity. It is distinctly associated with the name of Ole Bull because it is provided expressly that the fund shall be administered by trustees bearing his name as a part of their title, and already holding funds donated as a memorial to him and in connection with a national institution founded by him. The proposed appointment satisfies every requirement of the trust instrument in being to a public [483] charity, national and philanthropic in nature, closely associated with the name of Ole Bull.

The trustee is instructed that he holds the fund under the instrument of February 5, 1903, and has the power of appointment thereof under the terms of that instrument, and that the proposed appointment of the fund to the Ole Bull Fund Committee, organized by royal charter in Norway to hold moneys for the purposes set forth in the trust instrument and in accordance with its statutes, would be a valid appointment to a public charity.

So ordered.

NOTE.

In the reported case it is held that a gift for the purpose of establishing in Norway a memorial to Ole Bull is for such a national or patriotic purpose as to constitute a charity. Whether a gift for a public purpose as distinguished from a benevolent, educational or religious purpose is a valid charitable gift is discussed in the note to *New Castle Common v. Megginson*, Ann. Cas. 1914A 1207.

GENERAL INDEX

To Cases and Notes in this Volume.

(For separate Index to Notes, see post, p. 1259.)

ABATEMENT.

See Wills.

ABSENCE.

See Trial.

ACCIDENT.

See Workmen's Compensation Acts.

ACCIDENT INSURANCE.

Burden of proving that death did not result from suicide. *Aetna Life Ins. Co. v. Taylor* (Ark.), 1122.

ACCOUNTING.

See Tenants in Common; Trusts and Trustees.

ACTIONABLE WORDS.

See Libel and Slander.

ACTIONS.

Injunctions—power of court to enjoin proceeding in another state. *American Express Co. v. Fox* (Tenn.), 1148. *Annotated*

Joinder of actions—rights arising from same transaction—causes arising from breach of contract and from tort. *Littlefield v. Bowen* (Wash.), 177.

Moot case—what constitutes. *Postal Telegraph-Cable Co. v. Montgomery* (Ala.), 554. *Annotated*

Survival of actions—action revived in name of special administrator. *Aetna Life Ins. Co. v. Taylor* (Ark.), 1122.

See also Banks; Mechanics' Liens; Parties to Actions; Removal of Causes; Wills.

ADJOINING LANDOWNERS.

Hedge fence—invoking doctrine of estoppel to establish ownership. *Wideman v. Faivre* (Kan.), 1168.

Tree near boundary line—rights of owner. *Wideman v. Faivre* (Kan.), 1168. *Annotated*

Tree overhanging boundary line—right of owner of premises to cut to line. *Cobb v. Western Union Telegraph Co.* (Vt.), 1156. *Annotated*

ADMINISTRATION.

See Trusts and Trustees.

ADMINISTRATORS.

See Executors and Administrators.

ADMISSIONS AND DECLARATIONS.

Carriers of passengers—action for injury to passenger—admissibility of declaration of employee of carrier. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.

Conspiracy—declaration of coconspirators—proof of conspiracy as prerequisites to admission. *Hitchman Coal, etc. Co. v. Mitchell* (U. S.), 461.

Eminent domain—evidence of value—certain evidence held not admissible as admission. *Brackett v. Commonwealth* (Mass.), 863.

Workmen's compensation acts—admissibility of declaration of employee as to cause of injury. *Carroll v. Knickerbocker Ice Co.* (N. Y.), 540.

ADMISSIONS AND DECLARATIONS — Continued.

Workmen's compensation acts—admissibility of declaration of employee while suffering from delirium tremens. *Carroll v. Knickerbocker Ice Co.* (N. Y.), 540.
See also Pleading.

ADOPTION.

Inheritance by adopted child—what law governs. *Brewer v. Browning* (Miss.), 1013.

ADVERSE POSSESSION.

Mineral lands—doctrine of adverse possession as applicable to mineral lands. *Northcut v. Church* (Tenn.), 545.

AFFIDAVITS.

See New Trial.

AGE.

Testimony as to age of another—admissibility. *State v. Tetrault* (N. H.), 425.
 Testimony as to person's own age—admissibility. *State v. Tetrault* (N. H.), 425. *Annotated*
See also Infants.

AGENCY.

Warranty to agent as insuring to benefit of undisclosed principal. *Pacific Power, etc. Co. v. White* (Wash.), 125.
See also Brokers; Insurance.

AGRICULTURE.

See Seed.

ALIENS.

Workmen's compensation acts—right of nonresident alien to compensation. *Victor Chemical Works v. Industrial Board* (Ill.), 627.

ALIMONY.

Amount of allowance of alimony—amount held proper. *Hiecke v. Hiecke* (Wis.), 497.

"ALL DEBTS."

Meaning of "all debts" as used in contract. *Silver King Coalition Mines Co. v. Silver King Consol. Min. Co.* (U. S.), 571.

ALLOWANCE.

See Alimony; Executors and Administrators; Workmen's Compensation Acts.

AMENDMENTS.

Pleading—mechanics' liens—amendment of bill to foreclose lien as affecting plea of limitations. *Niehaus v. C. B. Barker Construction Co.* (Tenn.), 23.
 — variance—construction of statute authorizing amendment in case of variance. *Conrad v. Ellison-Harvey Co.* (Va.), 1171.
 Statutes—construction of statute as amended—powers of public service commission. *Sayers v. Montpelier, etc. R. Co.* (Vt.), 1050.

AMUSEMENTS.

See Theaters and Amusements.

ANCESTORS.

See Insanity.

"AND."

"Or" construed as "and" in instrument creating charity. *Thorp v. Lund* (Mass.), 1204.

ANIMALS.

See Food and Drugs.

ANTAGONISM.

See Trusts and Trustees.

ANTENUPTIAL AGREEMENTS.

Validity—concealment of facts as affecting validity. *Stratton v. Wilson* (Ky.), 917.

ANTENUPTIAL AGREEMENTS — Continued.

- Validity—contract favored in law. *Stratton v. Wilson* (Ky.), 917.
 — effect of partial invalidity. *Stratton v. Wilson* (Ky.), 917. *Annotated*
 — provision contemplating divorce as affecting validity. *Stratton v. Wilson* (Ky.), 917.

APPEAL AND ERROR.

- Appealable judgments and orders—order revoking letters of public administrator. *Brinck-wirth's Estate v. Troll* (Mo.), 1056. *Annotated*
 Dismissal of appeal—merits of care not considered on motion to dismiss. *In re Hahn* (N. J.), 830.
 — sufficiency of notice of motion to dismiss. *City Sash, etc. Co. v. Bunn* (Wash.), 31.
 Disposition of cause—error in sentence—remand for proper sentence. *People v. Elliott* (Ill.), 391.
 Examination of case—action brought under federal employers' liability act—consideration on appeal of right of action at common law. *Chesapeake, etc. R. Co. v. Harmon's Administrator* (Ky.), 41.
 — conflicting evidence—review on appeal. *Silver King Coalition Mines Co. v. Silver King Consol. Min. Co.* (U. S.), 571.
 — decree disapproving order of public service commission—conclusiveness on appeal. *Mississippi R. Co. v. Mobile, etc. R. Co.* (Miss.), 828.
 — error assented to at trial—review on appeal. *Minneapolis, etc. R. Co. v. Winters* (U. S.), 54.
 — findings of public service commission—review on appeal. *Western Union Tel. Co. v. Burlington Traction Co.* (Vt.), 841.
 — findings of trial court—review on appeal. *Hiecke v. Hiecke* (Wis.), 497.
 — findings of workmen's compensation board—review on appeal. *Chicago Dry Kiln Co. v. Industrial Board* (Ill.), 645. *Annotated*
 — findings of workmen's compensation board—review on appeal. *Carroll v. Knickerbocker Ice Co.* (N. Y.), 540; *Victor Chemical Works v. Industrial Board* (Ill.), 627; *Dale v. Saunders* (N. Y.), 703; *Eugene Dietzen Co. v. Industrial Board* (Ill.), 764.
 — judgment dismissing claim for compensation under workmen's compensation act—review on appeal. *Grinnell v. Wilkinson* (R. I.), 618.
 — lump sum award under workmen's compensation act—review on appeal. *McCracken v. Missouri Valley Bridge, etc. Co.* (Kan.), 689. *Annotated*
 — matters not shown by record—review on appeal. *People v. Elliott* (Ill.), 391; *Holstein v. Benedict* (Hawaii), 941; *Neven v. Neven* (Nev.), 1083.
 — question of fact determined by trial court—review on appeal. *Wideman v. Faivre* (Kan.), 1168.
 — question not raised below—review on appeal. *People v. Falkovitch* (Ill.), 1077; *Victor Chemical Works v. Industrial Board* (Ill.), 627.
 — review by federal court of state decision—action under federal employers' liability act. *Southern R. Co. v. Puckett* (U. S.), 69.
 — review of sentence in criminal case. *People v. Elliott* (Ill.), 391.
 Harmless error—admission of evidence—fact otherwise proved. *Taylor v. Moseley* (Ky.), 1125.
 — admission of evidence—technical error. *People v. Gibson* (N. Y.), 509.
 — exclusion of evidence—fact otherwise proved. *Taylor v. Moseley* (Ky.), 1125.
 — refusal of instructions—party not entitled to recover. *Taylor v. Moseley* (Ky.), 1125.
 Law of the case—review of previous holding on second appeal. *Brewer v. Browning* (Miss.), 1013.
 Right to appeal—appeal from order of disbarment. *In re Hahn* (N. J.), 830. *Annotated*
 Stare decisis—power to overrule previous decision. *Brewer v. Browning* (Miss.), 1013.
 — propriety of overruling previous decision. *Brewer v. Browning* (Miss.), 1013.
 See also **Eminent Domain; Pleading.**

APPEARANCE.

- Federal practice—effect of appearance to object to jurisdiction of court. *Hitchman Coal, etc. Co. v. Mitchell* (U. S.), 461.

APPLIANCES.

See **Electricity; Master and Servant.**

APPOINTMENT.

See **Trusts and Trustees.**

APPREHENSION OF INJURY.

See **Injunctions.**

APPROPRIATIONS.

- State contract exceeding appropriation—validity. *Fergus v. Brady* (Ill.), 220.

ARGUMENT OF COUNSEL.

Improper argument—argument not cured by instruction. *Ravenscroft v. Stull* (Ill.), 1130.
 ——— comment on failure of incompetent witness to testify. *Ravenscroft v. Stull* (Ill.), 1130.
 ——— stating penalty for crime as proper argument. *State v. Tetrault* (N. H.), 425.

ARMY AND NAVY.

Conscription—validity of federal statute. *Selective Draft Law Cases* (U. S.), 856.
 Pledge of public property by soldier—liability of civilian for receiving. *Bolland v. United States* (U. S.), 520. *Annotated*
 See also *Veterans; War*.

ARREST.

Intoxicating liquors—arrest for threatened violation of law—duty of officer. *State v. Reichman* (Tenn.), 889.
 ——— right of sheriff to arrest without warrant—unlawful sale of intoxicants. *State v. Reichman* (Tenn.), 889.

ASSEMBLY.

See *Unlawful Assembly*.

ASSIGNMENTS.

See *Life Insurance; Tenants in Common*.

ATTACHMENT.

Election of remedies—right to dismiss attachment and proceed in equity. *Nichaus v. C. P. Barker Construction Co.* (Tenn.), 23.

ATTORNEYS.

Compensation—attorney's fee held to be reasonable. *Aetna Life Ins. Co. v. Taylor* (Ark.), 1122.
 Disbarment—jurisdiction to disbar—court of chancery. *In re Hahn* (N. J.), 830.
 ——— right of appeal from order of disbarment. *In re Hahn* (N. J.), 830. *Annotated*
 Witnesses—presumption from failure to call attorney as witness. *Ravenscroft v. Stull* (Ill.), 1130.
 See also *Appearance*.

AUDIENCE.

See *Theaters and Amusements*.

AUTOMOBILES.

Injuries in operation of automobile—liability as affected by fact that automobile is unregistered. *Koonovsky v. Quellette* (Mass.), 1146.
 ——— liability of driver for negligent homicide. *People v. Falkovitch* (Ill.), 1077.
 ——— liability of owner for injury to guest. *Massaletti v. Fitzroy* (Mass.), 1088.
 ——— negligence of husband operating automobile not imputed to wife. *Virginia R. etc. Co. v. Gorsuch* (Va.), 838.
 ——— person in charge of car as dealer in automobiles—sufficiency of evidence to establish. *Koonovsky v. Quellette* (Mass.), 1146.

"AVERAGE WEEKLY EARNINGS."

Meaning of "average weekly earnings" as used in workmen's compensation act. *Cox v. Trollope* (Eng.), 637. *Annotated*
 Tips of railroad porter as part of "average weekly earnings" within workmen's compensation act. *Great Western R. Co. v. Helps* (Eng.), 1120. *Annotated*

AVOIDANCE OF CONTRACTS.

See *Infants*.

AWARD.

See *Eminent Domain; Workmen's Compensation Acts*.

BANKS.

Banking commission—status and powers—power to bring action. *American Southern Nat. Bank v. Smith* (Ky.), 959.
 Deposits—special deposit—rights as to special deposit—priority. *Sawyer v. Conner* (Miss.), 388.
 ——— special deposit—what constitutes. *Sawyer v. Conner* (Miss.), 388.
 Regulation under police power. *American Southern Nat. Bank v. Smith* (Ky.), 959.

BED OF STREAM.

See Waters and Watercourses.

BENEFICIAL ASSOCIATIONS.

Workmen's compensation acts—receipt of benefit from beneficial association as affecting right to compensation under workmen's compensation act. *State v. District Court (Minn.)*, 635. *Annotated*

BENEFICIARIES.

See Insurance; Trusts and Trustees; Workmen's Compensation Acts.

BEST EVIDENCE.

See Evidence.

BILLS AND NOTES.

Bona fide purchasers—circumstances putting on inquiry. *First National Bank v. Stover (N. Mex.)*, 145.
— sufficiency of evidence of good faith. *First National Bank v. Stover (N. Mex.)*, 145.
Extension of time of payment—construction of agreement to extend—necessity of consent of holder. *First National Bank v. Stover (N. Mex.)*, 145. *Annotated*
Negotiability—agreement to extend time of payment as affecting negotiability. *First National Bank v. Stover (N. Mex.)*, 145.
— provision for discount as affecting negotiability. *Farmers' Loan, etc. Co. v. Planck (Neb.)*, 598. *Annotated*
See also Gifts.

BONA FIDE PURCHASERS.

See Bills and Notes.

BONDS.

See Municipal Corporations; Public Officers.

BOUNDARIES.

See Adjoining Landowners.

BREACH OF DUTY.

See Negligence.

BREACH OF THE PEACE.

Unlawful sale of intoxicants as breach of the peace. *State v. Reichman (Tenn.)*, 889.
Violence not essential to breach of the peace. *State v. Reichman (Tenn.)*, 889.
What constitutes breach of the peace. *State v. Reichman (Tenn.)*, 889.

BREACH OF WARRANTY.

See Warranty.

BROKERS.

Commissions—joint contract of buyer and seller to pay commission—liability of party preventing sale. *Littlefield v. Bowen (Wash.)*, 177. *Annotated*
— refusal by principal to convey—sufficiency of evidence of refusal. *Littlefield v. Bowen (Wash.)*, 177.
Performance by broker—refusal of principal to accept trade—necessity of tender. *Littlefield v. Bowen (Wash.)*, 177.
Recording of contract by broker—liability to principal in damages. *Littlefield v. Bowen (Wash.)*, 177.
Regulation—validity of regulation of loan brokers. *Wessell v. Timberlake (Ohio)*, 402.

BUILDING RESTRICTIONS.

Public service corporations—building restriction as binding public service corporation. *Flynn v. New York, etc. R. Co. (N. Y.)*, 588. *Annotated*
Subsequent purchasers—building restriction as binding subsequent purchaser. *Flynn v. New York, etc. R. Co. (N. Y.)*, 588.
Validity of building restrictions generally. *Flynn v. New York, etc. R. Co. (N. Y.)*, 588.

BUILDINGS.

Building ordinance—validity. *St. Louis v. Nash (Mo.)*, 134.

BURDEN OF PROOF.

- Accident insurance—burden of proving that death did not result from suicide. *Aetna Life Ins. Co. v. Taylor* (Ark.), 1122.
- Contributory negligence—sufficiency of instruction as to burden of proving contributory negligence. *Froeming v. Stockton Electric R. Co.* (Cal.) 408.
- Fiduciary relation—burden of proving fairness of transaction. *Dawson v. National Life Ins. Co.* (Iowa), 230.
- Gifts—conveyance by parent to child—burden of proof of undue influence. *Soper v. Ciasco* (N. J.), 452. *Annotated*
- Insanity—burden of proof as to insanity. *James v. State* (Ala.), 119.
- Wills—undue influence—propriety of instruction as to burden of proof. *Ravenscroft v. Stull* (Ill.), 1130.
- Workmen's compensation acts—burden of proving that claimant is casual employee. *Victor Chemical Works v. Industrial Board* (Ill.), 627.

BUSINESS.

See Licenses.

BUSINESS CAPACITY.

See Wills.

BUSINESS COMPETITION.

See Municipal Corporations.

CANALS.

See Owners of Premises.

CANDIDATES.

See Elections; Libel and Slander.

CARRIERS OF PASSENGERS.

- Injury to passenger—contributory negligence—standing on platform or steps preparatory to alighting. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
- evidence—admissibility of declaration of employee of carrier. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
- evidence—sufficiency of evidence to sustain recovery against carrier. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
- instructions—propriety of instruction as to negligence in alighting from moving car. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
- instructions—propriety of instruction as to presumption of negligence from injury. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
- instructions—propriety of instruction as to right of passenger to be on step of moving car. *Froeming v. Stockton* (Cal.), 408.
- pleading—construction of pleading. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.

CASUAL EMPLOYEES.

See Workmen's Compensation Acts.

CERTAINTY.

See Statutes.

CHARITIES.

- Creation of charity—construction of instrument in favor of charity. *Thorp v. Lund* (Mass.), 1204.
- necessity for use of term "charity." *Thorp v. Lund* (Mass.), 1204.
- "or" construed as "and." *Thorp v. Lund* (Mass.), 1204.
- purpose of instrument—circumstances to be considered. *Thorp v. Lund* (Mass.), 1204.
- What constitutes charity—national or patriotic purpose. *Thorp v. Lund* (Mass.), 1204.
- scope of term "charity." *Thorp v. Lund* (Mass.), 1204.
- trust for maintenance of estate as charity. *Thorp v. Lund* (Mass.), 1204.

CHARTER.

See Corporations; Municipal Corporations.

"CHILD."

"Child" as including legitimate child. *Peerless Pacific Co. v. Burckhard* (Wash.), 247.

Annotated

See also Infants.

CITIZENSHIP.

Federal citizenship as paramount to state citizenship. *Selective Draft Law Cases* (U. S.); 856.

CLAIMS.

See *Workmen's Compensation Acts*.

COLLATERAL ATTACK.

See *Public Service Commissions*.

COMMERCE.

See *Constitutional Law*; *Employers' Liability Acts*; *Workmen's Compensation Acts*.

COMMISSIONERS.

See *Eminent Domain*.

COMMISSIONS.

See *Brokers*.

COMMON LAW.

See *Eminent Domain*; *Employers' Liability Acts*.

COMPENSATION.

See *Attorneys*; *Eminent Domain*; *Executors and Administrators*; *Public Officers*; *Workmen's Compensation Acts*.

COMPETITION.

See *Municipal Corporations*.

COMPLAINT.

See *Pleading*.

COMPOUNDING OF INTEREST.

See *Interest*.

CONCEALMENT OF FACTS.

See *Antenuptial Agreements*.

CONDITIONAL SALES.

Right of conditional vendee to recover damages for breach of warranty. *Peuser v. Marsh* (N. Y.), 913. *Annotated*

CONDITIONS.

See *Wills*.

CONDUCT.

See *Divorce*; *Jury*; *Trial*.

CONFLICT OF LAWS.

Inheritance by adopted child—what law governs. *Brewer v. Browning* (Miss.), 1013
See also *Actions*; *Employers' Liability Acts*; *Workmen's Compensation Acts*.

CONGRESS.

Power of Congress to punish for contempt—nature and extent of power. *Marshall v. Gordon* (U. S.), 371. *Annotated*

CONSCRIPTION.

See *War*.

CONSENT.

See *Bills and Notes*.

CONSIDERATION.

See *Warranty*.

CONSOLIDATION OF ACTIONS.

See *Mechanics' Liens*.

CONSPIRACY.

Admissibility of declarations of coconspirators—proof of conspiracy as prerequisite to admission in evidence. *Hitchman Coal, etc. Co. v. Mitchell* (U. S.), 461.

CONSTITUTIONAL LAW.

- Banks**—regulation under police power. *American Southern Nat. Bank v. Smith* (Ky.), 959.
- Buildings**—validity of building ordinance. *St. Louis v. Nash* (Mo.), 134.
- Citizenship**—federal citizenship as paramount to state citizenship. *Selective Draft Law Cases* (U. S.), 856.
- Commerce**—regulation of commerce under police power. *New Orleans v. Toca* (La.), 1032.
- Construction of constitution**—contemporaneous construction. *Fergus v. Brady* (Ill.), 220.
- Contracts**—liberty of contract as absolute right. *Pittsburgh, etc. R. Co. v. Kinney* (Ohio), 286.
- public policy as affecting validity of contract. *Pittsburgh, etc. R. Co. v. Kinney* (Ohio), 286.
- statute prohibiting letting of public contract to nonresidents—validity. *State v. Senatobia Blank Book, etc. Co.* (Miss.), 953.
- Electricity**—separation of electric wires—power of public service commission to order. *Western Union Tel. Co. v. Burlington Traction Co.* (Vt.), 841. *Annotated*
- Food**—legislative power to regulate. *New Orleans v. Toca* (La.), 1032.
- regulation of ice cream—validity. *New Orleans v. Toca* (La.), 1032.
- Intoxicating liquors**—regulation of transportation—validity. *Kansas City v. Jordan* (Kan.), 273.
- Liberty of speech and of press**—construction of constitutional provision. *In re Hayes* (Fla.), 936.
- Loan brokers**—chattel loans—validity of regulation. *Wessell v. Timberlake* (Ohio), 402.
- Master and servant**—workmen's compensation act—validity of Illinois act. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- workmen's compensation act—validity of Kentucky act. *Greene v. Caldwell* (Ky.), 604. *Annotated*
- workmen's compensation act—validity of Washington act. *Stertz v. Industrial Ins. Commission* (Wash.), 354.
- Municipal corporations**—debt limit—computation of indebtedness—interest on municipal bonds as factor. *O'Rear v. Sartain* (Ala.), 593. *Annotated*
- debt limit—computation of indebtedness—time as of which indebtedness is computed. *O'Rear v. Sartain* (Ala.), 593.
- debt limit—computation of indebtedness—unissued bonds as part of present indebtedness. *O'Rear v. Sartain* (Ala.), 593.
- debt limit—effect of exceeding limit—validity of tax for payment. *O'Rear v. Sartain* (Ala.), 593.
- Police power**—nature and scope. *Wessell v. Timberlake* (Ohio), 402.
- Railroads**—order of public service commission requiring station at particular place—reasonableness of order. *Mississippi R. Co. v. Mobile, etc. R. Co.* (Miss.), 828.
- Smoke**—validity of regulatory ordinance. *People v. Detroit, etc. Ferry Co.* (Mich.), 170. *Annotated*
- Statutes**—certainty—statute held not void for uncertainty. *State v. Linn* (Okla.), 139.
- construction of statute in favor of validity. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- presumption in favor of validity of statute. *Victor Chemical Works v. Industrial Board* (Ill.), 627; *New Orleans v. Toca* (La.), 1032.
- repeal of repealing act as reviving repealed statute. *Manchester Township Supervisors v. Wayne County Commissioners* (Pa.), 278. *Annotated*
- wisdom of statute—judicial review. *State v. Senatobia Blank Book, etc. Co.* (Miss.), 953; *Massey Pub. Co. v. Patten* (U. S.), 999.
- Taxation**—property used for religious purposes as exempt from taxation. *Commonwealth v. First Christian Church* (Ky.), 525.
- War**—conscription—validity of federal act. *Selective Draft Law Cases* (U. S.), 856.
- espionage—validity of federal act. *Massey Pub. Co. v. Patten* (U. S.), 999. *Annotated*
- Waters and watercourses**—grant of land under navigable water—power of state to make grant. *People v. Steeplechase Park Co.* (N. Y.), 1099. *Annotated*
- Witnesses**—privilege—demand on accused for production of papers as violation of privilege. *People v. Gibson* (N. Y.), 509.
- See also Public Officers.**

CONSTRUCTION.

See Amendments; Bills and Notes; Charities; Constitutional Law; Contracts; Pleading; Statutes; Warranty; Workmen's Compensation Acts.

CONTEMPORANEOUS CONSTRUCTION.

See Constitutional Law.

CONTEMPT.

Congress—power to punish for contempt—nature and extent of power. *Marshall v. Gordon* (U. S.), 371. *Annotated*
 Inherent power of court to punish for contempt. *In re Hayes* (Fla.), 936.
 Newspaper publication as contempt. *In re Hayes* (Fla.), 936.

CONTEST.

See Wills.

CONTINGENT REMAINDERS.

See Remainders and Reversions.

CONTINUANCE.

See Appeal and Error; Trial.

CONTINUANCE IN SERVICE.

See Master and Servant.

CONTINUING WARRANTY.

See Warranty.

CONTRACTORS.

See Mechanics' Liens.

CONTRACTS.

Construction—contract for future support—place of support. *Soper v. Cisco* (N. J.), 452.
 — promise to pay "all debts." *Silver King Coalition Mines Co. v. Silver King Consol. Min. Co.* (U. S.), 571.
 Implied contracts—services by member of family. *Holstein v. Benedict* (Hawaii), 941.
 Rescission—contract for future support—right to rescind after part performance. *Soper v. Cisco* (N. J.), 452.
 Termination—contract for exchange of property—reasonable time implied. *Littlefield v. Bowen* (Wash.), 177.
 Validity—antenuptial agreements—concealment of facts as affecting validity. *Stratton v. Wilson* (Ky.), 917.
 — antenuptial agreements—contract favored in law. *Stratton v. Wilson* (Ky.), 917.
 — antenuptial agreements—effect of partial invalidity. *Stratton v. Wilson* (Ky.), 917. *Annotated*
 — antenuptial agreements—provision contemplating divorce as affecting validity. *Stratton v. Wilson* (Ky.), 917.
 — intoxicating liquors—validity of sale of liquor with knowledge of purpose to resell illegally. *Paul Jones & Co. v. Wilkins* (Tenn.), 977. *Annotated*
 — liberty of contract as absolute right. *Pittsburgh, etc. R. Co. v. Kinney* (Ohio), 286.
 — master and servant—validity of contract limiting liability of master. *Pittsburgh, etc. R. Co. v. Kinney* (Ohio), 286.
 — public contracts—validity of statute prohibiting letting to nonresidents. *State v. Senatobia Blank Book, etc. Co* (Miss.), 953.
 — public policy as affecting validity of contract. *Pittsburgh, etc. R. Co. v. Kinney* (Ohio), 286.
 — states—validity of contract exceeding appropriation. *Fergus v. Brady* (Ill.), 220.
See also Actions; Bills, and Notes; Brokers; Building Restrictions; Corporations; Infants; Marriage; Master and Servant; Parent and Child; Sales; Telegraphs and Telephones.

CONTRIBUTORY NEGLIGENCE.

Carriers of passengers—contributory negligence of passenger—propriety of instruction as to alighting from moving car. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
 — contributory negligence of passenger—standing on platform or steps preparatory to alighting. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
 Instructions—sufficiency of instruction as to burden of proving contributory negligence. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
 Master and servant—contributory negligence of servant—using unsafe appliance. *Shaughnessy v. Northland Steamship Co.* (Wash.), 655.

CONVERSION.

See Equitable Conversion.

CORONERS.

Workmen's compensation acts—admissibility in evidence of verdict of coroner's jury. *Victor Chemical Works v. Industrial Board* (Ill.), 627.

CORPORATIONS.

- Charter—construction of debt limit provision. *American Nat. Bank v. Smith* (Ky.), 959. *Annotated*
- quo warranto as remedy for violation of charter. *State v. Senatobia Blank Book, etc. Co.* (Miss.), 953.
- Contracts—what are "ultra vires contracts." *American Southern Nat. Bank v. Smith* (Ky.), 959.
- Libel or slander of corporation—what constitutes. *Axton Fisher Tobacco Co. v. Evening Post Co.* (Ky.), 560.
- Officers—purchase of stock by director as affected by fiduciary relation to stockholder. *Dawson v. National Life Ins. Co.* (Iowa), 230. *Annotated*
- Stock and stockholders—relation of stockholders to corporation. *Dawson v. National Life Ins. Co.* (Iowa), 230.
- subscription to stock—fraud on subscriber—waiver by delay. *Heiskell v. Morris* (Tenn.), 1134.
- subscription to stock—issue of new stock—right of stockholder to preference in subscribing. *Schmidt v. Martoni Wireless Tel. Co.* (N. J.), 131. *Annotated*
- subscription to stock—liability on subscription as affected by failure to subscribe entire amount. *Heiskell v. Morris* (Tenn.), 1134. *Annotated*
- subscription to stock—right of promoters to subscribe. *Heiskell v. Morris* (Tenn.), 1134.
- See also Eminent Domain; Public Service Commissions; Public Service Corporations.**

CORRECTION.

See Judgments.

COSTS.

- Divorce—expenses of proceeding before commissioner as taxable costs. *Hiecke v. Hiecke* (Wis.), 497.
- See also Executors and Administrators.**

COUNSEL FEES.

See Executors and Administrators.

COUNTIES.

- Officers—control of discretion by injunction. *O'Rear v. Sartain* (Ala.), 593.

COURSE OF CONDUCT.

See Divorce.

COURSE OF EMPLOYMENT.

See Workmen's Compensation Acts.

COURTS.

- Actions—power of court to enjoin proceeding in another state. *American Express Co. v. Fox* (Tenn.), 1148. *Annotated*
- Constitutional law—wisdom of statute—judicial review. *State v. Senatobia Blank Book, etc. Co.* (Miss.), 953; *Masses Pub. Co. v. Patten* (U. S.), 999.
- Contempt—inherent power of court to punish. *In re Hayes* (Fla.), 936.
- newspaper publication as contempt. *In re Hayes* (Fla.), 936.
- Decisions—federal decision as binding state court. *Shaughnessy v. Northland Steamship Co.* (Wash.), 655.
- rules of decision—following other jurisdictions. *Northcut v. Church* (Tenn.), 545.
- Disbarment of attorney—jurisdiction of court of chancery. *In re Hahn* (N. J.), 830.
- Eminent domain—jurisdiction of proceeding to enforce award. *Brackett v. Commonwealth* (Mass.), 863.
- jurisdiction over commissioners to assess damages. *Brackett v. Commonwealth* (Mass.), 863.
- Judicial notice—insanity—judicial notice of inheritable nature of insanity. *James v. State* (Ala.), 119.
- mortality tables—judicial notice of mortality tables. *Froeming v. Stockton Electric R. Co.* (Cal.), 408. *Annotated*
- navigable waters—judicial notice of navigable character of stream. *Wear v. Kansas* (U. S.), 586.

COURTS — Continued.

- Judicial notice—public service corporations—judicial notice of charter of public service corporation. *Western Union Tel. Co. v. Burlington Traction Co.* (Vt.), 841.
 Public service commissions—judicial review of order of commission—power of court of equity. *Sayers v. Montpelier, etc. R. Co.* (Vt.), 1050.
 Stare decisis—power to overrule previous decision. *Brewer v. Browning* (Miss.), 1013.
 ——— propriety of overruling previous decision. *Brewer v. Browning* (Miss.), 1013.
 Trusts and trustees—removal of trustee—jurisdiction of court of chancery. *Maydwell v. Maydwell* (Tenn.), 1043.
 Wills—jurisdiction of city court over will contest. *Ravenscroft v. Stull* (Ill.), 1130.
 Workmen's compensation acts—construction of act—depriving court of jurisdiction. *Stertz v. Industrial Ins. Commission* (Wash.), 354.
See also Appeal and Error; Appearance; Executors and Administrators; Pleading; Removal of Causes; Trial; Trusts and Trustees.

COVENANTS.

See Building Restrictions; Master and Servant.

CREDIBILITY.

See Witnesses.

CREDITORS.

See Life Insurance.

CRIMINAL LAW.

- Argument of counsel—stating penalty for crime as proper argument. *State v. Tetrault* (N. H.), 425.
 Army and navy—pledge of public property by soldier—criminal liability of civilian receiving property. *Bolland v. United States* (U. S.), 520. *Annotated*
 Breach of the peace—violence not essential to breach of the peace. *State v. Reichman* (Tenn.), 889.
 ——— what constitutes breach of the peace. *State v. Reichman* (Tenn.), 889.
 Disorderly houses—saloon run in violation of law as disorderly house. *State v. Reichman* (Tenn.), 889.
 Embezzlement—evidence—embezzlement by executor—admissibility of evidence of revocation of letters. *People v. Gibson* (N. Y.), 509.
 ——— indictment—sufficiency of indictment for embezzlement by executor. *People v. Gibson* (N. Y.), 509.
 Homicide—evidence—admissibility of evidence as to insanity of relatives. *James v. State* (Ala.), 119. *Annotated*
 ——— evidence—admissibility of evidence as to mental condition of accused on prior occasion. *James v. State* (Ala.), 119.
 ——— evidence—admissibility of evidence of conduct and condition of accused associated with present drunkenness. *James v. State* (Ala.), 119.
 ——— evidence—admissibility of evidence of intoxication of accused. *James v. State* (Ala.), 119.
 ——— evidence—admissibility of opinion of witness as to insanity of accused. *James v. State* (Ala.), 119.
 ——— evidence—burden of proof as to insanity of accused. *James v. State* (Ala.), 119.
 ——— evidence—sufficiency of evidence to sustain verdict of guilty. *Chilton v. Commonwealth* (Ky.), 851.
 ——— indictment—reckless driving of automobile—sufficiency of indictment. *People v. Falkovitch* (Ill.), 1077.
 ——— insanity as defense—test of irresponsibility—knowledge of consequences. *James v. State* (Ala.), 119.
 ——— instructions—instructions as to insanity properly refused. *James v. State* (Ala.), 119.
 ——— instructions—propriety of instruction on self-defense. *Chilton v. Commonwealth* (Ky.), 851.
 ——— instructions—reckless driving of automobile—inaccurate instruction cured by other instruction. *People v. Falkovitch* (Ill.), 1077.
 ——— instructions—reckless driving of automobile—instruction not applicable to evidence—prejudicial effect. *People v. Falkovitch* (Ill.), 1077.
 Intoxicating liquors—breach of the peace—unlawful sale of intoxicants as breach of the peace. *State v. Reichman* (Tenn.), 889.
 ——— duty of officer to arrest for threatened violation of law. *State v. Reichman* (Tenn.), 889.
 ——— duty of sheriff with respect to unlawful sale of intoxicants. *State v. Reichman* (Tenn.), 889.
 ——— evidence—admissibility of evidence of sales by bartender. *People v. Elliott* (Ill.), 391.

CRIMINAL LAW — Continued.

Intoxicating liquors—evidence—sufficiency of evidence of illegal sale. *People v. Elliott* (Ill.), 391.

— instructions—certain instructions held to be applicable. *People v. Elliott* (Ill.), 391.

Rape—evidence—admissibility of evidence as to conduct of prosecutrix with others. *State v. Tetrault* (N. H.), 425.

— evidence—admissibility of evidence as to subsequent familiarities with prosecutrix. *State v. Tetrault* (N. H.), 425.

Reasonable doubt—necessity of proving defendant's guilt beyond reasonable doubt. *State v. Tetrault* (N. H.), 425.

Rights of accused—demand on accused for production of papers as violation of privilege. *People v. Gibson* (N. Y.), 509.

Sentence and punishment—cruel and unusual punishment—what constitutes. *People v. Elliott* (Ill.), 391. *Annotated*

— error in sentence—remand by appellate court for proper sentence. *People v. Elliott* (Ill.), 391.

— form of sentence—conviction on several counts. *People v. Elliott* (Ill.), 391.

— review of sentence on appeal. *People v. Elliott* (Ill.), 391.

Trial—proof of venue—sufficiency. *People v. Elliott* (Ill.), 391.

Unlawful assembly—what constitutes—audience at Sunday moving picture show. *People v. Dixon* (Mich.), 385. *Annotated*

See also Appeal and Error; Municipal Corporations; Sheriffs and Constables.

CROSS-EXAMINATION.

See Witnesses.

CROSSINGS.

See Railroads.

CRUEL PUNISHMENT.

See Sentence and Punishment.

CRUELTY.

See Divorce.

CUSTODY.

See Jury; Parent and Child.

DAMAGES.

Conditional sales—right of conditional vendee to recover damages for breach of warranty. *Peuser v. Marsh* (N. Y.), 913. *Annotated*

Eminent domain—cost of removing personalty from premises as element of compensation. *St. Louis v. St. Louis, etc. R. Co.* (Mo.), 881. *Annotated*

— estoppel to assert damage. *Brckett v. Commonwealth* (Mass.), 863.

— evidence of value—admissibility of certificate of incorporation. *Brckett v. Commonwealth* (Mass.), 863.

— evidence of value—admissibility of tax returns. *Brckett v. Commonwealth* (Mass.), 863.

— evidence of value—certain evidence held not admissible as admission. *Brckett v. Commonwealth* (Mass.), 863.

— injury not actionable at common law—award by state not precluded. *Brckett v. Commonwealth* (Mass.), 863.

— loss of profits of business as element of damage. *Brckett v. Commonwealth* (Mass.), 863. *Annotated*

Excessiveness—death by wrongful act—what is excessive verdict. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.

Exemplary damages—elements considered—wealth of defendant. *Dwyer v. Libert* (Ida.), 973.

— when pleading sufficient to warrant recovery of exemplary damages. *Dwyer v. Libert* (Ida.), 973.

Libel and slander—loss of election as element of damage. *Taylor v. Moseley* (Ky.), 1125.

— necessity of proving special damages in case of libel not actionable per se. *Taylor v. Moseley* (Ky.), 1125. *Annotated*

Minerals—extraction of ore by one tenant—measure of damages. *Silver King Coalition Mines Co. v. Silver King Consol. Min. Co.* (U. S.), 571. *Annotated*

DEATH.

See Accident Insurance.

DEATH BY WRONGFUL ACT.

Damages—excessiveness of damages. *Frooming v. Stockton Electric R. Co. (Cal.)*, 408.

DEBT LIMIT.

See Corporations; Municipal Corporations.

DEBTOR AND CREDITOR.

See Life Insurance.

DEBTS.

See All Debts.

DECISIONS.

See Courts.

DECLARATIONS.

See Admissions and Declarations.

DECREE.

See Injunctions; Judgments.

DEEDS.

Consideration—future support as valuable consideration. *Soper v. Cisco (N. J.)*, 452.

Mental capacity of grantor—test. *Soper v. Cisco (N. J.)*, 452.

Parent and child—conveyance by parent to child—presumption and burden of proof of undue influence. *Soper v. Cisco (N. J.)*, 452. *Annotated*

See also Rescission, Cancellation and Reformation.

DE FACTO OFFICERS.

See Public Officers.

DEFECTS.

See Streets and Highways.

DEFINITIONS.

See Statutes; Words and Phrases.

DEGREES.

See Negligence.

DE JURE OFFICERS.

See Public Officers.

DELAY.

See Fraud.

DELIRIUM TREMENS.

See Admissions and Declarations.

DEMURRER.

See Pleading.

DEPENDENTS.

See Workmen's Compensation Acts.

DEPOSITS.

See Banks.

DESCENT AND DISTRIBUTION.

Adopted child—what law governs inheritance by adopted child. *Brewer v. Browning (Miss.)*, 1013.

DILIGENCE.

See New Trial.

DIRECTION OF VERDICT.

See Verdict.

DISBARMENT.

See Attorneys.

DISCHARGE.

See Master and Servant.

DISCOUNT.

See Bills and Notes.

DISCRETION.

See County Officers; Trial; Veterans.

DISEASE.

- Workmen's compensation acts—disease as accident—fall of driver from hack. *Carroll v. What Cheer Stables Co. (R. I.), 346. Annotated*
- disease as accident—suicide from supervening insanity. *Withers v. London, etc. R. Co. (Eng.), 341. Annotated*
- disease as accident—typhoid from impure drinking water. *Vennen v. New Dells Lumber Co. (Wis.), 293. Annotated*

DISMISSAL.

See Appeal and Error.

DISOBEDIENCE.

See Workmen's Compensation Acts.

DISORDERLY HOUSES.Saloon run in violation of law as disorderly house. *State v. Reichman (Tenn.), 889.***DISQUALIFICATION.**

See Jury.

DIVORCE.

- Alimony—amount of allowance—allowance held proper. *Hiecke v. Hiecke (Wis.), 497.*
- Antenuptial agreements—provision contemplating divorce as affecting validity. *Stratton v. Wilson (Ky.), 917. Annotated*
- Continuance in divorce case—absence of party as ground. *Neven v. Neven (Nev.), 1083. Annotated*
- Costs—expenses of proceeding before commissioner. *Hiecke v. Hiecke (Wis.), 497.*
- Grounds for divorce—conduct of spouse as cruelty warranting divorce. *Hiecke v. Hiecke (Wis.), 497. Annotated*
- habits of spouse as cruelty warranting divorce. *Cunningham v. Cunningham (Mich.), 478. Annotated*
- Recrimination as defense—rule stated. *Hiecke v. Hiecke (Wis.), 497.*
- Remarriage after divorce—right to custody of child. *Cain v. Garner (Ky.), 824.*
- validity of marriage within proscribed time after divorce. *Peerless Pacific Co. v. Burckhard (Wash.), 247.*

DRINKING IMPURE WATER.

See Disease.

DRIVERS.

See Disease.

DRUNKENNESS.

See Homicide; Wills; Workmen's Compensation Acts.

DURESS.

See Payment.

EARNINGS.

See Average Weekly Earnings.

ELECTION.

See Equitable Election; Workmen's Compensation Acts.

ELECTION OF REMEDIES.

Attachment—right to dismiss attachment and proceed in equity. *Niehaus v. C. B. Barker Construction Co. (Tenn.)*, 23.

ELECTIONS.

Local option election—proof of result—record book as prima facie evidence. *People v. Elliott (Ill.)*, 391.

Result of election—ineligibility of candidate receiving majority vote—rights of minority candidate. *Woll v. Jensen (N. Dak.)*, 982.

See **Libel and Slander**.

ELECTRICITY.

Municipal corporations—power to compete with citizen—sale of fixtures in connection with operation of electric lighting plant. *Andrews v. South Haven (Mich.)*, 100. *Annotated*
Separation of electric wires—power of public service commission to order. *Western Union Tel. Co. v. Burlington Traction Co. (Vt.)*, 841. *Annotated*

EMBEZZLEMENT.

Evidence—embezzlement by executor—admissibility of evidence of revocation of letters. *People v. Gibson (N. Y.)*, 509.

Indictment—sufficiency of indictment for embezzlement by executor. *People v. Gibson (N. Y.)*, 509.

EMINENT DOMAIN.

Commissioners to assess damages,—jurisdiction over commissioners. *Brackett v. Commonwealth (Mass.)*, 863.

Commissioners to assess damages—status as federal officers. *Brackett v. Commonwealth (Mass.)*, 863.

Compensation—cost of removing personalty from premises as element of compensation. *St. Louis v. St. Louis, etc. R. Co. (Mo.)*, 881. *Annotated*

—estoppel to assert damage. *Brackett v. Commonwealth (Mass.)*, 863.

—evidence of value—admissibility of certificate of incorporation. *Brackett v. Commonwealth (Mass.)*, 863.

—evidence of value—admissibility of tax returns. *Brackett v. Commonwealth (Mass.)*, 863.

—evidence of value—certain evidence held not admissible as admission. *Brackett v. Commonwealth (Mass.)*, 863.

—injury not actionable at common law—award by state not precluded. *Brackett v. Commonwealth (Mass.)*, 863.

—loss of profits of business as element of damages. *Brackett v. Commonwealth (Mass.)*, 863. *Annotated*

Procedure—effect of admission of incompetent evidence. *Brackett v. Commonwealth (Mass.)*, 863.

—form of award—separate statement of items. *Brackett v. Commonwealth (Mass.)*, 863.

—jurisdiction of proceeding to enforce award. *Brackett v. Commonwealth (Mass.)*, 863.

—report of commissioners—to what court made. *Brackett v. Commonwealth (Mass.)*, 863.

—review of decision of commissioners. *Brackett v. Commonwealth (Mass.)*, 863.

EMPLOYEES.

See **Workmen's Compensation Acts**.

EMPLOYERS' LIABILITY ACTS.

Federal employers' liability act—act as exclusive of state regulation. *Erie R. Co. v. Winfield (U. S.)*, 662.

—employees within act—employee clearing wreckage from track. *Southern R. Co. v. Puckett (U. S.)*, 69. *Annotated*

—employees within act—engineer of switch engine. *Erie R. Co. v. Winfield (U. S.)*, 662.

—employees within act—machinist in roundhouse. *Minneapolis, etc. R. Co. v. Winters (U. S.)*, 54. *Annotated*

—employees within act—necessity for existence of relation of master and servant. *Chesapeake, etc. R. Co. v. Harmon's Administrator (Ky.)*, 41. *Annotated*

—judgment denying recovery as precluding remedy under state law. *Chesapeake, etc. R. Co. v. Harmon's Administrator (Ky.)*, 41.

—removal of cause from state to federal court. *Southern R. Co. v. Puckett (U. S.)*, 69.

—review—applicability of act—saving question for review. *Minneapolis, etc. R. Co. v. Winters (U. S.)*, 54.

EMPLOYERS' LIABILITY ACTS—Continued.

Federal employers' liability act—review—decision on appeal—determining rights at common law. *Chesapeake, etc. R. Co. v. Harmon's Administrator* (Ky.), 41.
 — review—review by federal court of state decision. *Southern R. Co. v. Puckett* (U. S.), 69.

EMPLOYMENT.

See Workmen's Compensation Acts.

ENFORCEMENT OF LAWS.

See Public Officers; States.

EQUITABLE CONVERSION.

Reconversion—how accomplished. *Chambers v. Preston* (Tenn.), 428.
 Testamentary direction for future sale as operating to convert realty into personalty. *Chambers v. Preston* (Tenn.), 428.

EQUITABLE ELECTION.

Election by widow to take under will as affecting right to intestate property. *Compton v. Akers* (Kan.), 983. *Annotated*

EQUITY.

See Courts.

ESPIONAGE.

See War.

ESTATES.

See Wills.

ESTOPPEL.

Adjoining landowners—hedge fence—invoking doctrine of estoppel to establish ownership. *Wideman v. Faivre* (Kan.), 1168.
 Eminent domain—estoppel to assert damage. *Brackett v. Commonwealth* (Mass.), 863.

EVIDENCE.

Admissions and declarations—carriers of passengers—injury to passenger—admissibility of declaration of employee of carrier. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
 — conspiracy—declarations of coconspirators—proof of conspiracy as prerequisites to admission. *Hitchman Coal, etc. Co. v. Mitchell* (U. S.), 461.
 — eminent domain—certain evidence held not admissible as admission of value of property taken. *Brackett v. Commonwealth* (Mass.), 863.
 — workmen's compensation acts—admissibility of declaration of employee while suffering from delirium tremens. *Carroll v. Knickerbocker Ice Co.* (N. Y.), 540.
 — workmen's compensation acts—admissibility of employee as to cause of injury. *Carroll v. Knickerbocker Ice Co.* (N. Y.), 540.
 Age—testimony as to age of another—admissibility. *State v. Tetrault* (N. H.), 425.
 — testimony as to person's own age—admissibility. *State v. Tetrault* (N. H.), 425. *Annotated*
 Best and secondary evidence—proof of title to real estate. *Littlefield v. Bowen* (Wash.), 177.
 Burden of proof—accident insurance—burden of proving that death did not result from suicide. *Aetna Life Ins. Co. v. Taylor* (Ark.), 1122.
 — contributory negligence—sufficiency of instruction as to burden of proving contributory negligence. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
 — fiduciary relation—burden of proving fairness of transaction. *Dawson v. National Life Ins. Co.* (Iowa), 230.
 — gifts—conveyance by parent to child—burden of proof of undue influence. *Soper v. Cisco* (N. J.), 452. *Annotated*
 — insanity—burden of proof as to insanity. *James v. State* (Ala.), 119.
 — wills—undue influence—propriety of instruction as to burden of proof. *Ravenscroft v. Stull* (Ill.), 1130.
 — workmen's compensation acts—burden of proving that claimant is casual employee. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
 Embezzlement—embezzlement by executor—admissibility of evidence of revocation of letters. *People v. Gibson* (N. Y.), 509.
 Eminent domain—effect of admission of incompetent evidence. *Brackett v. Commonwealth* (Mass.), 863.
 — evidence of value—admissibility of certificate of incorporation. *Brackett v. Commonwealth* (Mass.), 863.

EVIDENCE — Continued.

- Eminent domain**—evidence of value—admissibility of tax returns. *Brackett v. Commonwealth* (Mass.), 863.
- Expert and opinion evidence**—homicide—admissibility of opinion of witness as to insanity of accused. *James v. State* (Ala.), 119.
- wills—admissibility of opinion evidence as to testamentary capacity. *Ravenscroft v. Stull* (Ill.), 1130.
- Guardian ad litem**—admissibility in evidence of order appointing guardian ad litem. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
- Hearsay evidence**—inadmissibility generally. *Carroll v. Knickerbocker Ice Co.* (N. Y.), 540.
- Homicide**—admissibility of evidence as to insanity of relatives. *James v. State* (Ala.), 119.
- admissibility of evidence as to mental condition of accused on prior occasion. *James v. State* (Ala.), 119.
- admissibility of evidence of conduct and condition of accused associated with present drunkenness. *James v. State* (Ala.), 119.
- admissibility of evidence of intoxication of accused. *James v. State* (Ala.), 119.
- Identity**—right of witness to identify person by pointing him out. *People v. Elliott* (Ill.), 391.
- Intoxicating liquors**—criminal prosecution—admissibility of evidence of sales by bartender. *People v. Elliott* (Ill.), 391.
- local option election—proof of result—record book as prima facie evidence. *People v. Elliott* (Ill.), 391.
- Judicial notice**—insanity—judicial notice of inheritable nature of insanity. *James v. State* (Ala.), 119.
- mortality tables—judicial notice of mortality tables. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
- navigable waters—judicial notice of navigable character of stream. *Wear v. Kansas* (U. S.), 586.
- public service corporations—judicial notice of charter of public service corporation. *Western Union Tel. Co. v. Burlington Traction Co.* (Vt.), 841.
- Libel and slander**—admissibility of proof of other publications. *Anderson v. Shockley* (Mo.), 500.
- Master and servant**—action by discharged employee for salary—admissibility in evidence of written contract of employment for previous term. *Conrad v. Ellison-Harvey Co.* (Va.), 1171.
- workmen's compensation act—admissibility in evidence of verdict of coroner's jury. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- workmen's compensation act—sufficiency of evidence of dependency. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- Presumptions**—carriers of passengers—presumption of negligence from injury caused by operation of street car. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
- gifts—conveyance by parent to child—presumption of undue influence. *Soper v. Cisco* (N. J.), 462.
- public service commissions—presumption in favor of order of commission. *Mississippi R. Com. v. Mobile, etc. R. Co.* (Miss.), 828.
- statutes—presumption in favor of validity of statute. *Victor Chemical Works v. Industrial Board* (Ill.), 627; *New Orleans v. Toca* (La.), 1032.
- witnesses—presumption from failure to call attorney as witness. *Ravenscroft v. Stull* (Ill.), 1130.
- Rape**—admissibility of evidence as to conduct of prosecutrix with others. *State v. Tetrault* (N. H.), 425.
- admissibility of evidence as to subsequent familiarities with prosecutrix. *State v. Tetrault* (N. H.), 425.
- Secondary evidence**—necessity of demand for document from accused before introduction of secondary evidence. *People v. Gibson* (N. Y.), 509.
- Telegraphs and telephones**—overhanging trees on railroad right of way—cutting by telegraph company—admissibility of evidence of contract with railroad. *Cobb v. Western Union Telegraph Co.* (Vt.), 1156.
- Weight and sufficiency**—automobiles—injury in operation—person in charge of car as dealer—sufficiency of evidence to establish. *Koonovsky v. Quellette* (Mass.), 1146.
- bills and notes—sufficiency of evidence of good faith in taking promissory note. *First National Bank v. Stover* (N. Mex.), 145.
- brokers—refusal by principal to convey—sufficiency of evidence of refusal. *Littlefield v. Bowen* (Wash.), 177.
- carriers of passengers—injury to passengers—sufficiency of evidence to sustain recovery against carrier. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
- duty of court or jury in determining facts from conflicting testimony. *Wideman v. Faivre* (Kan.), 1168.
- homicide—sufficiency of evidence to sustain verdict of guilty. *Chilton v. Commonwealth* (Ky.), 851.

EVIDENCE — Continued.

- Weight and sufficiency—intoxicating liquors—criminal prosecution—sufficiency of evidence of illegal sale. *People v. Elliott* (Ill.), 391.
- positive and negative testimony—propriety of instruction as to weight. *Babb v. State* (Ariz.), 925.
- reasonable doubt—criminal case—necessity of proving defendant's guilt beyond reasonable doubt. *State v. Tetrault* (N. H.), 425.
- scintilla of evidence—what constitutes. *Holstein v. Benedict* (Hawaii), 941.
- seed—warranty of correspondence to name or variety—sufficiency of evidence of breach. *Buckbee v. P. Hohenadel, Jr. Co.* (U. S.), 88. *Annotated*
- seed—warranty of germinating power—sufficiency of evidence of breach. *Meehan v. Ingalls* (Wash.), 71. *Annotated*
- uncontradicted testimony—weight. *Schmidt v. Marconi Wireless Tel. Co.* (N. J.), 131.
- venue—sufficiency of proof of venue in criminal trial. *People v. Elliott* (Ill.), 391.
- workmen's compensation acts—sufficiency of evidence of dependency. *Victor Chemical Works v. Industrial Board* (Ill.), 627. *Annotated*
- Wills—testamentary capacity—admissibility of evidence as to general business capacity of testator. *Ravenscroft v. Stull* (Ill.), 1130.
- testamentary capacity—admissibility of evidence as to use of intoxicants by testator. *Ravenscroft v. Stull* (Ill.), 1130.
- testamentary capacity—admissibility of remote statements of testator. *Ravenscroft v. Stull* (Ill.), 1130.
- testamentary capacity—evidence admissible generally as to capacity. *Ravenscroft v. Stull* (Ill.), 1130.
- See also **Appeal and Error; New Trial; Trial; Variance; Witnesses; Workmen's Compensation Acts.**

EXCEPTIONS.

See **Municipal Corporations.**

EXCHANGE OF PROPERTY.

See **Contracts.**

EXECUTORS AND ADMINISTRATORS.

- Compensation of administrator—amount of allowance. *Stratton v. Wilson* (Ky.), 917.
- Contest of will—right of administrator of heir to contest. *Braemel v. Reuther* (Mo.), 533. *Annotated*
- Counsel fees of administrator—discretion of court. *Stratton v. Wilson* (Ky.), 917.
- Public administrator—priority of right to appointment. *Brinckwirth's Estate v. Troll* (Mo.), 1056. *Annotated*
- revocation of letters. *Brinckwirth's Estate v. Troll* (Mo.), 1056. *Annotated*
- Widow—allowance to widow for housekeeping expenses and court costs—discretion of court. *Stratton v. Wilson* (Ky.), 917.
- occupation of homestead—right of widow. *Stratton v. Wilson* (Ky.), 917.
- See also **Actions; Embezzlement.**

EXEMPLARY DAMAGES.

See **Damages.**

EXEMPTIONS.

- "Child" in exemption statute as including legitimate child. *Peerless Pacific Co. v. Burckhard* (Wash.), 247. *Annotated*
- Insurance money—proceeds of fire insurance policy—policy on property not exempt at time of fire. *Peerless Pacific Co. v. Burckhard* (Wash.), 247.
- See also **Taxation.**

EXTENSION OF TIME.

See **Bills and Notes.**

FAIRNESS OF TRANSACTION.

See **Fraud.**

FAMILY.

See **Implied Contracts.**

FEDERAL COURTS.

See **Appeal and Error; Courts; Parties to Actions; Removal of Causes.**

FEDERAL EMPLOYERS' LIABILITY ACT.See *Employers' Liability Acts*.**FEDERAL OFFICERS.**See *Public Officers*.**FENCES.**Hedge fence—invoking doctrine of estoppel to establish ownership. *Wideman v. Faivre* (Kan.), 1168.**FIDUCIARY RELATION.**See *Fraud*.**FINDINGS.**See *Appeal and Error*; *Public Service Commissions*; *Res Judicata*.**FIRE INSURANCE.**Agents—liability of agent to owner of property for failure to procure insurance. *Rezac v. Zima* (Kan.), 1035. *Annotated*Exemptions—proceeds of fire insurance policy—policy on property not exempt at time of fire. *Peerless Pacific Co. v. Burekhard* (Wash.), 247.**FIXTURES.**See *Electricity*.**FOOD AND DRUGS.**Foreign substance in animal food—liability of seller. *Newell v. Reid* (Mich.), 224.Regulation—legislative power to regulate sale of food. *New Orleans v. Toca* (La.), 1032. *Annotated*— validity of ordinance regulating sale of ice cream. *New Orleans v. Toca* (La.), 1032.**FORECLOSURE.**See *Mechanics' Liens*.**FOREIGN ACTIONS.**See *Actions*.**FOREIGN SUBSTANCE.**See *Food and Drugs*.**FRAUD.**Corporations—subscription to stock—fraud on subscriber—waiver by delay. *Heiskell v. Morris* (Tenn.), 1134.Fiduciary relation—burden of proving fairness of transaction. *Dawson v. National Life Ins. Co.* (Iowa), 230.— purchase of stock by director as affected by fiduciary relation to stockholder. *Dawson v. National Life Ins. Co.* (Iowa), 230. *Annotated*— what constitutes. *Dawson v. National Life Ins. Co.* (Iowa), 230.**FRAUDS, STATUTE OF.**Master and servant—written contract for one year's service—continuance from year to year thereafter as within statute of frauds. *Conrad v. Ellison-Harvey Co.* (Va.), 1171.Memorandum—sufficiency of printed signature. *Berryman v. Childs* (Neb.), 1029. *Annotated***FUTURE SUPPORT.**See *Contracts*; *Deeds*.**GERMINATING POWER.**See *Seed*.**GIFTS.**Husband and wife—money given by husband to wife—right to retain money after death of husband. *Stratton v. Wilson* (Ky.), 917.Parent and child—conveyance by parent to child—presumption and burden of proof of undue influence. *Soper v. Cisco* (N. J.), 452. *Annotated*Right to make gift—note payable to donor's estate as subject to his disposition. *Poole v. Poole* (Kan.), 929.

GOOD FAITH.

See Bills and Notes.

GRADE CROSSINGS.

See Railroads.

GRATUITOUS UNDERTAKING.

See Negligence.

GUARANTY.

Warranty—distinction between warranty and guaranty. *Pacific Power, etc. Co. v. White* (Wash.), 125.

GUARDIANS.

Guardian ad litem—admissibility in evidence of order appointing guardian ad litem. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.

—sufficiency of allegation of appointment of guardian ad litem. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.

Injury to infant—defenses—release by guardian. *Stetz v. F. Mayer Bros, etc. Co.* (Wis.), 675.

GUESTS.

See Automobiles.

HABITS.

See Divorce.

HACKS.

See Disease.

HARMLESS ERROR.

See Appeal and Error.

HEARSAY EVIDENCE.

See Evidence.

HEDGE FENCE.

See Fences.

HEIRS.

See Wills.

HOLIDAYS.

See Sundays and Holidays.

HOLOGRAPHIC WILLS.

See Wills.

HOMESTEAD.

See Executors and Administrators.

HOMICIDE.

Defenses—insanity as defense—test of irresponsibility—knowledge of consequences. *James v. State* (Ala.), 119.

Evidence—admissibility of evidence as to insanity of relatives. *James v. State* (Ala.), 119.

—admissibility of evidence as to mental condition of accused on prior occasion. *James v. State* (Ala.), 119. *Annotated*

—admissibility of evidence of conduct and condition of accused associated with present drunkenness. *James v. State* (Ala.), 119.

—admissibility of evidence of intoxication of accused. *James v. State* (Ala.), 119.

—admissibility of opinion of witness as to insanity of accused. *James v. State* (Ala.), 119.

—burden of proof as to insanity. *James v. State* (Ala.), 119.

—sufficiency of evidence to sustain verdict of guilty. *Chilton v. Commonwealth* (Ky.), 851.

Indictment—reckless driving of automobile—sufficiency of indictment. *People v. Falkovitch* (Ill.), 1077.

HOMICIDE — Continued.

- Instructions—insanity—propriety of instruction as to insanity. *James v. State (Ala.)*, 119.
 ——— reckless driving of automobile—inaccurate instruction cured by other instructions. *People v. Falkovitch (Ill.)*, 1077.
 ——— reckless driving of automobile—instruction not applicable to evidence—prejudicial effect. *People v. Falkovitch (Ill.)*, 1077.
 ——— self-defense—propriety of instruction as to self-defense. *Chilton v. Commonwealth (Ky.)*, 851.

HOUSEKEEPING EXPENSES.

See Executors and Administrators.

HUSBAND AND WIFE.

- Antenuptial agreements—concealment of facts as affecting validity. *Stratton v. Wilson (Ky.)*, 917.
 ——— contract favored in law. *Stratton v. Wilson (Ky.)*, 917.
 ——— effect of partial invalidity. *Stratton v. Wilson (Ky.)*, 917. *Annotated*
 ——— validity of provision contemplating divorce. *Stratton v. Wilson (Ky.)*, 917.
 Automobiles—negligence of husband operating automobile not imputed to wife. *Virginia R. etc. Co. v. Gorsuch (Va.)*, 838.
 Gifts—money given by husband to wife—right to retain money after death of husband. *Stratton v. Wilson (Ky.)*, 917.
 Personal property—power of husband to dispose of personalty during coverture. *Poole v. Poole (Kan.)*, 929. *Annotated*
 See also Divorce.

ICE CREAM.

See Food and Drugs.

IDENTITY.

- Evidence of identity—right of witness to identify person by pointing him out. *People v. Elliott (Ill.)*, 391.

ILLEGAL CONTRACTS.

- Antenuptial agreements—concealment of facts as affecting validity. *Stratton v. Wilson (Ky.)*, 917.
 ——— contract favored in law. *Stratton v. Wilson (Ky.)*, 917.
 ——— effect of partial invalidity. *Stratton v. Wilson (Ky.)*, 917. *Annotated*
 ——— validity of provision contemplating divorce. *Stratton v. Wilson (Ky.)*, 917.
 Intoxicating liquors—sale of liquor with knowledge of purpose to resell illegally—validity of contract. *Paul Jones & Co. v. Wilkins (Tenn.)*, 977. *Annotated*
 Liberty of contract as absolute right. *Pittsburgh, etc. R. Co. v. Kinney (Ohio)*, 286.
 Master and servant—validity of contract limiting liability of master. *Pittsburgh, etc. R. Co. v. Kinney (Ohio)*, 286.
 Public policy as affecting validity of contract. *Pittsburgh, etc. R. Co. v. Kinney (Ohio)*, 286.
 States—validity of contract exceeding appropriation. *Fergus v. Brady (Ill.)*, 220.
 See also Building Restrictions; Marriage; Parent and Child.

ILLEGITIMACY.

- “Child” as including legitimate child. *Peerless Pacific Co. v. Burckhard (Wash.)*, 247.

ILL FEELING.

See Trusts and Trustees.

IMPEACHMENT.

See Witnesses.

IMPLIED CONTRACTS.

- Services by member of family—right of recovery. *Holstein v. Benedict (Hawaii)*, 941.

IMPURE WATER.

See Disease.

IMPUTED NEGLIGENCE.

See Negligence.

INDICTMENT.

See Embezzlement; Homicide.

INDUSTRIAL INSURANCE.

Insurable interest—necessity that beneficiary have insurable interest. *Metropolitan Life Ins. Co. v. Nelson* (Ky.), 1182. *Annotated*

INFANTS.

"Child" as including illegitimate child. *Peerless Pacific Co. v. Burekhard* (Wash.), 247. *Annotated*

Contracts—enforcement of infant's contract for services. *Cain v. Garner* (Ky.), 824.

—right of infant to avoid contract for personal services. *Cain v. Garner* (Ky.), 824.

Injuries to infant—defenses—misrepresentation as to age. *Stetz v. F. Mayer Boot, etc. Co.* (Wis.), 675.

—defenses—release by guardian. *Stetz v. F. Mayer, etc. Co.* (Wis.), 675.

—trespassing infant—basis of doctrine of liability to trespassing infant. *Fusselman v. Yellowstone Valley Land, etc. Co.* (Mont.), 420.

—trespassing infant—liability of owner of premises for drowning of child in canal. *Fusselman v. Yellowstone Valley Land, etc. Co.* (Mont.), 420.

—trespassing infant—turntable doctrine—sufficiency of complaint. *Fusselman v. Yellowstone Valley Land, etc. Co.* (Mont.), 420.

—workmen's compensation act—minor illegally employed as entitled to compensation under workmen's compensation act. *Stetz v. F. Mayer Boot, etc. Co.* (Wis.), 675. *Annotated*

See also Adoption; Parent and Child.

INJUNCTIONS.

Actions—power of court to enjoin proceeding in another state. *American Express Co. v. Fox* (Tenn.), 1148. *Annotated*

Apprehension of injury as ground for issuance of injunction. *O'Rear v. Sartain* (Ala.), 593.

Decree—form of decree—effect of enjoining defendant in individual capacity only. *Hitchman Coal, etc. Co. v. Mitchell* (U. S.), 461.

—form of decree—improper inclusion of persons in injunction—right of others to object. *Hitchman Coal, etc. Co. v. Mitchell* (U. S.), 461.

Labor combinations—injunction against officer—possibility of injury to complainant as affecting right to injunction. *Hitchman Coal, etc. Co. v. Mitchell* (U. S.), 461.

—injunction against officer—right to injunction to prevent unionizing of employees. *Hitchman Coal, etc. Co. v. Mitchell* (U. S.), 461.

Licenses—failure to pay license fee—injunction as proper remedy to prevent licensee from carrying on business. *Postal Telegraph-Cable Co. v. Montgomery* (Ala.), 554.

Municipal corporations—sale of fixtures in connection with operation of public utility—right of citizen to injunction. *Andrews v. South Haven* (Mich.), 100. *Annotated*

Parties—successor of official—necessity of service of process on successor. *Hitchman Coal, etc. Co. v. Mitchell* (U. S.), 461.

Public officers—control of discretion of county officers by injunction. *O'Rear v. Sartain* (Ala.), 593.

—unauthorized payment—right of taxpayer to restrain. *Fergus v. Brady* (Ill.), 220.

Public service commissions—injunction as remedy to review order. *Mississippi R. Com. v. Mobile, etc. R. Co.* (Miss.), 828.

INJURY.

Workmen's compensation acts—what constitutes "injury" within meaning of act. *Stertz v. Industrial Ins. Commission* (Wash.), 354. *Annotated*

See also Injunctions; Workmen's Compensation Acts.

INSANITY.

Deeds—mental capacity of grantor. *Soper v. Cisco* (N. J.), 452.

Judicial notice of inheritable nature of insanity. *James v. State* (Ala.), 119.

Homicide—insanity as defense—admissibility of evidence as to condition of accused on prior occasion. *James v. State* (Ala.), 119.

—insanity as defense—admissibility of evidence as to insanity of relatives. *James v. State* (Ala.), 119. *Annotated*

—insanity as defense—admissibility of evidence of conduct and condition of accused associated with present drunkenness. *James v. State* (Ala.), 119.

—insanity as defense—admissibility of opinion of witness as to insanity of accused. *James v. State* (Ala.), 119.

—insanity as defense—burden of proof as to insanity. *James v. State* (Ala.), 119.

—insanity as defense—instructions properly refused. *James v. State* (Ala.), 119.

—insanity as defense—test of irresponsibility—knowledge of consequences. *James v. State* (Ala.), 119.

Witnesses—mental capacity of witness as question of law and fact. *State v. Tetrault* (N. H.), 425.

See also Disease.

INSTRUCTIONS.

See Appeal and Error; Argument of Counsel; Carriers of Passengers; Homicide; Insanity; Intoxicating Liquors; Negligence; Wills; Witnesses.

INSURABLE INTEREST.

See Industrial Insurance; Life Insurance.

INSURANCE.

Accident insurance—burden of proving that death did not result from suicide. *Aetna Life Ins. Co. v. Taylor* (Ark.), 1122.

Automobile insurance—loss—contract for settlement—effect. *Gaffey v. St. Paul Fire, etc. Ins. Co.* (N. Y.), 1041.

Benefit insurance—receipt of benefit from beneficial association as affecting right to compensation under workmen's compensation act. *State v. District Court* (Minn.), 635.

Fire insurance—exemptions—proceeds of fire insurance policy—property not exempt at time of fire. *Peerless Pacific Co. v. Burekhard* (Wash.), 247.

— liability of agent to owner of property for failure to procure insurance. *Rezac v. Zima* (Kan.), 1035. *Annotated*

Industrial insurance—insurable interest—necessity that beneficiary have insurable interest. *Metropolitan Life Ins. Co. v. Nelson* (Ky.), 1182. *Annotated*

Life insurance—insurable interest—insurable interest of creditor. *Metropolitan Life Ins. Co. v. Nelson* (Ky.), 1182.

— insurable interest—necessity that beneficiary have insurable interest. *Metropolitan Life Ins. Co. v. Nelson* (Ky.), 1182.

— insurable interest—rights of assignee not having insurable interest. *Metropolitan Life Ins. Co. v. Nelson* (Ky.), 1182.

INTENT.

See Statutes; Wills.

INTEREST.

Compounding of interest—accounting by trustee. *Silver King Coalition Mines Co. v. Silver King Consol. Min. Co.* (U. S.), 571.

See also Municipal Corporations.

INTEREST IN PROPERTY.

See Wills.

INTERSTATE COMMERCE.

See Employers' Liability Acts; Workmen's Compensation Acts.

INTESTATE PROPERTY.

See Wills.

INTOXICATING LIQUORS.

Abatement of liquor nuisance—exclusiveness of remedy. *State v. Reichman* (Tenn.), 889.

Arrest for threatened violation of law—duty of officer. *State v. Reichman* (Tenn.), 889.

Breach of the peace—unlawful sale of intoxicants as breach of the peace. *State v. Reichman* (Tenn.), 889.

Contract to sell liquor—effect of knowledge of purpose to resell illegally. *Paul Jones & Co. v. Wilkins* (Tenn.), 977. *Annotated*

Criminal prosecution—admissibility of evidence as to sales by bartender. *People v. Elliott* (Ill.), 391.

— certain instructions held to be applicable. *People v. Elliott* (Ill.), 391.

— sufficiency of evidence of illegal sale. *People v. Elliott* (Ill.), 391.

— what constitutes cruel and unusual punishment. *People v. Elliott* (Ill.), 391. *Annotated*

Disorderly houses—saloon run in violation of law as disorderly house. *State v. Reichman* (Tenn.), 889.

Local option election—proof of result—record book as prima facie evidence. *People v. Elliott* (Ill.), 391.

Sheriffs—duty of sheriff with respect to unlawful sale of intoxicants. *State v. Reichman* (Tenn.), 889.

Statutory regulation—validity of ordinance regulating transportation. *Kansas City v. Jordan* (Kan.), 273.

INTOXICATION.

See Homicide; Wills; Workmen's Compensation Acts.

INVITATION.**See Owner of Premises.****INVOLUNTARY MANSLAUGHTER.****See Homicide.****IRRESPONSIBILITY.****See Insanity.****JOINDER OF ACTIONS.****See Actions.****JUDGES.****See Trial.****JUDGMENTS.**

Correction of judgments—premature entry by clerk. *Shaughnessy v. Northland Steamship Co.* (Wash.), 655.

Res judicata—federal employers' liability act—judgment denying recovery as precluding remedy under state law. *Chesapeake, etc. R. Co. v. Harmon's Administrator* (Ky.), 41.

— finding of facts—effect of future developments. *People v. Detroit, etc. Ferry Co.* (Mich.), 170.

— mechanics' liens—foreclosure decree as binding adjudication. *Cain v. Parfitt* (Utah), 28.

See also Injunctions.**JUDICIAL CONTROVERSY.****See Workmen's Compensation Acts.****JUDICIAL NOTICE.**

Insanity—judicial notice of inheritable nature of insanity. *James v. State* (Ala.), 119.

Mortality tables—judicial notice of mortality tables. *Froeming v. Stockton Electric R. Co.* (Cal.), 408. *Annotated*

Navigable waters—judicial notice of navigable character of stream. *Wear v. Kansas* (U.S.), 586.

Public service corporations—judicial notice of charter of public service corporation. *Western Union Tel. Co. v. Burlington Traction Co.* (Vt.), 841.

JURISDICTION.**See Courts.****JURY.**

Custody and conduct of jury—jury not to be subjected to outside influence. *Chilton v. Commonwealth* (Ky.), 851.

— reading of newspapers by jury as ground for new trial. *Babb v. State* (Ariz.), 925.

— taking jury to revival meeting as ground for new trial. *Chilton v. Commonwealth* (Ky.), 851. *Annotated*

Qualifications of jurors—disqualification of juror as ground for new trial. *Chilton v. Commonwealth* (Ky.), 851.

See also Appeal and Error; Coroners.**KINDRED.****See Insanity.****KNOWLEDGE OF CONSEQUENCES.****See Insanity.****LABOR COMBINATIONS.**

Injunction against officer—possibility of injury to complainant as affecting right to injunction. *Hitchman Coal, etc. Co. v. Mitchell* (U. S.), 461.

— right to injunction to prevent unionizing of employees. *Hitchman Coal, etc. Co. v. Mitchell* (U. S.), 461.

Libel and slander—charge that name of employer is on "unfair list" as libelous. *Axton Fisher Tobacco Co. v. Evening Post Co.* (Ky.), 560. *Annotated*

Nonmembership in union as condition of employment—right of employer to impose condition. *Hitchman Coal, etc. Co. v. Mitchell* (U. S.), 461.

LACHES.

Proof obscured by delay—denial of relief proper. *Soper v. Cisco* (N. J.), 452.

LEADING QUESTIONS.

See Witnesses.

LEGISLATURE.

Contempt—power of Congress to punish—nature and extent of power. *Marshall v. Gordon* (U. S.), 371. *Annotated*

LEGITIMACY.

See Illegitimacy.

LETTERS.

See Executors and Administrators.

"LIABILITIES."

Meaning of "liabilities." *Pacific Power, etc. Co. v. White* (Wash.), 125.

LIBEL AND SLANDER.

Actionable words—attributing certain statement to candidate for office as actionable per se. *Taylor v. Moseley* (Ky.), 1125.

— charge of unfair treatment of labor as libelous. *Axton Fisher Tobacco Co. v. Evening Post Co.* (Ky.), 560.

— charge that name of employer is on "unfair list" as libelous. *Axton Fisher Tobacco Co. v. Evening Post Co.* (Ky.), 560. *Annotated*

— distinction between libel and slander. *Dwyer v. Libert* (Ida.), 973.

— effect of inaccurate designation of person in libel. *Axton Fisher Tobacco Co. v. Evening Post Co.* (Ky.), 560.

— what constitutes libel or slander of corporation. *Axton Fisher Tobacco Co. v. Evening Post Co.* (Ky.), 560.

— when words are libelous per se. *Axton Fisher Tobacco Co. v. Evening Post Co.* (Ky.), 560.

— written communication held to be actionable per se. *Dwyer v. Libert* (Ida.), 973.

Damages—loss of election as element of damage. *Taylor v. Moseley* (Ky.), 1125. *Annotated*

— necessity of proving special damages in case of libel not actionable per se. *Taylor v. Moseley* (Ky.), 1125.

Evidence—admissibility of proof of other publications. *Anderson v. Shockley* (Mo.), 500.

Pleading—necessity of alleging special damage. *Axton Fisher Tobacco Co. v. Evening Post Co.* (Ky.), 560.

— sufficiency of complaint with respect to averments of time and place of slander. *Anderson v. Shockley* (Mo.), 500. *Annotated*

— suit on several publications—necessity of pleading each publication separately. *Anderson v. Shockley* (Mo.), 500.

— variance between complaint and proof. *Anderson v. Shockley* (Mo.), 500.

Privileged communications—complaint against public officer. *Dwyer v. Libert* (Ida.), 973.

LIBERTY OF CONTRACT.

See Contracts.

LIBERTY OF SPEECH AND OF PRESS.

Construction of constitutional provision. *In re Hayes* (Fla.), 936.

LICENSES.

Failure to pay license fee—injunction as proper remedy to prevent licensee from carrying on business. *Postal Telegraph-Cable Co. v. Montgomery* (Ala.), 554.

Payment to secure license—right to recover back. *Baldwin v. Chesaning* (Mich.), 512.

Annotated

LIENS.

See Mechanics' Liens.

LIFE INSURANCE.

Industrial insurance—insurable interest—necessity that beneficiary have insurable interest. *Metropolitan Life Ins. Co. v. Nelson* (Ky.), 1182. *Annotated*

Insurable interest—insurable interest of creditor. *Metropolitan Life Ins. Co. v. Nelson* (Ky.), 1182.

Ann. Cas. 1918B.—78.

LIFE INSURANCE — Continued.

Insurable interest—necessity that beneficiary have insurable interest. *Metropolitan Life Ins. Co. v. Nelson* (Ky.), 1182.

—— rights of assignee not having insurable interest. *Metropolitan Life Ins. Co. v. Nelson* (Ky.), 1182.

LIMITATION OF ACTIONS.

Mechanics' liens—foreclosure—amendment of bill as affecting plea of limitations. *Niehans v. C. B. Barker Construction Co.* (Tenn.), 23.

Retroactive operation of statute of limitations. *State v. General Accident, etc. Assur. Corp.* (Minn.), 615.

LIMITATION OF LIABILITY.

See *Master and Servant*.

LOAN BROKERS.

See *Brokers*.

LOCAL OPTION.

Election—proof of result—record book as prima facie evidence. *People v. Elliott* (Ill.), 391.

LOSS OF ELECTION.

See *Libel and Slander*.

LOSS OF PROFITS.

See *Eminent Domain*.

LUMP SUM AWARD.

See *Workmen's Compensation Acts*.

MACHINISTS.

See *Employers' Liability Acts*.

MAJORITY VOTE.

See *Elections*.

MANDAMUS.

Veterans—right to appointment to office—enforcement by mandamus. *Phelps v. Byrne* (S. Dak.), 996.

MARITIME EMPLOYEES.

See *Master and Servant*; *Workmen's Compensation Acts*.

MARRIAGE.

Remarriage after divorce—right to custody of child. *Cain v. Garner* (Ky.), 824.

—— validity of marriage within proscribed time after divorce. *Peerless Pacific Co. v. Burekhard* (Wash.), 247.

Restraint of marriage—validity of testamentary disposition in restraint of marriage. *Matter of Seaman* (N. Y.), 1138. *Annotated*

See also *Workmen's Compensation Acts*.

MASSAGE.

See *Physicians and Surgeons*.

MASTER AND SERVANT.

Contract of employment—action by discharged employee for salary—admissibility in evidence of written contract for previous term. *Conrad v. Ellison-Harvey Co.* (Va.), 1171.

—— action by employee for salary—pleading—sufficiency of objection on ground of variance. *Conrad v. Ellison-Harvey Co.* (Va.), 1171.

—— continuance in service after termination of contract—effect as renewal of contract. *Conrad v. Ellison-Harvey Co.* (Va.), 1171. *Annotated*

—— enforcement of negative covenant. *Cain v. Garner* (Ky.), 824.

—— wrongful discharge of servant—form of remedy. *Conrad v. Ellison-Harvey Co.* (Va.), 1171.

—— wrongful discharge of servant—question of law or fact. *Conrad v. Ellison-Harvey Co.* (Va.), 1171.

Injury to servant—contract limitation of liability—validity. *Pittsburgh, etc. R. Co. v. Kinney* (Ohio), 286.

MASTER AND SERVANT—Continued.

- Injury to servant—contributory negligence of servant—using unsafe appliance. *Shaughnessy v. Northland Steamship Co.* (Wash.), 655.
- duty to furnish safe appliances—application of rule to maritime employee. *Shaughnessy v. Northland Steamship Co.* (Wash.), 655.
- federal employers' liability act—act as exclusive of state regulation. *Erie R. Co. v. Winfield* (U. S.), 662.
- federal employers' liability act—employees within act—employee clearing wreckage from track. *Southern R. Co. v. Puckett* (U. S.), 69. *Annotated*
- federal employers' liability act—employees within act—engineer of switch engine. *Erie R. Co. v. Winfield* (U. S.), 662.
- federal employers' liability act—employees within act—machinist in roundhouse. *Minneapolis, etc. R. Co. v. Winters* (U. S.), 54. *Annotated*
- federal employers' liability act—employees within act—necessity for existence of relation of master and servant. *Chesapeake, etc. R. Co. v. Harmon's Administrator* (Ky.), 41. *Annotated*
- federal employers' liability act—judgment denying recovery as precluding remedy under state law. *Chesapeake, etc. R. Co. v. Harmon's Administrator* (Ky.), 41.
- federal employers' liability act—removal of cause from state to federal court. *Southern R. Co. v. Puckett* (U. S.), 69.
- federal employers' liability act—review—applicability of act—saving question for review. *Minneapolis, etc. R. Co. v. Winters* (U. S.), 54.
- federal employers' liability act—review—decision on appeal—determining rights at common law. *Chesapeake, etc. R. Co. v. Harmon's Administrator* (Ky.), 41.
- federal employers' liability act—review—review by federal court of state decision. *Southern R. Co. v. Puckett* (U. S.), 69.
- workmen's compensation act—accident or injury within act—disease as accident—fall of driver from hack. *Carroll v. What Cheer Stables Co.* (R. I.), 346. *Annotated*
- workmen's compensation act—accident or injury within act—disease as accident—suicide from supervening insanity. *Withers v. London, etc. R. Co.* (Eng.), 341. *Annotated*
- workmen's compensation act—accident or injury within act—disease as accident—typhoid from impure drinking water. *Vennen v. New Dells Lumber Co.* (Wis.), 293. *Annotated*
- workmen's compensation act—accident or injury within act—injury by act of third person. *Stertz v. Industrial Ins. Commission* (Wash.), 354.
- workmen's compensation act—accident or injury within act—injury not arising out of employment. *Stertz v. Industrial Ins. Commission* (Wash.), 354.
- workmen's compensation act—accident or injury within act—injury received in another jurisdiction. *Grinnell v. Wilkinson* (R. I.), 618. *Annotated*
- workmen's compensation act—accident or injury within act—what constitutes accident arising out of employment. *Eugene Dietzen Co. v. Industrial Board* (Ill.), 764. *Annotated*
- workmen's compensation act—accident or injury within act—what constitutes accident arising out of employment. *Carroll v. Knickerbocker Ice Co.* (N. Y.), 540; *Chicago Dry Kiln Co. v. Industrial Board* (Ill.), 645.
- workmen's compensation act—accident or injury within act—what constitutes "injury." *Stertz v. Industrial Ins. Commission* (Wash.), 354. *Annotated*
- workmen's compensation act—appeal and error—review of findings of workmen's compensation board. *Chicago Dry Kiln Co. v. Industrial Board* (Ill.), 645. *Annotated*
- workmen's compensation act—appeal and error—review of findings of workmen's compensation board. *Carroll v. Knickerbocker Ice Co.* (N. Y.), 540; *Victor Chemical Works v. Industrial Board* (Ill.), 627; *Dale v. Saunders* (N. Y.), 703; *Eugene Dietzen Co. v. Industrial Board* (Ill.), 764.
- workmen's compensation act—appeal and error—review of judgment dismissing claim for compensation. *Grinnell v. Wilkinson* (R. I.), 618.
- workmen's compensation act—"average weekly earnings"—construction of phrase. *Cox v. Trollope* (Eng.), 637. *Annotated*
- workmen's compensation act—"average weekly earnings"—tips of railroad porter as included. *Great Western R. Co. v. Helps* (Eng.), 1120. *Annotated*
- workmen's compensation act—award or allowance—lump sum award. *McCracken v. Missouri Valley Bridge, etc. Co.* (Kan.), 689. *Annotated*
- workmen's compensation act—award or allowance—termination of allowance by marriage of beneficiary. *Adleman v. Ocean Accident, etc. Corp.* (Md.), 730. *Annotated*
- workmen's compensation act—construction and operation of act—depriving court of jurisdiction. *Stertz v. Industrial Ins. Commission* (Wash.), 354.
- workmen's compensation act—construction and operation of act—effect of act as dispensing with judicial controversy. *Stertz v. Industrial Ins. Commission* (Wash.), 354.
- workmen's compensation act—construction and operation of act—effect of change in act on pending proceedings. *Carroll v. Knickerbocker Ice Co.* (N. Y.), 540.
- workmen's compensation act—construction and operation of act—nature and purpose of Illinois act. *Victor Chemical Works v. Industrial Board* (Ill.), 627.

MASTER AND SERVANT — Continued.

- Injury to servant—workmen's compensation act—construction and operation of act—nature and scope of Washington act. *Stertz v. Industrial Ins. Commission* (Wash.), 354; *Shaughnessy v. Northland Steamship Co.* (Wash.), 655.
- workmen's compensation act—construction and operation of act—retroactive operation of act. *State v. General Accident, etc. Assur. Corp.* (Minn.), 615. *Annotated*
- workmen's compensation act—construction and operation of act—theory of liability under New York act. *Dale v. Saunders* (N. Y.), 703.
- workmen's compensation act—defenses—absence from place of employment as affecting right of recovery. *Stertz v. Industrial Ins. Commission* (Wash.), 354.
- workmen's compensation act—defenses—disobedience of orders as precluding recovery. *Williams v. Llandudno Coaching, etc. Co.* (Eng.), 682.
- workmen's compensation act—defenses—intoxication of employee as barring recovery. *Williams v. Llandudno Coaching, etc. Co.* (Eng.), 682. *Annotated*
- workmen's compensation act—defenses—receipt of other benefit as affecting right to compensation. *State v. District Ct.* (Minn.), 635. *Annotated*
- workmen's compensation act—dependents within act—absence of dependents—award to state. *Blanton v. Wheeler, etc. Co.* (Conn.), 747.
- workmen's compensation act—dependents within act—who is "dependent." *Blanton v. Wheeler, etc. Co.* (Conn.), 747. *Annotated*
- workmen's compensation act—dependents within act—residence of beneficiary as affecting right to compensation. *Victor Chemical Works v. Industrial Board* (Ill.), 627. *Annotated*
- workmen's compensation act—election to accept act—necessity of election. *Vaughan's Seed Store v. Simonini* (Ill.), 713. *Annotated*
- workmen's compensation act—election to accept act—right of election. *Shaughnessy v. Northland Steamship Co.* (Wash.), 655.
- workmen's compensation act—election to accept act—time for election. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- workmen's compensation act—employees within act—casual employee. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- workmen's compensation act—employees within act—maritime employee. *Shaughnessy v. Northland Steamship Co.* (Wash.), 655. *Annotated*
- workmen's compensation act—employees within act—minor illegally employed. *Stetz v. F. Mayer Boot, etc. Co.* (Wis.), 675. *Annotated*
- workmen's compensation act—employees within act—municipal employee. *State v. District Court* (Minn.), 635.
- workmen's compensation act—employees within act—railroad employee. *Erie R. Co. v. Winfield* (U. S.), 662. *Annotated*
- workmen's compensation act—employees within act—who is "employee." *Dale v. Saunders* (N. Y.), 703. *Annotated*
- workmen's compensation act—employments within act—construction of Illinois statute. *Vaughan's Seed Store v. Simonini* (Ill.), 713.
- workmen's compensation act—evidence—declaration of employee as to cause of injury—admissibility in evidence. *Carroll v. Knickerbocker Ice Co.* (N. Y.), 540.
- workmen's compensation act—evidence—declaration of employee while suffering from delirium tremens—admissibility in evidence. *Carroll v. Knickerbocker Ice Co.* (N. Y.), 540.
- workmen's compensation act—evidence—dependency—sufficiency of evidence. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- workmen's compensation act—evidence—verdict of coroner's jury—admissibility in evidence. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- workmen's compensation act—medical examination of workman. *Earwicker v. London Graving Dock Co.* (Eng.), 665. *Annotated*
- workmen's compensation act—medical referee—duties. *Earwicker v. London Graving Dock Co.* (Eng.), 665.
- workmen's compensation act—notice of claim—time for giving. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- workmen's compensation act—proceedings under act—applicability of rules of evidence. *Carroll v. Knickerbocker Ice Co.* (N. Y.), 540.
- workmen's compensation act—proceedings under act—applicability of rules of legal procedure. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- workmen's compensation act—proceedings under act—form of findings. *Blanton v. Wheeler, etc. Co.* (Conn.), 747.
- workmen's compensation act—proceedings under act—motion to recommit. *Blanton v. Wheeler, etc. Co.* (Conn.), 747.
- workmen's compensation act—validity of Illinois act. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- workmen's compensation acts—validity of Kentucky act. *Greene v. Caldwell* (Ky.), 604. *Annotated*
- workmen's compensation act—validity of Washington act. *Stertz v. Industrial Ins. Commission* (Wash.), 354.

MASTER AND SERVANT—Continued.

- Label and slander—charge of unfair treatment of labor as libelous. *Axton Fisher Tobacco Co. v. Evening Post Co. (Ky.)*, 560.
- charge that name of employer is on "unfair list" as libelous. *Axton Fisher Tobacco Co. v. Evening Post Co. (Ky.)*, 560. *Annotated*
- See also **Labor Combinations.**

MECHANICS' LIENS.

- Foreclosure of lien—amendment of bill as affecting plea of limitations. *Niehaus v. C. B. Barker Construction Co. (Tenn.)*, 23.
- consolidation of several actions—effect as to party not served in one proceeding. *City Sash, etc. Co. v. Bunn (Wash.)*, 31.
- foreclosure decree as binding adjudication. *Cain v. Parfitt (Utah)*, 28.
- parties—owner of premises as necessary party defendant. *City Sash, etc. Co. v. Bunn (Wash.)*, 31. *Annotated*
- parties—person having claim to premises as proper party defendant. *Bacon v. Reichelt (Ill.)*, 1. *Annotated*
- parties—principal contractor as necessary party defendant. *Becker v. Hopper (Wyo.)*, 35. *Annotated*
- parties—trustees under prior mortgage as necessary parties defendant. *Niehaus v. C. B. Barker Construction Co. (Tenn.)*, 23. *Annotated*
- parties—vendee in contract for sale of premises as necessary party defendant. *Cain v. Parfitt (Utah)*, 28. *Annotated*
- time for institution of proceeding. *City Sash, etc. Co. v. Bunn (Wash.)*, 31.
- Right to lien—effect of payment to contractor in full. *Becker v. Hopper (Wyo.)*, 35.

MEDICAL EXAMINATION.

See **Workmen's Compensation Acts.**

MEDICINE.

See **Physicians and Surgeons.**

MEMBER OF FAMILY.

See **Implied Contracts.**

MEMORANDUM.

See **Frauds, Statute of.**

MENTAL CAPACITY.

See **Insanity.**

MINES AND MINERALS.

- Adverse possession—applicability of doctrine to mineral lands. *Northcut v. Church (Tenn.)*, 545.
- Severance of surface and mineral rights—effect on rights of parties. *Northcut v. Church (Tenn.)*, 545. *Annotated*
- Tenants in common—extraction of ore by one tenant—measure of damages. *Silver King Coalition Mines Co. v. Silver King Consol. Min. Co. (U. S.)*, 571. *Annotated*

MINORS.

See **Infants.**

MISCONDUCT OF JURY.

See **Appeal and Error.**

MISREPRESENTATION.

See **Infants.**

MOOT CASE.

See **Actions.**

MORTALITY TABLES.

- Judicial notice of mortality tables. *Froeming v. Stockton Electric R. Co. (Cal.)*, 408. *Annotated*

MOTIONS.

See **Appeal and Error; Trial; Verdict.**

MOVING PICTURES.

Unlawful assembly—what constitutes—audience at Sunday moving picture show. *People v. Dixon* (Mich.), 385. *Annotated*

MUNICIPAL CORPORATIONS.

Buildings—validity of building ordinance. *St. Louis v. Nash* (Mo.), 134.
 Business competition with citizen—power of municipality—sale of fixtures in connection with operation of electric lighting plant. *Andrews v. South Haven* (Mich.), 100. *Annotated*
 Charter—effect as superseding state laws. *State v. Linn* (Okla.), 139.
 Debt limit—computation of indebtedness—interest on bonds as factor. *O'Rear v. Sartain* (Ala.), 593. *Annotated*
 ——— computation of indebtedness—time as of which indebtedness is computed. *O'Rear v. Sartain* (Ala.), 593.
 ——— computation of indebtedness—unissued bonds as part of present indebtedness. *O'Rear v. Sartain* (Ala.), 593.
 ——— effect of exceeding limit—validity of tax for payment. *O'Rear v. Sartain* (Ala.), 593.
 Food—regulation of ice cream—validity. *New Orleans v. Toca* (La.), 1032.
 Intoxicating liquors—regulation of transportation—validity. *Kansas City v. Jordan* (Kan.), 273.
 Officers—municipal officer as state officer. *State v. Linn* (Okla.), 139.
 ——— removal—failure to enforce laws as ground for removal. *State v. Linn* (Okla.), 139.
 ——— removal—procedure for removal—charter remedy not exclusive. *State v. Linn* (Okla.), 140.
 Ordinances—charging offense under ordinance—necessity of negating exceptions. *Kansas City v. Jordan* (Kan.), 273.
 ——— title and subject-matter—ordinance regulating transportation of intoxicating liquors. *Kansas City v. Jordan* (Kan.), 273.
 Smoke—validity of regulatory ordinance. *People v. Detroit, etc. Ferry Co.* (Mich.), 170. *Annotated*
 State—relation to municipality—interest in enforcement of laws within municipality. *State v. Linn* (Okla.), 139.
 Streets—injury from defect—liability of municipality as dependent on notice of defect. *Jamieson v. Edmonton* (Can.), 379.
 Workmen's compensation acts—municipal employee as within purview of workmen's compensation act. *State v. District Court* (Minn.), 635.

NATIONAL PURPOSE.

See Charities.

NAVIGABLE WATERS.

See Waters and Watercourses.

NEGATIVE COVENANTS.

See Master and Servant.

NEGATIVE TESTIMONY.

See Evidence.

NEGATING EXCEPTIONS.

See Municipal Corporations.

NEGLIGENCE.

Automobiles—imputed negligence—negligence of husband operating automobile not imputed to wife. *Virginia R. etc. Co. v. Gorsuch* (Va.), 838.
 ——— injury in operation—sufficiency of evidence to establish fact that person in charge of car is owner. *Koonovsky v. Quellette* (Mass.), 1146.
 ——— liability for injury in operation as affected by fact that automobile is unregistered. *Koonovsky v. Quellette* (Mass.), 1146.
 ——— liability of owner for injury to guest. *Massaletti v. Fitzroy* (Mass.), 1088.
 ——— reckless driving of automobile—liability of driver for negligent homicide. *People v. Falkovitch* (Ill.), 1077.
 Carriers of passengers—action for injury to passenger—admissibility of declaration of employee of carrier. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
 ——— action for injury to passenger—construction of pleading. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
 ——— action for injury to passenger—propriety of instruction as to negligence in alighting from moving car. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
 ——— action for injury to passenger—propriety of instruction as to presumption of negligence from injury. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.

NEGLIGENCE — Continued.

- Carriers of passengers**—action for injury to passenger—propriety of instruction as to right of passenger to be on step of moving car. *Froeming v. Stockton Electric R. Co. (Cal.)*, 408.
- action for injury to passenger—sufficiency of evidence to sustain recovery against carrier. *Froeming v. Stockton Electric R. Co. (Cal.)*, 408.
- contributory negligence of passenger—standing on platform or steps preparatory to alighting. *Froeming v. Stockton Electric R. Co. (Cal.)*, 408.
- Contributory negligence**—sufficiency of instruction as to burden of proving contributory negligence. *Froeming v. Stockton Electric R. Co. (Cal.)*, 408.
- Death by wrongful act**—damages—what is excessive verdict. *Froeming v. Stockton Electric R. Co. (Cal.)*, 408.
- Degrees of negligence**—gratuitous undertaking. *Massaletti v. Fitzroy (Mass.)*, 1088.
- Food**—foreign substance in animal food—liability of seller. *Newell v. Reid (Mich.)*, 224.
- Infants**—action for injuries—defenses—misrepresentation as to age. *Stetz v. F. Mayer Boot, etc. Co. (Wis.)*, 675.
- action for injuries—defenses—release by guardian. *Stetz v. F. Mayer Boot, etc. Co. (Wis.)*, 675.
- basis of doctrine of liability for trespassing infant. *Fusselman v. Yellowstone Valley Land, etc. Co. (Mont.)*, 420.
- liability of owner of premises for drowning of child in canal. *Fusselman v. Yellowstone Valley Land, etc. Co. (Mont.)*, 420.
- sufficiency of complaint based on turntable doctrine. *Fusselman v. Yellowstone Valley Land, etc. Co. (Mont.)*, 420.
- Insurance**—liability of agent to owner of property for failure to procure insurance. *Rezac v. Zima (Kan.)*, 1035.
- Master and servant**—contract limitation of liability—validity. *Pittsburgh, etc. R. Co. v. Kinney (Ohio)*, 286.
- contributory negligence of servant—using unsafe appliance. *Shaughnessy v. Northland Steamship Co. (Wash.)*, 655.
- duty to furnish safe appliances—application of rule to maritime employee. *Shaughnessy v. Northland Steamship Co. (Wash.)*, 655.
- federal employer's liability act—act as exclusive of state regulation. *Erie R. Co. v. Winfield (U. S.)*, 662.
- federal employers' liability act—employees within act—employee clearing wreckage from track. *Southern R. Co. v. Puckett (U. S.)*, 69.
- federal employer's liability act—employees within act—engineer of switch engine. *Erie R. Co. v. Winfield (U. S.)*, 662.
- federal employers' liability act—employees within act—machinist in roundhouse. *Minneapolis, etc. R. Co. v. Winters (U. S.)*, 54.
- federal employers' liability act—employees within act—necessity for existence of relation of master and servant. *Chesapeake, etc. R. Co. v. Harmon's Administrator (Ky.)*, 41.
- federal employers' liability act—judgment denying recovery as precluding remedy under state law. *Chesapeake, etc. R. Co. v. Harmon's Administrator (Ky.)*, 41.
- federal employers' liability act—removal of cause from state to federal court. *Southern R. Co. v. Puckett (U. S.)*, 69.
- federal employers' liability act—review—applicability of act—saving question for review. *Minneapolis, etc. R. Co. v. Winters (U. S.)*, 54.
- federal employers' liability act—review—decision on appeal—determining rights at common law. *Chesapeake, etc. R. Co. v. Harmon's Administrator (Ky.)*, 41.
- federal employers' liability act—review—review by federal court of state decision. *Southern R. Co. v. Puckett (U. S.)*, 69.
- workmen's compensation act—accident or injury within act—disease as accident—fall of driver from hack. *Carroll v. What Cheer Stables Co. (R. I.)*, 346.
- workmen's compensation act—accident or injury within act—disease as accident—suicide from supervening insanity. *Withers v. London, etc. R. Co. (Eng.)*, 341.
- workmen's compensation act—accident or injury within act—disease as accident—typhoid from impure drinking water. *Vennen v. New Dells Lumber Co. (Wis.)*, 293.
- workmen's compensation act—accident or injury within act—injury by act of third person. *Stertz v. Industrial Ins. Commission (Wash.)*, 354.
- workmen's compensation act—accident or injury within act—injury not arising out of employment. *Stertz v. Industrial Ins. Commission (Wash.)*, 354.
- workmen's compensation act—accident or injury within act—injury received in another jurisdiction. *Grinnell v. Wilkinson (R. I.)*, 618.
- workmen's compensation act—accident or injury within act—what constitutes accident arising out of employment. *Eugene Dietzen Co. v. Industrial Board (Ill.)*, 764.

NEGLIGENCE — Continued.

- Master and servant—workmen's compensation act—accident or injury within act—what constitutes accident arising out of employment. *Carroll v. Knickerbocker Ice Co.* (N. Y.), 540; *Chicago Dry Kiln Co. v. Industrial Board* (Ill.), 645.
- workmen's compensation act—accident or injury within act—what constitutes "injury." *Stertz v. Industrial Ins. Commission* (Wash.), 354. *Annotated*
- workmen's compensation act—appeal and error—review of findings of workmen's compensation board. *Chicago Dry Kiln Co. v. Industrial Board* (Ill.), 645. *Annotated*
- workmen's compensation act—appeal and error—review of findings of workmen's compensation board. *Carroll v. Knickerbocker Ice Co.* (N. Y.), 540; *Victor Chemical Works v. Industrial Board* (Ill.), 627; *Dale v. Saunders* (N. Y.), 703; *Eugene Dietzen Co. v. Industrial Board* (Ill.), 764.
- workmen's compensation act—appeal and error—review of judgment dismissing claim for compensation. *Grinnell v. Wilkinson* (R. I.), 618.
- workmen's compensation act—"average weekly earnings"—construction of phrase. *Cox v. Trollope* (Eng.), 637. *Annotated*
- workmen's compensation act—"average weekly earnings"—tips of railroad porter as included. *Great Western R. Co. v. Helps* (Eng.), 1120. *Annotated*
- workmen's compensation act—award or allowance—lump sum award. *McCracken v. Missouri Valley Bridge, etc. Co.* (Kan.), 689.
- workmen's compensation act—award or allowance—termination of allowance by marriage of beneficiary. *Adleman v. Ocean Accident, etc. Corp.* (Md.), 730. *Annotated*
- workmen's compensation act—construction and operation of act—depriving court of jurisdiction. *Stertz v. Industrial Ins. Commission* (Wash.), 354.
- workmen's compensation act—construction and operation of act—effect of act as dispensing with judicial controversy. *Stertz v. Industrial Ins. Commission* (Wash.), 354.
- workmen's compensation act—construction and operation of act—effect of change in act on pending proceedings. *Carroll v. Knickerbocker Ice Co.* (N. Y.), 540.
- workmen's compensation act—construction and operation of act—nature and purpose of Illinois act. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- workmen's compensation act—construction and operation of act—nature and scope of Washington act. *Stertz v. Industrial Ins. Commission* (Wash.), 354; *Shaughnessy v. Northland Steamship Co.* (Wash.), 655.
- workmen's compensation act—construction and operation of act—retroactive operation of act. *State v. General Accident, etc. Assur. Corp.* (Minn.), 615. *Annotated*
- workmen's compensation act—construction and operation of act—theory of liability under New York act. *Dale v. Saunders* (N. Y.), 703.
- workmen's compensation act—defenses—absence from place of employment as affecting right of recovery. *Stertz v. Industrial Ins. Commission* (Wash.), 354.
- workmen's compensation acts—defenses—disobedience of orders as precluding recovery. *Williams v. Llandudno Coaching, etc. Co.* (Eng.), 682.
- workmen's compensation acts—defenses—intoxication of employee as precluding recovery. *Williams v. Llandudno Coaching, etc. Co.* (Eng.), 682. *Annotated*
- workmen's compensation act—defenses—receipt of other benefit as affecting right to compensation. *State v. District Court* (Minn.), 635. *Annotated*
- workmen's compensation act—dependents within act—absence of dependents—award to state. *Blanton v. Wheeler, etc. Co.* (Conn.), 747.
- workmen's compensation act—dependents within act—who is "dependent." *Blanton v. Wheeler, etc. Co.* (Conn.), 747. *Annotated*
- workmen's compensation act—dependents within act—residence of beneficiary as affecting right to compensation. *Victor Chemical Works v. Industrial Board* (Ill.), 627. *Annotated*
- workmen's compensation act—election to accept act—necessity of election. *Seed Store v. Simonini* (Ill.), 713. *Annotated*
- workmen's compensation act—election to accept act—right of election. *Shaughnessy v. Northland Steamship Co.* (Wash.), 655. *Annotated*
- workmen's compensation act—election to accept act—time for election. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- workmen's compensation act—employees within act—casual employee. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- workmen's compensation act—employees within act—maritime employee. *Shaughnessy v. Northland Steamship Co.* (Wash.), 655. *Annotated*
- workmen's compensation act—employees within act—minor illegally employed. *Stetz v. F. Mayer Boot, etc. Co.* (Wis.), 675. *Annotated*
- workmen's compensation act—employees within act—municipal employee. *State v. District Court* (Minn.), 635.
- workmen's compensation act—employees within act—railroad employee. *Erie R. Co. v. Winfield* (U. S.), 662. *Annotated*
- workmen's compensation act—employees within act—who is "employee." *Dale v. Saunders* (N. Y.), 703. *Annotated*
- workmen's compensation act—employments within act—construction of Illinois statute. *Vaughan's Seed Store v. Simonini* (Ill.), 713. *Annotated*

NEGLIGENCE — Continued.

- Master and servant—workmen's compensation act—evidence—declaration of employee as to cause of injury—admissibility in evidence. *Carroll v. Knickerbocker Ice Co. (N.Y.)*, 540.
- workmen's compensation act—evidence—declaration of employee while suffering from delirium tremens—admissibility in evidence. *Carroll v. Knickerbocker Ice Co. (N.Y.)*, 540.
- workmen's compensation act—evidence—dependency—sufficiency of evidence. *Victor Chemical Works v. Industrial Board (Ill.)*, 627.
- workmen's compensation act—evidence—verdict of coroner's jury—admissibility in evidence. *Victor Chemical Works v. Industrial Board (Ill.)*, 627.
- workmen's compensation act—medical examination of workman. *Earwicker v. London Graving Dock Co. (Eng.)*, 665. *Annotated*
- workmen's compensation act—medical referee—duties. *Earwicker v. London Graving Dock Co. (Eng.)*, 665.
- workmen's compensation act—notice of claim—time for giving. *Victor Chemical Works v. Industrial Board (Ill.)*, 627.
- workmen's compensation act—proceedings under act—applicability of rules of evidence. *Carroll v. Knickerbocker Ice Co. (N.Y.)*, 540.
- workmen's compensation act—proceedings under act—applicability of rules of legal procedure. *Victor Chemical Works v. Industrial Board (Ill.)*, 627.
- workmen's compensation act—proceedings under act—form of findings. *Blanton v. Wheeler, etc. Co. (Conn.)*, 747.
- workmen's compensation act—proceedings under act—motion to recommit. *Blanton v. Wheeler, etc. Co. (Conn.)*, 747.
- workmen's compensation act—validity of Illinois act. *Victor Chemical Works v. Industrial Board (Ill.)*, 627.
- workmen's compensation act—validity of Kentucky act. *Greene v. Caldwell (Ky.)*, 604. *Annotated*
- workmen's compensation act—validity of Washington act. *Stertz v. Industrial Ins. Commission (Wash.)*, 354.
- Owners of premises—liability for injury in case of invitation not accepted or acted on. *Fusselman v. Yellowstone Valley Land, etc. Co. (Mont.)*, 420.
- Pleading—propriety of alleging several inconsistent charges of negligence. *Froeming v. Stockton Electric R. Co. (Cal.)*, 408.
- sufficiency of complaint for negligence. *Fusselman v. Yellowstone Valley Land, etc. Co. (Mont.)*, 420.
- Public officers—neglect of duty as affecting right to public officer to compensation. *Bartholomew v. Springdale (Wash.)*, 432. *Annotated*
- neglect of duty as affecting right of public officer to compensation. *Young v. Morris (Okla.)*, 450. *Annotated*
- Streets and highways—injury from defect—liability of municipality—notice of defect. *Jamieson v. Edmonton (Can.)*, 379.
- What constitutes negligence—breach of duty essential. *Fusselman v. Yellowstone Valley Land, etc. Co. (Mont.)*, 420.
- See also Brokers; Public Service Commissions; Taxation.**

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

See New Trial.

NEWSPAPERS.

See Contempt; Jury.

NEW TRIAL.

- Newly discovered evidence—affidavit showing diligence—necessity. *Chilton v. Commonwealth (Ky.)*, 851.
- sufficiency of affidavit for new trial. *Fusselman v. Yellowstone Valley Land, etc. Co. (Mont.)*, 420.
- See also Jury.**

NONMAILABLE MATTER.

See War.

NONRESIDENTS.

See Contracts.

NOTES.

See Bills and Notes.

NOTICE.

See Appeal and Error; Sheriffs and Constables; Streets and Highways; Workmen's Compensation Acts.

OBJECTIONS TO EVIDENCE.

See Trial.

OFFICERS.

See Municipal Corporations; Public Officers.

OFFICIAL BONDS.

See Public Officers.

OLOGRAPHIC WILLS.

See Wills.

OPINION EVIDENCE.

See Evidence.

"OR."

"Or" construed as "and" in instrument creating charity. *Thorp v. Lund* (Mass.), 1204.

ORDERS.

See Public Service Commissions.

ORDINANCES.

See Municipal Corporations.

ORE.

See Mines and Minerals.

OVERHANGING TREES.

See Adjoining Landowners.

OWNERSHIP.

See Fences.

OWNERS OF PREMISES.

Infants—basis of doctrine of liability for trespassing infant. *Fusselman v. Yellowstone Valley Land, etc. Co.* (Mont.), 420.

—— liability of owner of premises for drowning of child in canal. *Fusselman v. Yellowstone Valley Land, etc. Co.* (Mont.), 420.

—— sufficiency of complaint based on turntable doctrine. *Fusselman v. Yellowstone Valley Land, etc. Co.* (Mont.), 420.

Invitation—liability for injury in case of invitation not accepted or acted on. *Fusselman v. Yellowstone Valley Land, etc. Co.* (Mont.), 420.

See also Adjoining Landowners; Mechanics' Liens.

PARENT AND CHILD.

Contract by parent for services of child—effect as binding child. *Cain v. Garner* (Ky.), 824. *Annotated*

Custody of child—effect of remarriage after divorce. *Cain v. Garner* (Ky.), 824.

Gifts—conveyance by parent to child—presumption and burden of proof of undue influence. *Soper v. Ciseo* (N. J.), 452. *Annotated*

Respective rights of parents in relation to children. *Cain v. Garner* (Ky.), 824.

See also Adoption; Infants.

PARTIAL INVALIDITY.

See Antenuptial Agreements.

PARTIES TO ACTIONS.

Injunctions—parties—successor of official—necessity of service of process on successor. *Hitchman Coal, etc. Co. v. Mitchell* (U. S.), 461.

Mechanics' liens—foreclosure—consolidation of several actions—effect as to party not served in one proceeding. *City Sash, etc. Co. v. Bunn* (Wash.), 31.

PARTIES TO ACTIONS — Continued.

- Mechanics' liens**—foreclosure—owner of premises as necessary party defendant. *City Sash, etc. Co. v. Bunn (Wash.)*, 31.
 ——— foreclosure—person having claim to premises as proper party defendant. *Bacon v. Reichelt (Ill.)*, 1. *Annotated*
 ——— foreclosure—principal contractor as necessary party defendant. *Becker v. Hopper (Wyo.)*, 35. *Annotated*
 ——— foreclosure—trustees under prior mortgage as necessary parties defendant. *Niehaus v. C. B. Barker Construction Co. (Tenn.)*, 23. *Annotated*
 ——— foreclosure—vendee in contract for sale of premises as necessary party defendant. *Cain v. Parfitt (Utah)*, 28.
Omission of party—effect of omission in equitable action in federal courts. *Silver King Coalition Mines Co. v. Silver King Consol. Min. Co. (U. S.)*, 571.
Tenants in common—accounting—parties—effect of assignment of interest by one tenant. *Silver King Coalition Mines Co. v. King Consol. Min. Co. (U. S.)*, 571.
Virtual representation—action for partition. *Chambers v. Preston (Tenn.)*, 428.
Warranty—action on warranty—necessary parties. *Pacific Power, etc. Co. v. White (Wash.)*, 125.
 See also **Trial**.

PARTITION.

- Parties**—virtual representation. *Chambers v. Preston (Tenn.)*, 428.

PATRIOTIC PURPOSE.

See **Charities**.

PAYMENT.

- Recovery of payments**—payment to secure license as payment under duress—right to recover. *Baldwin v. Chesaning (Mich.)*, 512. *Annotated*
 See also **Bills and Notes**; **Public Officers**.

PERPETUITIES.

- Trust for maintenance of estate held to be void as perpetuity**. *Thorp v. Lund (Mass.)*, 1204.

PERSONAL PROPERTY.

See **Eminent Domain**; **Husband and Wife**.

PERSONAL SERVICES.

See **Infants**; **Parent and Child**.

PHYSICIANS AND SURGEONS.

- Practice of medicine**—massage treatment as practice of medicine. *State Board v. Terrill (Utah)*, 1117.

PLEADING.

- Amendment**—bill to foreclose mechanic's lien—amendment as affecting plea of limitations. *Niehaus v. C. B. Barker Construction Co. (Tenn.)*, 23.
 ——— construction of statute authorizing amendment in case of variance. *Conrad v. Ellison-Harvey (Va.)*, 1171.
Carriers of passengers—action for injury—construction of pleading. *Froeming v. Stockton Electric R. Co. (Cal.)*, 408.
Damages—averments in complaint sufficient to warrant recovery of exemplary damages. *Dwyer v. Libert (Ida.)*, 973.
Demurrer—effect as admission. *Axton Fisher Tobacco Co. v. Evening Post Co. (Ky.)*, 560; *State v. Senatobia Blank Book, etc. Co. (Miss.)*, 953.
Guardian ad litem—sufficiency of allegation of appointment of guardian ad litem. *Froeming v. Stockton Electric R. Co. (Cal.)*, 408.
Libel and slander—necessity of alleging special damage. *Axton Fisher Tobacco Co. v. Evening Post Co. (Ky.)*, 560.
 ——— sufficiency of complaint with respect to averments of time and place of slander. *Anderson v. Shockley (Mo.)*, 500. *Annotated*
 ——— suit on several publications—necessity of pleading each publication separately. *Anderson v. Shockley (Mo.)*, 500.
 ——— variance between complaint and proof. *Anderson v. Shockley (Mo.)*, 500.
Master and servant—action by discharged employee for salary—sufficiency of objection on ground of variance. *Conrad v. Ellison-Harvey Co. (Va.)*, 1171.
Negligence—propriety of alleging several inconsistent charges of negligence. *Froeming v. Stockton Electric R. Co. (Cal.)*, 408.
 ——— sufficiency of complaint for negligence. *Fusselman v. Yellowstone Valley Land, etc. Co. (Mont.)*, 420.

PLEADING — Continued.

Owners of premises—sufficiency of complaint based on turntable doctrine. *Fusselman v. Yellowstone Valley Land, etc. Co.* (Mont.), 420.
 Striking out pleading—reply to new matter on appeal. *Berryman v. Childs* (Neb.), 1029.

PLEDGE.

Army and navy—pledge of public property by soldier—criminal liability of civilian receiving property. *Bolland v. United States* (U. S.), 520. *Annotated*

POLICE POWER.

See Constitutional Law.

PORTERS.

See Average Weekly Earnings.

POSITIVE TESTIMONY.

See Evidence.

POST OFFICE.

Espionage act—validity. *Masses Pub. Co. v. Patten* (U. S.), 999. *Annotated*

POWER OF APPOINTMENT.

See Trusts and Trustees.

PRACTICE OF MEDICINE.

See Physicians and Surgeons.

PREFERENCE.

See Stock and Stockholders.

PRESUMPTIONS.

Carriers of passengers—presumption of negligence from injuries caused by operation of street car. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
 Gifts—conveyance by parent to child—presumption of undue influence. *Soper v. Cisco* (N. J.), 452. *Annotated*
 Public service commissions—presumption in favor of order of commission. *Mississippi R. Com. v. Mobile, etc. R. Co.* (Miss.), 828.
 Statutes—presumption in favor of validity of statute. *Victor Chemical Works v. Industrial Board* (Ill.), 627; *New Orleans v. Toca* (La.), 1032.
 Witnesses—presumption from failure to call attorney as witness. *Ravenscroft v. Stull* (Ill.), 1130.

PRIMA FACIE EVIDENCE.

See Evidence.

PRINCIPAL AND AGENT.

See Agency.

PRINTED SIGNATURE.

See Frauds, Statute of.

PRINTING.

Statute prohibiting letting of printing contract to nonresident—validity. *State v. Senatobia Blank Book, etc. Co.* (Miss.), 953.

PRIORITY.

See Banks.

PRIVILEGE.

See Witnesses.

PRIVILEGED COMMUNICATIONS.

See Libel and Slander.

PROCEDURE.

See Eminent Domain; Workmen's Compensation Acts.

PROCESS.

See Injunctions; Mechanics' Liens.

PRODUCTION OF DOCUMENTS.

See Witnesses.

PROFITS.

See Eminent Domain.

PROMISSORY NOTES.

See Bills and Notes.

PROMOTERS.

See Corporations.

PUBLIC ADMINISTRATORS.

See Executors and Administrators.

PUBLICATION.

See Contempt.

PUBLIC CONTRACTS.

See Contracts.

PUBLIC LANDS.

Land under water—effect of restrictions in grant. *People v. Steeplechase Park Co. (N. Y.)*, 1099.

—— limitation on unrestricted grant. *People v. Steeplechase Park Co. (N. Y.)*, 1099.

—— power of state to make grant. *People v. Steeplechase Park Co. (N. Y.)*, 1099.

Annotated

PUBLIC OFFICERS.

Compensation—neglect of duty as affecting right of public officer to compensation. *Bartholomew v. Springdale (Wash.)*, 432. *Annotated*

—— neglect of duty as affecting right of public officer to compensation. *Young v. Morris (Okla.)*, 450. *Annotated*

—— right of de facto officer to compensation. *Thompson v. Denver (Colo.)*, 915.

—— right of de jure officer to recover salary paid to de facto officer. *Thompson v. Denver (Colo.)*, 915.

—— right to compensation as affected by failure of officials to approve bond. *Bartholomew v. Springdale (Wash.)*, 432.

Federal officers—eminent domain commissioners as federal officers. *Brackett v. Commonwealth (Mass.)*, 863.

Injunctions—control of discretion of county officers by injunction. *O'Rear v. Sartain (Ala.)*, 593.

—— unauthorized payment by public officer—right of taxpayer to restrain. *Fergus v. Brady (Ill.)*, 220.

Personal liability—payment for purpose not governmental. *Fergus v. Brady (Ill.)*, 220.

—— payment under void statute. *Fergus v. Brady (Ill.)*, 220.

—— sale of property for taxes under void statute. *Fields v. Altman (Ala.)*, 189.

Annotated

Removal—failure to enforce laws as ground for removal. *State v. Linn (Okla.)*, 139; *State v. Reichman (Tenn.)*, 889.

—— procedure for removal—remedy provided in city charter not exclusive. *State v. Linn (Okla.)*, 140.

State officers—municipal officer as state officer. *State v. Linn (Okla.)*, 139.

Vacancy—neglect of duty as creating vacancy in office. *Young v. Morris (Okla.)*, 450.

Veterans—right to appointment to office—discretion of appointing power. *Phelps v. Byrne (S. Dak.)*, 996.

—— right to appointment to office—enforcement by mandamus. *Phelps v. Byrne (S. Dak.)*, 996.

See also Libel and Slander.

PUBLIC POLIOY.

See Contracts.

PUBLIC PROPERTY.

See Army and Navy.

PUBLIC SERVICE COMMISSION.

- Collateral attack on order of commission. *Sayers v. Montpelier, etc. R. Co. (Vt.)*, 1050.
- Effect of order of commission—liability of corporation obeying order. *Sayers v. Montpelier, etc. Co. (Vt.)*, 1050.
- Power of commission—abolition of grade crossings—exceeding powers. *Sayers v. Montpelier, etc. R. Co. (Vt.)*, 1050.
- construction of statute as amended. *Sayers v. Montpelier, etc. R. Co. (Vt.)*, 1050.
- electric wires—power of commission to prevent maintenance in close proximity. *Western Union Tel. Co. v. Burlington Traction Co. (Vt.)*, 841. *Annotated*
- railroads—validity of order of commission requiring station at particular place. *Mississippi R. Co. v. Mobile, etc. R. Co. (Miss.)*, 828.
- Presumption in favor of order of public service commission. *Mississippi R. Com. v. Mobile, etc. R. Co. (Miss.)*, 828.
- Review of order of commission—injunction as proper remedy. *Mississippi R. Com. v. Mobile, etc. R. Co. (Miss.)*, 828.
- power of court of equity. *Sayers v. Montpelier, etc. R. Co. (Vt.)*, 1050.
- review by appellate court of decree disapproving order of commission. *Mississippi R. Com. v. Mobile, etc. R. Co. (Miss.)*, 828.
- review of findings on appeal. *Western Union Tel. Co. v. Burlington Traction Co. (Vt.)*, 841.

PUBLIC SERVICE CORPORATIONS.

- Building restriction as binding public service corporation. *Flynn v. New York, etc. R. Co. (N. Y.)*, 588. *Annotated*
- Judicial notice of charter of public service corporation. *Western Union Tel. Co. v. Burlington Traction Co. (Vt.)*, 841.

PUBLIC UTILITIES.

- Power of municipality to compete with citizen in operation of public utility. *Andrews v. South Haven (Mich.)*, 100. *Annotated*

PUNISHMENT.

See Sentence and Punishment.

QUALIFICATION.

See Jury.

QUESTIONS OF LAW AND FACT.

- Master and servant—wrongful discharge of servant—question of law or fact. *Conrad v. Ellison-Harvey Co. (Va.)*, 1171.
- Witnesses—mental capacity of witness as question of law and fact. *State v. Tetrault (N. H.)*, 425.

QUO WARRANTO.

- Corporations—violation of charter—quo warranto as proper remedy. *State v. Senatobia Blank Book, etc. Co. (Miss.)*, 953.

RAILROADS.

- Crossings—operation of grade crossing—power of public service commission. *Sayers v. Montpelier, etc. R. Co. (Vt.)*, 1050.
- Right of way—telegraph line on right of way—right of telegraph company to cut overhanging trees—admissibility of evidence of contract with railroad. *Cobb v. Western Union Telegraph Co. (Vt.)*, 1156.
- Stations—order of public service commission requiring station at particular place—reasonableness of order. *Mississippi R. Com. v. Mobile, etc. R. Co. (Miss.)*, 828.
- See also Employers' Liability Acts; Workmen's Compensation Acts.**

RAPE.

- Evidence—admissibility of evidence as to conduct of prosecutrix with others. *State v. Tetrault (N. H.)*, 425.
- admissibility of evidence as to subsequent familiarities with prosecutrix. *State v. Tetrault (N. H.)*, 425.

READING OF NEWSPAPERS.

See Jury.

REASONABLE DOUBT.

See Criminal Law.

RECEPTION OF EVIDENCE.

See Trial.

RECONVERSION.

See Equitable Conversion.

RECORDING ACTS.

See Brokers.

RECORDS.

See Evidence.

RECOVERY OF PAYMENTS.

See Payment.

RECREATION.

See Jury.

RECRIMINATION.

See Divorce.

REGISTRATION.

See Automobiles.

RELATIVES.

See Insanity.

RELEASE AND DISCHARGE.

Action for injuries to infant—release by guardian as defense. *Stetz v. F. Mayer Boot, etc Co. (Wis.)*, 675.

RELIGIOUS INSTITUTIONS.

Property used for religious purposes as exempt from taxation. *Commonwealth v. First Christian Church (Ky.)*, 525.

REMAINDERS AND REVERSIONS.

Contingent remainder as "interest" in land. *Hill v. Purdy (D. C.)*, 847.

REMARRIAGE.

See Marriage.

REMEDIES.

See Election of Remedies.

REMOVAL.

See Public Officers; Trusts and Trustees.

REMOVAL OF CAUSES.

Federal employers' liability act—removal of cause from state to federal court. *Southern R Co. v. Puckett (U. S.)*, 69.

RENEWAL OF CONTRACT.

See Master and Servant.

REOPENING CASE.

See Trial.

REPEAL.

See Statutes.

REPLY.

See Pleading.

RESCISSION, CANCELLATION AND REFORMATION.

Conveyance for future support—right of grantor to rescind after part performance—nature of relief granted. *Soper v. Cisco (N. J.)*, 432.

RESIDENCE.

See Workmen's Compensation Acts.

RES JUDICATA.

Federal employers' liability act—judgment denying recovery as precluding remedy under state law. *Chesapeake, etc. R. Co. v. Harmon's Administrator* (Ky.), 41.

Finding of facts—effect of future developments. *People v. Detroit, etc. Ferry Co.* (Mich.), 170.

Mechanics' liens—foreclosure decree as binding adjudication. *Cain v. Parfitt* (Utah), 28.

RESTRAINT OF MARRIAGE.

See Marriage.

RESTRICTIONS.

See Building Restrictions; Waters and Watercourses.

REVENUE.

Meaning of "revenue." *State v. Gordon* (Mo.), 191.

Meaning of "revenue." *Fergus v. Brady* (Ill.), 220.

Annotated

Annotated

REVIVAL.

See Actions; Statutes.

REVIVAL MEETING.

See Jury.

REVOCATION OF LETTERS.

See Executors and Administrators.

RIGHT OF WAY.

See Railroads.

RIPARIAN RIGHTS.

See Waters and Watercourses.

ROUNDHOUSES.

See Employers' Liability Acts.

RULES OF DECISION.

See Courts.

RULES OF EVIDENCE.

See Workmen's Compensation Acts.

RULES OF PROCEDURE.

See Workmen's Compensation Acts.

SAFE APPLIANCES.

See Master and Servant.

SALES.

Conditional sales—right of conditional vendee to recover damages for breach of warranty. *Peuser v. Marsh* (N. Y.), 913.

Food—foreign substance in animal food—liability of seller. *Newell v. Reid* (Mich.), 224.

Warranty—action on warranty—necessary parties. *Pacific Power, etc. Co. v. White* (Wash.), 125.

—— agency—warranty to agent as insuring to benefit of undisclosed principal. *Pacific Power, etc. Co. v. White* (Wash.), 125.

—— consideration—sufficiency. *Pacific Power, etc. Co. v. White* (Wash.), 125.

—— construction of warranty—meaning of "liabilities." *Pacific Power, etc. Co. v. White* (Wash.), 125.

—— distinction between warranty and guaranty. *Pacific Power, etc. Co. v. White* (Wash.), 125.

—— duration—continuing warranty. *Pacific Power, etc. Co. v. White* (Wash.), 125.

—— duration—when contract executed. *Pacific Power, etc. Co. v. White* (Wash.), 125.

SALES — Continued.

Warranty—seed—correspondence of seed sold to name or variety—evidence of breach of warranty. *Buckbee v. P. Hohenadel, Jr. Co. (U. S.), 88.*
 — seed—germinating power of seed—evidence of breach of warranty. *Meehan v. Ingalls (Wash.), 71.* *Annotated*

SAND

See Waters and Watercourses.

SCINTILLA.

See Evidence.

SECONDARY EVIDENCE.

See Evidence.

SEED.

Warranty of correspondence to name or variety—evidence of breach. *Buckbee v. P. Hohenadel, Jr. Co. (U. S.), 88.* *Annotated*
 Warranty of germinating power—evidence of breach. *Meehan v. Ingalls (Wash.), 71.* *Annotated*

SELF-DEFENSE.

See Homicide.

SENTENCE AND PUNISHMENT.

Cruel and unusual punishment—what constitutes. *People v. Elliott (Ill.), 391.* *Annotated*
 Error in sentence—remand by appellate court for proper sentence. *People v. Elliott (Ill.), 391.*
 Form of sentence—conviction on several counts. *People v. Elliott (Ill.), 391.*
 Review of sentence on appeal. *People v. Elliott (Ill.), 391.*

SERVICE OF PROCESS.

See Injunctions; Mechanics' Liens.

SERVICE.

See Implied Contracts; Infants; Parent and Child.

SEVERANCE.

See Mines and Minerals.

SHERIFFS AND CONSTABLES.

Sheriffs—duty of sheriff with respect to unlawful sale of intoxicants. *State v. Reichman (Tenn.), 889.*
 — duty to enforce law—what constitutes notice of violation. *State v. Reichman (Tenn.), 889.*
 — duty to investigate suspected places of business or residence. *State v. Reichman (Tenn.), 889.*
 — duty to prevent crime. *State v. Reichman (Tenn.), 889.*
 — powers generally. *State v. Reichman (Tenn.), 889.*
 — removal—failure to enforce law as ground for removal. *State v. Reichman (Tenn.), 889.*

SIGNATURE.

Meaning of "sign." *Estate of Manchester (Cal.), 227.*
See also Frauds, Statute of; Wills.

SLANDER.

See Libel and Sander.

SMOKE.

Validity of smoke ordinance. *People v. Detroit, etc. Ferry Co. (Mich.), 170.* *Annotated*

SOLDIERS.

See Army and Navy.

SPECIAL ADMINISTRATORS.

See Actions.

SPECIAL DAMAGES.**See Libel and Slander.****SPECIAL DEPOSITS.****See Banks.****STARE DECISIS.****See Courts.****STATE COURTS.****See Appeal and Error; Courts; Removal of Causes.****STATES.**Contract exceeding amount of appropriation—validity. *Fergus v. Brady* (Ill.), 220.Enforcement of laws—interest of state in enforcement of laws within municipality. *State v. Linn* (Okla.), 139.Officers—municipal officer as state officer. *State v. Linn* (Okla.), 139.**See also Public Lands; Workmen's Compensation Acts.****STATIONS.****See Railroads.****STATUTE OF FRAUDS.****See Frauds, Statute of.****STATUTE OF LIMITATIONS.****See Limitation of Actions.****STATUTES.**Amendment—construction of statute as amended—powers of public service commission. *Sayers v. Montpelier, etc. R. Co.* (Vt.), 1050.Construction—all parts of statute considered. *Victor Chemical Works v. Industrial Board* (Ill.), 627.— construction in favor of validity. *Victor Chemical Works v. Industrial Board* (Ill.), 627.— effectuating legislative intent. *State v. Gordon* (Mo.), 191.— legislative definitions—effect. *St. Louis v. Nash* (Mo.), 134.— weight accorded to construction by executive officers. *State v. Gordon* (Mo.), 191.— words given ordinary meaning. *State v. Gordon* (Mo.), 191.Repeal—repeal of repealing act as reviving repealed statute. *Manchester Township Supervisors v. Wayne County Commissioners* (Pa.), 278. *Annotated*Retroactive operation—statute of limitations. *State v. General Accident, etc. Assur. Corp.* (Minn.), 615.Retroactive operation—workmen's compensation act. *State v. General Accident Assur. Corp.* (Minn.), 615. *Annotated*Validity—certainty—statute held not void for uncertainty. *State v. Linn* (Okla.), 139.— presumption in favor of validity of statute. *Victor Chemical Works v. Industrial Board* (Ill.), 627; *New Orleans v. Toca* (La.), 1032.— wisdom of statute—judicial review. *State v. Senatobia Blank Book, etc. Co.* (Miss.), 953; *Masses Pub. Co. v. Patten* (U. S.), 999.**See also Municipal Corporations; Wills; Workmen's Compensation Acts.****STOCK AND STOCKHOLDERS.**Directors—purchase of stock by director as affected by fiduciary relation to stockholder. *Dawson v. National Life Ins. Co.* (Iowa), 230. *Annotated*Relation of stockholders to corporation. *Dawson v. National Life Ins. Co.* (Iowa), 230.Subscription to stock—fraud on subscriber—waiver by delay. *Heiskell v. Morris* (Tenn.), 1134.— liability on subscription as affected by failure to subscribe entire amount. *Heiskell v. Morris* (Tenn.), 1134. *Annotated*— right of promoters to subscribe. *Heiskell v. Morris* (Tenn.), 1134.— right of stockholder to preference in subscribing for new stock. *Schmidt v. Marconi Wireless Tel. Co.* (N. J.), 131. *Annotated***STREAMS.****See Waters and Watercourses.****STREETS AND HIGHWAYS.**Injury from defect—liability of municipality—necessity that municipality have notice of defect. *Jamieson v. Edmonton* (Can.), 379.

SUBSCRIPTION.

See Stock and Stockholders.

SUBSEQUENT PURCHASERS.

See Building Restrictions.

SUICIDE.

See Accident Insurance; Disease.

SUNDAYS AND HOLIDAYS.

Amusements—audience at Sunday moving picture show as constituting unlawful assembly
People v. Dixon (Mich.), 385. *Annotated*

SUPPORT.

See Deeds.

SURFACE.

See Mines and Minerals.

SURVIVAL OF ACTIONS.

See Actions.

TABLES.

See Mortality Tables.

TAXATION.

Exemptions from taxation—property used for religious purposes—what is included in exemption. Commonwealth v. First Christian Church (Ky.), 525

Municipal corporations—debt limit—effect of exceeding limit—validity of tax for payment. O'Rear v. Sartain (Ala.), 593.

Tax sale—sale under void statute—personal liability of officer. Fields v. Altman (Ala.), 189. *Annotated*

TAXPAYERS' ACTIONS.

Unauthorized payment by state official—right of taxpayer to injunction. Fergus v. Brady (Ill.), 220.

TAX RETURNS.

See Eminent Domain.

TELEGRAPHS AND TELEPHONES.

Overhanging trees on right of way—right of telegraph company to cut to line—admissibility of evidence of contract with railroad. Cobb v. Western Union Telegraph Co. (Vt.), 1156.

TENANTS IN COMMON.

Accounting between tenants in common—parties—effect of assignment of interest by one tenant. Silver King Coalition Mines Co. v. Silver King Consol. Min. Co. (U. S.), 571.

Minerals—extraction of ore by one tenant—measure of damages. Silver King Coalition Mines Co. v. Silver King Consol. Min. Co. (U. S.), 571. *Annotated*

TENDER.

See Brokers.

TENT.

Meaning of "tent." St. Louis v. Nash (Mo.), 134.

Annotated

TERMINATION OF ALLOWANCE.

See Workmen's Compensation Acts.

TERMINATION OF CONTRACT.

See Master and Servant.

TESTAMENTARY CAPACITY.

See Wills.

THEATERS AND AMUSEMENTS.

Sundays—audience at Sunday moving picture show as constituting unlawful assembly. People v. Dixon (Mich.) 385 *Annotated*

TIME OF PAYMENT.

See Bills and Notes.

TIPS.

See Average Weekly Earnings.

TITLE.Proof of title—best and secondary evidence. *Littlefield v. Bowen* (Wash.), 177.**TORTS.**

See Actions; Negligence; Taxation; Witnesses.

TRANSACTIONS WITH DECEDENTS.

See Witnesses.

TRANSPORTATION.

See Intoxicating Liquors.

TREES AND TIMBER.Adjoining landowners—tree near boundary line—rights of owner. *Wideman v. Faivre* (Kan.), 1168. *Annotated*— tree overhanging boundary line—right to cut to line. *Cobb v. Western Union Telegraph Co.* (Vt.), 1156. *Annotated***TRESPASS.**

See Infants.

TRIAL.Conduct of judge—remark by judge held to be proper. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.Continuance—absence of party as ground for continuance—divorce case. *Neven v. Neven* (Nev.), 1083. *Annotated*— absence of witness as ground for continuance. *Neven v. Neven* (Nev.), 1083.— motion for continuance as addressed to discretion of court. *Neven v. Neven* (Nev.), 1083.Motion to strike out evidence—necessity of disclosing ground. *Wideman v. Faivre* (Kan.), 1168.Objection to evidence—general objection—sufficiency. *People v. Elliott* (Ill.), 391.Reception of evidence—refusal to allow offer of proof—propriety. *People v. Elliott* (Ill.), 391.Reopening case for additional testimony—discretion of court. *Virginia R. etc. Co. v. Gorsuch* (Va.), 838.

See also Appeal and Error; Argument of Counsel; Homicide; Jury; Venue; Witnesses.

TRUSTS AND TRUSTEES.Accounting by trustee—compounding of interest. *Silver King Coalition Mines Co. v. Silver King Consol. Min. Co.* (U. S.), 571.Administration of trust—asking instruction of court. *Thorp v. Lund* (Mass.), 1204.Creation of trust—necessity of assent of beneficiary. *Thorp v. Lund* (Mass.), 1204.Power of appointment—propriety of exercise—beneficiary designated generally. *Thorp v. Lund* (Mass.), 1204.Removal of trustee—antagonism or ill feeling between trustee and beneficiary as ground for removal. *Maydwell v. Maydwell* (Tenn.), 1043. *Annotated*— jurisdiction of court of chancery. *Maydwell v. Maydwell* (Tenn.), 1043.Revocation of trust—right of settlor to revoke. *Thorp v. Lund* (Mass.), 1204.

See also Charities; Parties to Actions.

TURNTABLE DOCTRINE.

See Owners of Premises.

TYPHOID FEVER.

See Disease.

ULTRA VIRES.What are "ultra vires contracts." *American Southern Nat. Bank v. Smith* (Ky.), 959.**UNCERTAINTY.**

See Statutes.

UNCONTRADICTIONED TESTIMONY.

See Evidence.

UNDISCLOSED PRINCIPAL.

See Agency.

UNDUE INFLUENCE.

See Parent and Child; Wills.

UNFAIR LIST.

See Labor Combinations.

UNIONS.

See Labor Combinations.

UNLAWFUL ASSEMBLY.

What constitutes unlawful assembly—audience at Sunday moving picture show. *People v. Dixon (Mich.)*, 385. *Annotated*

UNUSUAL PUNISHMENT.

See Sentence and Punishment.

VACANCY.

See Public Officers.

VALUE.

See Eminent Domain.

VARIANCE.

Libel and slander—variance between complaint and proof. *Anderson v. Shockley (Mo.)*, 500.

VENDOR AND PURCHASER.

Building restrictions—restriction as affecting subsequent purchaser. *Flynn v. New York, etc. R. Co. (N. Y.)*, 588.

— restriction as binding public service corporation. *Flynn v. New York, etc. R. Co. (N. Y.)*, 588. *Annotated*

— validity of restriction. *Wear v. Kansas (U. S.)*, 586.

See also Mechanics' Liens.

VENUE.

Proof of venue—sufficiency. *People v. Elliott (Ill.)*, 391.

VERDICT.

Direction of verdict—effect of motion—court authorized to find facts. *Buckbee v. P. Hohenadel, Jr. Co. (U. S.)*, 88.

Excessiveness—death by wrongful act—what is excessive verdict. *Froeming v. Stockton Electric R. Co. (Cal.)*, 408.

See also Coroners.

VETERANS.

Veterans preference acts—right of veteran to appointment—discretion of appointing power. *Phelps v. Byrne (S. Dak.)*, 996.

— right to appointment—enforcement by mandamus. *Phelps v. Byrne (S. Dak.)*, 996.

VIOLENCE.

See Breach of the Peace.

VIRTUAL REPRESENTATION.

See Parties to Actions.

WAIVER.

See Fraud; Witnesses.

WAR.

Conscription—validity of federal statute. *Selective Draft Law Cases (U. S.)*, 856.

WAR — Continued.

- Espionage act—construction—nonmailable matter. *Masses Pub. Co. v. Patten* (U. S.), 999.
 ——— validity of federal statute. *Masses Pub. Co. v. Patten* (U. S.), 999. *Annotated*
 War power—nature and scope. *Masses Pub. Co. v. Patten* (U. S.), 999.
 See also **Army and Navy; Veterans.**

WARRANTY.

- Action on warranty—necessary parties. *Pacific Power, etc. Co. v. White* (Wash.), 125.
 Agency—warranty to agent as insuring to benefit of undisclosed principal. *Pacific Power, etc. Co. v. White* (Wash.), 125. *Annotated*
 Conditional sales—right of conditional vendee to recover damages for breach of warranty. *Peuser v. Marsh* (N. Y.), 913. *Annotated*
 Consideration for warranty—sufficiency. *Pacific Power, etc. Co. v. White* (Wash.), 125.
 Construction of warranty—meaning of “liabilities.” *Pacific Power, etc. Co. v. White* (Wash.), 125.
 Duration—continuing warranty. *Pacific Power, etc. Co. v. White* (Wash.), 125.
 ——— when contract executed. *Pacific Power, etc. Co. v. White* (Wash.), 125.
 Guaranty—distinction between warranty and guaranty. *Pacific Power, etc. Co. v. White* (Wash.), 125.
 Seed—warranty of correspondence to name or variety—evidence of breach. *Buckbee v. P. Hohenadel, Jr. Co.* (U. S.), 88. *Annotated*
 ——— warranty of germinating power—evidence of breach. *Meehan v. Ingalls* (Wash.), 71. *Annotated*

WATERS AND WATERCOURSES.

- Navigable waters—grant of land under navigable water—effect of restrictions in grant. *People v. Steeplechase Park Co.* (N. Y.), 1099.
 ——— grant of land under navigable water—limitations on unrestricted grant. *People v. Steeplechase Park Co.* (N. Y.), 1099.
 ——— grant of land under navigable water—power of state to make grant. *People v. Steeplechase Park Co.* (N. Y.), 1099. *Annotated*
 ——— judicial notice of navigable character of stream. *Wear v. Kansas* (U. S.), 586.
 ——— right to take sand from bed of stream. *Wear v. Kansas* (U. S.), 586.
 Riparian rights—ownership of bed of stream. *Wear v. Kansas* (U. S.), 586.

WEALTH.

See **Damages.**

WEEKLY EARNINGS.

See **Average Weekly Earnings.**

WEIGHT OF EVIDENCE.

See **Evidence.**

WIDOW.

See **Equitable Election; Executors and Administrators.**

WILLS.

- Contest of will—abatement of will contest—death of contestant. *Braeuel v. Reuther* (Mo.), 533.
 ——— jurisdiction of city court over will contest. *Ravenscroft v. Stull* (Ill.), 1130.
 ——— persons entitled to contest—necessity of pecuniary interest. *Braeuel v. Reuther* (Mo.), 533.
 ——— right of administrator of heir to contest. *Braeuel v. Reuther* (Mo.), 533. *Annotated*
 ——— statute authorizing contest—strict construction. *Braeuel v. Reuther* (Mo.), 533.
 Equitable election—election by widow to take under will as affecting right to intestate property. *Compton v. Akers* (Kan.), 983. *Annotated*
 Estate devisable—contingent remainder as “interest” in land. *Hill v. Purdy* (D. C.), 847.
 Execution—effect of testator’s intention. *Estate of Manchester* (Cal.), 227.
 ——— place of signature—intent of testator. *Estate of Manchester* (Cal.), 227.
 Olographic wills—necessity of signature at end. *Estate of Manchester* (Cal.), 227.
 Testamentary capacity—evidence admissible as to capacity generally. *Ravenscroft v. Stull* (Ill.), 1130.
 ——— evidence of use of intoxicants by testator—admissibility. *Ravenscroft v. Stull* (Ill.), 1130.
 ——— general business capacity of testator—admissibility of opinion of witness. *Ravenscroft v. Stull* (Ill.), 1130.
 ——— instruction as to capacity held erroneous. *Ravenscroft v. Stull* (Ill.), 1130.
 ——— opinion evidence—admissibility. *Ravenscroft v. Stull* (Ill.), 1130.

WILLS — Continued.

- Testamentary capacity—remote statements of testator—admissibility. *Ravenscroft v. Stull* (Ill.), 1130.
 ——— test of testamentary capacity. *Ravenscroft v. Stull* (Ill.), 1130.
 Undue influence—instruction as to burden of proof—propriety. *Ravenscroft v. Stull* (Ill.), 1130.
 Validity of provisions—validity of condition in restraint of marriage. *Matter of Seaman* (N. Y.), 1138. *Annotated*
See also Equitable Conversion; Perpetuities.

WIRES.

See Electricity.

WISDOM.

See Statutes.

WITNESSES.

- Age—competency of witness to testify as to his own age. *State v. Tetrault* (N. H.), 425.
 ——— competency of witness to testify to age of another. *State v. Tetrault* (N. H.), 425.
 Attorneys—presumption from failure to call attorney as witness. *Ravenscroft v. Stull* (Ill.), 1130.
 Credibility and impeachment—impeachment by prior conflicting statement—necessity of laying foundation. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
 ——— instructions as to effect of false testimony—propriety. *Babb v. State* (Ariz.), 925.
 ——— instruction as to weight of positive and negative testimony—propriety. *Babb v. State* (Ariz.), 925.
 ——— instruction singling out particular witness—propriety. *Babb v. State* (Ariz.), 925.
 Cross-examination—effect of cross-examining witness outside scope of direct examination. *Froeming v. Stockton Electric R. Co.* (Cal.), 408.
 ——— irrelevant cross-examination properly curtailed. *People v. Elliott* (Ill.), 391; *Taylor v. Moseley* (Ky.), 1125.
 Examination—certain questions held not proper. *People v. Elliott* (Ill.), 391.
 Mental capacity of witness—question of law or fact. *State v. Tetrault* (N. H.), 425.
 Privilege of witness—demand on accused for production of papers as violation of privilege. *People v. Gibson* (N. Y.), 509.
 Transactions with decedent—rule excluding testimony as applicable to action *ex delicto*. *Leavea v. Southern R. Co.* (Mo.), 97. *Annotated*
 ——— waiver of incompetency by cross-examination. *Poole v. Poole* (Kan.), 929.
See also Argument of Counsel; Trial.

WORDS AND PHRASES.

- "All debts"—meaning of term. *Silver King Coalition Mines Co. v. Silver King Consol. Min. Co.* (U. S.), 571.
 "And"—"or" construed as "and" in instrument creating charity. *Thorp v. Lund* (Mass.), 1204.
 "Average weekly earnings"—meaning of term. *Cox v. Trollope* (Eng.), 637. *Annotated*
 "Average weekly earnings"—tips of railroad porter as included within term. *Great Western R. Co. v. Helps* (Eng.), 1120. *Annotated*
 "Breach of the peace"—what constitutes. *State v. Reichman* (Tenn.), 889.
 "Charity"—meaning of term. *Thorp v. Lund* (Mass.), 1204.
 "Child" as including legitimate child. *Peerless Pacific Co. v. Burkhard* (Wash.), 247. *Annotated*
 "Dependent"—meaning of term. *Blanton v. Wheeler, etc. Co.* (Conn.), 747. *Annotated*
 "Employee"—meaning of term. *Dale v. Saunders* (N. Y.), 703. *Annotated*
 "Injury"—what is "injury" within meaning of workmen's compensation act. *Stertz v. Industrial Ins. Commission* (Wash.), 354. *Annotated*
 "Liabilities"—meaning of term. *Pacific Power, etc. Co. v. White* (Wash.), 125.
 "Or"—"or" construed as "and" in instrument creating charity. *Thorp v. Lund* (Mass.), 1204.
 "Revenue"—meaning of term. *State v. Gordon* (Mo.), 191. *Annotated*
 "Revenue"—meaning of term. *Fergus v. Brady* (Ill.), 220. *Annotated*
 "Sign"—meaning of term. *Estate of Manchester* (Cal.), 227.
 "Tent"—meaning of term. *St. Louis v. Nash* (Mo.), 134. *Annotated*
 "Ultra vires contracts"—what constitute. *American Southern Nat. Bank v. Smith* (Ky.), 959.
See also Evidence; Statutes; Wills.

WORKMEN'S COMPENSATION ACTS.

- Accident or injury within act—disease as accident—fall of driver from hack. *Carroll v. What Cheer Stables Co.* (R. I.), 346. *Annotated*
 ——— disease as accident—suicide from supervening insanity. *Withers v. London, etc. R. Co.* (Eng.), 341. *Annotated*

WORKMEN'S COMPENSATION ACTS — Continued.

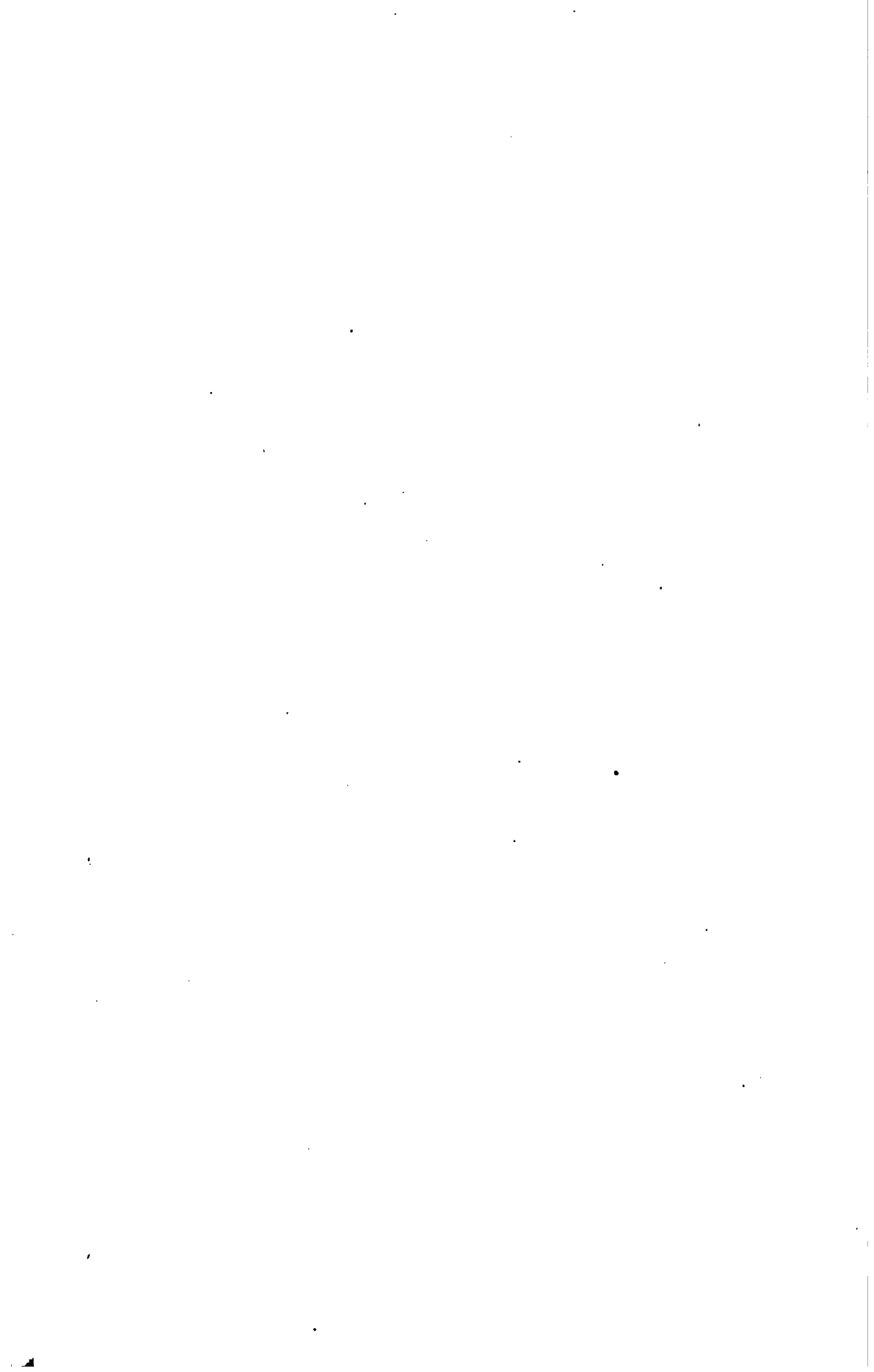
- Accident or injury within act—disease as accident—typhoid from impure drinking water. *Vennen v. New Dells Lumber Co. (Wis.), 293.* *Annotated*
- injury by act of third person. *Stertz v. Industrial Ins. Commission (Wash.), 354.*
- injury not arising out of employment. *Stertz v. Industrial Ins. Commission (Wash.), 354.*
- injury received in another jurisdiction. *Grinnell v. Wilkinson (R. I.), 618.* *Annotated*
- what constitutes accident arising out of employment. *Eugene Dietzen Co. v. Industrial Board (Ill.), 764.* *Annotated*
- what constitutes accident arising out of employment. *Carroll v. Knickerbocker Ice Co. (N. Y.), 540; Chicago Dry Kiln Co. v. Industrial Board (Ill.), 645.*
- what constitutes "injury." *Stertz v. Industrial Ins. Commission (Wash.), 354.* *Annotated*
- Appeal and error—review of findings of workmen's compensation board. *Chicago Dry Kiln Co. v. Industrial Board (Ill.), 645.* *Annotated*
- review of findings of workmen's compensation board. *Carroll v. Knickerbocker Ice Co. (N. Y.), 540; Victor Chemical Works v. Industrial Board (Ill.), 627; Dale v. Saunders (N. Y.), 703; Eugene Dietzen Co. v. Industrial Board (Ill.), 764.*
- review of judgment dismissing claim for compensation. *Grinnell v. Wilkinson (R. I.), 618.*
- "Average weekly earnings"—construction of phrase. *Cox v. Trollope (Eng.), 637.* *Annotated*
- tips of railroad porter as included. *Great Western R. Co. v. Helps (Eng.), 1120.* *Annotated*
- Award or allowance—lump sum award. *McCracken v. Missouri Valley Bridge, etc. Co. (Kan.), 689.* *Annotated*
- termination of allowance by marriage of beneficiary. *Adleman v. Ocean Accident, etc. Corp. (Md.), 730.* *Annotated*
- Construction and operation of act—depriving court of jurisdiction. *Stertz v. Industrial Ins. Commission (Wash.), 354.*
- effect of act as dispensing with judicial controversy. *Stertz v. Industrial Ins. Commission (Wash.), 354.*
- effect of change in act on pending proceedings. *Carroll v. Knickerbocker Ice Co. (N. Y.), 540.*
- nature and purpose of Illinois act. *Victor Chemical Works v. Industrial Board (Ill.), 627.*
- nature and scope of Washington act. *Stertz v. Industrial Ins. Commission (Wash.), 354; Shaughnessy v. Northland Steamship Co. (Wash.), 655.*
- retroactive operation of act. *State v. General Accident, etc. Assur. Corp. (Minn.), 615.* *Annotated*
- theory of liability under New York act. *Dale v. Saunders (N. Y.), 703.*
- Defenses—absence from place of employment as affecting right of recovery. *Stertz v. Industrial Ins. Commission (Wash.), 354.*
- disobedience of orders as precluding recovery. *Williams v. Llandudno Coaching, etc. Co. (Eng.), 682.*
- intoxication of employee as precluding recovery. *Williams v. Llandudno Coaching, etc. Co. (Eng.), 682.* *Annotated*
- receipt of other benefit as affecting right to compensation. *State v. District Court (Minn.), 635.* *Annotated*
- Dependents within act—absence of dependents—award to state. *Blanton v. Wheeler, etc. Co. (Conn.), 747.*
- residence of beneficiary as affecting right to compensation. *Victor Chemical Works v. Industrial Board (Ill.), 627.*
- who is "dependent." *Blanton v. Wheeler, etc. Co. (Conn.), 747.* *Annotated*
- Election to accept act—necessity of election. *Vaughan's Seed Store v. Simonini (Ill.), 713.* *Annotated*
- right of election. *Shaughnessy v. Northland Steamship Co. (Wash.), 655.*
- time for election. *Victor Chemical Works v. Industrial Board (Ill.), 627.*
- Employees within act—casual employee. *Victor Chemical Works v. Industrial Board (Ill.), 627.*
- maritime employee. *Shaughnessy v. Northland Steamship Co. (Wash.), 655.* *Annotated*
- minor illegally employed. *Stetz v. F. Mayer Boot, etc. Co. (Wis.), 675.* *Annotated*
- municipal employee. *State v. District Court (Minn.), 635.*
- railroad employee. *Erie R. Co. v. Winfield (U. S.), 662.* *Annotated*
- who is "employee." *Dale v. Saunders (N. Y.), 703.* *Annotated*
- Employments within act—construction of Illinois statute. *Vaughan's Seed Store v. Simonini (Ill.), 713.*
- Evidence—declaration of employee as to cause of injury—admissibility in evidence. *Carroll v. Knickerbocker Ice Co. (N. Y.), 540.*

WORKMEN'S COMPENSATION ACTS — Continued.

- Evidence—declaration of employee while suffering from delirium tremens—admissibility in evidence. *Carroll v. Knickerbocker Ice Co.* (N. Y.), 540.
- dependency—sufficiency of evidence. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- verdict of coroner's jury—admissibility in evidence. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- Medical examination of workman. *Earwicker v. London Graving Dock Co.* (Eng.), 665. *Annotated*
- Medical referee—duties. *Earwicker v. London Graving Dock Co.* (Eng.), 665.
- Notice of claim—time for giving. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- Proceedings under act—applicability of rules of evidence. *Carroll v. Knickerbocker Ice Co.* (N. Y.), 540.
- applicability of rules of legal procedure. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- form of findings. *Blanton v. Wheeler, etc. Co.* (Conn.), 747.
- motion to recommit. *Blanton v. Wheeler, etc. Co.* (Conn.), 747.
- Validity of act—validity of Illinois act. *Victor Chemical Works v. Industrial Board* (Ill.), 627.
- validity of Kentucky act. *Greene v. Caldwell* (Ky.), 604. *Annotated*
- validity of Washington act. *Sertz v. Industrial Ins. Commission* (Wash.), 354.

WRONGFUL DISCHARGE.

See Master and Servant.



INDEX TO NOTES

IN THIS VOLUME.

ACCIDENT —

Disease as an accident, 297.

See also **Workmen's Compensation Acts.**

ACCIDENT INSURANCE —

Disease as accident under accident insurance policy, 298.

ACTIONS —

Power of court to enjoin proceedings in another state or country, 1150.

What constitutes moot case, 558.

See also **Parties to Actions.**

ADJOINING LANDOWNERS —

Rights of adjoining landowners with respect to tree on or overhanging boundary line, 1157.

ADMINISTRATORS —

See **Executors and Administrators.**

ADOPTION —

Adopted child as "dependent" within workmen's compensation act, 755.

AGE —

Competency of witness to testify as to his own age, 427.

AGENCY —

Warranty to agent as insuring to benefit of undisclosed principal, 130.

See also **Brokers; Insurance.**

AGRICULTURE —

See **Seed.**

ALIMONY —

Validity of conveyance by husband with intent to deprive wife of alimony, 936.

ALLOWANCE —

See **Workmen's Compensation Acts.**

ALL REVENUE —

Legal meaning of "all revenue," 206.

AMENDMENTS —

Effect of repeal or amendment of repealing statute as reviving repealed statute, 281.

AMUSEMENTS —

See **Theaters and Amusements.**

ANCESTORS —

See **Insanity.**

ANTAGONISM —

See **Trusts and Trustees.**

ANTENUPTIAL AGREEMENTS —

Effect of partial invalidity of antenuptial contract, 925.

APPEAL AND ERROR —

Meaning of "revenue laws" in statute relating to appellate jurisdiction, 214.

Review of disbarment proceedings by appeal or writ of error, 837.

Review of facts on appeal under workmen's compensation act, 647.

APPOINTMENT TO OFFICE —

See **Libel and Slander.**

APPREHENDED INJURY TO BUSINESS —

See **Payment.**

ARMY AND NAVY —

Liability of civilian for purchasing or receiving in pledge public property from soldier or sailor, 523.

ASSAULT —

What constitutes cruel and unusual punishment for assault, 398.

ASSIGNMENTS —

Assignor of mechanic's lien as necessary party to action by assignee to foreclose lien, 5.

ATTORNEYS —

Right of attorney to review of disbarment proceedings, 836.

AVERAGE WEEKLY EARNINGS —

Meaning of phrase "average weekly earnings" in workmen's compensation or similar act, 640.

Tips as part of average weekly earnings under workmen's compensation act, 1122.

AWARD —

See **Workmen's Compensation Acts.**

BENEFICIAL ASSOCIATIONS —

"Child" in benefit insurance policy as including illegitimate child, 261.

"Child" in statute relating to benefit insurance as including illegitimate child, 256.

Receipt of insurance or other benefit as affecting right to compensation under workmen's compensation act, 635.

BENEFICIARIES —

See *Trusts and Trustees; Workmen's Compensation Acts.*

BILLS AND NOTES —

Construction of extension of or agreement to extend time of payment of note, 157.
Negotiability of note containing provision allowing discount if paid within certain time, 600.

BILLS FOR RAISING REVENUE —

Legal meaning of "bills for raising revenue," 209.

BOARD OF REVENUE —

Legal meaning of "board of revenue," 220.

BONDS —

See *Municipal Corporations; Suretyship.*

BOUNDARIES —

See *Adjoining Landowners.*

BREACH OF WARRANTY —

See *Warranty.*

BROKERS —

Liability on contract of buyer and seller to pay broker's commission jointly, 180.

BROTHER —

Brother as "dependent" within workmen's compensation act, 759.

BUILDING CONTRACTS —

See *Contractors.*

BUILDING RESTRICTIONS —

Building restriction or restrictive agreement as binding public or public service corporation, 591.

BURDEN OF PROOF —

Presumption and burden of proof of undue influence in case of conveyance inter vivos by parent to child, 457.

What is accident arising out of and in course of employment within meaning of workmen's compensation act, 768.

BURGLARY —

What constitutes cruel and unusual punishment for burglary, 398.

BUSINESS —

See *Eminent Domain; Payment.*

BUSINESS COMPETITION —

See *Municipal Corporations.*

CERTIORARI —

Certiorari to review disbarment proceedings, 838.

CESTUI QUE TRUST —

See *Trusts and Trustees.*

CHARTER —

See *Corporations.*

"CHILD" —

"Child" as including illegitimate child, 249.

See also *Infants.*

CITIZENSHIP —

"Child" in statute relating to naturalization of Indians as including illegitimate child, 256.

COMMERCE —

See *Interstate Commerce; Intrastate Commerce.*

COMMISSIONS —

See *Brokers.*

COMPENSATION —

See *Eminent Domain; Public Officers; Master and Servant; Workmen's Compensation Acts.*

COMPETITION —

See *Municipal Corporations.*

COMPLAINT —

See *Pleading.*

CONDITIONAL SALES —

Right of conditional vendee to recover damages for breach of warranty, 914.

CONDITIONS —

See *Wills.*

CONDUCT —

See *Divorce; Jury.*

CONFLICT OF LAWS —

See *Actions; Workmen's Compensation Acts.*

CONGRESS —

Power of legislature to punish person other than witness for contempt, 378.

CONSTITUTIONAL LAW —

Electricity: power of public service commission to prevent maintenance of electric wires in close proximity, 847.

Municipal corporations: interest on municipal bonds as factor in determining whether municipality has exceeded constitutional debt limit, 598.

Smoke: validity of smoke ordinance or statute, 173.

Statutes: effect of repeal or amendment of repealing statute as reviving repealed statute, 281.

War: nature and scope of war power, 1009.

Waters and watercourses: power of state to grant title to land under navigable water, 1107.

Workmen's compensation acts: constitutionality of workmen's compensation act, 611.

See also *Public Officers.*

CONSTRUCTION —

See *Bills and Notes; Industrial Insurance.*

CONTEMPT —

Power of legislature to punish person other than witness for contempt, 378.
What constitutes cruel and unusual punishment for contempt of court, 398.

CONTEST —

See **Wills**.

CONTINUANCE —

See **Trial**.

CONTINUANCE IN SERVICE —

See **Master and Servant**.

CONTRACTORS —

Principal contractor as necessary party defendant to action to foreclose mechanic's lien, 6.

CONTRACTS —

Effect of partial invalidity of antenuptial contract, 925.
Validity of sale of liquors where seller knows same will be illegally resold, 978.
See also **Bills and Notes; Brokers; Contractors; Corporations; Master and Servant; Parent and Child; Sales**.

CORPORATIONS —

Construction of debt limit provision in charter of private corporation, 966.
Liability on stock subscription as dependent upon whole amount of stock having been subscribed, 1137.
Purchase of stock by director as affected by fiduciary relation to stockholder, 241.
Right of stockholder to preference in subscribing for new stock, 132.
See also **Public Service Corporations**.

COURSE OF CONDUCT —

See **Divorce**.

COURSE OF EMPLOYMENT —

See **Workmen's Compensation Acts**.

COURTS —

Judicial notice of mortality tables, 415.
Power of court to enjoin proceedings in another state or country, 1150.
Power of legislature to punish person other than witness for contempt, 378.
What constitutes cruel and unusual punishment for contempt of court, 398.

COVENANTS —

See **Building Restrictions**.

CRIMINAL LAW —

"Child" in statute relating to crime as including illegitimate child, 254.
Engaging in labor or amusement on Sunday as offense at common law or under statute other than Sunday law, 387.
Liability of civilian for purchasing or receiving in pledge public property from soldier or sailor, 523.
What is cruel and unusual punishment, 396.

CRUEL PUNISHMENT —

See **Sentence and Punishment**.

CRUELTY —

See **Divorce**.

CUSTODY —

See **Jury**.

DAMAGES —

Eminent domain: loss of profits or injury to business as element of damages in eminent domain proceedings, 869.
—recovery of damages in condemnation proceedings for injury to personal property or expense of removing it from premises, 886.
Fire insurance: measure of damages recoverable by owner of property for failure of agent to procure insurance, 1040.
Mines and minerals: measure of damages recoverable of tenant in common for removing minerals from soil, 584.
Sales: damages for breach of warranty on sale of seed, 83.
—right of conditional vendee to recover damages for breach of warranty, 914.
Trees: liability of owner for injuries caused by overhanging branches of trees, 1166.

DEATH BY WRONGFUL ACT —

"Child" in statute relating to death by wrongful act as including illegitimate child, 255.

DEATH PENALTY —

Death penalty as cruel and unusual punishment, 308.

DEBT LIMIT —

See **Corporations; Municipal Corporations**.

DECEDENTS' ESTATES —

See **Executors and Administrators**.

DECREASE OF ALLOWANCE —

See **Workmen's Compensation Acts**.

DEEDS —

"Child" in deed as including illegitimate child, 259.
Presumption and burden of proof of undue influence in case of conveyance inter vivos by parent to child, 457.

DEFINITIONS —

See **Words and Phrases**.

DEPENDENTS —

See **Workmen's Compensation Acts**.

DESCENT AND DISTRIBUTION —

"Child" in statute of descent and distribution as including illegitimate child, 251.
Devolution of dependent's right to compensation under workmen's compensation act, 762.

DISBARMENT —

See Attorneys.

DISCOUNT —

See Bills and Notes.

DISEASE —

Disease as an accident, 297.

Nonoccupational disease as "injury" within meaning of workmen's compensation act, 362.

Occupational disease as "injury" within meaning of workmen's compensation act, 366.

DISORDERLY HOUSES —

What constitutes cruel and unusual punishment for keeping disorderly house, 399.

DISTRIBUTION —

See Descent and Distribution.

DIVORCE —

Continuances in divorce cases, 1087.

Habits or course of conduct of spouse as cruelty warranting divorce, 480.

Validity of conveyance by husband with intent to deprive wife of alimony, 936.

DOWER —

Election by widow to take provision in will in lieu of dower as affecting her right to intestate property, 986.

DRUNKENNESS —

See Workmen's Compensation Acts.

DURESS —

See Payment.

EARNINGS —

See Average Weekly Earnings.

ELECTION —

See Equitable Election; Workmen's Compensation Acts.

ELECTIONS —

See Libel and Slander.

ELECTRICITY —

Power of public service commission to prevent maintenance of electric wires in close proximity, 847.

EMINENT DOMAIN —

Loss of profits or injury to business as element of damages in eminent domain proceedings, 869.

Recovery of damages in condemnation proceedings for injury to personal property or expense of removing it from premises, 886.

EMPLOYEES —

See Workmen's Compensation Acts.

EMPLOYERS' LIABILITY ACTS —

Employees entitled to protection under federal employers' liability act, 55.

EMPLOYERS' LIABILITY ACTS —

Continued.

Existence of relation of employer and employee under federal employers' liability act, 46.

EMPLOYMENT —

See Workmen's Compensation Acts.

EQUITABLE ELECTION —

Election by widow to take under will as affecting her right to intestate property, 986.

ESPIONAGE —

See War.

ESTIMATED REVENUE —

Legal meaning of "estimated revenue," 206.

EVIDENCE —

Age: competency of witness to testify as to his own age, 427.

Burden of proof: burden of proof of undue influence in case of conveyance inter vivos by parent to child, 457.

—burden of proof that accident arose out of employment within meaning of workmen's compensation act, 770.

Insanity: admissibility, on issue of sanity, of evidence of insanity of ancestors or kindred, 124.

Judicial notice of mortality tables, 415.

Presumption of undue influence in case of conveyance inter vivos by parent to child, 457.

Sales: evidence in action for breach of warranty in sale of seed, 87.

Scintilla: what constitutes scintilla of evidence, 943.

See also Gifts; Witnesses.

EXECUTORS AND ADMINISTRATORS —

"Child" in statute relating to administration of decedents' estates as including illegitimate child, 254.

Personal representative of deceased owner of premises as necessary party defendant to action to foreclose mechanic's lien, 16.

Public administrators, 1059.

Right of executor or administrator to contest will, 537.

EXEMPTIONS —

"Child" in statute relating to exemptions as including illegitimate child, 256.

EXPRESS COMPANIES —

Express agent as employee of railroad under federal employers' liability act, 52.

EXPRESS WARRANTY —

See Warranty.

EXTENSION OF TIME —

See Bills and Notes.

FACILITY OF PAYMENT —

Construction of "facility of payment" clause in industrial insurance policy, 1193.

FAMILY —

Member of family as "dependent" within workmen's compensation act, 751.

FEDERAL EMPLOYERS' LIABILITY ACT —

See Employers' Liability Acts.

FIDUCIARY RELATION —

See Fraud.

FIRE INSURANCE —

Liability of insurance agent to owner of property for failure to procure insurance, 1037.

FISH AND GAME —

What constitutes cruel and unusual punishment for violation of fish and game law, 401.

FOOD AND DRUGS —

Liability for injury resulting from foreign substance in food, 225.

FORECLOSURE —

See Mechanics' Liens.

FOREIGN ACTIONS —

See Actions.

FOREIGN SUBSTANCE —

See Food and Drugs.

FRANCHISES —

Injury to franchise as element of damages in eminent domain proceeding, 877.

FRAUD —

Purchase of stock by director as affected by fiduciary relation to stockholder, 241.
See also Post Office.

FRAUDS, STATUTE OF —

Sufficiency of printed signature to memorandum within statute of frauds, 1030.

FRUIT —

Right to fruit of overhanging tree, 1168.

GAME —

See Fish and Game.

GAMING —

What constitutes cruel and unusual punishment for sale of lottery tickets, 400.

GENERAL REVENUE —

Legal meaning of "general revenue," 207.

GERMINATING POWER —

See Seed.

GIFTS —

"Child" in statute creating presumption of gift as including illegitimate child, 258.

GIFTS — Continued.

Presumption and burden of proof of undue influence in case of conveyance inter vivos, 457.

GOOD WILL —

Injury to good will as element of damages in eminent domain proceeding, 878.

GRANDCHILDREN —

Grandchild as "dependent" within workmen's compensation act, 756.

GUARDIANS —

Right of guardian or guardian ad litem to contest will, 538.

HABITS —

See Divorce.

HEIRS —

Heir of deceased owner of premises as necessary party defendant to action to foreclose mechanic's lien, 16.

HOLIDAYS —

See Sundays and Holidays.

HOMICIDE —

What constitutes cruel and unusual punishment for homicide, 398.

HUSBAND AND WIFE —

Antenuptial agreements: effect of partial invalidity of antenuptial contract, 925.
Mechanics' liens: husband of owner of premises as necessary party defendant to action to foreclose mechanic's lien, 15.
—wife of owner of premises as necessary party defendant to action to foreclose mechanic's lien, 14.
Nonsupport: what constitutes cruel and unusual punishment for nonsupport of wife, 399.
Personal property: right of husband, as against wife, to dispose of his personality during coverture, 934.
Workmen's compensation acts: wife as "dependent" within workmen's compensation act, 756.
See also Divorce.

ILLEGAL CONTRACTS —

Effect of partial invalidity of antenuptial contract, 925.
Validity of sale of liquors where seller knows same will be illegally resold, 978.
See also Parent and Child.

ILLEGITIMACY —

"Child" as including illegitimate child, 249.
Illegitimate child as "dependent" within workmen's compensation act, 754.

ILL FEELING —

See Trusts and Trustees.

IMPLIED WARRANTY —

See Warranty.

IMPRISONMENT FOR DEBT —

What constitutes cruel and unusual punishment for nonpayment of debt, 398.

INCREASE OF ALLOWANCE —

See **Workmen's Compensation Acts.**

INDEPENDENT CONTRACTORS —

Distinction between independent contractor and workman under workmen's compensation act, 708.

Employee of independent contractor as "workman" within workmen's compensation act, 709.

Independent contractor as employee of railroad under federal employers' liability act, 52.

INDIANS —

"Child" in statute relating to naturalization of Indians as including illegitimate child, 256.

INDUSTRIAL INSURANCE —

Nature and construction of industrial insurance policy, 1186.

INFANTS —

Child as "dependent" within workmen's compensation act, 754.

"Child" as including illegitimate child, 249.

Election by infant employee with respect to acceptance of provisions of workmen's compensation act, 716.

Increase of allowance to infant under workmen's compensation act, 735.

Minor employed in violation of law as entitled to compensation under workmen's compensation act, 679.

See also **Parent and Child.**

INJUNCTIONS —

Power of court to enjoin proceedings in another state or country, 1150.

Right of citizen to enjoin business competition by municipality, 118.

INJURY —

What is "injury" or "personal injury" within meaning of workmen's compensation act, 362.

INJURY TO BUSINESS —

See **Eminent Domain; Payment.**

INJURY TO PERSONALTY —

See **Eminent Domain.**

INSANITY —

Admissibility, on issue of sanity, of evidence of insanity of ancestors or kindred, 124.

INSURABLE INTEREST —

See **Industrial Insurance.**

INSURANCE —

Accident insurance: disease as accident under accident insurance policy, 298.

Benefit insurance: "child" in benefit insurance policy as including illegitimate child, 261.

INSURANCE — Continued.

Benefit insurance: "child" in statute relating to benefit insurance as including illegitimate child, 256.

Fire insurance: liability of insurance agent to owner of property for failure to procure insurance, 1037.

Industrial insurance, 1186.

Workmen's compensation acts: receipt of insurance or other benefit as affecting right to compensation under workmen's compensation act, 635.

INTEREST —

See **Municipal Corporations.**

INTERSTATE COMMERCE —

Railroad employee engaged in interstate commerce as within purview of workmen's compensation act, 664.

INTESTATE PROPERTY —

See **Wills.**

INTOXICATING LIQUORS —

Validity of sale of liquors where seller knows same will be illegally resold, 978.

What constitutes cruel and unusual punishment for violation of liquor law, 401.

INTOXICATION —

See **Workmen's Compensation Acts.**

INTRASTATE COMMERCE —

Railroad employee engaged in intrastate commerce as within purview of workmen's compensation act, 664.

JUDICIAL NOTICE —

Judicial notice of mortality tables, 415.

JURY —

Allowing recreation to jury during trial as ground for new trial, 855.

KINDRED —

See **Insanity.**

LABOR —

See **Sundays and Holidays.**

LABOR COMBINATIONS —

Publication that employer has been placed on "unfair list" of labor union as libelous, 570.

LANDLORD AND TENANT —

Lessee of premises as necessary party defendant to action to foreclose mechanic's lien, 15.

Lessor of premises as necessary party defendant to action to foreclose mechanic's lien, 15.

LAPSE OF LEGACIES —

See **Legacies.**

LARCENY —

What constitutes cruel and unusual punishment for larceny, 399.

LEASES —

See Landlord and Tenant.

LEGACIES —

"Child" in statute avoiding lapsing of legacies as including illegitimate child, 254.

LEGISLATURE —

Power of legislature to punish person other than witness for contempt, 378.

LEGITIMACY —

See Illegitimacy.

LIBEL AND SLANDER —

Loss of election or appointment to office as element of damages for libel or slander, 1129.

Publication that employer has been placed on "unfair list" of labor union as libelous, 570.

Sufficiency of complaint in action for slander with respect to averments of publication and of time and place, 504.

LIENS —

See Mechanics' Liens.

LIFE INSURANCE —

Industrial insurance, 1186.

LIMITATION OF ACTIONS —

Meaning of "revenue laws" in statute relating to limitation of actions, 216.

LOSS OF ELECTION —

See Libel and Slander.

LOSS OF PROFITS —

See Eminent Domain.

LOTTERIES —

See Gaming.

LUMP SUM AWARD —

See Workmen's Compensation Acts.

MAILS —

See Post Office.

MANDAMUS —

Mandamus to review disbarment proceedings, 837.

MARITIME EMPLOYEES —

See Workmen's Compensation Acts.

MARRIAGE —

Validity of testamentary disposition in restraint of marriage, 1141.

MASTER AND SERVANT —

Contract of employment: term of employment and rate of compensation of one continuing in service after termination of contract, 1176.

—tips as part of earnings or wages, 1122.
Employers' liability acts: employees entitled to protection under federal employers' liability act, 55.
Ann. Cas. 1918B.—80.

MASTER AND SERVANT — Continued.

Employers' liability acts: existence of relation of employer and employee under federal employers' liability act, 46.

Libel and slander: publication that employer has been placed on "unfair list" of labor union as libelous, 570.

Workmen's compensation acts: "child" in workmen's compensation act as including illegitimate child, 258.

—constitutionality of workmen's compensation act, 611.

—disease as accident under workmen's compensation act, 309.

—increase, decrease, termination or suspension of allowance under workmen's compensation act, 733.

—intoxication of employee as precluding recovery under workmen's compensation act, 686.

—lump sum award under workmen's compensation act, 694.

—maritime employees as within purview of workmen's compensation act, 661.

—meaning of phrase "average weekly earnings" in workmen's compensation or similar act, 640.

—person employed in violation of law as entitled to compensation under workmen's compensation act, 679.

—provisions in workmen's compensation acts respecting medical examination of workmen, 670.

—railroad employees as within purview of workmen's compensation act, 664.

—receipt of insurance or other benefit as affecting right to compensation under workmen's compensation act, 635.

—residence of beneficiary as affecting right to compensation under workmen's compensation act, 634.

—review of facts on appeal under workmen's compensation act, 647.

—right to and effect of election with respect to acceptance of provisions of workmen's compensation act, 715.

—what is accident arising out of and in course of employment within meaning of workmen's compensation act, 768.

—what is "injury" or "personal injury" within meaning of workmen's compensation act, 362.

—who is "dependent" within workmen's compensation act, 749.

—who is "workman" within meaning of workmen's compensation act, 704.

—workmen's compensation act as applicable to injury received in another jurisdiction, 625.

—workmen's compensation act as retroactive in operation, 617.

MECHANICS' LIENS —

Necessary or proper parties to action to foreclose mechanic's lien, 3.

MEDICAL EXAMINATION —

See Workmen's Compensation Acts.

MEMORANDUM —

See Frauds, Statute of.

MINES AND MINERALS —

Resulting rights of mine owner after severance of surface and mineral estates, 550.
 Right of tenant in common to remove minerals from soil, 580.

MINORS —

See Infants.

MOOT CASE —

See Actions.

MORTALITY TABLES —

Judicial notice of mortality tables, 415.

MORTGAGES —

Mortgagee of premises as necessary party defendant to action to foreclose mechanic's lien, 19.

MOVING PICTURES —

Engaging in labor or amusement on Sunday as offense at common law or under statute other than Sunday law, 387.

MUNICIPAL CORPORATIONS —

Interest on municipal bonds as factor in determining whether municipality has exceeded constitutional debt limit, 598.
 Liability of municipality for acts of public administrator, 1074.
 Right of municipality to enter into business competition with citizen, 104.
 Validity of smoke ordinance or statute, 173.

NATURALIZATION —

"Child" in statute relating to naturalization of Indians as including illegitimate child, 256.

NAVIGABLE WATERS —

See Waters and Watercourses.

NEGLIGENCE —

Death by wrongful act: "child" in statute relating to death by wrongful act as including illegitimate child, 255.
 Fire insurance: liability of insurance agent to owner of property for failure to procure insurance, 1037.
 Food: liability for injury resulting from foreign substance in food, 225.
 Master and servant: "child" in workmen's compensation act as including illegitimate child, 258.
 —constitutionality of workmen's compensation act, 611.
 —disease as accident under workmen's compensation act, 309.
 —employees entitled to protection under federal employers' liability act, 55.
 —existence of relation of employer and employee under federal employers' liability act, 46.
 —increase, decrease, termination or suspension of allowance under workmen's compensation act, 733.
 —intoxication of employee as precluding recovery under workmen's compensation act, 686.
 —lump sum award under workmen's compensation act, 694.

NEGLIGENCE — Continued.

Master and servant: maritime employees as within purview of workmen's compensation act, 661.
 —meaning of phrase "average weekly earnings" in workmen's compensation or similar act, 640.
 —person employed in violation of law as entitled to compensation under workmen's compensation act, 679.
 —provisions in workmen's compensation acts respecting medical examination of workmen, 670.
 —railroad employees as within purview of workmen's compensation act, 664.
 —receipt of insurance or other benefit as affecting right to compensation under workmen's compensation act, 635.
 —residence of beneficiary as affecting right to compensation under workmen's compensation act, 634.
 —review of facts on appeal under workmen's compensation act, 647.
 —right to and effect of election with respect to acceptance of provisions of workmen's compensation act, 715.
 —what is accident arising out of and in course of employment within meaning of workmen's compensation act, 768.
 —what is "injury" or "personal injury" within meaning of workmen's compensation act, 362.
 —who is "dependent" within workmen's compensation act, 749.
 —who is "workman" within meaning of workmen's compensation act, 704.
 —workmen's compensation act as applicable to injury received in another jurisdiction, 625.
 —workmen's compensation act as retroactive in operation, 617.
 Public administrators: personal liability of public administrator for injury to property administered, 1072.
 Public officers: neglect of duty as affecting right of public officers to salary, 435.
 See also Taxation.

NEGOTIABLE INSTRUMENTS —

See Bills and Notes.

NEW TRIAL —

See Jury.

NONOCCUPATIONAL DISEASE —

See Disease.

NONSUPPORT —

See Husband and Wife.

NOTES —

See Bills and Notes.

OCCUPATIONAL DISEASE —

See Disease.

OFFICER OF THE REVENUE —

Legal meaning of "officer of the revenue," 220.

OFFICERS —

See Public Officers.

ORDINARY REVENUE —

Legal meaning of "ordinary revenue," 208.

OVERHANGING TREES —

See Adjoining Landowners.

OWNERS OF PREMISES —

Owner of premises as necessary party defendant to action to foreclose mechanic's lien, 11.

See also Adjoining Landowners.

PARENT AND CHILD —

Contract by parent for services of minor child as binding latter, 827.

Parent as "dependent" within workmen's compensation act, 752.

Presumption and burden of proof of undue influence in case of conveyance inter vivos by parent to child, 457.

PARTIAL INVALIDITY —

See Antenuptial Agreements.

PARTIES TO ACTIONS —

Necessary or proper parties to action to foreclose mechanic's lien, 3.

PAYMENT —

Payment to prevent apprehended injury to business as payment under duress, 516.

See also Bills and Notes; Facility of Payment.

PERSONAL INJURY —

What is "injury" or "personal injury" within meaning of workmen's compensation act, 362.

PERSONAL PROPERTY —

See Eminent Domain; Husband and Wife.

PERSONAL REPRESENTATIVES —

See Executors and Administrators.

PERSONAL SERVICES —

See Parent and Child.

PLEADING —

"Child" in pleading as including illegitimate child, 261.

Pleading in action for breach of warranty in sale of seed, 86.

Sufficiency of complaint in action for slander with respect to averments of publication and of time and place, 504.

PLEDGE —

Liability of civilian for purchasing or receiving in pledge public property from soldier or sailor, 523.

POOR AND POOR LAWS —

"Child" in statute relating to poor as including illegitimate child, 257.

PORTERS —

See Average Weekly Earnings.

POSTHUMOUS CHILD —

Posthumous child as "dependent" within workmen's compensation act, 755.

POST OFFICE —

Validity of espionage act, 1011.

What constitutes cruel and unusual punishment for use of mails for fraudulent purpose, 401.

PREFERENCE —

See Stock and Stockholders.

PRESUMPTIONS —

Presumption and burden of proof of undue influence in case of conveyance inter vivos by parent to child, 457.

See also Gifts.

PRETERMISSION —

"Child" in statute of pretermission as including illegitimate child, 253.

PRINCIPAL AND AGENT —

See Agency.

PRINCIPAL AND SURETY —

See Suretyship.

PRINCIPAL CONTRACTOR —

See Contractors.

PRINTED SIGNATURE —

See Frauds, Statute of.

PROFITS —

See Eminent Domain.

PROMISSORY NOTES —

See Bills and Notes.

PUBLIC ADMINISTRATORS —

See Executors and Administrators.

PUBLICATION —

See Libel and Slander.

PUBLIC LANDS —

Power of state to grant title to land under navigable water, 1107.

PUBLIC OFFICERS —

Neglect of duty as affecting right of public officer to salary, 435.

Payment made to public official to prevent apprehended injury to business as payment under duress, 519.

Personal liability of officer for sale of property for taxes under void statute, 190.

See also Libel and Slander.

PUBLIC PROPERTY —

See Army and Navy.

PUBLIC SERVICE COMMISSIONS —

Power of public service commission to prevent maintenance of electric wires in close proximity, 847.

PUBLIC SERVICE CORPORATIONS —
Building restriction or restrictive agreement as binding public or public service corporation, 591.

PUBLIC UTILITIES —
Right of municipality to operate public utility in competition with citizen, 106.

PULLMAN CARS —
See Sleeping Car Companies.

PUNISHMENT —
See Sentence and Punishment.

RAILROADS —
See Eminent Domain; Employers' Liability Acts; Workmen's Compensation Acts.

RAPE —
What constitutes cruel and unusual punishment for rape, 399.

RECEIVERS —
Receiver of property as necessary party defendant to action to foreclose mechanic's lien, 23.

RECOVERY OF PAYMENTS —
See Payment.

RECREATION —
See Jury.

RELATIVES —
See Insanity.

REMOVAL —
See Trusts and Trustees.

REMOVAL OF CAUSES —
Meaning of "revenue laws" in statute relating to removal of causes, 270.

RENEWAL OF CONTRACTS —
See Master and Servant.

REPEAL —
See Statutes.

REPRESENTATIVES —
See Executors and Administrators.

RESIDENCE —
See Workmen's Compensation Acts.

RESTRAINT OF MARRIAGE —
See Marriage.

RESTRICTIONS —
See Building Restrictions.

REVENUE —
Legal meaning of "revenue," 200.

REVENUE DEBTS OR CHARGES —
Legal meaning of "revenue debts or charges," 219.

REVENUE LAWS —
Legal meaning of "revenue laws," 209.

REVENUE MEASURE —
Legal meaning of "revenue measure," 218.

REVENUE TAX —
Legal meaning of "revenue tax," 219.

REVIVAL —
See Statutes.

ROBBERY —
What constitutes cruel and unusual punishment for robbery, 400.

SAILORS —
See Army and Navy.

SALES —
Express or implied warranty on sale of seed, 72.
Liability for injury resulting from foreign substance in food, 225.
Right of conditional vendee to recover damages for breach of warranty, 914.
Warranty to agent as insuring to benefit of undisclosed principal, 130.

SCINTILLA —
See Evidence.

SEED —
Express or implied warranty on sale of seed, 72.

SENTENCE AND PUNISHMENT —
What is cruel and unusual punishment, 396.

SERVICES —
See Parent and Child.

SEVERANCE —
See Mines and Minerals.

SHIPS AND SHIPPING —
Employee working on watercraft as entitled to protection under federal employers' liability act, 68.

SIGNATURE —
See Frauds, Statute of.

SISTER —
Sister as "dependent" within workmen's compensation act, 759.

SLANDER —
See Libel and Slander.

SLEEPING CAR COMPANIES —
Pullman car employee as employee of railroad under federal employers' liability act, 53.

SMOKE —
Validity of smoke ordinance or statute, 173.

SOLDIERS —
See Army and Navy.

STATES —
See Public Lands.

STATUTE OF FRAUDS —

See *Frauds, Statute of.*

STATUTE OF LIMITATIONS —

See *Limitation of Actions.*

STATUTES —

"Child" in statute as including illegitimate child, 250.

Effect of repeal or amendment of repealing statute as reviving repealed statute, 281.

Workmen's compensation act as retroactive in operation, 617.

STEPCHILDREN —

Stepchild as "dependent" within workmen's compensation act, 756.

STOCK AND STOCKHOLDERS —

Liability on stock subscription as dependent upon whole amount of stock having been subscribed, 1137.

Purchase of stock by director as affected by fiduciary relation to stockholder, 241.

Right of stockholder to preference in subscribing for new stock, 132.

STREET RAILWAYS —

See *Workmen's Compensation Acts.*

SUBSCRIPTION —

See *Stock and Stockholders.*

SUNDAYS AND HOLIDAYS —

Engaging in labor or amusement on Sunday as offense at common law or under statute other than Sunday law, 387.

SUPPORT —

See *Husband and Wife.*

SURETYSHIP —

Liability of sureties on bond of public administrator, 1072.

Surety on bond of contractor or purchaser as necessary party defendant to action to foreclose mechanic's lien, 23.

SURFACE —

See *Mines and Minerals.*

SUSPENSION OF ALLOWANCE —

See *Workmen's Compensation Acts.*

TABLES —

See *Mortality Tables.*

TAXATION —

Personal liability of officer for sale of property for taxes under void statute, 190.

TENANTS IN COMMON —

Right of tenant in common to remove minerals from soil, 580.

TENT —

Legal meaning of "tent," 138.

TERMINATION OF ALLOWANCE —

See *Workmen's Compensation Acts.*

TERMINATION OF CONTRACT —

See *Master and Servant.*

THEATERS AND AMUSEMENTS —

Engaging in labor or amusement on Sunday as offense at common law or under statute other than Sunday law, 387.

TIME OF PAYMENT —

See *Bills and Notes.*

TIPS —

Tips as part of earnings or wages, 1122.

TORTS —

See *Taxation; Witnesses.*

TRANSACTIONS WITH DECEDENTS

See *Witnesses.*

TREES AND TIMBER —

Rights of adjoining landowners with respect to tree on or overhanging boundary line, 1157.

TRIAL —

Continuance in divorce cases, 1087.

See also *Jury.*

TRUSTS AND TRUSTEES —

Antagonism or ill feeling between trustee and beneficiary as ground for removal of trustee, 1044.

Cestui que trust as necessary party defendant to action to foreclose mechanic's lien, 18.

Trustee of property as necessary party defendant to action to foreclose mechanic's lien, 17.

UNDISCLOSED PRINCIPAL —

See *Agency.*

UNDUE INFLUENCE —

Presumption and burden of proof of undue influence in case of conveyance inter vivos by parent to child, 457.

UNFAIR LIST —

See *Labor Combinations.*

UNLAWFUL ASSEMBLY —

Engaging in labor or amusement on Sunday as offense at common law or under statute other than Sunday law, 387.

UNUSUAL PUNISHMENT —

See *Sentence and Punishment.*

USURY —

What constitutes cruel and unusual punishment for taking usury, 400.

VASECTOMY —

Vasectomy as cruel and unusual punishment, 398.

VENDOR AND PURCHASER —

Building restriction or restrictive agreement as binding public or public service corporation, 591.

VESSELS —

See Ships and Shipping.

WAGES —

See Master and Servant.

WAR —

Nature and scope of war power, 1009.

Validity of espionage act, 1011.

See also Army and Navy.

WARRANTY —

Express or implied warranty on sale of seed, 72.

Right of conditional vendee to recover damages for breach of warranty, 914.

Warranty to agent as insuring to benefit of undisclosed principal, 130.

WATERCRAFT —

See Ships and Shipping.

WATERS AND WATERCOURSES —

Power of state to grant title to land under navigable water, 1107.

WEEKLY EARNINGS —

See Average Weekly Earnings.

WIDOW —

Widow of owner of premises as necessary party defendant to action to foreclose mechanic's lien, 14.

See also Equitable Election.

WIFE —

See Husband and Wife.

WILLS —

"Child" in will as including illegitimate child, 261.

Election by widow to take under will as affecting her right to intestate property, 986.

Power or duty of administrator, guardian, or the like, to contest will, 536.

Validity of testamentary disposition in restraint of marriage, 1141.

WIRES —

See Electricity.

WITNESSES —

Competency of witness to testify as to his own age, 427.

Rule excluding testimony relating to transaction with decedent as applicable to action ex delicto, 98.

WORDS AND PHRASES —

"All revenue:" legal meaning of "all revenue," 206.

"Average weekly earnings:" meaning of phrase "average weekly earnings" in workmen's compensation or similar act, 640.

—tips as part of "average weekly earnings" under workmen's compensation act, 1122.

"Bills for raising revenue:" legal meaning of "bills for raising revenue," 209.

WORDS AND PHRASES — Continued.

"Board or revenue:" legal meaning of "board of revenue," 220.

"Child" as including illegitimate child, 249.

"Dependent:" who is "dependent" within workmen's compensation act, 749.

"Estimated revenue:" legal meaning of "estimated revenue," 206.

"Facility of payment:" construction of "facility of payment" clause in industrial insurance policy, 1193.

"General revenue:" legal meaning of "general revenue," 207.

"Injury:" what is "injury" within meaning of workmen's compensation act, 362.

"Officer of the revenue:" legal meaning of "officer of the revenue," 220.

"Ordinary revenue:" legal meaning of "ordinary revenue," 208.

"Personal injury:" what is "personal injury" within meaning of workmen's compensation act, 362.

"Revenue:" legal meaning of "revenue," 200.

"Revenue debts or charges:" legal meaning of "revenue debts or charges," 219.

"Revenue laws:" legal meaning of "revenue laws," 209.

"Revenue measure:" legal meaning of "revenue measure," 218.

"Revenue tax:" legal meaning of "revenue tax," 219.

"Tent:" legal meaning of "tent," 138.

"Workman:" who is "workman" within meaning of workmen's compensation act, 704.

See also Evidence.

WORKMEN'S COMPENSATION ACTS

Accident or injury within act: disease as accident under workmen's compensation act, 309.

—what is accident arising out of and in course of employment within meaning of workmen's compensation act, 768.

—what is "injury" or "personal injury" within meaning of workmen's compensation act, 362.

—workmen's compensation act as applicable to injury received in another jurisdiction, 625.

Appeal and error: review of facts on appeal under workmen's compensation act, 647.

"Average weekly earnings:" meaning of phrase "average weekly earnings" in workmen's compensation or similar act, 640.

—tips as part of "average weekly earnings" under workmen's compensation act, 1122.

Award or allowance: increase, decrease, termination or suspension of allowance under workmen's compensation act, 733.

—lump sum award under workmen's compensation act, 694.

Defenses: intoxication of employee as precluding recovery under workmen's compensation act, 686.

—receipt of insurance or other benefit as affecting right to compensation under workmen's compensation act, 635.

WORKMEN'S COMPENSATION ACTS

— Continued.

- Dependents within act: "child" in workmen's compensation act as including illegitimate child, 258.
- residence of beneficiary as affecting right to compensation under workmen's compensation act, 634.
- who is "dependent" within workmen's compensation act, 749.
- Election to accept act: right to and effect of election with respect to acceptance of provisions of workmen's compensation act, 715.
- Employees within act: maritime employees as within purview of workmen's compensation act, 661.

WORKMEN'S COMPENSATION ACTS

— Continued.

- Employees within act: person employed in violation of law as entitled to compensation under workmen's compensation act, 679.
- railroad employees as within purview of workmen's compensation act, 664.
- who is "workman" within meaning of workmen's compensation act, 704.
- Medical examination: provisions in workmen's compensation acts respecting medical examination of workmen, 670.
- Retroactive operation: workmen's compensation act as retroactive in operation, 617.
- Validity of workmen's compensation act, 611.

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